‘Might is Right?’

Policy Exchange

The ‘Right to Protest’ in a new era of disruption and confrontation

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Endorsements

"In recent years the policing of protest has become increasingly challenging for police commanders and officers on the ground. We regularly see police officers demonstrating conspicuous courage and for that they deserve our gratitude and respect. As this timely and detailed Policy Exchange report shows, the Government must rebalance the legal regime in favour of ordinary members of the public going about their daily lives. The recent Divisional Court judgment concerning the threshold for 'serious disruption to the life of the community' demonstrates how important it is for the Government and Parliament to craft an effective legal regime principally through primary legislation. It is also the right time for policing to review their tactical options in order that the wider public and police officers can be kept safe and the law enforced without fear or favour."

Lord Hogan-Howe QPM, former Commissioner of the Metropolitan Police Service

"This report highlights important issues regarding both the existing legal regime concerning disruptive protest and the way that the police and prosecutors have chosen to deal with protestors. Too often the 'rights' of protestors seem to be prioritised over those of ordinary members of the public. By following the recommendations in Policy Exchange's very detailed report, the new Government has an opportunity to put in place a legal framework for protest and to ensure that the police and prosecutors are held to account for their decisions."

Rt Hon Lord West of Spithead GCB DSC PC, former Parliamentary Under-Secretary of State for Security and Counter-Terrorism and Minister for Cyber Security

"The law, and the enforcement of the law, has too often favoured those involved in disruptive protests at the expense of the legitimate interests of ordinary members of the public. There is an important debate to be had about the proper balancing of rights in such cases and this paper is an excellent contribution to that debate."

Lord Faulks KC, former Minister of State for Justice and Recorder of the Crown Court

"The existing legal regime concerning disruptive protest, and the way that the police and other authorities approach those protests, have been seen by many as favouring the 'rights' of protestors over those of ordinary members of the public. This forensic and well-timed Policy Exchange report demonstrates the urgency with which these issues should be addressed, and provides a clear approach for the new Government."

Lord Wolfson of Tredegar KC, former Parliamentary Under-Secretary of State for Justice

"I commend the findings of this excellent and timely Policy Exchange report, which lays bare the disproportionate weight being placed on the rights of activists at the expense of law-abiding members of the public - who should be able to go about their lives free from intimidation or disruption. It is without doubt that changes are necessary to both the policing approach and to parts of the legal framework itself."

Rt Hon Lord Blencathra, former Minister of State at the Home Office

"Too often ordinary members of the public, civil servants and Parliamentarians have been subject to the whims of highly disruptive protestors. As the newly elected Government considers how best to approach these issues they should look to the approach taken in Ireland, as cited in this excellent report by Policy Exchange which demonstrates how the balance might be better struck in the future."

Rt Hon Lord Bew, former Chair of the Committee on Standards in Public Life and Emeritus Professor of Politics, Queen's University Belfast

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Executive Summary

We have entered a new era of increasingly disruptive protests. This report shows how decisions made by the police, prosecutors, courts, Parliament and Government mean that undue weight is being placed on the rights and interests of disruptive (and, at times, criminal) activists at the expense of the rights, wellbeing and interests of ordinary members of the public.

This report addresses two central questions:

i. Do the police, and other authorities, use their existing powers effectively to deal with disruptive protest?
ii. Is the existing legal regime (consisting of UK legislation, domestic case law and European case law) fit for purpose?

The answer to both questions, as we show in this report, is no. If we are to see a rebalancing in favour of ordinary members of the public, changes are required to both how the police deal with disruptive protest under the existing regime and the legal regime itself.

In examining these two questions, the report highlights three core themes which explain the weakness in how the police, prosecutors and Government respond to disruptive protests:

i. A failure to prioritise the rights of ordinary members of the public – both in how the authorities fail to use the full range of the powers available to them under the existing legal regime; and in terms of the legal regime itself.
ii. A lack of transparency – into the negotiations between the police and protest organisers; regarding the role of staff networks, pressure groups and other 'advisory groups' (both official and otherwise); and into the full impact of protests on the wider public, residents, visitors and businesses.
iii. A failure of accountability – by both Government and London's City Hall to hold policing to account effectively for how the policing of protests is approached.

The new Government will soon commence their review of the legislation relating to protest. The Government has also chosen to continue their appeal in the high-profile case of *National Council for Civil*

Liberties v Secretary of State for the Home Department[1] which addresses a key piece of secondary legislation relating to how the disruption relating to protest is defined. This paper argues that the new Government must take a clear view – through both legislation and the subsequent actions of the authorities – that they will prioritise the rights, wellbeing and interests of ordinary members of the public. If the Government does not, they risk finding themselves in the same difficulties as their predecessors.

The riots during the summer of 2024 were the largest episode of violent disorder in the United Kingdom for over a decade. The disorder followed an attack in July 2024 at a dance studio in Southport: three children were murdered and a further ten people were attacked. Following this tragic event, misinformation spread through social media regarding the attacker. In towns and cities across the country there followed scenes of considerable violence. Large numbers of police officers were injured. Mosques were attacked. In one instance, attempts were made to set fire to a hotel where people were living. A robust response to the disorder, by the police, was necessary. Similarly, those involved in the riots must be swiftly sentenced to lengthy terms of imprisonment. There is a clear distinction between scenes of such flagrantly violent and criminal disorder and protest.

Recent years have seen a measurable increase in the number of disruptive and confrontational protests.[2] Groups such as Extinction Rebellion and Just Stop Oil have conducted a campaign of disruptive, and often unlawful, protest activity which has included tactics such as 'locking on' (where protestors attach themselves to buildings, the transport network or other structures to prevent their easy removal); mass obstruction of the highway (through both 'sit down' and 'slow walking' protests); and offences of criminal damage.

Protest groups themselves are highly organised. The Palestine Solidarity Campaign contacted the Metropolitan Police to inform them of their intention to conduct their first mass protest march just over ten hours after the start of the Hamas terrorist attacks against Israel had commenced on the 7th October 2023.[3] As previously shown by Policy Exchange, Just Stop Oil has in the past asked activists to sign a 'contract' committing them to action that would lead to 'at least one arrest'.[4]

In the months following the 7th October 2023 Hamas terrorist attacks against Israel there was a rolling campaign of highly disruptive protests. An alliance of campaign groups mobilised many thousands of people to conduct protests on Britain's streets, in railway stations and outside the homes and offices of Parliamentarians. In the months following October 2023, almost every fortnight parts of London were given over to large-scale protest marches. The mass protest marches (and the assemblies linked to them) covered an average of 3.6km of central London's streets

1. *National Council for Civil Liberties v Secretary of State for the Home Department* [2024] EWHC 1181 (Admin), link
2. D. Bailey, Decade of dissent: how protest is shaking the UK and why it's likely to continue (January 2020), The Conversation, link
3. Metropolitan Police Service, Freedom of Information Request Response Ref: **01.FOI.23.033311**, link
4. P. Stott, R. Ekins, D. Spencer (2022), The 'Just Stop Oil' protests: A legal and policing quagmire, Policy Exchange, link

on each occasion and lasted, on average, five hours.

Exclusive nationwide polling conducted for Policy Exchange shows that the average number of times respondents believe protest groups should be permitted to undertake major protests in central London is no more than 12 times per year.[5] This is far fewer than the phase of protests which took place in the months following October 2023. 58% of respondents stated that they do not believe an organisation should be permitted to protest more than once per month.[6]

Current legislation requires protest organisers to provide only six days notice to the police of their intention to stage a march. During this six-day period the police are expected to assess the nature of the protest (including considering its route, timing and the likely number of attendees), gather relevant intelligence, plan for how they will police the protest including ensuring sufficient officers are available for deployment both at the protest and covering other local policing duties, determine what conditions they may apply to the protest and communicate these conditions to the public. This means that the final plans for any march are only provided to the public at the last possible moment – often the day before or the day of a march itself. The ordinary public, businesses, tourists and other local services are therefore required to adapt to these events at very short notice. It is simply unreasonable for the public to be required to continually adapt to such a situation week after week.

Polling conducted for Policy Exchange shows members of the public are choosing not to engage in a whole range of activities because of large-scale protests.[7] This is particularly the case for women (compared to men) and older (compared to younger) people – showing the disproportionate impact of large-scale protests on different groups. The polling clearly demonstrates the negative impact on people's willingness to take advantage of tourism, shopping and entertainment venues when mass protests are taking place. If a major protest was taking place in a nearby town or city centre a clear majority of people would drop their plans to:

- Travel with small children (71%);
- Travel with an elderly or mobility-impaired friend of relative (69%);
- Visit a tourist attraction (62%);
- Go shopping (58%);
- Eat at a specific restaurant (58%).

Following and during the protests linked to the Palestinian cause, there were several occasions where the police were met with violence when attempting to enforce the law. On these occasions the police officers involved responded with conspicuous courage – for this the

5. Polling for Policy Exchange by Deltapoll, 23rd – 25th May 2024, 1,517 Adults in Great Britain, 'Please imagine that a single pressure group or campaigning organisation wished to stage major multiple protests, each time involving tens of thousands of people in support of their particular cause. How often, if at all, do you think it should be allowed to protest in Central London?'
6. Ibid.
7. Polling for Policy Exchange by Deltapoll, 23rd – 25th May 2024, 1,517 Adults in Great Britain, 'Imagine that a major protest is taking place in the centre of any city or town very close to where you live, and that you had previously made plans to enter that central part of the city/town where the protest was taking place. In each of the following situations, would you keep your plans to go into the central part of the city/town or drop your plans to go there?'

officers involved should be commended. During the first six months of the protests – between October and April 2024 – 415 individuals were arrested during the protests, with 193 of those for "antisemitic offences".[8] At the time the Metropolitan Police stated there were arrests for 15 offences related to terrorism – which it described as being "unheard of previously" and that the "majority of these have been on suspicion for support of proscribed organisations, namely Hamas".[9]

There are huge costs to the policing of protest activity. The Metropolitan Police states that the costs of policing the Palestine-related protests in London between October 2023 and June 2024 were £42.9million with 51,799 Metropolitan Police officers' shifts and 9,639 police officer shifts from officers usually based outside the Metropolitan Police area required.[10] 6,339 police officers have had rest days cancelled between October 2023 and April 2024 – all of which will need to be repaid to officers in due course.[11] The impact on levels of crime and disorder in local communities of police officers being removed from their normal policing duties is surely considerable.

Polling for Policy Exchange shows that the public overwhelmingly support police intervention in disruptive protests.[12] The polling shows the public believe that the police should intervene if protestors are:

- Causing damage to private property (85%);
- Approaching passers-by to shout at and/or threaten them (84%);
- Causing damage to public property (84%);
- Holding banners containing racist or derogatory slogans (80%);
- Deliberately obstructing the road, preventing traffic from passing (79%);
- Blocking access to public transport, such as tube or railway stations (79%);
- Holding banners or chanting slogans that are threatening or implying violence to specific groups of people at home or abroad (78%);
- Blocking access to people's workplaces (78%);
- Climbing on buildings or public monuments (78%); and
- Blocking access to private or public buildings such as shops or museums (75%).

The polling shows that only 49% of the public believe the police should intervene if the protestors are chanting loudly in a way that some people could find intimidating (49%). Only 24% believe that the police should intervene if the protestors are holding banners with slogans.

Central to these events is the claim of a 'right to protest' – despite there being no such explicit and unfettered right within the European Convention on Human Rights (ratified by the UK in 1951, the ECHR

8. Metropolitan Police Service, Met sets out policing plan ahead of central London protests on Saturday, 26th April 2024, link
9. Ibid.
10. London Assembly Police and Crime Committee, Wednesday 17 July 2024, Transcript of Agenda Item 7 - Question and Answer Session with the Mayor's Office for Policing and Crime, link
11. Metropolitan Police Service, Met sets out policing plan ahead of central London protests on Saturday, 26th April 2024, link
12. Polling for Policy Exchange by Deltapoll, 23rd – 25th May 2024, 1,517 Adults in Great Britain, 'Please think about the rights of people who are protesting on marches or elsewhere, and the rights of other people not protesting about anything, but who may or may not be affected by the protesting. In balancing the rights of protestors and the rights of others, in each of the following situations do you think the police should intervene to stop the protests, or not intervene to stop the protests?'

came into force in 1953) or the Human Rights Act 1998. Instead of an explicit 'right to protest', the key rights applicable to protestors, amongst others, in this context are:

- Article 11: the right to freedom of peaceful assembly and association, and;
- Article 10: the right to freedom of expression.

Both rights are explicitly *qualified* by restrictions as "prescribed by law and are necessary in a democratic society", amongst other things, "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 …of others".[13] These qualifications are all too often overlooked.

The legal regime governing the policing of protests has become increasingly complex, involving a patchwork of UK legislation, guidelines, ECHR case law, domestic case law interpreting and applying ECHR rights through the HRA 1998. This patchwork has made it more challenging, and indeed confusing, for the police, Government and the public to understand what the law requires and permits.

Despite public support for police intervention, and the powers which exist under the existing legal regime, the authorities too often strike the wrong balance between the 'right to protest' on one side and the rights of everyone else to go about their daily lives without unnecessary and excessive disruption on the other. Following one egregious recent example of police failure, Dorset Police explained their inaction at an intimidating protest outside the family home of a Member of Parliament, by saying that they "respect people's right to lawful protest".[14] As far back as 2021, an inspection into the policing of protests by His Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), said:

> *"…the police do not strike the right balance on every occasion. The balance may tip too readily in favour of protestors when – as is often the case – the police do not accurately assess the level of disruption caused, or likely to be caused, by a protest."*[15]

Not enough has changed since 2021 – in an exclusive interview with Policy Exchange in May 2024, Assistant Commissioner Matt Twist of the Metropolitan Police admitted:

> *"When we look back at the policing of protests over the last 8 months, we know we didn't get everything right – particularly in the early stages in October. We've developed our tactics since then, becoming faster and more decisive. On occasion we did not move quickly to make arrests, for example the*

13. Schedule 1, Human Rights Act 1998, link
14. Dorset Police, Media Statement issued following protest on the evening of Monday 12th February 2024, copy provided to Policy Exchange by Dorset Police on the 20th March 2024
15. His Majesty's Inspectorate of Constabulary and Fire & Rescue Services, Getting the balance right? An inspection into how effectively the police deal with protests, March 2021, link

> *man chanting for 'Jihad' which was a decision made following fast time advice from lawyers and the CPS. We are now much more focussed on identifying reasonable grounds for arrest, acting where needed, and then investigating, so in these circumstances its very likely arrests would be made more quickly now."*[16]

This report examines the legal framework around protests, including the relevant European and domestic case law, and the police's response to the actions of protest groups. While there is room to make recommendations for change in the legal framework, any claim by the police that they have done 'everything possible' under the existing legal framework is not borne out by the facts. Although some recent UK case law may present an unduly 'pro-protestor' picture, the police must not misinterpret the courts' judgments and use it to take an approach which unduly prioritises protestors at the expense of others. In particular, the police must not unduly refrain from arresting individual protestors reasonably suspected to be committing criminal offences. There remains a wealth of judgments, at both the domestic and European level, which make clear that protestors cannot rely on their frequently misinterpreted 'rights' to immunise them from police action against them.

The core argument of this report is that changes are necessary to both the policing approach to protest under the existing legal regime and to elements of the legal framework itself. This would enable what is an essential rebalancing in favour of the ordinary member of the public who wishes to go about their daily lives unimpeded by the activities of relentlessly disruptive protest groups.

16. Assistant Commissioner Matt Twist, Metropolitan Police Service – interview with Policy Exchange, 21st May 2024

Summary of Recommendations

Recommendations for Government

1. The Government should change the criteria to prohibit a protest march under section 13 of the Public Order Act 1986. Currently protest marches can only be prohibited when any conditions applied by the police to a march under section 12 of the Public Order Act 1986 would be insufficient to prevent '*serious public disorder*'. This should be extended so protest marches could be prohibited under section 13 of the Public Order Act 1986 when conditions under section 12 of the Public Order Act 1986 are insufficient to prevent '*serious public disorder, serious damage to property or serious disruption to the life of the community*'. This should explicitly include the impact of 'cumulative disruption'. There should also be a provision to prohibit a march if it would place 'any undue demands on the police or military forces', replicating section 11 of the Public Processions (Northern Ireland) Act 1998.

2. The Government should legislate to establish a Protest Commission for London. This Commission should be established with independent Commissioners, appointed by the Home Secretary following consultation with the Mayor of London. The Commission should have the power to make determinations concerning the conditions applied to protests and processions. They should consider representations by groups that are representatives of local residents and businesses, such as local authorities and Business Improvement Districts, to understand the impact of marches, *in advance of marches being held*. They should have the power to apply to the Home Secretary to prohibit marches.

3. The Government should amend section 11 of the Public Order Act 1986 to increase the notification period for all protest marches to 28 days – replicating the notification requirements already in place in Northern Ireland. The notification requirements should include: any planned procession's date, time and route, the number of likely attendees, and the arrangements for its control being made by the organisers. The requirement to provide at least 28 days notice to the police should be mandatory in all cases. Failure to provide appropriate notification should make the protest

unlawful by default.

4. The Government should legislate to require that police forces *must* take action to prevent the interference by protestors with the operation of those installations and facilities classified as Key National Infrastructure under section 7 of the Public Order Act 2023. Given Key National Infrastructure sites are essential for the running of the country, it must no longer be an option for police chiefs to choose not to intervene.
5. The Government should expand the definition of Key National Infrastructure under section 7 of the Public Order Act 2023 to include the facilities and buildings related to any 'branch' of the State (including but not limited to Parliament, Government departments and the Courts). They should also extend this protection to the wider communications infrastructure.

6. The Secretary of State for Transport and British Transport Police Authority should commission His Majesty's Inspectorate of Constabulary and Fire and Rescue Services to inspect the approach of British Transport Police to disruptive or unlawful protests on and around the transport infrastructure.

7. The Government should legislate to increase the protections afforded to Parliament and Parliamentarians by replicating the legislation in force in the Irish Republic under the Offences Against the State Act 1939 which forbids the "prevention by obstruction or intimidation of any branch of the government of the State from carrying out their functions, duties or powers". The Government should also legislate to return to the limitations of demonstrations as enacted in the Serious and Organised Crime and Police Act 2005.

8. The Government should clarify the legal position for public order offences by legislating for an express reversal of the judgment of the Supreme Court case of *DPP v Ziegler [2021]*, regarding the offence of wilful obstruction to the highway. Legislation should make clear that no protestor can have a lawful excuse for obstructing the highway if he or she intends to obstruct, harass, inconvenience or harm others.

9. The Government should legislate for a general reversal of the line of reasoning created by the Supreme Court case of *DPP v Ziegler [2021]*, with a view to public order offences that include a reasonable or lawful excuse defence – making clear that no protestor can have a lawful excuse to a charge of any public order offence if he or she intends to obstruct, harass, inconvenience or harm others.

10. The Government should legislate to make it unlawful for individuals at protests to wear face coverings wholly or mainly with the intention of concealing their identity.

Recommendations for the Mayor of London

11. The Mayor of London should conduct and publish an 'Economic Impact Assessment', taking into account not only the direct costs of policing but also with wider impacts on business and productivity on London. The published assessment should set out all the assumptions and judgements made in estimating these costs. The Home Office and HM Treasury should support the Mayor of London in ensuring an appropriate methodology is used.

12. The Mayor of London should conduct and publish an evaluation of the impact on local residents and visitors of protests. This should also consider the 'Equality Impact' on those who may be more vulnerable to the impact of protests – including but not limited to older people, women and people with disabilities. The Home Office and Government Equalities Office should support the Mayor of London in ensuring an appropriate methodology is used.

13. The Mayor of London should take responsibility for co-ordinating with the police and other relevant public services to ensure that all Londoners, visitors, businesses and public services are kept fully informed about the routes, timing and likely impact of all protests taking place across the Capital. At a minimum this information should be published, in advance, on a single dedicated website incorporating all of the relevant information including the impact on the transport network.

Recommendations for Police Forces and Policing Bodies

14. The Commissioner of the Metropolitan Police must take all possible steps to ensure that all those suspected of committing criminal offences at protests are arrested at the time of the offence. Ministers should explicitly and publicly support such an approach, including, if necessary, making changes to the framework of accountability for holding police officers and forces to account to increase officers' confidence in taking immediate action.

15. The Metropolitan Police should impose more stringent conditions on protest marches, using section 12 of the Public Order Act 1986 to limit the *continued* serious disruption being caused to the public. These conditions should particularly relate to the length of time, the locations and distance over which processions and marches can take place.

16. The National Police Chiefs Council and College of Policing, working with Chief Constables, should review their public order policing approach in a number of areas – funding should be provided by HM Tresaury where required:
    i. All uniform police officers should receive a higher level ('level 2') of public order training in order that significantly more officers can be deployed into a wider range of confrontational scenarios. All new officers should receive this training as part of their basic training during their probationary period.
    ii. Policing should establish a system in order that large numbers of public order officers can be deployed at very short notice – particularly in major cities across the country.
    iii. There should be a significant increase in the number of mounted officers and police dogs available for deployment.
    iv. There should be a change in tactical approach which would enable 'distance' to be more readily created between police officers and violent crowds at an earlier stage of confrontation – where necessary using mounted officers, police dogs and Attenuating Energy Projectiles (AEP – commonly known as 'Baton Rounds') – all of which are currently available for public order deployment.
    v. Following any disorder the police should provide detailed explanations as to why they responded in the way that they did – for example outlining the difference in response to 'spontaneous' disorder versus 'pre-planned' events.

17. Every police force must, in line with the 'Defending Democracy Policing Protocol', use the powers contained within section 42 of the Criminal Justice and Police Act 2001 to its fullest extent to prevent all protests outside the homes of Parliamentarians. Within 12 months the Home Secretary should commission an inspection by His Majesty's Inspectorate of Constabulary and Fire and Rescue Services to determine whether the 'Defending Democracy Policing Protocol' has ensured that in all cases police forces have robustly used the full powers available to them to prevent protests of any kind outside the homes of Parliamentarians. Where this has not been the case Chief Constables should be held to account for their failure.

18. Police forces should publish the full records of discussions between the police and protest organisers well in advance of any protest march going ahead. If necessary the Government should legislate to require police forces to abide by this requirement.

19. The College of Policing must ensure that all training for public order commanders makes clear that the existing case law

(particularly the case Supreme Court case of *DPP v Ziegler*) does *not* prevent *arrests* being made when reasonable grounds exist for suspecting an individual has committed a criminal offence – with the thresholds for arrest being markedly different to those for convicting an individual of a criminal offence.

20. The College of Policing and National Police Chiefs Council – working closely with the Metropolitan Police and other forces – must plan for how future protests and protestors are likely to evolve their tactics and develop effective strategies and tactics to deal with the resultant disruption and criminality.

21. The Metropolitan Police Strategic Insights Unit (working closely with other police forces, the College of Policing, the London Fire Brigade and the London Ambulance Service) should undertake and publish an evaluation of the impact of protests in London on the emergency services – including the impact of protests on crime (particularly where police officers are diverted from their normal duties) and the impact on the ability of the different emergency services to respond to incidents.

22. The Metropolitan Police should publish their new 'charter' relating to advisory groups without delay. It should include the provisions outlined in this Policy Exchange report – including the publication of all minutes of meetings between the police and Advisory Groups, including those involving meetings with internal police Staff Networks. The College of Policing should set the standard for all police forces nationally regarding Advisory Groups.

23. His Majesty's Inspectorate of Constabulary and Fire and Rescue Services should conduct an inspection to determine whether the Metropolitan Police Service, and policing nationally, have sufficient covert policing capacity to gather intelligence on disruptive or criminal protest groups.

24. The current inspection into political impartiality being undertaken by His Majesty's Inspectorate of Constabulary and Fire and Rescue Services should explicitly consider whether there is evidence of 'Differential Policing'[17] in the policing of protest.

Recommendations for the Crown Prosecution Service

25. The Crown Prosecution Service must amend its Legal Guidance on 'Offences during Protests, Demonstrations or Campaigns' to reduce the likelihood of suspects not being prosecuted for 'Public Interest' reasons. The Guidance should also make clear that a factor

17. A different policing approach – based predominantly on the cause ascribed by those the police are dealing with.

weighing in favour of prosecution is if the protest is 'intimidatory'.

26. The Crown Prosecution Service must publish the full details of all consultations which they have conducted in relation to their Legal Guidance on 'Offences during Protests, Demonstrations or Campaigns'. The full details of any future consultations must be published. Future consultations must ensure that the views of the wider public who are most directly affected by protests, including the views of businesses and local residents, are actively sought.

1. Introduction

This report examines, and at times criticises, those protesting for their disruptive, and at times criminal, activities. Similarly the approach of the authorities – including the police and prosecutors – to dealing with protestors is subject to detailed analysis. However, there is a clear distinction between protest activities and many of the scenes of disorder which took place across the country in the summer of 2024. Where the police have taken a robust response to scenes of violence they have been right to do so. Every effort should be made to identify the individuals who have been part of this criminality and ensure that they are sentenced to lengthy terms of imprisonment.

This report focuses primarily on the response by the authorities to the increase in large-scale protest activity on the streets of London and in other major cities over recent years – including following the Hamas terrorist attacks of the 7th October 2023 and the subsequent large-scale military operation in response.

The proscribed terrorist group Hamas commenced their terrorist attack against Israel at 3.30am GMT on the 7th October 2023 – an attack which led to the murder of over 1,000 people and abduction of a further 253. Less than ten hours later, at 12.50pm GMT on the 7th October 2023 while aspects of the terrorist attacks were still underway, an organiser on behalf of the Palestine Solidarity Campaign contacted London's Metropolitan Police Service to inform them of their intention to hold their first pro-Palestine protest march a week later.[18]

The first of these major protests in support of the Palestinian cause occurred in London 7 days later, on the 14th October 2023.[19] Between October 2023 and April 2024 a coalition of pro-Palestinian groups[20] led thirteen mass march processions across the Capital; trespassory assemblies in mainline railway stations; disruptive public assemblies in Parliament Square and Whitehall; the targeting of historic institutions such as the British Museum; and, in a particularly sinister development, intimidatory protests outside the offices and family homes of Parliamentarians.

18. Metropolitan Police Service, Freedom of Information Request Response Ref: **01.FOI.23.033311**, link
19. Section 11 of the Public Order Act 1986 requires that protest organisers give the police six days-notice of their intention to hold a 'public procession intended to demonstrate support for or opposition to the views or actions of any person or body of persons'.
20. There are six groups which have primarily organised recent protest assemblies and processions – these are Palestine Solidarity Campaign, Friends of Al-Aqsa, Stop the War Coalition, Muslim Association of Britain, Palestinian Forum in Britain and Campaign for Nuclear Disarmament – see: Palestine Solidarity Campaign, 6th November 2023, link

'Peaceful' protest?

Sir Mark Rowley, the Commissioner of the Metropolitan Police has claimed, while presenting to the Mayor of London's Policing Board on the 5th March 2024, that the majority of major protests have been peaceful.[21] Such a characterisation is an inaccurate usage of the ordinary meaning of the word 'peaceful'. While many of the recent pro-Palestinian protests may not have led to very widespread acts of violence, that is not the same as them being 'peaceful'. There have been calls for 'Jihad'[22] and to 'Globalise the Intifada'[23]; antisemitic placards have been seen at countless protests. Between October 2023 and April 2024 415 individuals were arrested.[24] Fifteen individuals were arrested for terrorism offences – something the Metropolitan Police states is "unheard of previously" with the majority "on suspicion of support for proscribed organisations, namely Hamas".[25] In at least one case, members of a large breakaway group fired fireworks at police officers.[26]

Had the protests been genuinely 'peaceful' it would surely not have been necessary for police officers to escort a solitary counter-protestor away from the fringes of a pro-Palestinian march.[27] Neither would it have been necessary for police officers to instruct those seeking to highlight the plight of those held hostage by the terrorist group Hamas to leave central London.[28] It would surely not have been necessary for there to be substantial lines of public order police officers deployed to keep marchers and counter-protestors apart – as has been seen at various protests.

Amidst this trend of increasingly disruptive and confrontational protests, Parliamentarians are increasingly facing sinister threats and intimidation. Protests have taken place outside the private family homes of Members of Parliament – including the former Prime Minister Rt Hon Rishi Sunak MP[29] and the then Conservative MP Rt Hon Tobias Ellwood.[30] The constituency surgeries of Members of Parliament have been targeted. The police were called when the constituency surgery of Labour MP Chi Onwurah's was targeted by protestors alleged to have been 'aggressive, banging on walls, hurling abuse, attacking a parliamentary staff member's car and jumping in front of traffic'.[31] Protestors held a protest outside the office of Labour MP Rushanara Ali to protest – blocking the footpath with some protestors wearing masks. Protestors reportedly chanted, "stop killing babies" and "from the river to the sea, Palestine will be free".[32] The Speaker of the House of Commons overturned long-held Parliamentary procedure, partly he claimed because of the risks faced by Members of Parliament.[33] The then Mother of the House of Commons, Rt Hon Baroness Harman, suggested that those MPs who feel 'vulnerable' or 'under pressure' should be permitted to speak or have their votes in Parliament recorded remotely.[34]

This 'discourse of threat' is no accident. When Members of Parliament debated the Israel-Gaza conflict in February 2024, the Director of the Palestine Solidarity Campaign reportedly told a gathering crowd that "we want so many of you to come that they will have to lock the doors of parliament itself."[35] This type of statement leads to the questions – how

21. London Policing Board, Minutes of Meeting held on 5th March 2024, link
22. 'X', @hurryupharry, 21st October 2023, link
23. 'X', @huryupharry, 28th October 2023, link
24. Metropolitan Police Service, Met sets out policing plan ahead of central London protests on Saturday, 26th April 2024, link
25. Ibid.
26. Metropolitan Police, Assistant Commissioner Matt Twist statement on policing in central London, 11th November 2023, link
27. Daily Mail, Met Police say they forcibly removed anti-Hamas protestor from pro-Palestine demo 'because he was trying to provoke' by holding sign calling jihadi group 'terrorists' - amid backlash at the force, 19th February 2024, link
28. Evening Standard, Met Police 'shut down vans showing pictures of children kidnapped by Hamas', 20th October 2023, link
29. "X', @JustStop_Oil, 29th November 2023, link
30. Sky News, Tobias Ellwood: Pro-Palestinian protesters hold demonstration outside MP's home, 13th February 2024, link
31. 'X', @ChiOnwurah, 15th March 2024, link
32. The Guardian, Protestors gather outside London MP's London office after Gaza vote, 16th November 2023, link
33. Hansard, 21st February 2024, Vol 745 Column 806, link
34. Return to hybrid model of working could help MPs who 'feel vulnerable' amid safety fears, Labour MP tells LBC, 27th February 2024, link
35. The Times, Pro-Palestinian protestors plotted to force parliament into lockdown, 23rd February 2024, link

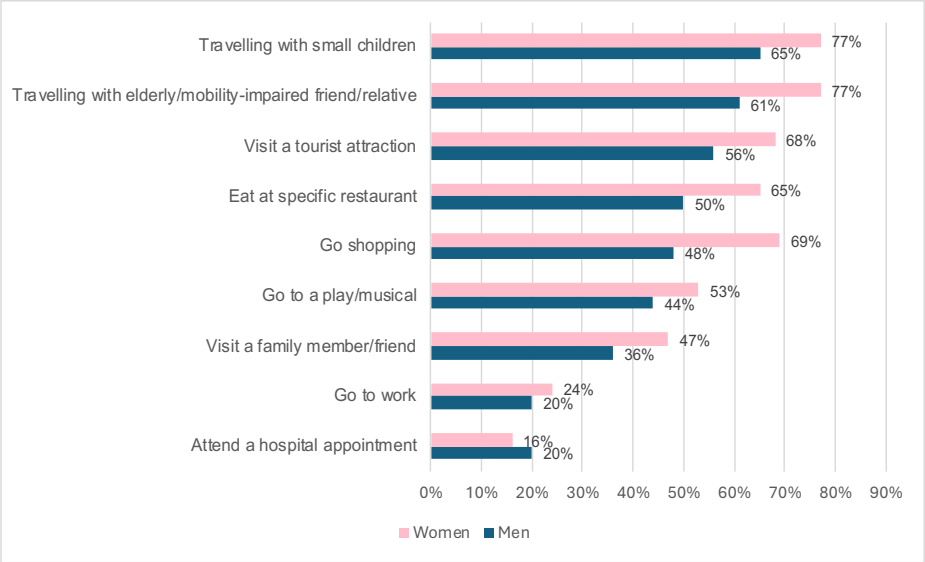
can they be defined as 'mostly peaceful' and are some activists willing to seek to bend Members of Parliament to their will other than through legitimate and lawful means?

Public opinion

Exclusive polling for Policy Exchange conducted in May 2024 provides evidence which shows the public would be discouraged from engaging in a whole range of activities because of large-scale protests taking place in nearby city and town centres.[36] This is particularly the case for women (compared to men) and older (compared to younger) people. If a major protest was taking place in a nearby city or town centre a clear majority of women would drop their plans to:

- Travel with small children (77%);
- Travel with an elderly or mobility-impaired friend of relative (77%);
- Go shopping (69%);
- Visit a tourist attraction (68%);
- Eat at a specific restaurant (65%); and
- Go to a play or musical (53%).

These results suggest that large-scale protests have a disproportionate impact on the activities that women would be wiling undertake – particularly when those activities concern small children or the elderly. The negative impact on people being willing to continue to take advantage of tourism, shopping and entertainment venues is also clear.



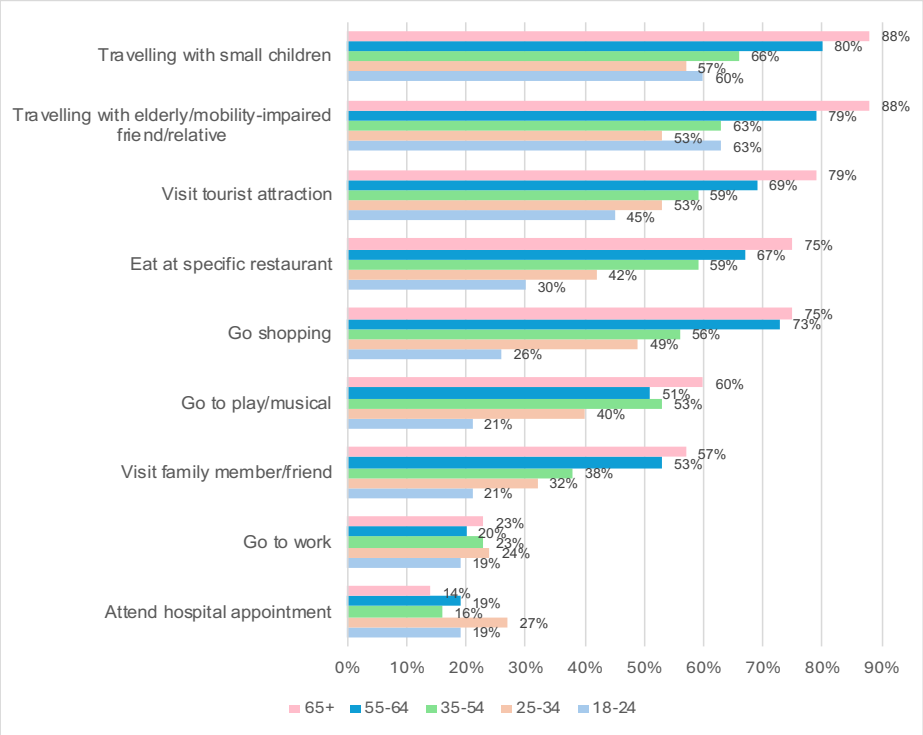
Respondents who would drop plans in this situation if a major protest was taking place in a nearby city or town centre (split by gender)[37]

36. Polling for Policy Exchange by Deltapoll, 23rd – 25th May 2024, 1,517 Adults in Great Britain, 'Imagine now that a major protest is taking place in the centre of any city or town very close to where you live, and that you had previously made plans to enter that central part of the city/town where the protest was taking place. In each of the following situations, would you keep your plans to go into the central part of the city/town or drop your plans to go there?'
37. Ibid.

There is an even greater disproportionate impact on older (aged 55 to 65 and 65 plus) compared to younger people. If a major protest was taking place in a nearby city or town centre a clear majority of people aged 65 years and over would drop their plans to:

- Travel with small children (88%);
- Travel with an elderly or mobility-impaired friend of relative (88%);
- Visit a tourist attraction (79%);
- Eat at a specific restaurant (75%);
- Go shopping (75%);
- Go to a play or musical (60%); and
- Visit a family member or friend (57%).

These results show that large-scale protests are having the impact of excluding a substantial proportion of people from vast swathes of our city and town centres – with a disproportionate impact on women and older people.



Respondents who would drop plans in this situation if a major protest was taking place in a nearby city or town centre (split by age)[38]

There are also concerns about the approach of authorities to dealing with recent protests. In polling conducted in November 2023 twice as many respondents stated that the rules relating to protests and marches in

38. Ibid.

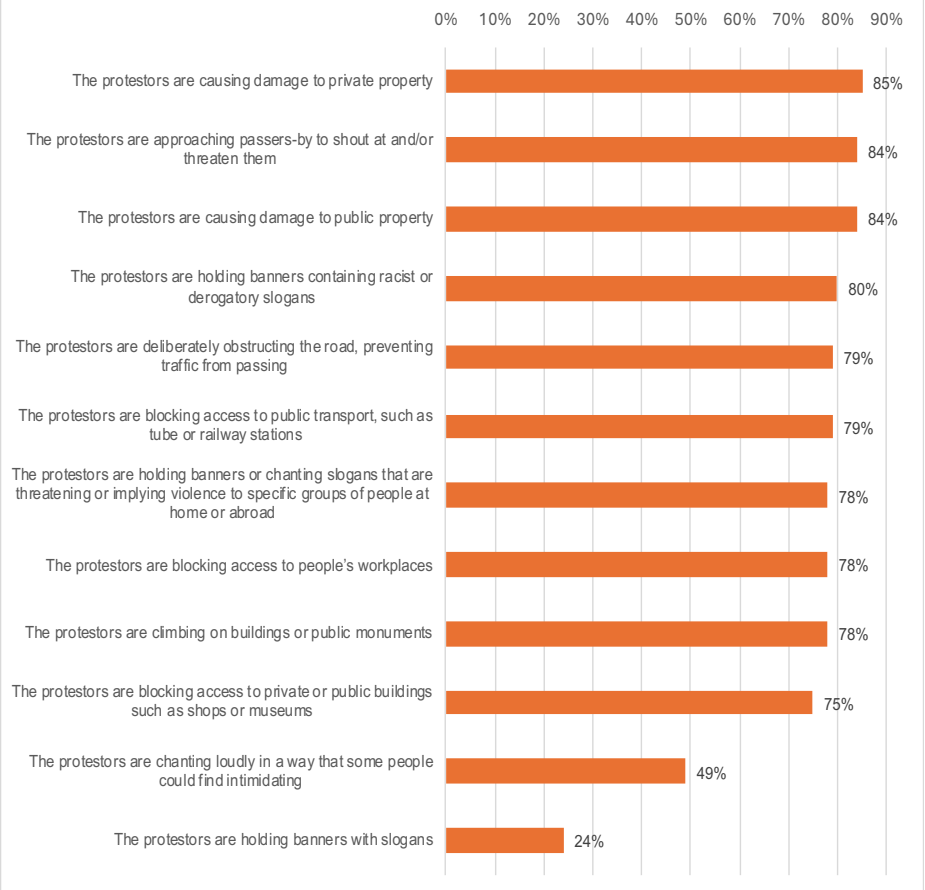
London were 'too relaxed, and should be tightened' as said that they were 'too strict, and should be relaxed'.[39] When asked whether it is acceptable or unacceptable to protest outside a politician's house respondents were almost twice as likely to say it was 'completely or somewhat unacceptable' as 'completely or somewhat acceptable'.[40]

In polling for Policy Exchange in May 2024, people were asked in what circumstances they believe the police should intervene relating to protests.[41] The results were overwhelmingly in favour of police intervention – with a substantial majority of respondents saying that the police should intervene if protestors are:

- Causing damage to private property (85%);
- Approaching passers-by to shout at and/or threaten them (84%);
- Causing damage to public property (84%);
- Holding banners containing racist or derogatory slogans (80%);
- Deliberately obstructing the road, preventing traffic from passing (79%);
- Blocking access to public transport, such as tube or railway stations (79%);
- Holding banners or chanting slogans that are threatening or implying violence to specific groups of people at home or abroad (78%);
- Blocking access to people's workplaces (78%);
- Climbing on buildings or public monuments (78%); and
- Blocking access to private or public buildings such as shops or museums (75%).

Police intervention was supported by nearly half of respondents when 'protestors are chanting loudly in a way that some people could find intimidating' (49%).[42] Twenty-four percent of respondents would support police intervention when 'protestors are holding banners with slogans'.[43]

39. YouGov/Sky Survey Results, 7th-8th November 2023, 2,080 adult respondents in Great Britain, link
40. YouGov Survey Results, 14th February 2024, 2,474 adult respondents in Great Britain, link
41. Polling for Policy Exchange by Deltapoll, 23rd – 25th May 2024, 1,517 Adults in Great Britain, "Please think about the rights of people who are protesting on marches or elsewhere, and the rights of other people not protesting about anything, but who may or may not be affected by the protesting. In balancing the rights of protestors and the rights of others, in each of the following situations do you think the police should intervene to stop the protests, or not intervene to stop the protests?"
42. Ibid.
43. Ibid.



Respondents who in balancing the rights of protestors and the rights of others, think the police should intervene to stop the protests in each of the following situations[44]

A 'balancing of rights' exercise

As disruptive protests continue – police forces, prosecutors and the courts engage themselves in a 'balancing of rights' exercise to adjudge whose rights, and which, are to be prioritised. The seeming objective of such an exercise is to ensure any interference with the rights of individuals by the state is 'proportionate' and 'necessary' in a democratic society – as required under the European Convention of Human Rights (ECHR) and brought into UK law through the Human Rights Act 1998 (HRA).

When undertaking any 'balancing of rights' exercise on one side are the rights of protestors, most significantly, the right to freedom of expression and freedom of assembly under Articles 10 and 11 of the European Convention on Human Rights.

However, these rights are explicitly *qualified* – they are each subject to such restrictions as "are prescribed by law and are necessary in a democratic society", amongst other things, "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 …of others".[45] In this way, protestors (like everyone else) are only entitled to their suitably

44. Ibid.
45. Schedule 1, Human Rights Act 1998, link

limited rights; the Convention provides the right to expression or assembly only to the extent that the State has not reasonably restricted or forbidden the relevant acts of expression or assembly, which it is entitled to do for the variety of reasons specified in the ECHR. Reasonable limitations by the State on Articles 10 and 11 are not de facto violations of any 'right to protest'; rather an integral part of the very essence of these Convention rights.

On the other side of the balancing act are all the rights of ordinary members of the public to go about their own daily lives unmolested (as well as, in the case of Article 10, their reputations and, in the case of Article 11, the other freedoms they legally enjoy). These include, but are not confined to, the rights of those not involved in the protest that are Convention rights and likely to be specifically targeted by protests, such as those to a private and family life (Article 8), their equivalent rights to freedom of thought, conscience and religion (Article 9), to freedom of expression (Article 10), their own rights of assembly and association (Article 11), and their rights to the peaceful enjoyment of their possessions (Article 1 of the 1st Protocol).

The extensive body of case law concerning protest provides guidance as to how this balancing of rights might best be conducted by public authorities, including the police. The legal framework concerning protest can seem complex - the case law often lacks clarity and consistency due to the fact-specific nature of the legal tests involved.

In the near quarter century since the Human Rights Act 1998 came into force, the domestic courts seem to have shifted to an excessively risk averse approach to protest, attaching more weight to the Article 10 and 11 rights of protestors than necessary, and arguably neglecting the rights and interests of the public as a result. Indeed, at the peak of this pro-protest approach – DPP v *Ziegler* [2021] and the cases which followed it – the domestic courts have come dangerously close to a primacy of the 'the right to protest' where interference with Convention rights must always be justified on a case-by-case basis, rather than reasonable interference being recognised as an inherent element of the Convention rights.

The police interpretation

This is a not an ideal legal regime for the police to operate under. For Parliament and the Courts to have created a regime where the police are required to undertake a 'balancing of rights' exercise – never certain whether they will be deemed to have been correct in their judgement – places the police in a most challenging position. Nevertheless, a set of legal principles can be drawn from the case law which can help guide the police in deciding whether or not to take action during a protest. This report sets out those principles. Whilst some recent case law may present an unduly 'pro-protestor' picture, it is essential that the police do not overinterpret the courts' judgments to take an approach which overly protects the rights of protestors, at the expense of the rights of ordinary members of the public.

There remains a wealth of judgments, at both the domestic and European level, which make clear that protestors cannot rely on their rights to immunise them from swift police action against them. Indeed, there is also a strong body of case law to limit the effects of *Ziegler's* [2021] permissive approach to protest.

As with other qualified Convention rights, member states are free to regulate the exercise of the Article 11 right to freedom of peaceful assembly. Member states can regulate Article 11 rights in pursuit of a *legitimate* aim that meets a pressing social need – provided the extent of the regulation of the right is proportionate to that legitimate aim. The *type* of protest or assembly at issue is relevant when assessing whether any restriction on protest or assembly is proportionate. For instance, the ECtHR reiterated in the recent case of *Laurijsen v Netherlands* [2024] that:[46]

> *"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".*

The ECtHR also made clear that this fact is relevant to assessing whether a national authority has acted proportionately in regulating certain forms of assembly and protest. In other words, member states have discretion to regulate disruptive forms of assembly and protest under Article 11.

And yet the approach taken by the police in recent years suggests that they have indeed been unduly restrained in dealing with disruptive protestors. In 2021 His Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) published their report 'Getting the balance right?' into the policing of protests. HMICFRS said:

> *"…the police do not strike the right balance on every occasion. The balance may tip too readily in favour of protestors when – as is often the case – the police do not accurately assess the level of disruption caused, or likely to be caused, by a protest".*[47]

In August 2023, prior to the Hamas terrorist attacks of the 7th October, in response to the HMICFRS report, the College of Policing and National Police Chiefs Council (NPCC) published their 'National protest operational advice'. The College of Policing and NPCC said:

> *"…the rights of those protesting are not absolute. The public are entitled to challenge perceived police inaction to disruption should they feel, or fear, that their rights are not being weighted sufficiently".*[48]

And yet, three years on from the report by the HMICFRS and a year on from the advice issued by the College of Policing and National Police Chiefs Council, not enough has changed. On too many occasions, the 'right to protest' has been unduly prioritised over the rights of others – despite the fact that there is no explicit 'right to protest' existing within the text of the ECHR or in the Act that gives effect to it in UK law – the Human Rights Act 1998.

46. *Laurijsen v Netherlands* [2024] (Applications nos: 56896/17, 56910/17, 56914/17, 56917/17 and 57307/17), para 5, link
47. His Majesty's Inspectorate of Constabulary and Fire & Rescue Services (2021), Getting the balance right? An inspection of how effectively the police deal with protests, 11th March 2021, **link**
48. College of Policing and National Police Chiefs Council, National protest operational advice, August 2023, link

How they go about the policing of protest, including their interpretation of the existing legal framework, is not one of the policies readily available on the Metropolitan Police's website. This is unlike policies related to: Accessing information (such as Freedom of Information requests), the London Emergency Services Liaison Panel, the 'Met diversity and inclusion strategy (STRIDE)', Cyber security strategy, Body Worn Video, the Gangs Violence Matrix (discontinued in October 2022), 'Tidal Thames: drowning prevention strategy' and Fraud.[49]

The patchwork of legislation and case law applicable to protest has caused the policing of protests to become a highly challenging activity. The former Chief Inspector of Constabulary, Sir Tom Winsor's analogy that it has become the "brain surgery of policing" is appropriate.[50] There is nonetheless a need for the police, prosecutors and legislators to grapple with the issues involved far more effectively than they have done to date – it is in the overwhelming public interest that they do so.

49. Metropolitan Police Service, About us, link
50. House of Commons Home Affairs Committee, Policing of Protests, 27th February 2024, link

2. A guide to the legal framework

There are numerous enactments which create mechanisms by which protests can be regulated, through giving the police certain powers or through creating criminal offences which may apply to protestors. A non-exhaustive summary of the most relevant legislation is provided in Annex A of this report.

In considering the practical implementation of the law, this legislative framework must be read and understood in the context of the relevant rights found in the European Convention on Human Rights (ECHR), the applicable case law of the European Court of Human Rights (ECtHR), and the domestic UK courts applying the Human Rights Act 1998. A key feature of the relationship between domestic courts and the ECtHR is that, in simple terms, UK courts will interpret the rights protected in the Human Rights Act 1998 consistently with clear and well-established lines of Strasbourg case-law. In more recent years, the UK Supreme Court has confirmed it is not the job of domestic courts to outpace Strasbourg and create novel legal principles from the provisions of the Human Rights Act.[51]

The legal framework concerning protest can seem complex: the case law often lacks clarity and consistency due to the fact-specific nature of the legal tests involved. Further, in recent years, the UK case law has, at times, placed excessive undue weight on the rights of protesters at the expense of the public's rights, wellbeing, and ability to go about their daily lives. A non-exhaustive summary of the most relevant case law is provided in Annex B of this report.

The complexity of, and issues with, the case law – as well as our recommendations to solve such issues – are discussed in far greater detail in Annex C of this report.

Policing protest requires quick decision-making in challenging situations, often under real-time media scrutiny. While the legal regime (consisting of UK domestic legislation, domestic case law and European Court of Human Rights case law) for the police to operate under is not ideal, a set of legal principles can be drawn from the case law which can help guide the police in deciding whether or not to take action more robust during a protest. And whilst some recent case law may present an unduly 'pro-protestor' picture, it is important the police do not overinterpret the courts' judgments to provide excessive protections to the 'rights' of protestors, at the expense of others. There remains a wealth of judgments,

51. *R (Elan-Cane) v Secretary of State for Home Department* [2021] UKSC 56

at both the domestic and European level, which make clear that protestors cannot rely on their rights to immunise them from police action against them.

The Background Framework

There are numerous pieces of UK legislation which create mechanisms by which protests can be regulated, through giving the police certain powers or through creating criminal offences which may apply to protestors.

Police powers

The most important legislation is the Public Order Act 1986. This gives the police the power to apply for the prohibition of a public procession or to impose conditions on public processions or assemblies in certain circumstances. These include:

- Section 12 of the Public Order Act 1986 allows the police to impose conditions on public processions if the police reasonably believe the procession will cause serious public disorder, serious damage to property or serious disruption to the life of the community.
- Section 13 of the Public Order Act 1986 allows the police to go further, if they believe that powers under section 12 of the Public Order Act 1986 will be insufficient to prevent the holding of public processions from resulting in serious public disorder (albeit not serious damage to property or serious disruption to the life of the community). In such circumstances, in London, the Metropolitan Police Commissioner may seek the consent of the Home Secretary to make an order prohibiting the protest entirely. Outside of London the Chief Constable must first apply to the local council before then applying to the Home Secretary.
- Section 14 of the Public Order Act 1986 allows the police to impose conditions on public assemblies if the police reasonably believe that it may result in serious public disorder, serious damage to property or serious disruption to the life of the community; or has the purpose of compelling others not to do an act they have a right to do.

Criminal offences

The Public Order Act 1986 provides for a range of offences associated with public disorder – including riot, violent disorder, affray, violent provocation, and harassment. The Act also makes it an offence to disregard conditions or orders made by the police in respect of public processions under sections 12, 13 and 14.

The Criminal Damage Act 1971 outlines the offence of criminal damage. Section 137 of the Highways Act 1980 makes it an offence to, without lawful authority, to wilfully obstruct the highway. The Public Order Act 2023 introduced a range of new offences including 'Locking on' under section 1, causing serious disruption by tunnelling under section 3 and

obstructing major transport works under section 6.

The ECHR and the HRA

The European Convention on Human Rights[52] ('ECHR' or 'the Convention') is an international treaty which contains a range of rights relevant to protest. The UK, as a member of the Council of Europe (distinct from the EU) is a signatory of the ECHR and has agreed to respect the rights set out in the Convention. The UK ratified the ECHR in 1951 and the ECHR came into force in 1953. The UK accepted the right of individual petition to the ECtHR in 1966.

The rights contained within the ECHR were incorporated into UK *national* law by the UK Parliament through the Human Rights Act 1998[53] (HRA) (specifically section 1). The result of this is that the ECHR's Convention rights were made into UK statutory rights. This means that public bodies (other than the House of Parliament but including the police) must respect these statutory rights, subject to a consideration of any other statutory duties or powers.[54]

Under section 3 of the Human Rights Act 1998, so far as is possible to do so, legislation must be read by the courts and given effect to in a way which is compatible with Convention rights. This includes all the legislation relevant to protest discussed in Annex A of this report, even if it was enacted before the Human Rights Act came into force in October 2000.

Further, under section 2(1) of the Human Rights Act 1998, when making decisions, the UK courts must take into account judgments of the European Court of Human Rights. This report therefore discusses both UK and ECtHR case law.

The Relevant Rights

Protest activity can engage the Convention rights of a range of individuals including: protestors, counter-protestors, residents living nearby, workers whose place of work is nearby, visitors to the area, police officers themselves, and the wider public. During a protest, the police will often be required to balance these competing rights against one another.

The rights of protestors

There is no explicit, stand-alone 'right to protest' within the ECHR. Instead, amongst others, the key rights applicable to protestors in this context are[55]:

- Article 11: the right to freedom of peaceful assembly and association, and;
- Article 10: the right to freedom of expression.

Courts will often consider these rights alongside each other[56], resulting in the bundle of rights commonly referred to as the 'right to protest'.

52. Council of Europe, European Convention on Human Rights, link
53. Human Rights Act 1998, link
54. Other statutory duties or powers will take precedence to the extent that they are incompatible (and cannot be interpreted compatibly) with Convention rights.
55. Other rights which can be of particular relevance to protestors include: Article 9: the right to freedom of thought, conscience and religion; Article 5: the right to liberty and security of person, and; Article 6: the right to a fair trial.
56. See for example, *Ezelin v France* [1992] 14 EHRR 362 at [37]: 'Article 11 must also be considered in the light of Article 10'. Link

The rights and freedoms of others

The key Convention rights of others applicable during a protest include:

- Article 8: the right to respect for private and family life
- Article 1 of Protocol 1: the right to peaceful enjoyment of property
- Article 9: freedom of thought, conscience and religion
- Article 17: prohibition of abuse of rights - this article prevents people, such as protestors, from engaging in activities aimed at the destruction of the rights and freedoms of others

It is important to emphasise that the rights and freedoms of others does not include only the Convention rights of others, but also their rights, powers and liberties under ordinary law of the UK (i.e. law other than the HRA and ECHR), for example the public right of way.

The qualified nature of all these rights

All of the rights mentioned above are qualified. This means that they can all be restricted.

Crucially, for Articles 10 and 11 these freedoms are subject to interference by the police, using any powers prescribed by law, which is 'necessary in a democratic society in the interests of … national security…. public safety…for the prevention of disorder or crime… for the protection of the reputation or rights of others'[57]. This means that the freedoms of expression and assembly are inherently limited – protestors, like everyone else, are only entitled to their suitably limited rights, not an absolute 'right to protest'.

The Role of the Police

Under section 6 of the Human Rights Act 1998, the police have a statutory duty to act, as far is possible, in a way that is compatible with the rights of all individuals. Any police action against protestors or other individuals must take place:

- In accordance with the law,
- In pursuit of a legitimate aim,
- As is necessary in a democratic society

Determining whether action is necessary in a democratic society involves considering the proportionality of the action against the relevant rights and interests involved[58]. Thus, when deciding whether to take action against protesters, the police must assess where the balance lies between the rights of the protestors to free expression and peaceful assembly against the need for public safety, public order and the need to protect the rights of others.

There is also no hierarchy between all the relevant rights. This means that when police are balancing competing rights of the public and the protestors, they must *start* (but not necessarily end) at the position that all

57. Council of Europe, '*European Convention on Human Rights*', Article 10(2) and 11(2), link
58. See for example *DPP v Ziegler* [2021] UKSC 23, at [15], link

the rights involved are of equal importance.

Questions for the Police

Police face a range of difficult questions when assessing whether a particular protest is protected by the Convention in the first instance and, if so, to what extent they can regulate or prohibit it. The complexity and uncertainty of the jurisprudence of the ECtHR on these issues becomes apparent

1. Is the protestor exercising one or more of his or her rights under the ECHR?

Whether the individual involved in the protest is exercising his or her Article 10 or 11 rights turns principally on the idea of whether the assembly is 'peaceful'.

The ECHR only protects the right to 'peaceful assembly'. Therefore, violent actions or intentions are not covered by the Convention (*CS v Germany [1988]*[59]). An individual does not lose the protections provided by the Convention, however, if *they* remain peaceful while the wider protest becomes violent (*Ezelin v France [1992]*[60]).

Nevertheless, the ECtHR has made clear that, whilst violence is not protected by Articles 10 and 11, 'it is important for the public authorities to show a certain degree of tolerance' towards disruption caused by protest.[61] For example, in *Steel and Others v UK [1999]*[62], attempts to disrupt motorway building works constituted symbolic speech which fell under the protection of Article 10. Meanwhile in *Balçik v Turkey [2007]*[63], blocking a tram line fell under the protection of Article 11. Indeed, in *Kudrevičius and Others v Lithuania [2015]*[64], the ECtHR held even *intentional* disruption of traffic could fall under the protection of Article 11.

However, the court also held that *intentionally* disruptive protests are not at the core of Article 11 and its protections. This means that national authorities like Parliament and the police have more leeway in regulating *intentionally* disruptive protests. This might be through the imposition of conditions on protests or by prohibiting them – including by imposing penalties of a criminal nature. The role of intention in proportionality is discussed further in point 5 (vi) below.

Business owners and others who have suffered a clear economic loss as a result of intentionally disruptive protests should consider making full use of their rights in private law against protestors – that is, to seek compensation for loss caused and to seek injunctions to prevent future or planned intentionally disruptive protest. This may include both those directly involved in the protest and arguably those who are members of a wider protest group that takes responsibility for the particular protest.

2. Is there an interference by the police with the Convention rights of the protestor?

This question is often straightforward to answer. Use of police powers against individuals, including dispersal, containment, and arrest, will

59. *CS v Germany* [1988] (Application no. 13858/88) at [2], link
60. *Ezelin v France* [1992] 14 EHRR 362 at [53], link
61. *Primov v Russia* [2014] (Application no. 17391/06), link
62. *Steel and Others v UK* [1999] (Application No. 24838/94), link
63. *Balçik v Turkey* [2007] (Application no. 25/02), link
64. *Kudrevičius and Others v. Lithuania* [2015] (Application no. 37553/05), link

constitute an interference. Police action in advance of protests may also constitute an interference; for example, communications with organisers concerning their likelihood of being prosecuted (*Leigh v Commissioner of Police*[65]).

Likewise, since the police also have a positive duty to protect people's rights, in certain circumstances police inaction – a failure to take steps to protect the rights of the protestors or the public – could also constitute an interference with the rights of the protestor or others.

3. Is the interference permitted by law?

When taking action which constitutes an interference with an individual's Convention rights, the police should always be able to identify the legal basis of the power they are using. This legal basis will often be found in the legislation (as outlined in Annex A of this report), whether it be legislation granting the police powers over protests or legislation setting out criminal offences the police can arrest individuals for.

4. Is the interference in pursuit of a legitimate aim?

Articles 10(2) and11(2) of the ECHR list several grounds, or legitimate aims, which justify regulation of the exercise of rights to speech and assembly. These include ensuring public safety, the prevention of disorder or crime, and the protection of the rights of others. In the UK, it is up to Parliament to decide how to regulate the rights of assembly and speech having regard to these legitimate aims. Parliament specifies which kind of conduct is impermissible in the context of an assembly or demonstration and the police, in turn, enforce the criteria they set.

5. Is the interference necessary in a democratic society to achieve that legitimate aim?

This question is often the most difficult for police officers to determine since it involves a highly fact-specific assessment of the proportionality of the police action against the Convention rights of the protestors, in light of the legitimate aim(s).

This proportionality assessment requires a balancing of the ECHR rights of the protestors, against the rights of others and the interests of public safety and public order. As well as considerations of: the importance of the legitimate aim, the rational connection between the action chosen and the legitimate aim, and whether there are less restrictive options available for the police to take.[66]

It is in this area of the legal regime that the courts have often displayed a lack of clarity and consistency. They have also, at times, placed excessive weight on the Convention rights of protestors. This has the potential to encourage police officers to place undue weight on their approach to protecting the 'rights' of protestors, at the risk of failing in their duty to protect public order, public safety and the 'rights' of others.

Below, therefore, is an outline of the factors important in assessing proportionality[67] which attempts to demonstrate how at least some clarity

65. *Leigh v Commissioner of the Metropolitan Police* [2022] EWHC 527 (Admin), link
66. See for example *DPP v Ziegler* [2021] UKSC 23, at [15], link
67. For a non-exhaustive list of factors important to proportionality see, for example, *City of London v Samede* [2012] EWCA Civ 160, link and *DPP v Ziegler* [2021] UKSC 23, link

can be drawn from the case law.

It is important to note that some of the cases relate directly to the proportionality of *conviction* of protestors for criminal offences rather than *arrests* (or other police action). The standard required for *conviction* is far higher than that require for *arrest* by the police. Police officers should not be looking for a *belief beyond any doubt* that a protestor will be convicted of an offence before they make an arrest. Instead, as per section 24(1) of the Police and Criminal Evidence Act 1984[68], police officers should focus on whether *reasonable* grounds exist for *suspecting* an offence is being committed or is about to be committed (using that as the context for considering the questions laid out in this guide required by their duty under section 6 of the HRA).

i. Duration of the protest

If a protest is continuous and prolonged, this is likely to have a greater impact on the public, increasing the likelihood of police action against protestors being proportionate. For example, the case of *City of London v Samede [2012]*[69] involved an extensive protest camp set up by 'Occupy London' outside St Paul's Cathedral for more than 2 months in 2011. The Court of Appeal paid particular attention to the prolonged period (and size) of the protest when finding interference with the protestors' Convention rights to be proportionate. Meanwhile in *Birmingham City Council v Afsar [2019]*[70], among other factors, the High Court referred to the seven-month period – 'months of distress' – of a protest outside a primary school (against the school's curriculum on same-sex relationships).

The protest does not need to last for months, or even days, for it to be considered of a duration long enough for the police to interfere. In *Molnár v Hungary [2009]*[71], the ECtHR held that it was proportionate to bring a protest in a city centre (which was also significantly disrupting traffic, another factor discussed below), to an end after 8 hours.

ii. Location

The location of the protest can impact the disruption a protest causes, along with the individuals it affects. In the case of *DPP v Ziegler [2021]*[72] (discussed in greater detail below), the Supreme Court explicitly recognised location as a factor in the proportionality assessment, particularly where it results in preventing public access to public spaces and infrastructure.

In *Afsar [2019]*[73], it was of importance that the protest took place directly outside a primary school in an area that was also highly residential – impacting young children and residents. In *Molnár [2009]*[74], the location of the busy city centre was a factor in the court's assessment.

If the protest occurs outside Parliament, specific legislation may bear heavily on the scope of the rights to protest in this location – namely section of the 143 Police Reform & Social Responsibility Act 2011, outlined in Annex A of this report.

iii. Extent of police interference

68. Section 24, Police and Criminal Evidence Act 1984, link
69. *City of London v Samede* [2012] EWCA Civ 160, link
70. *Birmingham City Council v Afsar* [2019] EWHC 3217, link
71. *Molnár v Hungary* [2009] (Application no. 10346/05), link
72. *DPP v Ziegler* [2021] UKSC 23, link
73. *Birmingham City Council v Afsar* [2019] EWHC 3217, link
74. *Molnár v Hungary* [2009] (Application no. 10346/05), link

In assessing whether action against protestors is proportionate, it is important police consider what is the least restrictive action they could take in light of the extent of the risk posed to others' rights, safety and public order. This may include, for example, containing protestors for only the minimal amount of time required to achieve the legitimate aim, however this containment does not necessarily have to be a matter of minutes. In *R (Hicks) v Commissioner of Police for the Metropolis [2017]*[75], the Supreme Court held it was proportionate for the police to arrest protestors without charge for a period of 2.5 to 5.5 hours in order to protect the lives and property of others at the wedding of the (then) Duke and Duchess of Cambridge. Similarly in *Wright v Commissioner of Police for the Metropolis [2013]* [76] (which concerned a protest outside a visit of the Israeli President to London), the High Court held it was proportionate for police to contain protestors for over an hour, the time required in those circumstances to protect public order and others' lives.

However – while it is important police keep intervention to a reasonable level and do not interfere too quickly during a protest – this should not result in a police presumption in favour of minimalist intervention. By responding too slowly to threats, the police expose themselves to the legal risk of having failed in their positive duty to take action to protect public order, public safety and the rights of others.

iv. The importance of the legitimate aim

As noted above, there will nearly always be a legitimate aim in this context, so this is not usually a point of tension. The police should consider what the specific public interest under threat is and the extent of the risk to that public interest. For example, the Convention rights of protestors must yield in light of risk to others' (or the protestors own) lives (*Wright*).

v. Seriousness of the protest matter

There are also some cases suggesting the police should consider the seriousness of the protest matter in their proportionality assessment. In *Ziegler [2021]*[77] (discussed below), the Supreme Court attached weight to the fact that the protest concerned a 'serious matter of public concern' – in this case arms sales. This was also followed by the High Court in *Leigh v Commissioner of the Metropolitan Police [2022]*[78], which concerned a protest following the vigil for Sarah Everard on Clapham Common.

However, the police should remain cautious of making value judgements of the importance or seriousness of protest matters since this may lead to accusations of political or 'differential' policing. [79] The better view is that the law applies equally regardless of how popular or noble the cause of the protestors is.[80]

vi. Intention and Aggression

Where a protestor intends to cause disruption, or intends to be aggressive or intimidatory, this can make police interference with the protestor more likely to be proportionate.

75. *R (Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9, link
76. *Wright v Commissioner of Police for the Metropolis* [2013] EWHC 2739 (QB), link
77. *DPP v Ziegler* [2021] UKSC 23, link
78. *Leigh v Commissioner of the Metropolitan Police* [2022] EWHC 527 (Admin), link
79. 'Differential Policing' is where the police take a different policing approach – based predominantly on the cause ascribed by those the police are dealing with.
80. The only exception to this would be if or when the cause involves an attack on the rights of others, which might engage Article 17 of the Convention: prohibition of abuse of rights which prevents people, such as protestors, from engaging in activities aimed at the destruction of the rights and freedoms of others.

In *R v Brown* [2022][81] the Court of Appeal held it is important to consider whether the protestor's behaviour "seeks to cause chaos and as much harm as possible to members of the public". This case involved a climate activist who superglued their hand to a commercial aircraft at London City Airport causing extensive disruption and delays to the entire airport: the Court of Appeal held the conviction of the protestor for public nuisance to be proportionate with his Convention rights. Likewise, in *Afsar* [2019][82] the High Court considered the "aggressive shouting through megaphones" outside a primary school to be an important factor in finding interference with the protestors' Convention rights to be proportionate.

The consideration of intention also finds support in ECtHR jurisprudence, for example the case of *Handzhiyski v Bulgaria* [2021][83] and *Kudrevičius and Others v Lithuania* [2015][84] (noted above).

i. Extent of the protestor's interference with the rights of others and extent of the disruption caused

As discussed above, protestors' action can still fall under the protection of the Convention even if it causes some disruption, or interference with the rights of others. However, the level of this disruption or interference remains important for the police to consider when assessing the proportionality of any action against protestors.

This is a particularly complex area of domestic and ECtHR case law (indeed it is the focus of Annex C of this report) and disruption can come in many forms, including: obstruction to public infrastructure, damage to (public) property, and distress to others.

Previously, the case law has suggested that if the protestor's action causes disruption and/or interference with others' rights which is more than de minimis (beyond the minimum level acceptable), reasonable police interference is highly likely to be proportionate, especially where the disruption/interference caused by the protestor is significant and/or serious. In *DPP v Jones* [1999][85], decided between the passage and commencement of the Human Rights Act 1998, the Supreme Court spoke of how only 'reasonable or usual' use of public infrastructure by protestors (specifically highways) can be tolerated.

After the commencement of the HRA, in *Samede* [2012][86] (discussed above) the Court of Appeal referred to the protestors *significantly* interfering with the rights of others (the extensive camp site affecting the daily lives of worshipers, visitors and the public) as a factor in finding the proportionality of interference with the protest. In *Dulgheriu v LB Ealing* [2019][87], the Court of Appeal again looked to the level of disruption caused by the protestors – here the *lasting* psychological and emotional harm caused to users of an abortion clinic by anti-abortion protests outside the clinic. Likewise, in the High Court during the case of *Afsar* [2019][88] (discussed above), the 'months of distress on teachers and local residents, causing anxiety to the staff, and leading some residents to consider selling up their homes' went beyond the minimal level of interference with others' rights and lives which must be tolerated during a protest.

81. *R v Brown* [2022] EWCA Crim 6, link
82. *Birmingham City Council v Afsar* [2019] EWHC 3217, link
83. *Handzhiyski v Bulgaria* [2021] (Application no. 10783/14), link
84. *Kudrevičius and Others v. Lithuania* [2015] (Application no. 37553/05), link
85. *DPP v Jones* [1999] UKHL 5, link
86. *City of London v Samede* [2012] EWCA Civ 160, link
87. *Dulgheriu v LB Ealing* [2019] EWCA Civ 1490, link
88. *Birmingham City Council v Afsar* [2019] EWHC 3217, link

However, in the context of protestors' obstruction of the highway, a shift came with the Supreme Court case of *Ziegler* [2021][89] in 2021. This case concerned the conviction of protestors for wilful obstruction of the highway under section 137 of the Highways Act 1980 after they attached themselves to lock boxes in the middle of the carriageway outside an arms fair.

Director of Public Prosecutions v Ziegler and others [2021][90]

In September 2017, the Defence and Security International arms fair was held at the Excel Centre in East London. Prior to the opening of the fair deliveries were being made to the Excel Centre. On the 5th September 2017 Nora Ziegler, Chris Cole, Jo Frew, and Henrietta Cullinan lay down in the middle of one side of the dual carriageway of an approach road to the Excel Centre. They attached themselves to 'lock boxes' with pipes sticking out from either side locking themselves to a bar centred in the middle of one of the boxes.

The police officers almost immediately approached the protestors and attempted to try and persuade them to remove themselves from the road. When the protestors failed to respond they were arrested. It took approximately 90 minutes to remove them from the road because the boxes were constructed so as to make them hard to disassemble.

The protestors were charged with wilful obstruction of a highway contrary to section 137 of the Highways Act 1980. On 1-2 February 2018, they were tried at Stratford Magistrates' Court. The district judge dismissed the charges. The Director of Public Prosecutions appealed to the Divisional Court and at a hearing in January 2019 allowed the appeal and convicted the protestors with a sentence of conditional discharges for 12 months. In December 2019 the Supreme Court granted permission to appeal the convictions which was allowed with the judgment issued on the 25th June 2021.

The crux of the Supreme Court's judgment[91] (discussed in greater detail in Annex C of this report) was that even when protestors' obstruction of the highway is more than minimal, or even serious, and actively prevents others from accessing public spaces, this does not automatically mean their conviction is a proportionate response. This represents a significant shift to a more 'pro-protest' approach from the UK courts (a shift we critique in Annex C of this report), which makes it harder to convict deliberately disruptive protestors.[92]

Section 6 of the Human Rights Act requires all public officials – including police officers – to carry out their functions in a manner compliant with Convention rights, including Article 11. *Ziegler* [2021] may lead some police officers to be hesitant as to whether, having regard to their section 6 duty, it is lawful for them to *arrest* protestors who obstruct the highways, or at least to arrest them before significant disruption has been caused. The law in this area requires urgent clarification (discussed

89. *DPP v Ziegler* [2021] UKSC 23, link

91. The case was heard before Lord Hodge, Lady Arden, Lord Sales, Lord Hamblen and Lord Stephens with Lord Sales issuing a partially dissenting opinion with which Lord Hodge agreed.

92. The Supreme Court went on to find the convictions in this case were disproportionate, considering whether serious disruption was caused and the other factors outlined above. The Supreme Court in *Ziegler* seems to have ignored a significant line of ECtHR jurisprudence which suggests that for some public order offences, where the disruption caused by protestors crosses a certain threshold, conviction (and assumingly therefore arrest), can be proportionate. The specific cases the Supreme Court failed to consider, along with the reasoning in these cases, is discussed in detail in Annex C of this report.

90. Ibid.

in greater detail in Annex C of this report). However, in the meantime it bears noting that while the *Ziegler [2021]* judgment clearly imposes risk, it does not necessarily make it unlawful for police to act swiftly in relation to protestors who block the roads (or indeed protestors who act in other disruptive ways). The judgment did not directly address whether an *arrest* by the police in these circumstances is unlawful. The police should not therefore overinterpret the judgment as preventing them from ever making arrests of protestors who are obstructing the highway.

This is particularly so given that the standard for making an arrest, reasonable suspicion, is far lower than the standard for conviction. Even if after their arrest, a protestor does not go on to be convicted of the offence or even prosecuted, this does not automatically result in the arrest being unlawful, unnecessary, or unhelpful. Police officers should be cautious of assuming a quasi-judicial role when making arrests; they should not be looking for a belief beyond any doubt that a protestor will be convicted of an offence before they make an arrest. Instead, as per section 24(1) of the Police and Criminal Evidence Act 1984[93], to make an arrest, a constable needs *reasonable* grounds for *suspecting* an offence is being committed or is about to be committed.

Importantly, even though *Ziegler [2021]*, as a Supreme Court judgment, remains authoritative for the offence of wilful obstruction to the highway there is now a significant line of cases which suggest *Ziegler* [2021] is limited to only this offence – most significantly the decisions of the Court of Appeal in *R v Brown [2022]*[94] and the High Court in *DPP v Cuciurean*[95] *[2022]*. Importantly, in the specific context of the offence of criminal damage, in *AG Reference (Colston Four) [2022]*[96] , the Court of Appeal held that prosecution for causing significant (in this case defined as serious or irreversible) criminal damage to property is proportionate.[97] The reasoning in *Cuciurian* was also referred to by the Supreme Court in *Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill (2022)*. All these cases are discussed in greater detail in Annex C of this report.

Given the recent judicial limitations of *Ziegler [2021]*, it is important the police do not refrain from arresting protestors for other offences, this includes when protestors cause criminal damage, especially if this damage is significant.

Recommendation: The College of Policing must ensure that all training for public order commanders makes clear that the existing case law (particularly the case of *DPP v Ziegler [2021]*) does *not* prevent *arrests* being made when reasonable grounds exist for suspecting an individual has committed a criminal offence – with the thresholds for arrest being markedly different to those for convicting an individual of a criminal offence.

The question concerning many of the issues regarding protests then often turns on the meaning of "significant disruption" (or damage). Some certainty on this threshold was given to the police on this point in April 2023. Using powers granted to her by Parliament under the Police, Crime,

93. Section 24, Police and Criminal Evidence Act 1984, link
94. *R v Brown* [2022] EWCA Crim 6, link
95. *DPP v Cuciurean* [2022] EWHC 736 (Admin), link
96. *AG Reference (Colston Four)* [2022] EWCA Crim 1259, link
97. This approach can also be found in ECtHR case law, including *Handzhiyski v Bulgaria* [2021] (Application no. 10783/14), link and *Genov v. Bulgaria* [2022] (Application no. 52358/15), link

Sentencing and Courts Act 2022, the then Home Secretary introduced regulations[98] defining "serious disruption" as disruption which was "more than minor", for the purposes of police intervention in protest under the Public Order Act 1986.[99] This provided the police with increased certainty as to the level of disruption required in order for them to intervene.

However, in May 2024 in the case of *National Council for Civil Liberties v Secretary of State for the Home Department* [2024][100], the Divisional Court held these regulations to be unlawful and ordered for them to be quashed. The Divisional Court held that the regulations were unlawful since, amongst other reasons, the powers granted to the Home Secretary to clarify the meaning of "serious disruption", did not permit the substitution of the lower threshold of "more than minor" disruption. The Government has appealed this decision, with the Divisional Court suspending their quashing order until the appeal has been decided.[101] It is likely to be some time before the courts provide any definitive outcome.[102]

98. Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023, link

99. The Home Secretary introduced these regulations using 'Henry VIII powers' (powers enabling ministers to make changes to primary legislation through secondary legislation) granted to her by Parliament under the Police, Crime, Sentencing and Courts Act 2022, which said that the Home Secretary could define any aspect of the term "serious disruption" or give examples of what is or is not serious disruption.

100. *National Council for Civil Liberties v Secretary of State for the Home Department* [2024] EWHC 1181 (Admin), link

101. For a more detailed discussion of this case and the failures of the government to address the public order problem, see the following article from Head of Policy Exchange's Judicial Power Project: Richard Ekins, *'The Government's court defeat on public order regulations was of its own making'*, Conservative Home, 22nd May 2024, link

102. As of June 2024 the four most recent judgments issued by the Supreme Court took between two and fifteen months between hearing and judgment. In the case of *Ziegler the incident occurred in September 2017, the original trial was held in February 2018, the high court heard the appeal in November 2018 with the judgment issued in January 2019*. The eventual appeal to the Supreme Court was heard in January 2021 with the judgment given in June 2021.

National Council for Civil Liberties v Secretary of State for the Home Department[103]

The High Court held that amendments made by the Secretary of State to the Public Order Act 1986 were unlawful. The regulations issued by the Secretary of State that amended the Public Order Act 1986 lowered the statutory threshold of police intervention in protests.

The Public Order Act 1986 permits the police to intervene in a public procession or assembly to prevent "serious disruption to the life of the community". However, "serious disruption" is not defined in the Act. In 2022, the 1986 Act was amended by the Police, Crime, Sentencing and Courts Act 2022, which granted the Secretary of State statutory authority to make regulations to amend the definition of "serious disruption". In UK constitutional law, where Parliament vests the Government with a power to amend primary legislation through issuing subordinate regulations, they are creating what is known as a "Henry VIII clause".

In April 2023, using Henry VIII powers granted to her by Parliament under the Police, Crime, Sentencing and Courts Act 2022, the then Home Secretary introduced regulations defining "serious disruption" for the purposes of police intervention in protest under the Public Order Act 1986, as disruptions which are "more than minor".

The pressure group Liberty (as the National Council for Civil Liberties is now more commonly known) challenged the legality of these regulations. The most important argument was that the regulations issued by the Home Secretary were beyond the scope of the power that Parliament intended to give her. The Divisional Court agreed with this argument and held that in empowering the Home Secretary to clarify the meaning of "serious disruption", including by providing examples, the Henry VIII power in the Police, Crime, Sentencing and Courts Act 2022 did not authorise the substitution of the lower threshold of "more than minor disruption".

In simple terms, the Court said that Parliament intended the Home Secretary to make regulations to clarify what serious disruption meant, not to *lower* the statutory threshold for police intervention from that of serious disruption to more than minor disruption. The government has appealed this decision, with the Divisional Court suspending their quashing order until the appeal has been decided.

There is no doubt that this creates an operational problem for the police who have been relying extensively on The Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023. If the decision of the Divisional Court is upheld and the regulations are quashed, it is vital the government acts urgently with primary legislation to resolve the issues both *Ziegler* [2021] and the "serious disruption" threshold pose to police operations. Policy Exchange sets out its core recommendations for legislative change below.

103. *National Council for Civil Liberties v Secretary of State for the Home Department* [2024] EWHC 1181 (Admin), link

However, until the appeal is decided, this standard for "serious disruption" – more than minor disruption – remains in place and, in the absence of any other statutory guidance, remains the most authoritative standard for the police to follow when deciding whether to arrest a protestor.

Resolving the problems concerning the law

The law in this area is in need of reform, particularly that relating to the *Ziegler* [2021] line of reasoning and the thresholds for 'serious disruption'. Attempts to resolve these issues were sought through the recent Criminal Justice Bill[104], however the intervention of the 2024 General Election has meant that the next Government will be left the task. An amendment to the recent Criminal Justice Bill had stated that a protestor has no "lawful or reasonable" excuse defence to public order offences if his actions cause "serious disruption", which is defined as hinderance of 'more than a minor degree' to the activities of others. This amendment, though doing some work to restrict *Ziegler* [2021] by reducing the opportunity for protestors to argue a 'lawful excuse' defence does not, however, fully solve the problems at hand.

To provide further clarity in the law and re-establish a more appropriate balance between the rights of protestors and public order, public safety and the rights of others it is necessary to shift the focus away from the *level* of disruption or damage caused by a protestor to the individual protestor's *intention* in causing any disruption or damage.

Recommendation: The Government should clarify the legal position for public order offences by legislating for an express reversal of the judgment of the Supreme Court case of *DPP v Ziegler* [2021], regarding the offence of wilful obstruction to the highway. Legislation should make clear that no protestor can have a lawful excuse for obstructing the highway if he or she intends to obstruct, harass, inconvenience or harm others.

A draft amendment (to Highways Act 1980) to this effect might be:

1. Section 137 of the Highways Act 1980 is amended as follows.
2. After subsection (1C), insert –

"(1D) A person has no lawful excuse wilfully to obstruct free passage

along a highway if the obstruction —

(a) is intended to intimidate, provoke, inconvenience or otherwise harm members of the public by interrupting or disrupting their freedom to use the highway or to carry on any other lawful activity;

104. Criminal Justice Bill, As Amended (Amendment Paper),13th May 2024, link - for the amendment discussed above see amendment NC102.

or

(b) is designed to influence the government or public opinion by subjecting any person, or their property, to a risk, or increased risk, of loss or damage.

(1E) It is immaterial that there are or may be other excuses or reasons for wilfully obstructing the highway or that the person's main purpose may be different.

(1F) For the purposes of the Human Rights Act 1998, this section must be treated as necessary in a democratic society for the protection of the rights and freedoms of others."

Recommendation: The Government should legislate for a general reversal of the line of reasoning created by the Supreme Court in the case of *DPP v Ziegler [2021]*, with a view to public order offences that include a reasonable or lawful excuse defence – making clear that no protestor can have a lawful excuse to a charge of any public order offence if he or she intends to obstruct, harass, inconvenience or harm others.

A draft amendment (to the Public Order Act 2023, s137 of the Highways Act 1980 and s1 of the Criminal Damage Act 1971) to this effect might be:

(1) This section applies to any offence that makes conduct unlawful unless there is an excuse for it and specifies either that the excuse must be a lawful excuse or that it must be a reasonable one.

(2) A person has no excuse for the conduct if—

(a) it is intended to intimidate, provoke, inconvenience or otherwise harm members of the public by interrupting or disrupting their freedom to carry on a lawful activity; or

(b) it is designed to influence the government or public opinion by subjecting any person, or their property, to a risk, or increased risk, of loss or damage.

(3) It is immaterial that there are or may be other excuses or reasons for the conduct or that its main purpose may be different.

(4) In this section "conduct" includes any act or omission;

(5) For the purposes of the Human Rights Act 1998, this section must be treated as necessary in a democratic society for the protection of the rights and freedoms of others.

3. Policing mass protest marches

Since the Hamas terrorist attacks of the 7th October 2024 the frequency and scale of mass-protests in London and beyond has increased significantly. Despite attempts to characterise these events as 'peaceful', this is not – at least under any ordinary meaning of the word – the case. The evidence for this is overwhelming. Thousands have shouted the phrase 'from the river to the sea', understood by many to be an antisemitic phrase calling for the abolition of Israel. To maintain even a semblance of public order it has been necessary to deploy thousands of police officers away from their normal day-to-day duties. Many hundreds of individuals have been arrested for a broad range of serious criminal offences. Giving evidence to the Home Affairs Select Committee on the 12th December 2023 Assistant Commissioner Matt Twist of the Metropolitan Police said:

> *"…on every occasion so far we have found offences of hate crime, supporting a proscribed organisation and people looking to intimidate."*[105]

Six months of large-scale marches in Central London (October 2023 – April 2024)

March organised by the Palestine Solidarity Campaign	Distance of Procession (Approximate)[106]	Start and Finish Times of Procession and Assembly (Approximate)
14th October 2023: Portland Place to Whitehall[107]	2.5km	12pm – 3.30pm
21st October 2023: Marble Arch to Downing Street[108]	3km	12pm – 4pm
28th October 2023: Victoria Embankment to Parliament Square[109]	5.5km	12pm – 4pm
11th November 2023: Hyde Park to US Embassy[110]	4.25km	12pm – 5pm
25th November 2023: Park Lane to Parliament Square[111]	3km	12.30pm – 5pm
9th December 2023: City of London to Parliament Square[112]	4.25km	12pm – 5pm

105. Home Affairs Select Committee, Oral evidence: Policing of Protests, HC 369, 12th December 2023, link

106. The approximate distance is obtained by using open-source mapping software to estimate the protest route prescribed by the conditions applied by the Metropolitan Police Service for each march.

107. Metropolitan Police Service, Restrictions in place for demonstration and protest, 13th October 2023, accessed via Internet Archive Wayback Machine, link and Palestine Solidarity Campaign, March for Palestine – End the violence – end apartheid, 14th October 2023, link

108. Metropolitan Police Service, Met response to terror attacks in Israel and ongoing military action in Gaza, 20th October 2023, accessed via Internet Archive Wayback Machine, link and Palestine Solidarity Campaign, National March for Palestine – Stop the War on Gaza, 21st October 2023, accessed via Internet Archive Wayback Machine, link

109. Palestine Solidarity Campaign, National March for Palestine – Ceasefire Now!, 28th October 2024, link

110. Metropolitan Police Service, Met releases details of significant policing operation across Remembrance weekend, 10th November 2023, accessed via Internet Archive Wayback Machine, link

111. Metropolitan Police Service, Met releases details of policing operation ahead of further protests, 24th November 2023, accessed via Internet Archive Wayback Machine, link

112. 'X', @metpoliceuk, 9th December 2023, link

13th January 2024: Bank to Parliament Square[113]	4.25km	12 – 5pm
3rd February 2024: Portland Place to Whitehall[114]	2.75km	11 – 5.30pm
17th February 2024: Marble Arch to Israeli Embassy[115]	4km	1.30pm – 6pm
9th March 2024: Hyde Park Corner to US Embassy [116]	3.75km	12pm – 5pm
30th March 2024: Russell Square to Trafalgar Square[117]	2.25km	12.30pm – 5pm
13th April 2024: Russell Square to Parliament Square[118]	3.25km	12pm – 5pm
27th April 2024: Parliament Square to Hyde Park[119]	3.25km	12.30pm – 5pm

A local resident's experience[120]

Westminster residents are used to having the normal rhythm of weekend life disrupted. Tourists, sporting events, ceremonial occasions and, from time to time, protest marches are all part and parcel of living in such a central, world-famous space. But since the start of the relentless protest marches last year following October 7th, the level of intrusion into local life has reached new – intolerable – levels.

One of the biggest problems is that details of the marches are only publicised at the last minute, or are otherwise very hard to discover, making it impossible to plan ahead and avoid the disruption. Roads, bridges and cycle routes are blocked off at short notice, tube stations become overly congested and access to local parks for dog walkers difficult to impossible. Add to all this the high frequency of these protests, the noise pollution, the chants of the protesters themselves and the inevitable litter left in their wake, and it's easy to see why residents, shopkeepers and workers feel like prisoners in their own spaces.

I have been caught up many times unwittingly as protest marches have materialised around me. One such occasion was when I was returning home in my car one Saturday afternoon after carrying out the weekly shop and became stuck in traffic just a mile from my home. Unaware of the reason for the blockage, I asked a policeman standing nearby what I should do. He told me the roads would stay impassable for the next few hours and that the only way I could advance would be to leave my car in the street and walk. When I asked whom I should complain to, the policeman told me to write to the Mayor of London. I appealed to another policemen standing nearby who told me that he didn't come from London and was unable to help or advise further. Laden down with heavy bags, I had no option but to abandon my car and trudge back to my home on foot. Some hours later, I returned to retrieve my car and found that it had been given a parking ticket.

113. Metropolitan Police Service, Met announces details of policing operation ahead of weekend protests, 12th January 2024, accessed via Internet Archive Wayback Machine, link

114. Metropolitan Police Service, Police prepare to minimise disruption caused by Saturday's protest march, 3rd February 2024, accessed via Internet Archive Wayback Machine, link

115. Metropolitan Police Service, Met confirms details of protest policing operation, 16th February 2024, accessed via Internet Archive Wayback Machine, link

116. Metropolitan Police Service, Met prepared for busy weekend in the Capital, 8th March 2024, accessed by the Internet Archive Wayback Machine link

117. Metropolitan Police Service, Met prepared for busy Easter weekend across London, 28th March 2024, accessed via Internet Archive Wayback Machine, link

118. Metropolitan Police Service, Met sets out public order policing plan for the weekend, 11th April 2024, accessed via Internet Archive Wayback Machine link

119. Metropolitan Police Service, Met sets out policing plan ahead of central London protests on Saturday, 26th April 2024, accessed via Internet Archive Wayback Machine, link

120. Interview with Policy Exchange, 25th June 2024

Demonstrating the scale, particularly of the early protest marches, the Metropolitan Police's Assistant Commissioner Matt Twist told Policy Exchange in May 2024:

> *"From a peak of around three hundred thousand people in November 2023 when we were seeing marches every fortnight, we are now seeing around five to ten thousand people on marches every third weekend. This is still a very real policing challenge and there is no doubt the cumulative impact causes significant concern within the Jewish community in London".*[121]

It is a feature of the protest marches across London that they occurred almost fortnightly between the Hamas terrorist attacks of the 7th October 2023 and April 2024. The impact on Londoners and visitors to the capital is substantial. The Metropolitan Police stated that the costs of policing the Palestine-related protests in London between October 2023 and June 2024 were £42.9million with 51,799 Metropolitan Police officers' shifts and 9,639 police officer shifts from officers usually based outside the Metropolitan Police area required.[122] Between October 2023 and April 2024 6,339 police officers had rest days cancelled – all of which will need to be repaid to officers in due course.[123] The opportunity cost of policing the protests as opposed to undertaking policing in local communities is surely enormous.

Quite apart from the absence of peacefulness and the effect on public order and public safety, it is totally unrealistic to suggest that there has not been a significant impact on the rights and freedoms of others as a result of the immediate impact of the disruption and criminality associated with the protests. Additionally, those whose rights have been affected include not only those wanting to carry on their ordinary lives and exercise their own rights and freedoms in the vicinity of where the protests have been held, but also those in other parts of London and elsewhere where policing has been otherwise diminished or prejudiced. It would seem that the rights of this wider group – who may well be far from the vicinity of the protests but are impacted as a result of the inevitable reduction in their local policing services – are entirely disregarded in any 'balancing of rights' exercise undertaken by the police, Mayor or central Government.

Lord Walney in his 2024 review into political violence and disruption, 'Protecting our Democracy from Coercion', in relation to the substantial and increasing costs of policing protests, recommended that:

> *"The Government should consider the viability of requiring protest organisers to contribute to policing costs when groups are holding a significant number of large demonstrations which cause serious disruption or significant levels of law-breaking."*[124]

Although superficially appealing, there is a significant risk that protest groups who have access to substantial funding streams – whether domestically crowd funded or from wealthy backers outside the UK – may well be placed in a privileged position over smaller, less well-funded groups. Such a situation would be tantamount to a situation where different

121. Assistant Commissioner Matt Twist, Metropolitan Police Service – interview with Policy Exchange, 21st May 2024

122. London Assembly Police and Crime Committee, Wednesday 17 July 2024, Transcript of Agenda Item 7 - Question and Answer Session with the Mayor's Office for Policing and Crime, link

123. Metropolitan Police Service, Met sets out policing plan ahead of central London protests on Saturday, 26th April 2024, link

124. Lord Walney (2023), Protecting our Democracy from Coercion, May 2024, link

groups could 'pay to protest' – benefiting those who are able to leverage large amounts of funding over others. It is, therefore, a recommendation which should not be seriously considered by Government.

Recommendation: The Metropolitan Police Strategic Insights Unit (working closely with other police forces, the College of Policing, the London Fire Brigade and the London Ambulance Service) should undertake and publish an evaluation of the impact of protests in London on the emergency services – including the impact of protests on crime (particularly where police officers are distracted from their normal duties) and the impact on the ability of the different emergency services to respond to incidents.

Gathering intelligence on protestors

Vital to the ability to prepare an appropriate policing operation and response to protest activity is the police's understanding of the protest groups and individuals involved. It is clear that different groups and individuals pose differing levels of risk of disruption, criminality and disorder. It is essential that police forces and other authorities have the capability and capacity to gather intelligence to make such assessments – through both open-source and covert means where necessary. The police record their national intelligence assessment through the 'National Public Order – Public Safety Strategic Risk Assessment' (POPSSRA), published by the National Police Coordination Centre (NPoCC) and signed off by the national chief police officer lead for public order policing – currently Chief Constable BJ Harrington of Essex Police.[125]

The 2021 Inspection by His Majesty's Inspectorate of Constabulary and Fire and Constabulary into how effectively the police deal with protests was highly critical of the national coordination of intelligence gathering:

> *"Intelligence gathering is not well co-ordinated across forces and regions. This is important because some protests are arranged on national (and international) lines spanning multiple force areas. A range of senior officers told us that, on a national level, there is a need to improve arrangements relating to the identification and targeting of the most prominent aggravated activists. Many such activists don't just operate within single force boundaries."*[126]

They particularly noted that an over-reliance on 'open-source' intelligence gathering, presumably with a failure to sufficiently prioritise the use of covert methods of intelligence gathering:

> *"We do not underestimate the value of open-source research. But the police should draw on a wider range of sources to make sure that the information is accurate and to improve the intelligence picture. Officers told us that open-source research is the main source of intelligence about protests. They generally felt that it gave them enough information to respond. However, forces recognised that information gathered in this way may be inaccurate or purposely misleading."*[127]

125. National Public Order – Public Safety Strategic Risk Assessment, Autumn 2021, link – provides a heavily redacted copy of the POPSSRA through a Freedom of Information Request

126. His Majesty's Inspectorate of Constabulary and Fire & Rescue Services (2021), Getting the balance right? An inspection of how effectively the police deal with protests, 11th March 2021, link

127. Ibid.

The Undercover Policing Inquiry

The Undercover Policing Inquiry is an independent statutory inquiry into undercover policing in England and Wales. Announced in 2014 by then Home Secretary Theresa May, the Inquiry's terms of reference were published in 2015. Since 2017 the Inquiry has been chaired by Sir John Mitting.

The purpose of the Inquiry is to inquire into and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968 and, in particular, to:[128]

- investigate the role and the contribution made by undercover policing towards the prevention and detection of crime;
- examine the motivation for, and the scope of, undercover police operations in
- practice and their effect upon individuals in particular and the public in general;
- ascertain the state of awareness of undercover police operations of Her Majesty's Government;
- identify and assess the adequacy of the:
  1. justification, authorisation, operational governance and oversight of undercover policing;
  2. selection, training, management and care of undercover police officers;
- identify and assess the adequacy of the statutory, policy and judicial regulation of undercover policing.

The Inquiry published its Interim Report on the 29th June 2023 – concerning the activities of the 'Special Demonstration Squad' between 1968 – 1982.[129]

As of March 2024 the cost of the Undercover Policing Inquiry is £82.4m.[130]

Recommendation: His Majesty's Inspectorate of Constabulary and Fire and Rescue Services should conduct an inspection to determine whether the Metropolitan Police Service, and policing nationally, have sufficient covert policing capacity to gather intelligence on disruptive or criminal protest groups.

Protecting the public from the disruptive impact of mass protest marches:

In constraining public processions, the police are able to impose, and have regularly imposed since October 2023, conditions to mitigate the impact of large-scale protests. Under section 12 of the Public Order Act 1986 conditions can be imposed on protest organisers or those participating in the protest to prevent "disorder, damage, disruption, impact or

128. Undercover Policing Inquiry, Terms of Reference, link

129. Undercover Policing Inquiry, Undercover Policing Inquiry Tranche 1 Interim Report, Tranche 1: Special Demonstration Squad officers and managers and those affected by deployments (1968-1982), June 2023, link

130. Undercover Policing Inquiry, About us, link

intimidation". Conditions can only be applied if the police reasonably believe that it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or if the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.

Section 12 Public Order Act 1986 – imposing conditions on public processions[131]

The police can impose conditions on a public procession if they reasonably believe that:

a. it may result in serious public disorder, serious damage to property or serious disruption to the life of the community,
b. the noise generated by persons taking part in the procession may result in serious disruption to the activities of an organisation which are carried on in the vicinity of the procession,
c. the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.

The police may give directions imposing conditions to prevent such disorder, damage, disruption**,** impact or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.
A person who does not follow the conditions applied commits a criminal offence.

Part 3 Anti-social Behaviour, Crime and Policing Act 2014 – Dispersal Orders

The police can impose a 'Dispersal Order' requiring people to leave a specified area for up to 48 hours if reasonable grounds exist for it to be necessary to prevent either:

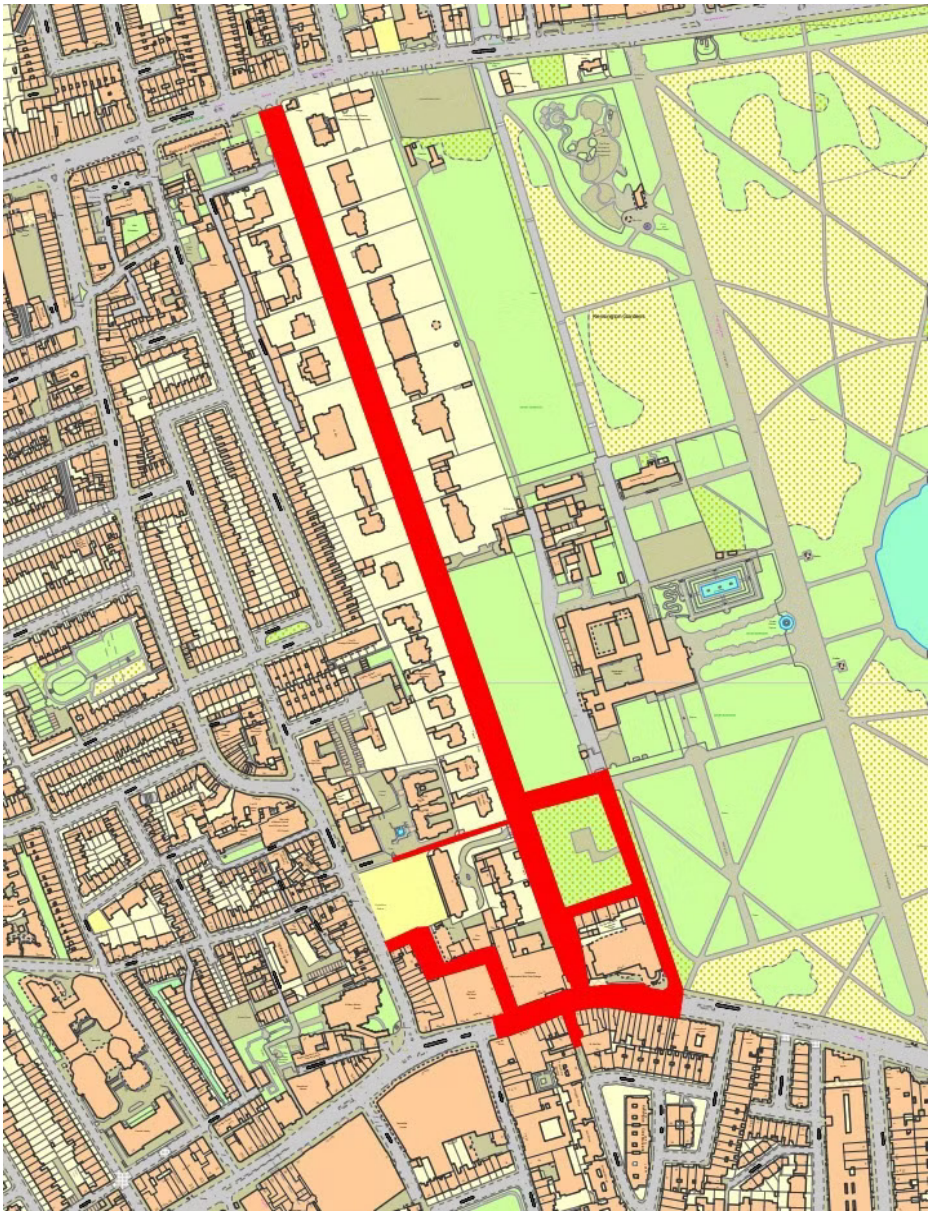
1. members of the public being harassed, alarmed or distressed, or
2. to prevent crime or disorder in the locality.

If a police officer then has reasonable grounds to suspect that the behaviour of a person in the locality has contributed to or is likely to contribute to either of the two conditions above they can direct a person to leave for up to 48 hours. It is an offence if they do not comply.

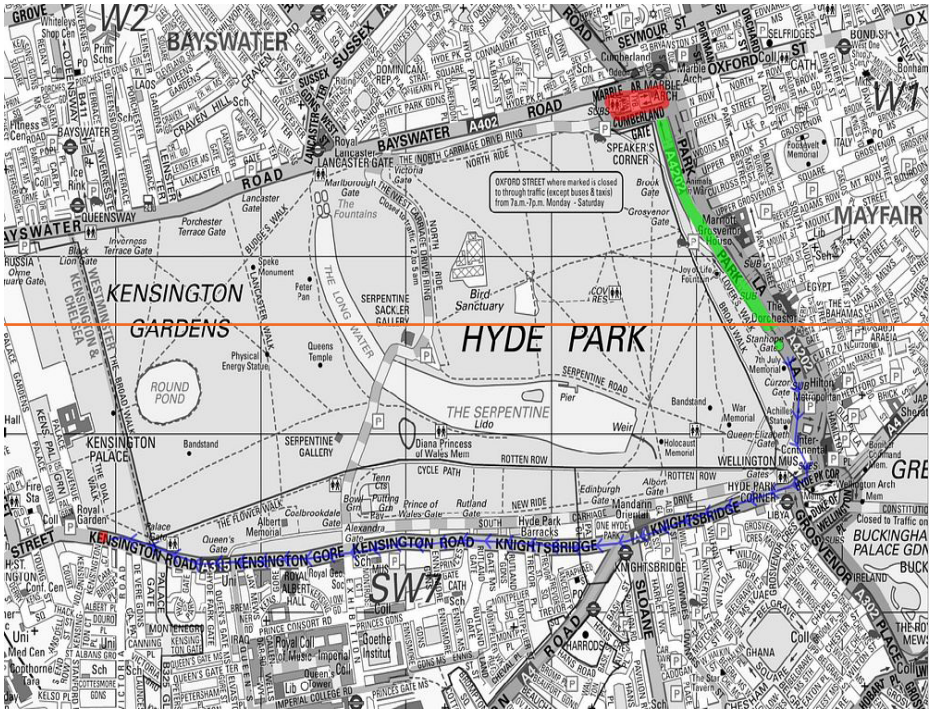
131. Section 12, Public Order Act 1986, link – note there are differences in some aspects of the legislation (particularly on the impact of noise from processions) in Scotland and in England and Wales.

The conditions applied by the Metropolitan Police in preparation for large-scale protest marches in London since October 2023 have commonly included requiring protestors to avoid specific areas (such as the Israeli Embassy); not to deviate from a specific pre-agreed route and for processions to start, and to finish by a specific time. The Metropolitan Police's Assistant Commissioner Matt Twist told Policy Exchange in May 2024:

> *"Since October 2023, as part of policing demonstrations in London, I think we have applied more pre-conditions to the PSC organised marches and assemblies than at any other point since the passing of the Public Order Act in 1986. We have also used additional powers linked to face coverings and dispersal zones in order to keep people safe".*[132]



132. Assistant Commissioner Matt Twist, Metropolitan Police Service – interview with Policy Exchange, 21st May 2024



Maps published by the Metropolitan Police relating to conditions applied to the protest march on the 16th February 2024 showing the 'exclusion zone' near to the Israeli Embassy and the route of the march to be taken.[133]

However, the conditions applied have still enabled marches to take place across large parts of Central London for many hours at a time. The marches have, on average, covered approximately 3.6km of central London with the marches and assemblies together lasting at least 5 hours during Saturday afternoons every fortnight. The impact on businesses, visitors and residents is substantial – yet the rights of these groups appear to be far from the minds of either authorities or protest organisers.

In polling for Policy Exchange the median frequency that respondents believed protest groups should be permitted to undertake major protests in central London was no more than 12 per year – far fewer than the current phase of protests that have taken place since October 2023.[134] Of respondents 58% state that they do not believe an organisation should be permitted to protest more than once per month.[135]

Given the numbers of individuals involved in the protest marches and the scale of disruption caused by the rolling campaign of protest marches, which to many have been deeply intimidating, the Metropolitan Police should impose increasingly stringent conditions on the marches to limit this impact. This should include further limiting the time and distance that marches can take place over.

It is worth noting that the existing legal framework is unlikely to make it possible to limit the number of individuals who might participate in a march. Such efforts would likely lead to any individuals unable to join a march claiming that their right to speak or assemble had been unjustly limited. However, the more people attending a march the more justifiable

133. Metropolitan Police, Met confirms details of protest policing operation, 16th February 2024, link

134. Polling for Policy Exchange by Deltapoll, 23rd – 25th May 2024, 1,517 Adults in Great Britain, 'Please imagine that a single pressure group or campaigning organisation wished to stage major multiple protests, each time involving tens of thousands of people in support of their particular cause. **How often, if at all, do you think it should be allowed to protest in Central London?'**

135. Ibid.

it would be for the police to apply more stringent conditions because of the impact on the rights of others and the life of the community.

Recommendation: The Mayor of London should conduct and publish an 'Economic Impact Assessment', taking into account not only the direct costs of policing but also with wider impacts on business and productivity on London. The published assessment should set out all the assumptions and judgements made in estimating these costs. The Home Office and HM Treasury should support the Mayor of London in ensuring an appropriate methodology is used.

Recommendation: The Mayor of London should conduct and publish and evaluation of the impact on local residents and visitors of protests. This should also consider the 'Equality Impact' on those who may be more vulnerable to the impact of protests – including but not limited to older people, women and people with disabilities. The Home Office and Government Equalities Office should support the Mayor of London in ensuring an appropriate methodology is used.

Recommendation: The Metropolitan Police should impose more stringent conditions on protest marches, using section 12 of the Public Order Act 1986 to limit the *continued* serious disruption being caused to the public. These conditions should particularly relate to the length of time, the locations and distance over which processions and marches can take place.

Section 11 of the Public Order Act 1986 requires protest organisers to notify the police of their proposal to hold a march, with six days clear notice "unless it is not reasonably practicable to give any advance notice of the procession". Failing to do so is a criminal offence which can lead to summary conviction and a 'level 3 fine' of up to £1,000.

During this six-day period the police are expected to assess the nature of the protest (including considering its route, timing and the likely number of attendees), gather relevant intelligence, plan for how they will police the protest including ensuring sufficient officers are available for deployment both at the protest and covering other local policing duties, determine what conditions they may apply to the protest and communicate these conditions to the public. The amount of time and the costs involved in planning for the policing of a large-scale protest is substantial.

The six-day timeframe ensures that the conditions for any march are only provided to the public at the last possible moment – often the day before or the day of a march itself. The ordinary public, businesses, tourists and other local services are therefore required to adapt to these events at very short notice. It is simply unreasonable for the public to be required to continually adapt to such a situation week after week.

Polling by Policy Exchange shows that the median level of notice that respondents believe protest organisers should have to give before a major

protest is 28 days – a significant difference from the current requirement of six days.[136] Of respondents 51% believe at least 3 weeks notice should be given and 45% that at least 4 weeks notice should be given.[137]

In Northern Ireland section 6 of the Public Processions (Northern Ireland) Act 1998 requires that organisers inform the police of their intentions not less than 28 days in advance of a march or procession. There are also requirements as to the march's date, time and route; the number of likely attendees; and the arrangements for its control being made by the organisers. This 28-day period enables the police and other authorities to better plan for any march including ensuring appropriate conditions are applied and ensures that the public are informed well in advance. Similar arrangements should be adopted for England and Wales.

Recommendation: The Government should amend section 11 of the Public Order Act 1986 to increase the notification period for all protest marches to 28 days – replicating the notification requirements already in place in Northern Ireland. The notification requirements should include: any planned procession's date, time and route, the number of likely attendees, and the arrangements for its control being made by the organisers. The requirement to provide at least 28 days notice to the police should be mandatory in all cases. Failure to provide appropriate notification should make the protest unlawful by default.

Recommendation: The Mayor of London should take responsibility for co-ordinating with the police and other relevant public services to ensure that all Londoners, visitors, businesses and public services are kept fully informed about the routes, timing and likely impact of all protests taking place across the Capital. At a minimum this information should be published, in advance, on a single dedicated website incorporating all of the relevant information including the impact on the transport network.

Dealing with individuals suspected of committing criminal offences:

Section 24 of the Police and Criminal Evidence Act 1984 provides police officers with extensive powers of arrest. Under section 24(1) a "constable may arrest without a warrant –

a. anyone who is about to commit an offence;
b. anyone who is in the act of committing an offence;
c. anyone whom he has reasonable grounds for suspecting to be about to commit an offence;
d. anyone whom he has reasonable grounds for suspecting to be committing an offence."

Under section 24(2), "if a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without

136. Polling for Policy Exchange by Deltapoll, 23rd – 25th May 2024, 1,517 Adults in Great Britain, 'If a pressure group or campaigning organisation wished to stage major, multiple protests, each time involving tens of thousands of people in support of a particular cause. How much notice, if any, do you think they should have to give to police or other authorities?'
137. Ibid.

a warrant anyone whom he has reasonable grounds to suspect of being guilty of it".
Under section 24(3), "if an offence has been committed, a constable may arrest without a warrant —

a. anyone who is guilty of the offence;
b. anyone whom he has reasonable grounds for suspecting to be guilty of it".

Despite these arrest powers, which are both extensive and long-established, the police have been slow to use their powers of arrest when they should have done. This is particularly the case at the start of each significant phase of protest in recent years. His Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), in their 2021 report into the policing of protests 'Getting the balance right?', provided numerous examples of protestors causing significant disruption with no arrests being made. In one example of an Extinction Rebellion protest HMICFRS say:

> *"The protest caused significant disruption when protesters used 'swarming' tactics to block roads for brief periods. This lasted over six hours, blocking access to a motorway during the evening rush hour and resulting in severe disruption to motorists, businesses and local communities. Despite the degree of disruption, the police did not make any arrests."*[138]

There are significant risks and costs to delayed arrests which must not be ignored. Such an approach risks reducing the likelihood of offenders being identified and successfully prosecuted. It also has the potential of leading to a belief that the forces of law and order have lost control of the streets and yielded control to a mob – undermining the rule of law and the public's confidence in the police's ability to enforce the law. This risks the emboldening of those who may commit criminal offences and cause serious disruption.

There would appear to be four potential reasons which might explain the police's failure to make arrests at the time an offence is committed during protests.

First, there are the physical risks both to the public and police officers of going in to a crowd to make arrests. Where arrests have been made in large-scale protests the number of officers required to safely extract an individual from a crowd, whether hostile or not, can be very substantial indeed. In some cases, thirty or more officers were required to safely enter a crowd and extract a single individual to be arrested. The risks of an individual, perhaps in the crowd but otherwise unconnected with the suspected criminal offence, being harmed due to police action are not minimal.

Over the last forty years – since, for example the policing of the miners' strikes of the 1980s – the police's approach to policing public order has

138. His Majesty's Inspectorate of Constabulary and Fire & Rescue Services (2021), Getting the balance right? An inspection of how effectively the police deal with protests, 11th March 2021, link

evolved. This is partially due to significant changes to the legal regime under which the police operate, particularly with the introduction of the Human Rights Act 1998. There are now clear obligations in law which require the police to take only action which is 'proportionate' in the circumstances. Taking action which causes injury to unconnected individuals in an effort to arrest an individual on suspicion of a relatively minor criminal offence or otherwise enforce the law may well lead to accusations that the police acted disproportionately in the circumstances.

Second, as discussed in Section 2 of this report, an unintended consequence of the *Ziegler* [2021] judgment is that police officers have become increasingly hesitant in exercising their powers of arrest in protest situations. This is despite the *Ziegler [2021]* judgment not directly addressing whether an *arrest* by the police in the fact-specific circumstances was unlawful: the case before the Supreme Court was focused primarily on the soundness of the appellant's convictions.

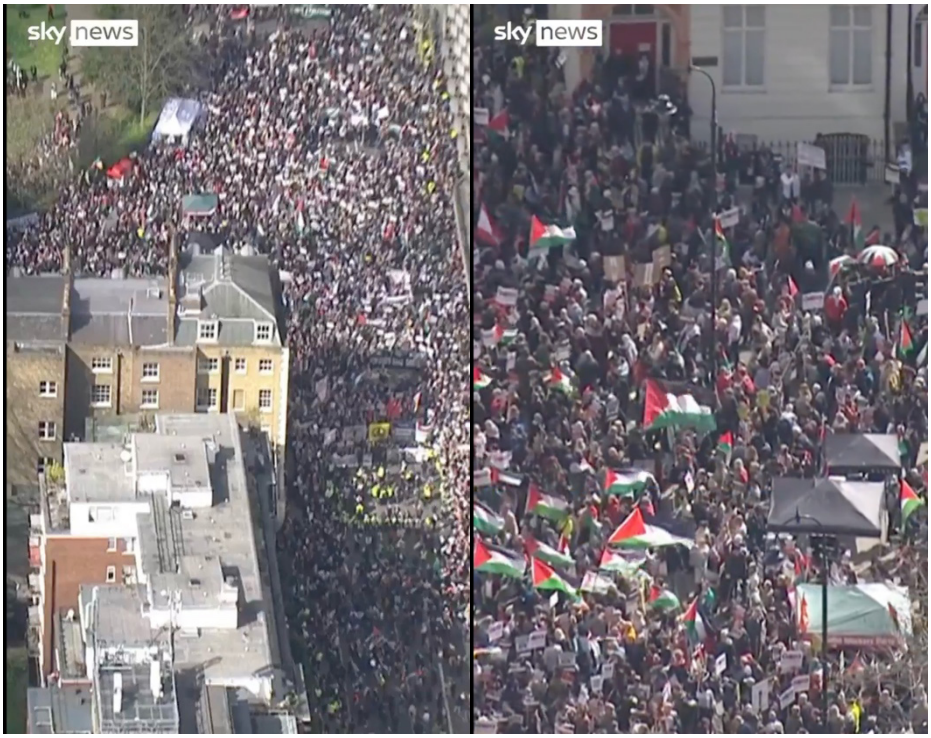
The standard for making an arrest, reasonable suspicion, is far lower than the standard for conviction. Even if after their arrest, if a protestor does not go on to be convicted of the offence or even prosecuted, this does not automatically result in the arrest being unlawful, unnecessary, or unhelpful. Despite this, *Ziegler* [2021] has led to the police overinterpreting the judgment – with them taking a 'maximalist' stance and so failing to make arrests of individuals suspected of committing criminal offences in the context of a protest.

Police officers should not be looking for a belief beyond any doubt that a protestor will be convicted of an offence before they make an arrest. Instead, as per section 24(1) of the Police and Criminal Evidence Act 1984[139], police officers should focus on whether *reasonable* grounds exist for *suspecting* an offence is being committed or is about to be committed (using that as the context for considering the questions laid out in this guide required by their duty under section 6 of the Human Rights Act).

Third, police officers are increasingly fearful of being subject to lengthy complaint investigation, independent inquiries and, potentially, prosecution as a result of a system of accountability which the Commissioner of the Metropolitan Police Service has described as being "slow, unfair and ineffective".[140] Sir Mark Rowley has said that officers "fear that acting with the best intent could leave their lives upturned for years" with proactive policing, as measured by the use of stop and search, having "halved, from almost 20,000 stops in January 2022 to just over 9,000 in December 2023" apparently because officers are reluctant to use their powers due to potential repercussions.[141]

Fourth, there is simply the challenge of the sheer volume of marchers and offending, compared to the number of police officers deployed in one place at one time, meaning that it may not be possible for the police to even observe the offences in the first place. Where officers have not made immediate arrests, the police state that they have sought to gather evidence of offences and arrest individuals afterwards.

139. Section 24, Police and Criminal Evidence Act 1984, link
140. Metropolitan Police Service, Commissioner responds to ≈Home Office Accountability Review and report into IOPC, 21st March 2024, accessed via the Wayback Machine on the 26th June 2024, link
141. Ibid.



Images from Sky News footage of Central London pro-Palestine protests[142]

Examples of posts by the Metropolitan Police in an effort to identify individuals suspected of criminal offences during protest marches[143]

The Metropolitan Police has acknowledged in the recent pro-Palestine protests that they were slow to make arrests in the early stages. Assistant Commissioner Matt Twist told Policy Exchange in May 2024:

> *"When we look back at the policing of protests over the last 8 months, we know we didn't get everything right – particularly in the early stages in October. We've developed our tactics since then, becoming faster and more*

142. 'X', @SkyNews, 30th March 2024, link
143. 'X', @metpoliceuk, 11th November 2023, link & link

> *decisive. On occasion we did not move quickly to make arrests, for example the man chanting for 'Jihad' which was a decision made following fast time advice from lawyers and the CPS. We are now much more focussed on identifying reasonable grounds for arrest, acting where needed, and then investigating, so in these circumstances its very likely arrests would be made more quickly now."*[144]

This explanation however suggests that while the four explanations outlined above may have some bearing on the reasons for arrests not being made at the time of an offence being committed, they are not the principal reason. Assistant Commissioner Twist's comments suggest that it was a combination of the advice they received, in this case from "lawyers and the Crown Prosecution Service", but also the use of operational tactics which meant that at the time the Metropolitan Police was slow to act.

The advice, and the consequences of that advice, that the police receive is addressed in more detail in Section 7 of this report.

In relation to operational tactics, the Metropolitan Police says that they have changed their approach to making arrests at the time of offences being committed. They claim to now be far more interventionist than at the start of the current phase of protest activity in October 2023. It is important that they are. One of the key issues these events raise is that the police are too often slow to adapt to new methods of protest – certainly their track record over the last decade would suggest this.

The election of a new central Government in 2024 has the potential to shift the dynamic of different protest movements – particularly those focused on the pro-Palestine cause and environmental issues. Activists and organisations may well have different expectations of a Labour Government than they had of the Conservative Governments which have been in place over the last fourteen years. Should those expectations not be met, the response by activists may well lead to an evolution in protest tactics which the police, prosecutors and Government should be prepared for. The Metropolitan Police (and other forces) alongside the College of Policing and National Police Chiefs Council need to take steps to envisage how protests will continue to evolve and how they will develop effective strategies and tactics to deal with the resultant disruption and criminality.

Recommendation: The Commissioner of the Metropolitan Police must take all possible steps to ensure that all those suspected of committing criminal offences are arrested at the time of the offence at protests. Ministers should explicitly and publicly support such an approach, including, if necessary, making changes to the framework of accountability for holding police officers and forces to account to increase officers' confidence in taking immediate action.

Recommendation: The College of Policing and National Police Chiefs Council – working closely with the Metropolitan Police and other forces – must plan for how future protests and protestors are likely to evolve their tactics and develop effective strategies and tactics to deal with the resultant disruption and criminality.

144. Assistant Commissioner Matt Twist, Metropolitan Police Service – interview with Policy Exchange, 21st May 2024

Determining the threshold to ban marches:

Amongst the most alarming of the major protests held in London to date have been those held on Armistice Day, the 11th November 2023. As with other protest marches, during the week leading up to Armistice Day the Metropolitan Police engaged in discussions with the protest organisers. More unusually, senior Government ministers publicly expressed concern over the planned protests – this included the then Prime Minister writing to the Commissioner of the Metropolitan Police on the 3rd November 2023. In addition to setting out concerns over the "provocative and disrespectful"[145] protests, the Prime Minister made clear that while any operational decisions were for the police to take, the Commissioner had the support of Prime Minister and Government in "making robust use of all of your powers to protect Remembrance activity".[146]

On the 6th November 2023 senior police officers met with and asked protest organisers to postpone any protests planned for Armistice weekend. The details of these discussions do not appear to be publicly available; neither are the details of the discussions for other protests. It is therefore impossible for the public to understand the nature of any arrangements or accommodations made by the police in relation to the protestors, protest groups and their supporters. This lack of transparency, where there is at least the appearance that authorities come to a form of secret accommodations with protest groups, cannot be in the public interest as a whole.

Recommendation: Police forces should publish the minutes of discussions between the police and protest organisers well in advance of any protest march going ahead. If necessary the Government should legislate to require police forces to abide by this requirement.

In the aftermath of the discussions between the police and protest organisers, the Metropolitan Police's Deputy Assistant Commissioner Ade Adelekan said:

> *"The risk of violence and disorder linked to breakaway groups is growing. This is of concern ahead of a significant and busy weekend in the capital. Our message to organisers is clear: Please, we ask you to urgently reconsider. It is not appropriate to hold any protests in London this weekend."*[147]

In response to this statement by a senior Metropolitan Police officer, the protest organisers declined – they stated the protests would go ahead.[148]

The threshold required to prohibit marches under section 13 of the Public Order Act 1986 is that powers to apply conditions to the procession under section 12 of the Public Order Act 1986 are insufficient to prevent 'serious public disorder'.

145. Letter from the Prime Minister to Commissioner of the Metropolitan Police Service, 3rd November 2023, last accessed 22nd March 2024, link

146. Ibid.

147. Metropolitan Police, "We ask you to urgently reconsider", 6th November 2023, last accessed via Wayback Machine 22nd March 2024, link

148. Palestine Solidarity Campaign, Coalition statement in response to the Met Police and the November 11 March, 6th November 2023, last accessed 22nd March 2024, link

Section 13 Public Order Act 1986 – prohibiting public processions[149]

If the police believe that the powers under section 12 of the Public Order Act 1986 will be insufficient to prevent public processions from resulting in ***serious public disorder***, they can, with the consent of the Home Secretary, make an order prohibiting public processions for up to 3 months.

The threshold for prohibiting public processions under section 13 is far more narrowly defined that those under which conditions can be applied under section 12. The term "serious public disorder" does not have a precise statutory definition. However, in practice, the police seem to understand it as setting a very high bar. In November 2023, the Commissioner of the Metropolitan Police said that the exercise of such powers was "extremely rare" and required a great deal of evidence.[150]

Outside of London it is necessary for the Chief Constable to make an application to the local council who can, with the consent of the Home Secretary, make a prohibition order.

A person who does not following the conditions applied commits a criminal offence.

On the evening of the 7th November 2023 the Commissioner of the Metropolitan Police issued a statement confirming he did not intend to request the consent of the Home Secretary to ban the march because the legal threshold had not been met. He said:

> *"Over recent weeks we've seen an escalation of violence and criminality by small groups attaching themselves to demonstrations, despite some key organisers working positively with us. But at this time, the intelligence surrounding the potential for serious disorder this weekend does not meet the threshold to apply for a ban."* [151]

Any attempt to judicially review a Commissioner's decision not to invoke their statutory discretion to request a procession be banned would be extremely unlikely to succeed. Any such proceedings could only prevail if it was possible to demonstrate bad faith on the part of the Commissioner or a total lack of any rational basis for the refusal.

On the 8th November 2023 the Commissioner of the Metropolitan Police, Sir Mark Rowley, was summoned to 10 Downing Street to meet with the Prime Minister. Afterwards the Prime Minister issued a statement concerning the protests and his meeting with the police:

> *"This weekend people around the UK will come together in quiet reflection to remember those who made the ultimate sacrifice for this country. It is not hyperbole to say that we are the beneficiaries of an inheritance born of their sacrifice.*
>
> *It is because that sacrifice is so immense, that Saturday's planned protest is not*

151. Metropolitan Police, Met will do everything it can to prevent disruption to Remembrance events, 7th November 2023, last accessed via Wayback Machine 22nd March 2024, link

149. Section 13, Public Order Act 1986, link

150. House of Commons Home Affairs Committee, Policing of Protests, (2023-2024 Session), 21st February 2024, link

just disrespectful but offends our heartfelt gratitude to the memory of those who gave so much so that we may live in freedom and peace today.

But part of that freedom is the right to peacefully protest. And the test of that freedom is whether our commitment to it can survive the discomfort and frustration of those who seek to use it, even if we disagree with them. We will meet that test and remain true to our principles.

This afternoon I asked the Metropolitan Police Commissioner, Sir Mark Rowley, to come to Downing Street and provide reassurances that the police are taking every step necessary to safeguard Remembrance services, provide reassurance to those who wish to pay their respects across the country and keep the public safe from disorder this weekend.

It's welcome that the police have confirmed that the march will be away from the Cenotaph and they will ensure that the timings do not conflict with any Remembrance events. There remains the risk of those who seek to divide society using this weekend as a platform to do so. That is what I discussed with the Metropolitan Police Commissioner in our meeting. The Commissioner has committed to keep the Met Police's posture under constant review based on the latest intelligence about the nature of the protests.

And finally, to our veterans and their families, I assure you that we will do everything it takes to protect this special weekend for you and our country, as we come together to reflect on those who protected our freedom."[152]

Despite the statement by the Prime Minister and the imploring requests of the Metropolitan Police, the protests on Armistice Day, Saturday the 11th November 2023, went ahead.

While the nation gathered to reflect on the sacrifice made by her war dead, protest groups principally organised by the Palestine Solidarity Campaign alongside counter-protestors undertook a series of protests marches and assemblies.

In the aftermath a Metropolitan Police statement issued that evening by Assistant Commissioner Matt Twist referred to the police sustaining "extreme violence from the right wing protestors".[153] Police officers acted with typical courage in dealing with this violence. Individuals within this group were stopped and searched with weapons including a knife, baton and knuckleduster recovered and class A drugs.[154]

In relation to the large-scale march organised by the Palestine Solidarity Campaign, Assistant Commissioner Twist stated that while there was not a similar level of physical violence, "for London's Jewish communities whose fears and concerns we absolutely recognise, the impact of hate crime and in particular anti-Semitic offences is just as significant".[155] He also confirmed that there were breakaway groups from the main march, "behaving in an intimidating manner".[156] Arrests were made after individuals from within a group of 150 people fired fireworks at officers.[157]

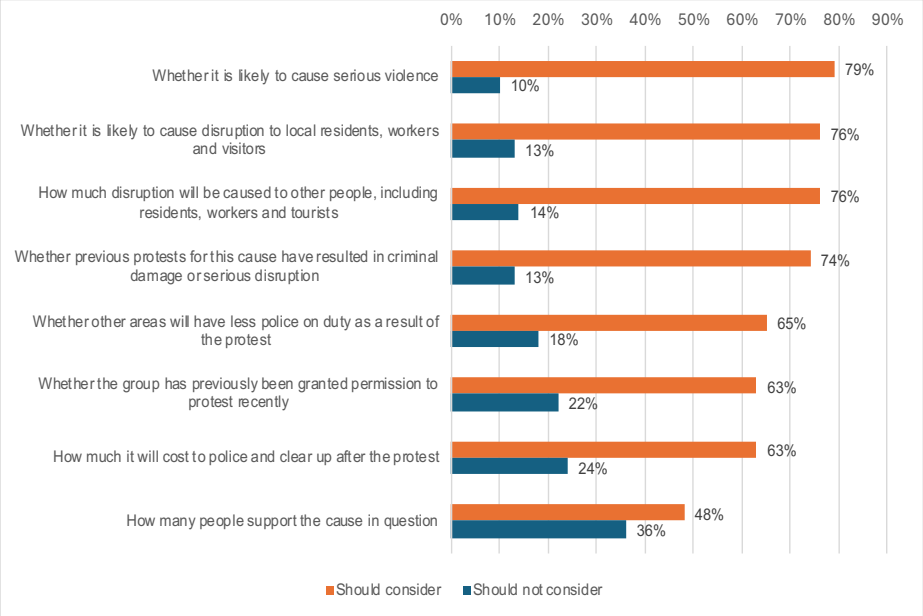
Currently, marches can only be banned under section 13 of the

152. Number 10 Downing Street, PM statement on protests following meeting with Metropolitan Police Commissioner: 8 November 2023, link
153. Metropolitan Police, Assistant Commissioner Matt Twist statement on policing in central London, 11th November 2023, link
154. Ibid.
155. Ibid.
156. Ibid.
157. Ibid.

Public Order Act 1986 if conditions applied under section 12 would be insufficient to prevent '***serious public disorder***'. Conditions under section 12 however can be applied to prevent a range of potential consequences – including the "serious disruption to the life of the community". There is no means however to prohibit a march from going ahead if the conditions applied are not sufficient to prevent "serious disruption to the life of the community".

In exclusive polling for Policy Exchange the vast majority of the public take the view that other factors, beyond only 'serious violent disorder' should be taken into account when considering whether a protest should be permitted to go ahead.[158] The factors that a clear majority believe should be taken into account include:

- Whether it is likely to cause disruption to local residents, workers and visitors (76%);
- How much disruption will be caused to other people, including residents, workers and tourists (76%);
- Whether previous protests for this cause have resulted in criminal damage or serious disruption (74%);
- Whether other areas will have less police on duty as a result of the protest (65%);
- Whether the group has previously been granted permission to protest recently (63%); and
- How much it will cost to police and clear up after the protest (63%).



In considering whether or not to permit a protest, which factors should the authorities consider?[159]

158. Polling for Policy Exchange by Deltapoll, 23rd – 25th May 2024, 1,517 Adults in Great Britain, 'In considering whether or not to permit a protest to happen, do you think the authorities should or should not consider.....'
159. Ibid.

The existing legal regime currently requires the public to tolerate, certainly based on this polling, far more disruption than they would wish for. This is particularly because processions cannot be prohibited because of "serious disruption to the life of the community", even if any conditions applied by the police were inadequate to preventing that disruption taking place. This requires a level of tolerance beyond which should be expected of the public, particularly in the case of large-scale protest marches taking place on a weekly or fortnightly basis.

Recommendation: The Government should change the criteria to prohibit a protest march under section 13 of the Public Order Act 1986. Currently protest marches can only be prohibited when any conditions applied by the police to a march under section 12 of the Public Order Act 1986 would be insufficient to prevent '*serious* public disorder'. This should be extended so protest marches could be prohibited under section 13 of the Public Order Act 1986 when conditions under section 12 of the Public Order Act 1986 are insufficient to prevent 'serious public disorder, serious damage to property or serious disruption to the life of the community'. This should explicitly include the impact of 'cumulative disruption'. There should also be a provision to prohibit a march if it would place 'any undue demands on the police or military forces', replicating section 11 of the Public Processions (Northern Ireland) Act 1998

4. Protecting Key National infrastructure

On several occasions, particularly during the colder autumn and winter months, a coalition of groups supporting the Palestinian cause chose to move their disruptive protests to mainline railway stations. The first occurred on the 28th October 2023, at London Waterloo. It was little noticed because the protestors failed to take over the full concourse and it happened amidst one of the large-scale weekend protest marches.

A few days later, on the 31st October 2023 the protest groups chose to disrupt thousands of commuters attempting to make their way home through Liverpool Street Station, the site of the Kindertransport Memorial, during rush hour. 'Sisters Uncut', a self-described "intersectional feminist direct-action collective"[160] claimed to have co-ordinated the various protest groups involved. The shift to a focus on the pro-Palestinian cause appears to be a diversion from the group's historic focus – the scourge of domestic violence in our society.[161] Sisters Uncut say they chose this particular railway station due to Liverpool Street's "connection with the City of London".[162] Their self-proclaimed intent is for there to be "no business as usual until genocide ends".[163]

160. Sisters Uncut Website, Frequently Asked Questions, Accessed: 18th March 2024, link
161. Ibid.
162. Sisters Uncut Website, Hundreds of pro-Palestine Activists shut down Liverpool Street to demand ceasefire on the eve of the bombing of Jabalia Refugee Camp, 1st November 2023, link
163. 'X', @SistersUncut, 31st October 2023, link

Footage and images from the protest show large numbers of protestors blocking the concourse; waving their flags and shouting chants of 'from the river to the sea'.[164] Meanwhile police officers stood by watching the disruption take place. Based on the footage available and the statements of the protest organisers it would appear that it was both their intent and the result of their actions that significant disruption be caused for the duration of the protest. Indeed, the organisers themselves claim they 'shut down' the station[165] although this is a claim contested by British Transport Police who stated at "no time was Liverpool Street Station locked down or services disrupted."[166] Either way it is clear that the intention of the organisers was to cause substantial disruption; in such circumstances, arrests to prevent criminal offences would have been entirely legitimate.

Remarkably British Transport Police's subsequent statement was that officers had "dealt with the protest".[167] The response of the then Secretary of State for Transport, Rt Hon Mark Harper, to the Liverpool Street protest was similarly weak. He expressed an intention to meet officers from the British Transport Police and made a statement, of the obvious, that "everyone should feel safe when using our rail network".[168]

Whether the protestors were successful in closing the station or not, it is difficult to conceive how this and other similar subsequent protests were not a significant episode of law breaking. Section 7 of the Public Order Act 2023, which became law in July 2023, makes clear that it is against the law to 'interfere with the use or operation of any key national infrastructure'.[169] The law specifies that this includes the 'rail infrastructure'. If the interference prevents the infrastructure from being used or operated to any extent for any of its intended purposes, it is a crime. It is surely impossible to see how these protests allowed railway stations and concourses to be used for their intended purpose. This is very clearly an instance of the police operating at an unreasonably elevated threshold before taking action to protect the rights of the wider public and

164. 'X', @SistersUncut, 31st October 2023, link

165. Sisters Uncut Website, Hundreds of pro-Palestine Activists shut down Liverpool Street to demand ceasefire on the eve of the bombing of Jabalia Refugee Camp, 1st November 2023, last accessed: 18th March 2024, link

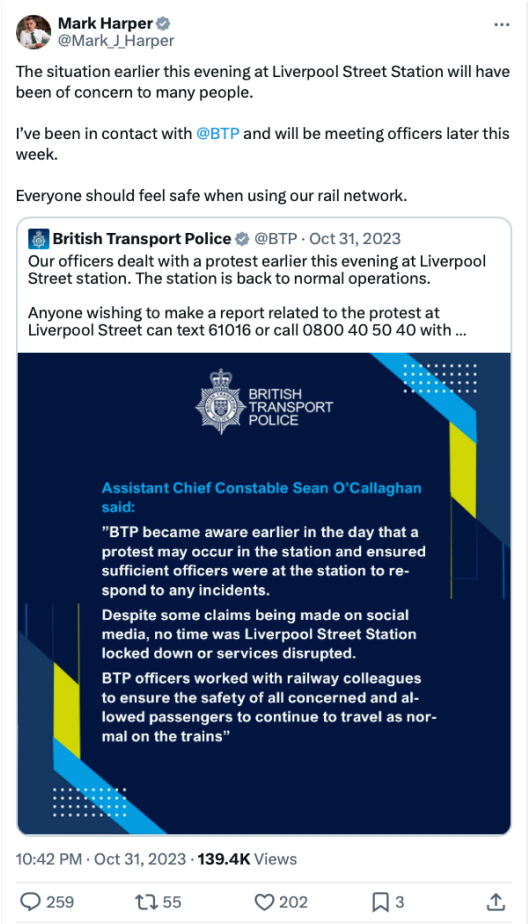
166. 'X', @BTP, 31st October 2023, link

167. Ibid.

168. 'X' @Mark_J_Harper, 31st October 2023, link

169. Section 7, Public Order Act 2023, link

deal with individuals committing criminal offences.



Section 7 Public Order Act 2023 – Interference with use or operation of key national infrastructure

It is a criminal offence if a person does an act which interferes with key national infrastructure and they intend to interfere, or are reckless as to whether interference is caused, with the use of or operation of the key national infrastructure.

The key national infrastructure is defined as:

i. road transport infrastructure,
ii. rail infrastructure,
iii. air transport infrastructure,
iv. harbour infrastructure,
v. downstream oil infrastructure,
vi. downstream gas infrastructure,
vii. onshore oil and gas exploration and production infrastructure,
viii. onshore electricity generation infrastructure, or
ix. newspaper printing infrastructure.

Following the 'success' of the Liverpool Street Station protest, and emboldened by the lack of police action in response, it was entirely predictable that similar protests would duly follow. This included protests across the subsequent weekend at Charing Cross, Leeds, Manchester, Edinburgh Waverley and Glasgow Central.

Widespread criticism of the British Transport Police and the Secretary of State led to a somewhat more robust response when London Kings Cross Station was targeted on the subsequent Friday evening rush hour on the 3rd November 2023. British Transport Police applied to the Secretary of State, and he granted permission to prohibit assemblies planned for London Kings Cross under legislation enacted in July 2023 – section 14A of the Public Order Act 1986.

Section 14A Public Order Act 1986 – Prohibiting Trespassory Assemblies (Railways)

Section 14A of the Public Order Act 1986 enables the police to apply to the Secretary of State to prohibit an assembly in a place related to the railways if it may result in serious disruption to the provision of railway services or cause serious disruption to the life of the community.

In such circumstances an order which prohibits trespassory assemblies for four days and extends to a five-mile radius can be put in place.

It is a criminal offence if the protests go ahead.

The takeover of railway stations represented law breaking on a significant scale – causing serious disruption to key national infrastructure, commuters and railways staff. While railway stations are the most prominent example of the targeting of our key national infrastructure, unless resisted by the authorities it is unlikely to be the last. Just Stop Oil previously stated that "airports will be sites of civil resistance" demonstrating the willingness of that group to disrupt the Key National Infrastructure.[170]

Unless police forces and prosecutors take a robust approach, as they are entitled to given the provisions of the Public Order Act 1986 and Public Order Act 2023 there is a more than marginal possibility that other sites of key national infrastructure will continue to be targeted by disruptive protestors committing criminal offences. The police and prosecutors must ensure that this cannot be allowed to re-occur. The Government should legislate to ensure that the police take action wherever necessary to prevent disruption to sites of key national infrastructure.

Recommendation: The Secretary of State for Transport and British Transport Police Authority should commission His Majesty's Inspectorate of Constabulary and Fire and Rescue Services to inspect

170. 'X', @JustStop_Oil, 29th April 2024, link

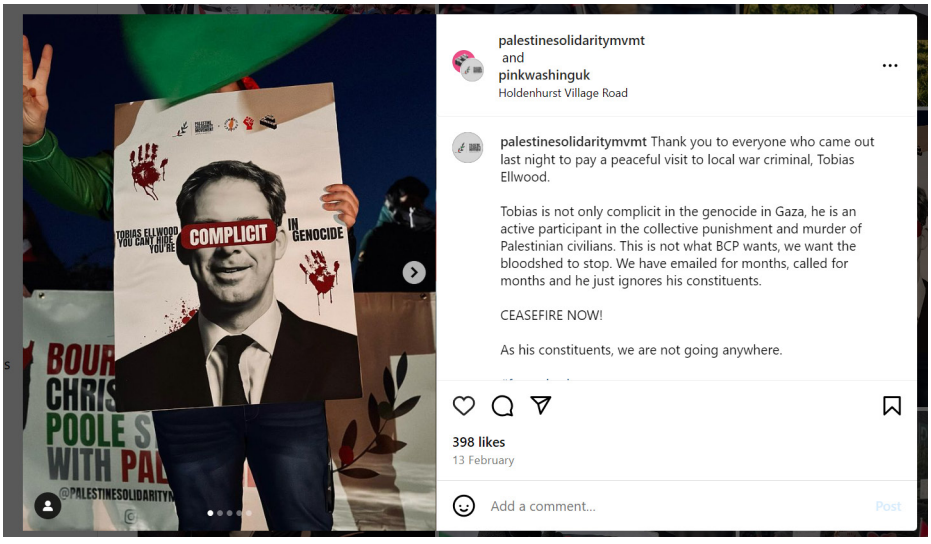
the approach of British Transport Police to disruptive or unlawful protests on and around the transport infrastructure.

Recommendation: The Government should legislate to require that police forces *must* take action to prevent the interference by protestors with the operation of those installations and facilities classified as Key National Infrastructure under section 7 of the Public Order Act 2023. Given Key National Infrastructure sites are essential for the running of the country, it must no longer be an option for police chiefs to choose not to intervene. They should also extend this protection to the wider communications infrastructure.

5. Protecting Parliamentarians

One of the most sinister elements of recent disruptive protest activity has been the targeting of Parliamentarians in and around their offices, events and family homes. It is impossible to forget the horrifying murders of Sir David Amess two years ago and Jo Cox eight years ago – both whilst undertaking work in their constituencies. Many politicians have testified to having faced a barrage of threats, stalking and harassment targeted at them and their staff. It is common-place for Members of Parliament to have panic alarms and bomb-proof letterboxes installed in their homes and offices. Several have revealed that they have been forced to wear stab vests while working in their constituencies.

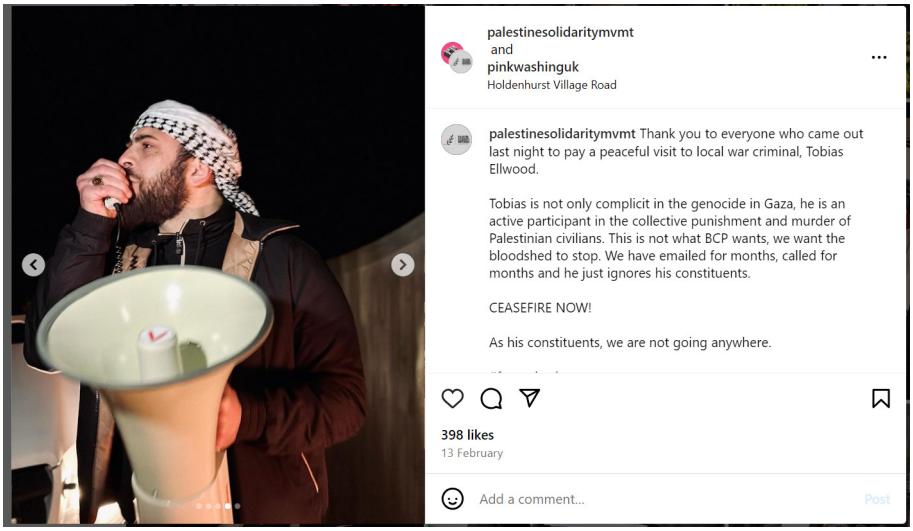
The targeting by protestors of Tobias Ellwood, who at the time was the Conservative Member of Parliament for Bournemouth East, and his family at their home on Monday 12th February 2024 represented an example of the serious and escalating risks faced by Parliamentarians. The protest consisted of between 60 and 100 protestors who gathered in the darkness outside Ellwood's family home to shout chants through a megaphone, wave flags and accuse the Member of Parliament of being "complicit in genocide" and of being a "local war criminal".



Instagram post by @palestinesolidaritymvt, 13th February 2024[171]

171. Instagram, @palestinesolidaritymvt, 13th February 2024, As of the 26th June 2024 the post had been removed from Instagram – the original link to the post is: link

They subsequently claimed their protest was 'peaceful', although the regular shouting by some of the protestors through a megaphone would suggest otherwise.



Instagram post by @palestinesolidaritymvt, 13th February 2024[172]

Dorset Police later issued the following statement:

> *"Dorset Police was aware of a protest that took place in Holdenhurst Village in Bournemouth during the evening of Monday 12 February 2024.*
>
> *Officers attended the scene and liaised with the organisers to ensure people could exercise their right to protest legally and safely without causing significant or ongoing serious public disorder, serious damage or serious disruption to the community.*
>
> *We respect people's right to lawful protest. However, we have a duty to ensure those involved act within the law and ensure the local community can go about their lawful activities.*
>
> *The group left the area by around 8.50pm and no arrests were made."*[173]

When defending inaction against disruptive protestors, the police often take refuge in the suggestion that their hands are tied by an insufficiency in the law. No such case can be made here – there seems little doubt that section 42 of the Criminal Justice and Police Act 2001 could have been utilised by the officers attending the protest.

172. Instagram, @palestinesolidaritymvt, 13th February 2024, As of the 26th June 2024 the post had been removed from Instagram – the original link to the post is: link

173. Dorset Police, Press Statement, 12th February 2024, provided to Policy Exchange by Dorset Police on the 20th March 2024

Section 42 Criminal Justice and Police Act 2001 – Harassment of a person in their home

The police have the power to give instructions to individuals outside someone's home seeking to 'persuade the resident that he should not do something that he is entitled to do' and is likely to be 'causing alarm or distress'.
Protestors can be instructed to leave the vicinity and not return for up to 3 months. It is a criminal offence not to comply.

Section 14 Public Order Act 1986 - Imposing conditions on public assemblies

The police can give directions to those taking part in or organising an assembly to "prevent disorder, damage, disruption, impact or intimidation".

This can be done if the police believe that a public assembly may either (i) result in serious public disorder, serious damage to property or serious disruption to the life of the community or (ii) the noise generated by the assembly may be significant, including that it may cause someone to 'suffer alarm or distress', or have the purpose of compelling others "not to do an act they have a right to do, or to do an act they have a right not to do."

It is a criminal offence not to comply.

Given the protestors were outside Ellwood's home for several hours – not leaving until 8.50pm – it is difficult to conceive how this gathering of up to 100 people could not have caused alarm and distress. Despite this however, Dorset Police took no action to disperse or relocate the crowd.

The Office of the Police and Crime Commissioner for Dorset was subsequently asked by Policy Exchange what action they had taken in relation to this incident. They said:

> *"As is the case following all prominent protests in Dorset, the PCC was updated on the incident by Dorset Police. He sought, and received, a thorough briefing on the full circumstances, as well as reassurance that the Force had correctly applied the powers at their disposal. The PCC, satisfied with the action taken under the powers available to the Force, subsequently wrote to the Policing Minister to raise the issue of further guidance around the level of community impact needed for action."*[174]

This represents a thoroughly inadequate response from the Police and Crime Commissioner – the public official whose role is primarily to hold the Chief Constable and force to account for their actions, on behalf of the public.

The Metropolitan Police's approach to protest outside individuals'

174. Dorset Police and Crime Commissioner, Statement provided to Policy Exchange on the 26th June 2024

homes appears to be in marked contrast to that of Dorset Police. On the 29th November 2023 officers from the Metropolitan Police arrested sixteen protestors from Just Stop Oil who gathered outside the West London home of the then Prime Minister, Rt Hon Rishi Sunak MP. The protestors were reportedly holding placards, singing songs through amplifiers and banging pots and pans.[175] While the Sunak property may well have been unoccupied the noise and disruption created protestors will have had a substantial impact on other local residents.

Giving evidence to the Home Affairs Select Committee on the 12th December 2023, the Metropolitan Police's Assistant Commissioner Matt Twist said:

> *"For me, it feels unacceptable to target people's homes. There are plenty of places where people can legitimately protest, be that at the heart of Government in Whitehall, different Government Departments or even constituency offices. Places of work seem to be a legitimate place to protest. To target an individual in their home is unacceptable, I believe. We have set out that we will respond quickly. There is specific legislation we can use under section 42 of the Criminal Justice and Police Act 2001, which was set up for a different purpose in the early 2000s, linked to animal rights, but it is relevant today in dealing with protest that targets people in their homes. For me, that would include MPs.*
>
> *"From a public order perspective, I have given very clear direction to our commanders that we expect them to remove any protest a sensible distance away from somebody's home because we do not think that it is right to target a home address."*[176]

On the 28th February 2024, two weeks after the incident outside Tobias Ellwood's home in Dorset, Government ministers – including the Prime Minister and Home Secretary – met with police chiefs in a 'summit' at Number 10 Downing Street.[177] Following the meeting the 'Defending Democracy Policing Protocol' was published which articulated an agreed position between the Government and police chiefs. It states:[179]

> *"In recent months, we have witnessed attempts to hijack legitimate protests and subvert the democratic process. Elected representatives have been threatened and had their family homes targeted. Council meetings have been repeatedly disrupted and, in some cases, abandoned. Constituency fundraisers of different political parties have been overrun. Last Wednesday, protestors threatened to force Parliament to "lock its doors".*
>
> *"These are not isolated incidents or legitimate means of achieving change through force of peaceful argument. They are part of a pattern of increasingly intimidatory behaviour seemingly intended to shout down and coerce elected representatives and hijack the democratic process through force itself. It is as un-British as it is undemocratic. If public confidence is to be maintained and the integrity of the democratic process is to be preserved, it cannot be allowed to stand."*

175. BBC News, Just Stop Oil: 16 protestors arrested outside Rishi Sunak's London home, 20th November 2023, link
176. Home Affairs Select Committee, Oral evidence: Policing of Protests, HC 369, 12th December 2023, link
177. 'X', @10DowningStreet, 28th February 2024, link
178. 178
179. Home Office, Defending democracy policing protocol, 28th February 2024, link

In relation to protests at the homes of elected represents the Protocol states: "Protests at the home addresses of elected representatives, including MPs and councillors, should generally be considered to be intimidatory, and the police have adequate powers, including section 42 of the Criminal Justice and Police Act 2001, to direct protestors away."[180] Furthermore, in such circumstances arrests should follow in the event that individuals fail to comply with the directions given as this would constitute a criminal offence.

Given that this legislation has been in force for over two decades it is remarkable that it has been necessary for the Government to make the position clear in such a protocol with police chiefs. Police leaders and those who hold them to account should recognise what the incident in Dorset outside Tobias Ellwood's home, and any other similar episodes, represent – an egregious failing in operational and strategic police leadership. It must not be allowed to be repeated.

Recommendation: Police forces must, in line with the 'Defending Democracy Policing Protocol', use section 42 of the Criminal Justice and Police Act 2001 to its fullest extent to prevent all protests outside the homes of Parliamentarians. Within 12 months the Home Secretary should commission an inspection by His Majesty's Inspectorate of Constabulary and Fire and Rescue Services to determine whether the 'Defending Democracy Policing Protocol' has ensured that in all cases police forces have robustly used the full powers available to them to prevent protests of any kind outside the homes of Parliamentarians. Where this has not been the case Chief Constables should be held to account for their failure.

180. Ibid.

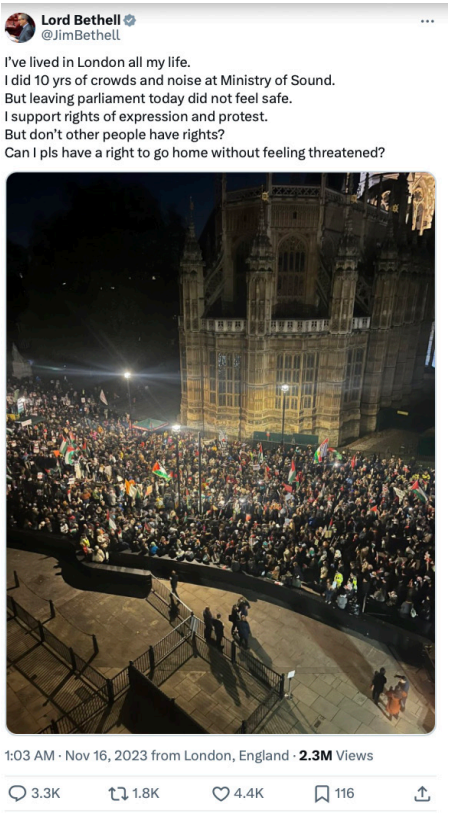
6. Protecting Parliament and Government

Parliament Square, Whitehall and the surrounding area have long been a focus for protest activity. Taking just one single day as an example (21st February 2024) there were groups: singing and chanting against Brexit and the Conservative government; holding a prayer vigil relating to climate change; assembling for a mass assembly to support the Palestinian cause; holding a protest against the Islamic Revolutionary Guard Corps; and calling attention to the activities of Hamas terrorists. It was at a protest on the same date which protestors projected "From the river to the sea, Palestina will be free" onto the Elizabeth Tower during a demonstration in Parliament Square.

The phrase "From the river to the sea, Palestina will be free" – projected onto the Elizabeth Tower during a protest on the 21st February 2024.[181]

Since October 2023, in addition to the mass marches which have often finished in Whitehall or Parliament Square, there have a series of mass pro-Palestine public assemblies. The first substantial protest assembly in Parliament Square occurred on the 15th November 2023 to coincide with a vote in the House of Commons relating to an Amendment to the King's Speech debate as tabled by the Scottish National Party. The Amendment related to the Israel-Gaza conflict.

181. LBC, Backlash aimed at police after divisive 'From the River to the Sea' slogan projected onto Parliament, 22nd February 2024, link



During the protest on the 15th November 2023 protestors were obstructing the roads and footpaths and were jammed up against the barriers which exist to protect Parliament and Parliamentarians. The access of Members of Parliament and Peers, staff and the public to the Parliamentary Estate via all the normal entrances was not maintained during this, and other subsequent, protests. Such a position compromises the constitutional duties of Members of Parliament and Peers to ensure that the work of Parliament can continue unimpeded.

The powers, legislation and case law relevant to protests elsewhere are also relevant to protests held in the vicinity of Parliament and Whitehall. In addition, given Parliament's unique constitutional role, there are a series of special provisions which apply only to protests around Parliament.

Policy Exchange's 2023 report, *Tarnished Jewel*, outlines the history from 1842 to February 2023 of how gatherings were controlled in the area near to Parliament.[182] From 1842 until 2005, the main instrument used was the 'Sessional Order' passed at the beginning of each Parliamentary session, directing the Commissioner of the Metropolitan Police:

> *"Ordered, That the Commissioner of the Police of the Metropolis do take care that during the Session of Parliament the passages through the streets leading to*

182. A. Gilligan (2023), Tarnished Jewel: The decline of the streets around Parliament, Policy Exchange, link

> *this House be kept free and open and that no obstruction be permitted to hinder the passage of Members to and from this House, and that no disorder be allowed in Westminster Hall, or in the passages leading to this House, during the Sitting of Parliament, and that there be no annoyance therein or thereabouts; and that the Serjeant at Arms attending this House do communicate this Order to the Commissioner aforesaid."*[183]

Although the House of Lords continues to pass such an order the House of Commons stopped doing do after the then Clerk of the House and Serjeant at Arms concluded:

> *"The sessional order to the Metropolitan Police is still seen by the House as having serious, practical significance; but its wording does not match the present physical surroundings of the House; and, however it were to be worded, it would not convey any legal authority on the police above and beyond the provisions of the general law."*[184]

New Legislation was duly enacted – the Serious Organised Crime and Police Act 2005 (SOCPA 2005). Under section 138 of SOCPA 2005 Act the Home Secretary was able to designate an area up to one kilometre from Parliament Square. Under section 133 of SOCPA 2005 the organisers of a demonstration were required to give the Metropolitan Police notice of their intentions and under section 134 of SOCPA 2005 the police had the power to apply conditions which would be necessary to prevent:

a. hindrance to any person wishing to enter or leave the Palace of Westminster,
b. hindrance to the proper operation of Parliament,
c. serious public disorder,
d. serious damage to property,
e. disruption to the life of the community,
f. a security risk in any part of the designated area,
g. risk to the safety of members of the public (including any taking part in the demonstration).

Under section 134 of SOCPA 2005 the conditions could specify the location, the times, the number of persons, the number and size of any placards and the maximum permitted noise levels. Under section 137 of SOCPA 2005 loudspeakers were prohibited at all times.

Under the Police Reform and Social Responsibility Act 2011, enacted by the Conservative-led Coalition government, sections 132 to 138 of SOCPA 2005 were repealed. The Police Reform and Social Responsibility Act 2011 introduced a 'controlled' area around Parliament. This area was the central garden of Parliament Square and the footways immediately adjoining the central garden of Parliament Square – an area significantly smaller than that 'designated' under SOCPA 2005. The 'controlled' area was then extended by the Anti-social Behaviour, Crime and Policing Act 2014 to include a small number of additional streets in the immediate vicinity of the Palace of Westminster.

183. Houses of Parliament, Memorandum by the Clerk of the House and the Serjeant at Arms, Procedure – Minutes of Evidence, 2nd July 2003, link
184. Ibid.

Section 143 Police Reform & Social Responsibility Act 2011 – Prohibited Activities

It is prohibited to 'obstruct, by the use of any item or otherwise, the passage of a vehicle of any description into or out of an entrance into or exit from the Parliamentary Estate, where that entrance or exit is within, or adjoins, the Palace of Westminster controlled area'.

A constable can direct someone to cease this prohibited activity – if the person refuses they are guilty of a summary offence and liable to a fine.

The 2023 Policy Exchange report, *Tarnished Jewel*, clearly demonstrates the continued impact of disruptive protests in and around Whitehall and the Palace of Westminster – affecting Parliamentarians, Government and the public. The current legislative framework – principally the Conservative-led Coalition Government's Police Reform and Social Responsibility Act 2011 – is inadequate.

In addition to sections 132 to 138 of the Serious and Organised Crime and Police Act 2005, which should be re-enacted, legislation in force in the Republic of Ireland which protects that country's national parliament (the Oireachtas) from disruption as a result of protests should be replicated for the Palace of Westminster. Sections 7(1) of the Offences Against the State Act 1939 is worthy of particular note – it states:[185]

> *"Every person who prevents or obstructs, or attempts or is concerned in an attempt to prevent or obstruct, by force of arms or other violent means or by any form of intimidation the carrying on of the government of the State or any branch (whether legislative, judicial, or executive) of the government of the State or the exercise or performance by any member of the legislature, the judiciary, or the executive or by any officer or employee (whether civil (including police) or military) of the State of any of his functions, powers, or duties shall be guilty of felony and shall be liable on conviction thereof to suffer penal servitude for a term not exceeding seven years or to imprisonment for a term not exceeding two years."*

In discussions with the authors, Lord Bew, former Chair of the House of Lords Appointments Commission and Emeritus Professor of Politics and International Relations at Queen's University Belfast said: "I think that the UK Parliament can learn from the determination of the Irish Parliament to protect the integrity of its proceedings."[186]

Recommendation: The Government should legislate to increase the protections afforded to Parliament and Parliamentarians by replicating the legislation in force in the Irish Republic under the Offences Against the State Act 1939 which forbids the "prevention by obstruction or intimidation of any branch of the government of the State from carrying out their functions, duties or powers". The Government should also legislate to return to the limitations of demonstrations as enacted in the Serious and Organised Crime and Police Act 2005.

185. Irish Statute, Section 28, Offences Against the State Act 1939, link

186. Interview with Lord Bew, 12th June 2024

On the morning of the 1st May 2024 the Department for Business and Trade was blockaded by mainly masked protestors, with all entrances and exits to the building blocked. The noise was substantial with megaphones and drums being used to whip up the crowd into a series of chants which included the 'river to the sea' – considered by many to be deeply antisemitic. Most of the protestors were wearing face coverings – it would appear to prevent protestors being identifiable. One of the aftermaths of the Covid-19 pandemic is that while face masks are no longer in widespread usage, on some protests they have become almost ubiquitous.

Section 60AA Criminal Justice and Public Order Act 1994

Where a senior police officer reasonably believes that activities may take place that are likely to involve the commission of offences, a person can be required to remove any item which a police officer believes is wearing wholly or mainly for the purpose of concealing his identity.

A person who refuses to comply is guilty of a criminal offence.

Recommendation: The Government should legislate to make it unlawful for individuals at protests to wear face coverings wholly or mainly with the intention of concealing their identity.

The protest outside the Department for Business and Trade on the 1st May 2024

A commuter's experience – protest outside the Department for Business and Trade[187]

My experience of walking to work on the 1st May 2024 was exhausting and terrifying in equal measure. It began with the thudding rhythm of protestors beating drums with their fists, vibrating through my headphones. Then came the thick, hissing smoke, cloaking the swelling throng of bawling protestors and blurring their mass as their growing shape came into view.

The wave of protestors filling my route and deliberately blocking entrances to Government buildings seemed to be multiplying by the minute. The sea of face-coverings – a mixture of black balaclavas, scarves and repurposed Covid masks, made the repetitive antisemitic chants even more unpleasant and intimidating. At sporadic points, chunks of the crowd of protestors lurched away from their positions and sprinted without warning towards me to get to their next destination, shoving their way through whoever stood in their way. Confused tourists ducked into phone boxes to avoid the crowds.

At one point I saw a man, likely in his sixties, clearly stressed and desperate to reach his office. He tried to reason with a group of placard-wielding protestors – he waited for a pause in their latest "*From the River to the Sea*" chant and pleaded with them to let him through. When they ignored him he tried to push his way past. The protestors hurled him backwards with distressing force and he fell heavily to the ground before scrambling up and hurrying away without turning back. No one else tried after that.

The protest outside the Department for Business and Trade on the 1st May 2024

There were large numbers of police officers at the scene of the protest,

187. Interview with Policy Exchange, 3rd June 2024

although for much of the course of the protest there was no sign that the police intended to take any action to enable individuals to access the building. Officers at the scene said they had known since the day before that the protest would happen. The police instructed one civil servant that was willing to try and push through the crowd that the civil servant should 'go and get a coffee until it all blew over'. A police officer on the scene said it would likely be some time until the Silver Commander decided to apply any conditions to the protest or move the protestors on – at least until the 'rights of everyone else' had been sufficiently affected to be more important than the 'rights of the protestors'.[188]

Section 241 Trade Union and Labour Relations (Consolidation) Act 1992

Although not unique to the area around Parliament it is highly relevant to the protest activities in this area. This legislation states that it is an offence, 'with a view to compelling another person to abstain from doing or to do any act which that person has a legal right to do or abstain from doing' to 'use violence to or intimidate that person'.

A person guilty of this offence may be subjected to a six-month term of imprisonment, or a fine, or both.

The protest outside the Department for Business and Trade on the 1st May 2024

This event, which is by no means a solitary example of the police's approach, appears to be an example of the police possessing the necessary powers and legislation to deal with protests – but choosing not to utilise them, effectively taking a 'pro-protestor' stance. In this case the police elected that the right of individuals to simply go to work through the

188. Information provided to the author by a police officer at the scene of the protest.

full range of entrances and exits would not be protected. It would appear the police believe a 'right to protest' requires inaction on their part, even when protestors clearly intend to stop other people from exercising their rights.

The impact of these sorts of protests on the operation of Government are significant and to protect the ability of the State to operate it is essential that this sort of blockade cannot be replicated.

A civil servant's experience[189]

Working in Whitehall is both fascinating and rewarding – but the presence of a small number of protestors in public areas near Government buildings can be incredibly disruptive. At times, the noise from protestors is so loud that you can hardly hear yourself think.

On one memorable occasion, one protestor and a small number of his followers had (for reasons known only to him) the old Soviet national anthem playing incredibly loudly. He was moving between the outside of Downing Street and King Charles Street. Working in the Cabinet Office at the time, I remember thinking that no other serious state would put up with this sort of interference at the heart of government. It was almost impossible to get any work done with music blaring from outside, on repeat.

In 2021 Policy Exchange 2021 published an extensive report on noise pollution in the capital:

> *"Policy Exchange polling revealed just over a quarter of Londoners are bothered by noise from protests, with 38 per cent of 25 to 34 year olds disturbed. Our polling reveals 37 per cent of office workers in London stated that they found noise from either inside or outside their workplace to negatively affect their concentration and productivity, which makes the issue of noise in Westminster particularly important as the UK Parliament and many Government bodies are located in this area."*[190]

The recently published 'Defending Democracy Policing Protocol', agreed between the Government and police chiefs makes clear that protests at democratic venues' (explicitly including Parliament) must not be allowed to (i) prevent or inhibit the use of the venue, attendance at the event or access to and from it or (ii) cause alarm, harassment or distress to attendees through the use of threatening or abusive words or disorderly behaviour, in keeping with public order laws.

It is very clear that in dealing with protests outside Parliament the Metropolitan Police have elected not to use the full range of powers available to them – both those unique to the area around the Palace of Westminster and those which are more generally applicable. The presumed 'right to protest' of the vocal and intimidating cadre of protestors in this area has been repeatedly given priority over the rights of every other

190. S.Falkner (2021), Turning down the volume, Policy Exchange, link

189. Interview with Policy Exchange, 12th June 2024

group – including Parliamentarians, Parliamentary staff and the general public. A significant change in the police approach, both in line with the law and with the newly agreed Protocol is required.

The protest outside the Department for Business and Trade on the 1st May 2024

Recommendation: The Government should expand the definition of Key National Infrastructure under section 7 of the Public Order Act 2023 to include the facilities and buildings related to any 'branch' of the State (including but not limited to Parliament, Government departments and the Courts).

7. Violent Disorder

The riots during six days in the summer of 2024 were the largest widespread episode of violent disorder in the United Kingdom for over a decade. There is a clear distinction between scenes of such flagrantly violent and criminal disorder and protest.

The disorder followed an attack at a dance studio in Southport on the 29th July 2024, which resulted in the murder of three children and the attempted murder of ten other people including eight children. Between the 30th July 2024 and the 5th August 2024 there was violent disorder in over 25 towns and cities across the country.

On the 18th July 2024 there was another instance of disorder in the Harehills area of Leeds following an attempt by the police and social services to take a number of children into emergency care by the authorities.

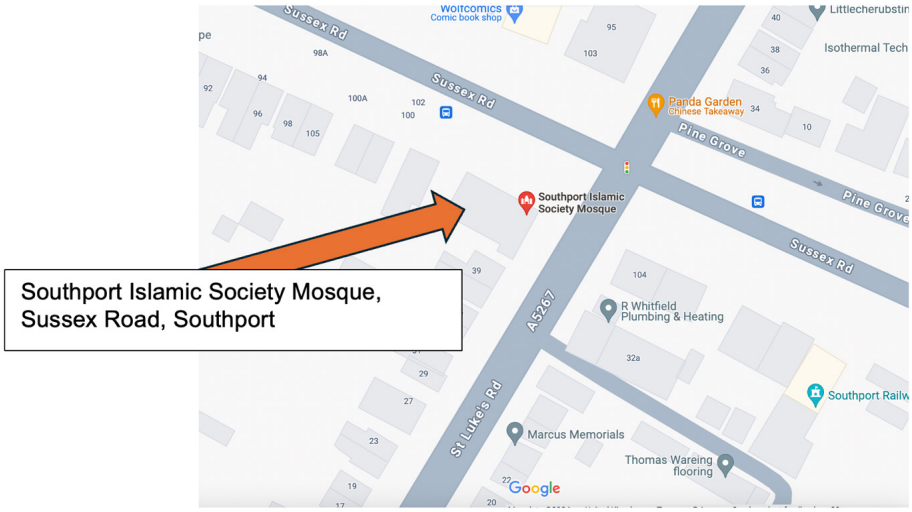
In dealing with the scenes of disorder police officers frequently demonstrated conspicuous courage in the face of violence by individuals intent on causing serious injury and damage. A robust response to the disorder, by the police, was essential. Similarly, those involved in the riots must be swiftly sentenced to lengthy terms of imprisonment.

Three exampes from the disorder in July and August 2024 are considered here. Although the events examined in this section are distinct from the vast majority of the protest activity outlined elsewhere in this report, they are relevant to consider questions of how the policing of public order more broadly is currently approached by police forces – including what changes are required in the future.

Southport Disorder – 30th July 2024

On the evening of the 30th July 2024 a vigil, attended by thousands of people, was held in Eastbank Square, Southport approximately a mile and a half from the scene of the attack. On the same evening hundreds of individuals gathered outside Southport Mosque, located 400 metres from the scene of the attack, apparently to conduct an anti-immigration and anti-muslim protest. Individuals were permitted by the police to mass just outside the Mosque. They could be heard shouting "We want our country back" and "Allah, Allah, who the fuck is Allah?".[191]

191. YouTube, 'DJE Media', "Southport R10T !!!!!! ENOUGH is ENOUGH", 30th July 2024, link



Map of St Lukes Road and Sussex Road, Southport[192]

Image of the early stages of the confrontation on St Lukes Road – outside the Southport Islamic Society Mosque on the 30th July 2024[193]

Police officers were deployed on St Lukes Road and Sussex Road between the mosque and the crowd. In the early stages of the incident the police officers were deployed in standard police uniform, including wearing flat police caps. After a short time the crowd became increasingly aggressive and members of the crowd started to violently push the police officers back. At this point officers drew their police batons shouting at the crowd to 'get back'. Individuals within the crowd became increasingly aggressive and violent towards the police. Bricks, bottles, wheelie bins and other items were thrown at the police officers by individuals within the crowd. Many of those fighting the police looked gleeful at the melee they were involved in. Others were wearing face coverings to hide their appearance.

192. Google Map, Southport, link

193. YouTube, 'DJE Media', "Southport R10T !!!!!! ENOUGH is ENOUGH", 30th July 2024, link

Image of the early stages of the confrontation on St Lukes Road – outside the Southport Islamic Society Mosque on the 30th July 2024[194]

As the disorder became more violent officers were then deployed with shields and public order helmets. A police van was substantially damaged before then being set alight. Officers were eventually able to disperse the crowd, including with the use of police dogs and officers from beyond Merseyside Police on 'mutual aid' (where a different police force agrees to provides assistance to officers). When being dispersed members of the crowd escaped from the police through local residents' gardens.

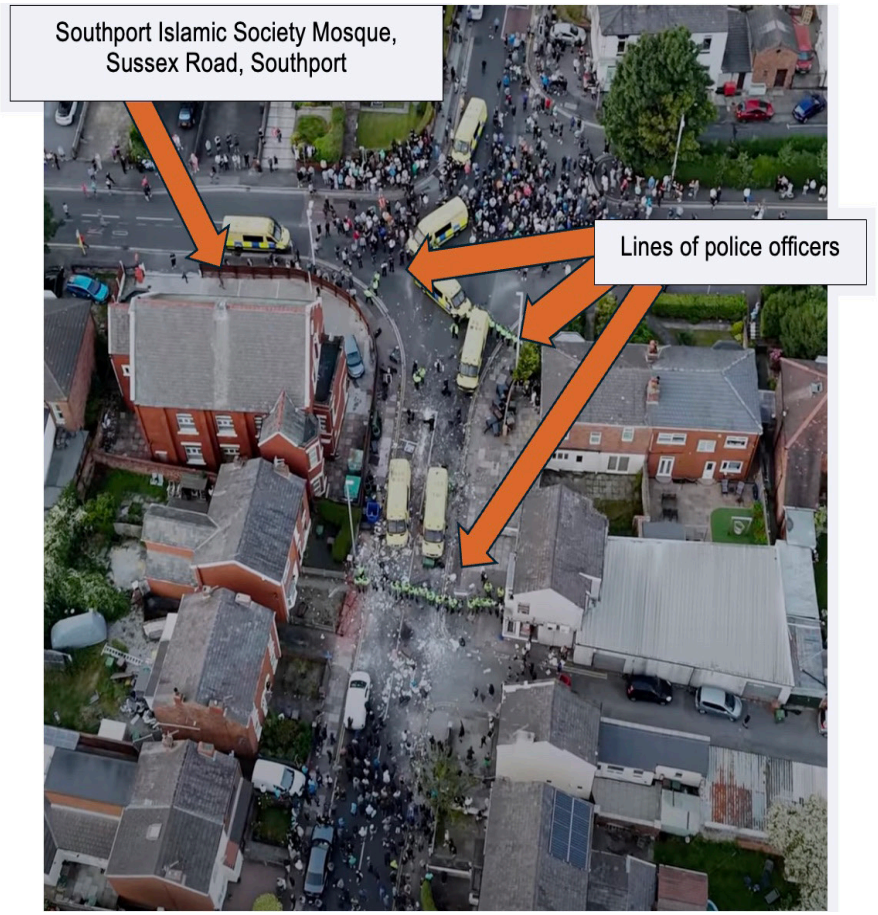
Merseyside Police later confirmed that 53 police officers sustained injuries in the violent clashes.[195] By the 23rd August 2024, Merseyside Police had, in relation to this instance of this disorder, arrested 86 individuals and charged 49 with criminal offences – 29 had been found or pleaded guilty in court.[196]

During this instance of disorder police officers acted with great courage. However as a result of the tactics used they were placed at considerable risk of injury. In reality it also appears that, based on the images and footage available, there was a substantial risk of the police being overwhelmed and the mosque being more seriously damaged than was the case.

In this instance it was an error to deploy officers in standard police officer uniform rather than in public order uniform, including hard public order helmets. Similarly the number of officers deployed was far too few to deal with the size of the crowd and their level of aggression. This may have been due to an intelligence or assessment failing or an error in decision making by operational police leaders. A far more robust operational response should have been taken by Merseyside Police. In particular, there was a failure of the police to create significant distance between the Mosque, the line of police officers and a crowd clearly intent on violence. This failure to 'create distance' is a common theme in the

194. YouTube, 'DJE Media', "Southport R10T !!!!!! ENOUGH is ENOUGH", 30th July 2024, link
195. Merseyside Police, Appeal after more than 50 officers injured in Southport disorder, 31st July 2024, link
196. Information provided to Policy Exchange by Merseyside Police on the 23rd August 2024

recent policing of violent disorder and is a tactical approach by British police forces which should be reconsidered.



Aerial image of the confrontation on St Lukes Road and Sussex Road – outside the Southport Islamic Society Mosque on the 30th July 2024[197]

Rotherham Disorder – 4th August 2024

On Sunday the 4th August 2024 a large group of people gathered outside the Holiday Inn, Manvers, near Rotherham. The hotel was being used to house asylum seekers. The incident began at approximately 11.30am – the initial 250 people attending what they claimed was a protest were then joined by a further 500 individuals.[198]

Officers were deployed on horseback and in public order uniform (albeit initially in soft caps rather than hard public order helmets). Police dogs were also deployed. On footage taken at the incident some individuals are wearing face coverings, apparently in an effort to hide their identity – many are drinking alcoholic beverages. Chants and shouts could be heard from the crowd – they included, "you're a fucking paedo", "Yorkshire, Yorkshire, Yorkshire", "wankers, wankers, wankers". On one occasion

197. Youtube, 'DJE Media', "Southport R10T !!!!!! ENOUGH is ENOUGH", 30th July 2024, link
198. South Yorkshire Police, Incidents of disorder in South Yorkshire, link

an individual can he heard shouting at a police officer, "I hope one of your kids gets raped by these cunts". The police officers demonstrate remarkable restraint in the face of such disgusting remarks.

Map of Manvers Way, Rotherham[199]

The distance between members of the crowd and the entrance to the hotel, with a line of police officers between them, was approximately ten metres.

Image of the early stages of the confrontation at the Holiday Inn, Manvers on the 4th August 2024[200]

By 2pm the gathering had become violent. Breakaway groups went to the side and rear of the building and started smashing in ground floor

199. Google Map, Manvers, link

200. YouTube, 'DJE Media', "Rotherham R1OT 'Yorkshire Yorkshire'", 4th August 2024, link

windows. At various points small groups of officers are confronted by very large crowds. Bricks and other missiles are repetedly thrown at the officers. Many of the officers were not equipped with shields to protect themselves. At least one officer was carried away by his colleagues. That these officers were permitted to come under sustained attack – including being kicked, punched and have missiles thrown at them – without a robust response to disperse the crowd and at the very least create distance between the crowd and the hotel is a serious misjudgement of public order tactics.

Image of the later stages of the confrontation at the Holiday Inn, Manvers on the 4th August 2024[201]

A number of individuals gained access to the hotel and a number were involved in setting light to a large refuse bin which was pushed against the hotel. At least one individual was found guilty of arson with intent to endanger life as a result of these actions.[202]

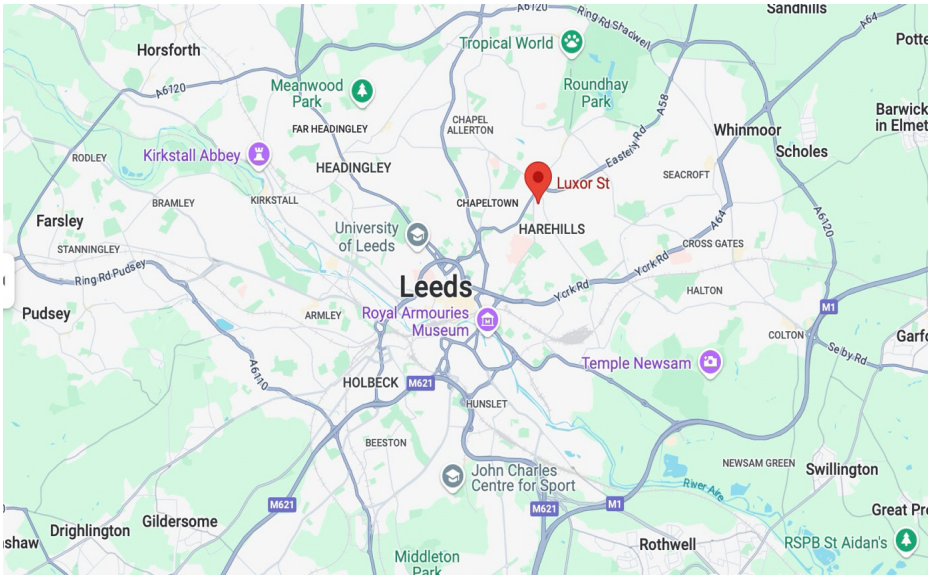
This incident is another example where British policing's existing public order approach to dealing with highly confrontational and violent crowds is placing the law-abiding public and police officers at unnecessary risk. In particular there is a a doctrinal reluctance to use force to create sufficient distance between police officers and violent crowds.

Harehills, Leeds Disorder – 18th July 2024

On the 18th July 2024, less than two weeks before the widespread disorder of late July and early August 2024 a single incident in Harehills led to significant scenes of violent disorder. Reportedly, in April 2024 the children had been subject to orders in the Family Court which prohibited the children being removed from the UK without the permission of the local authority or the court.[203] These orders were put in place after a baby in the family had apparently been taken to hospital with an unexplained serious injury.[204] In July 2024 the Family Court gave permission for the children to be removed from the home as there was concern that the family intended to take the children to Romania.[205]

201. Youtube, 'DJE Media', "Rotherham R1OT 'Yorkshire Yorkshire'", 4th August 2024, link
202. South Yorkshire Police, Convictions following mass violent disorder in South Yorkshire, Updated: 27th August 2024, link
203. LBC, Four children whose removal into foster care prompted violent disorder in Leeds returned with extended family, 24th July 2024, link
204. Mirror, Leeds riots: Kids were taken into care by police 'over fears they were leaving UK', 23rd July 2024, link
205. Ibid.

As child protection professionals were in the process of removing the children from the family home in Luxor Street, police officers were called to assist at 5pm as a group was gathering on the street – with the crowd becoming increasing aggressive.[206]



Map of Leeds – highlighting Harehills and Luxor Street – the site of disorder on the 18th July 2024 [207]

Individuals within the crowd attacked and overturned a police car. A bus was set alight – three individuals have since pleaded guilty to the offences of arson and violent disorder and according to a statement issued by West Yorkshire Police the men will be sentenced on the 1st October 2024.[208] West Yorkshire Police also stated that 32 people had been arrested for their role in the disorder.[209]

Officers deployed in standard (non-public order) uniform were at one point required to withdraw. Other officers came under attack from members of the crowd throwing missiles at police vehicles and officers. The disorder continued for a number of hours before any sense of order was restored in part of one of the UK's major cities.

The events of the 18th July 2024 in Harehills were an example of 'spontaneous disorder' with the police required to respond to events with little or no warning. As of the 31st March 2024 West Yorkshire Police had 6,073 police officers to police a population of over 2 million people covering approximately 780 square miles across – including the towns and cities of Leeds, Bradford, Huddersfield and Wakefield.[211]

While the force may have 6,073 police officers, only a proportion will be on duty and available for deployment on uniformed duties at any one time.[212] This is due to the shift patterns officers work and that a proportion of officers will be deployed to other roles, such as detectives. We estimate therefore that at most the entire force at the time of the Harehills incident

206. LeedsLive, Leeds riots: Police issue more details on what sparked night of violence, 19th July 2024, link
207. Google Map, Leeds, link
208. West Yorkshire Police, Three Men Plead Guilty To Setting Bus On Fire In Harehills Disorder, 29th August 2024, link
209. Ibid.
210. The constituencies of the Home Secretary, Rt Hon Yvette Cooper MP, and Chancellor of the Exchequer, Rt Hon Rachel Reeves MP, are within West Yorkshire.
211. Home Office, Police workforce, England and Wales, 31 March 2023 (second edition), link

would have no more than 500 uniformed officers on duty and available for deployment at any one time.

Image of police officers 'tactically withdrawing' from Harehills during disorder on the 18th July 2024[212]

Response by Government and Policing

On the 1st August 2024, in the aftermath of disorder in Southport, London, Manchester and Hartlepool, and following a meeting with senior police officers in Downing Street the Prime Minister announced a "new national capability across police forces".[213] As part of the Prime Minister's speech he outlined the intended police and governmental response to the violent disorder – particularly differentiating between the disorder and legitimate protest. He also announced an increase in the police's national intelligence analysis capabilities and the ability of police forces to strategically co-ordinate their activities across police forces.

The Prime Minister made a further statement on the 4th August 2024 stating that those involved in the disorder would face "the full force of the law".[214] There were also meetings between government officials and senior police officers (including so-called 'COBRA' meetings). This resulted in the creation of what the Prime Minister described a "standing army" of public order officers – in reality an expansion of the long-standing "mutual aid" system which already exists in order that different forces are able to provide assistance to one another at times of increased demand.[215]

While many individual police officers acted with great courage during the widerspread disorder of the summer 2024, in examining a number of the individual instances of disorder it becomes clear that too often police forces were slow to respond with sufficient speed and robustness to the scale of the challenge they were facing. At scenes of this nature, whether widespread or isolated, the police must be willing to act in a

212. Youtube, YappApp, Major Escalation After Police Retreat Following Large Scale Rioting in Harehills, link

213. Prime Minister Kier Starmer's statement in Downing Street: 1 August, 1st August 2024, link

214. PM statement: 4 August 2024, 4th August 2024, link

215. The Independent, Starmer creates 'standing army' of specialist police officers to crush far-right thugs, 5th August 2024, link

manner which protects the public and quickly prevents the continuation of violence and disorder.

Recommendation: The National Police Chiefs Council and College of Policing, working with Chief Constables, should review their public order policing approach in a number of areas – funding should be provided by HM Tresaury where required:

i. All uniform police officers should receive a higher level ('level 2') of public order training in order that significantly more officers can be deployed into a wider range of confrontational scenarios. All new officers should receive this training as part of their basic training during their probationary period.
ii. Policing should establish a system in order that large numbers of public order officers can be deployed at very short notice – particularly in major cities across the country.
iii. There should be a significant increase in the number of mounted officers and police dogs available for deployment.
iv. There should be a change in tactical approach which would enable 'distance' to be more readily created between police officers and violent crowds at an earlier stage of confrontation – where necessary using mounted officers, police dogs and Attenuating Energy Projectiles (AEP – commonly known as 'Baton Rounds') – all of which are currently available for public order deployment.
v. Following any disorder the police should provide detailed explanations as to why they responded in the way that they did – for example outlining the difference in response to 'spontaneous' disorder versus 'pre-planned' events.

8. 'Differential Policing' – a need for new oversight of protest policing in London?

Equality before the law is a fundamental principle of the rule of law. Everyone is subject to the same laws and entitled to be treated fairly by the institutions responsible for law and order – be that the courts, prosecutors or the police. And yet, there are examples of police forces and officers apparently treating individuals differently, dependent on the cause or the group of people they are dealing with. Where the police take a different approach in such circumstances, we term this: 'Differential Policing'.

On the 7th August 2024, Sir Mark Rowley, Commissioner of the Metropolitan Police, in an television interview on this issue said that those debating whether there is bias in policing:

> *"legitimise the violence that the officers I am sending on mutual aid today will face on the streets. They are putting [the officers] at risk by suggesting that any of those officers are going out with any intent other than to operate without 'fear or favour' in protecting communities."*[216]

Had this 'Rowley Doctrine' been adopted in the past, there would have been no exploration of the police's role in the circumstances which led to the Brixton riots of 1981. It was the Scarman Report, published in the aftermath, which highlighted the issues of racial disadvantage – including the disproportionate use by the police of stop and search against black people.[217] Certainly following the 2011 police shooting in Tottenham of Mark Duggan – which led to riots across the country, there was no attempt to claim that the scope of any debate into the role played by alleged police bias should be limited because it might in due course make policing London and elsewhere more difficult.

Whilst it may not have been conclusively proven that 'Differential Policing' exists as a *systemic* problem within policing, it is at the very least a debate which must be had.

There are various factors which inevitably affect the nature of the police response and rightly so. Section 7 of this report highlights the difference in responding to spontaneous or pre-planned disorder, for example. There will also be differences which are due to the intelligence or information obtained by the police prior to an incident. Beyond this however, we consider the differences in police response which may be due to other factors – such as where the difference in response is based on the cause or

216. Sky News, Met Police Chief Mark Rowley addresses 'two-tier policing' accusations and keyboard warriors, 7th August 2024, link

217. L. Scarman (1981), The Scarman Report: The Brixton Disorders 10-12 April 1981, link

the group of people the police are dealing with.

There are two key factors which might, in such circumstances, contribute to explaining the approach taken by the police and how it leads to, at the very least an appearance, of 'Differential Policing'. These are the: (i) police's priorities and (ii) the advice the police receive.

The police's priorities

On the evening of the 18th October 2023, officers from the Metropolitan Police stopped a small group of people who were driving advertising signage vans seeking to raise awareness about individuals taken hostage in Israel by Hamas terrorists. The group, from the Campaign Against Antisemitism, were reportedly stopped by police officers on Parliament Square, instructed to turn off their signs and to leave central London.[218] The Metropolitan Police later issued a statement that because a pro-Palestine protest was underway on Whitehall nearby, the campaigners' were advised to leave as the "officers were keen to avoid the billboard vans becoming a point of tension or conflict".[219]

In another example, a solitary counter-protestor was escorted away from pro-Palestinian protestors by police officers on at least two occasions. On the 17th February 2024 Niyak Ghorbani held up a sign asking whether Hamas were a terrorist group. In response a number of those on the pro-Palestine march hurled abuse at him and at least one attempted to hit Mr Ghorbani. It was Mr Ghorbani who was forcibly moved away by police officers. The Metropolitan Police reportedly said:

> *"While the wording on the man's [Niyak Ghorbani's] sign was an accurate reflection of the law in relation to Hamas, it was also apparent he was there to provoke a reaction from the passing crowd.*
>
> *"The priority for officers was to de-escalate the situation to keep everyone safe and the most proportionate way to do that was to ask the man to move away from the protest. Ten minutes passed with officers repeatedly asking him to move further away and eventually minimal force was used to get him to do so".*[220]

On the 9th March 2024 Mr Ghorbani held a sign up saying "Hamas is terrorist" which led to a number of pro-Palestine protestors attempting to snatch his sign, with a short physical altercation taking place. Police officers intervened, arresting Mr Ghorbani before later 'de-arresting' him. The Metropolitan Police later released a statement saying that Ghorbani was detained "after an altercation was ongoing, and officers intervened to prevent a breach of the peace."[221]

In both incidents involving Mr Ghorbani, the police chose to escort him away – on one of these occasions arresting him to do so, rather than arresting the protestors who appeared to be shouting abuse, attempting to snatch his sign or assault him.

Defending the Metropolitan Police's actions, Assistant Commissioner

218. Evening Standard, Met Police 'shut down vans showing pictures of children kidnapped by Hamas', 20th October 2023, link

219. Metropolitan Police, Statement following video from Campaign Against Antisemitism, 19th October 2023, accessed via Wayback Machine on 26th June 2024, link

220. Daily Mail, Met Police say they forcibly removed anti-Hamas protestor from pro-Palestine demo 'because he was trying to provoke' by holding sign calling jihadi group 'terrorists' - amid backlash at the force, 19th February 2024, link

221. 'X', @metpoliceuk, 9th March 2024, link

Matt Twist, set out the priorities of the police in dealing with such incidents. In an interview with Policy Exchange in May 2024, he said:

> *"The duty of the police is threefold – to maintain the King's Peace, to prevent and detect crime, and to save life. In meeting our duty, when we are policing protests it is often necessary for us to keep groups with strongly opposing views apart to allow both to peacefully protest. When we're doing that it is simply a matter of practicalities that moving a single person counter-protesting a short distance is quicker and simpler than trying to move many thousands of people who are following a pre-arranged route, especially if the individual's presence is likely to, or indeed is intended to, provoke a confrontation".*[222]

While the police's position may well initially appear sound it is nonetheless fundamentally flawed. Events such as those described above, and the police's defence of them, give rise to the conclusion that so long as a group is able to motivate sufficient people onto the streets they are to be permitted by the police to act in a way that is certainly beyond the scope of what might be considered to be 'peaceful protest' – including shouting abuse, attempting to snatch a sign which correctly states the law or even extending to assaulting someone.

Ultimately the police position is such that one might conclude that when it comes to protest – and when it comes to the police making choices between protest groups with contrasting positions – the police too often hold that 'might is right'. A troubling conclusion indeed.

The advice the police receive

One of the most remarkable examples of apparent police inaction during the recent protests, occurred on the 21st October 2023 – the same day as one of the mass marches in central London principally organised by the Palestine Solidarity Campaign. On this date Hizb ut-Tahrir, a group subsequently proscribed by the Government in January 2024 under the Terrorism Act 2000[223], held a march followed by an assembly. At the protest, based on the footage available, one speaker asked, "What is the solution to liberate people from the concentration camp called Palestine?". A number of individuals can then be heard shouting in response, "jihad, jihad".[224] Although police officers were present they appear to have taken very limited action at the time and no arrests were made.

The Metropolitan Police subsequently issued a statement that they believed no offences had been committed – stating:

> *"The word jihad has a number of meanings but we know the public will most commonly associate it with terrorism. We have specialist counter terrorism officers here in the operations room who have particular knowledge in this area. They have assessed this video, filmed at the Hizb ut-Tahrir protest in central London today, and have not identified any offences arising from the specific clip. However, recognising the way language like this will be interpreted by the public and the divisive impact it will have, officers have identified the man*

222. Assistant Commissioner Matt Twist, Metropolitan Police Service – interview with Policy Exchange, 21st May 2024
223. Home Office, Hizb ut-Tahrir proscribed as terrorist organisation, 19th January 2024, link
224. 'X', @hurryupharry, 21st October 2023, link

involved and will be speaking to him shorty to discourage any repeat of similar chanting."[225]

That the police reached such a conclusion does appear to be remarkable. It would certainly appear that they are being credulous or indulgent in response to what is given the context, by any reasonable understanding, a call to violence. It is difficult to comprehend why the police and prosecutors are unable to protect individuals seeking to highlight the plight of those held hostage by terrorists – yet seem so content to allow unimpeded those calling for 'jihad' in the context of a political protest.

At the very least it would appear to be reasonable to arrest individuals shouting for 'jihad' at a politically motivated protest on *suspicion* of committing offences under section 1 of the Terrorism Act 2006 which prohibits statements directly or indirectly encouraging acts of terrorism.

The Metropolitan Police has since acknowledged that it has made mistakes in the policing of protests. Referring to examples of individuals chanting 'jihad' in public, Assistant Commissioner Matt Twist of the Metropolitan Police told Policy Exchange in May 2024:

"When we look back at the policing of protests over the last 8 months, we know we didn't get everything right – particularly in the early stages in October. We've developed our tactics since then, becoming faster and more decisive. On occasion we did not move quickly to make arrests, for example the man chanting for 'Jihad' which was a decision made following fast time advice from lawyers and the CPS. We are now much more focussed on identifying reasonable grounds for arrest, acting where needed, and then investigating, so in these circumstances its very likely arrests would be made more quickly now."
[226]

The decisions taken around this case, and likely other similar cases, appear to revolve around the advice received by the police.

The Crown Prosecution Service

The first key source of advice, based upon the statement by the Metropolitan Police's Assistant Commissioner Twist, are (perhaps unsurprisingly) lawyers and in particularly the Crown Prosecution Service. Neither the police's own legal advice, nor the advice provided directly to them by the Crown Prosecution Service has been published. The former Director of Public Prosecutions, Sir Max Hill KC, when asked in October 2023 about the case of individuals shouting "jihad" in the street having not been prosecuted reportedly said:

"In any case arising from the current protests, there needs to be a very careful consideration of the actual circumstances in which something is said, or a flag is waved or actions are taken."[227]

The Crown Prosecution Service Legal Guidance on 'Offences during Protests, Demonstrations or Campaigns' states:

"The right to peacefully protest is protected by law. However, this is not an

225. 'X', @metpoliceuk, 21st October 2023, link

226. Assistant Commissioner Matt Twist, Metropolitan Police Service – interview with Policy Exchange, 21st May 2024

227. Daily Telegraph, Calling for jihad is not an automatic hate crime, says CPS chief, 27th October 2023, link

absolute right, and the behaviour of protestors may give rise to a number of criminal offences.

"Public protest cases can involve complex considerations relating to charge selection, evidential sufficiency, Convention rights and the public interest."[228]

All cases are subject to a two-stage test to determine whether an individual should be prosecuted. These tests are set out in the Code for Crown Prosecutors – the eighth and most recent version of the Code was published in October 2018.[229] The Code is issued by the Director of Public Prosecutions under section 10 of the Prosecution of Offences Act 1985. Prosecutors are required to subject each potential prosecution to a two-stage test – the 'Evidential' stage and 'Public Interest' stage. The Evidential stage requires prosecutors to consider whether there is sufficient admissible, reliable and credible evidence that would provide "provide a realistic prospect of conviction against each suspect on each charge".

If the case passes the Evidential stage the prosecutor must then apply the 'Public Interest' stage. The Code sets out the questions for the prosecutor to consider in applying the 'Public Interest' stage[230]:

i. How serious is the offence committed?
ii. What is the level of culpability of the suspect?
iii. What are the circumstances of and the harm caused to the victim?
iv. What was the suspect's age and maturity at the time of the offence?
v. What is the impact on the community?
vi. Is prosecution a proportionate response?
vii. Do sources of information require protecting?

The Legal Guidance on 'Offences during Protests, Demonstrations or Campaigns' states that a prosecution is less likely to be required where:[231]

- the public protest was essentially peaceful, save where the level of disruption caused to the public or businesses merits a prosecution;
- the suspect had no more than a minor role;
- the suspect has no previous relevant history of offending at public protests or in general;
- the act committed was minor; or
- the act committed was instinctive and in the heat of the moment.

According to the Crown Prosecution Service's own data, in the year to December 2023, 29.4% of public order cases considered by prosecutors result in a decision to take no further action – this compares to only 15.6% of robbery cases, 15.5% of homicide cases and 12.9% of drugs cases.[232]

228. Crown Prosecution Service, Legal Guidance: Offences during Protests, Demonstrations or Campaigns, published: 24 January 2019, Updated: 02 May 2023; 29 June 2023; 04 April 2024, link
229. Crown Prosecution Service, The Code for Crown Prosecutors, 26th October 2018, link
230. Ibid.
231. Crown Prosecution Service, Legal Guidance: Offences during Protests, Demonstrations or Campaigns, published: 24 January 2019, Updated: 02 May 2023; 29 June 2023; 04 April 2024, link
232. Crown Prosecution Service, CPS data summaries Quarter 3 2023/24, Pre-charge data tables (table 2.1), link

Crown Prosecution Service pre-charge decisions by principal offence category (year to December 2023)[233]	
Offence	***Legal decisions resulting in no prosecution***
Public Order	29.4%
Theft and Handling	27.6%
Fraud and Forgery	23.7%
Offences Against the Person	21.1%
Sexual Offences	19.9%
Criminal Damage	19.4%
Burglary	16.9%
Robbery	15.6%
Homicide	15.5%
Motoring	15.0%
Drugs	12.9%
Other (excluding motoring)	26.7%

There is an overwhelming public interest in disruptive and criminal protestors being appropriately dealt with by the courts. Where the Evidential Stage finds that there is a 'realistic prospect of a conviction' individuals involved in protests should not be able to avoid prosecution because a prosecutor determines that the suspect may have committed the act in the 'heat of the moment' or because there is no previous history of offending.

Recommendation: The Crown Prosecution Service must amend its Legal Guidance on 'Offences during Protests, Demonstrations or Campaigns' to reduce the likelihood of suspects not being prosecuted for 'Public Interest' reasons. The Guidance should also make clear that a factor weighing in favour of prosecution is if the protest is 'intimidatory'.

The Legal Guidance on 'Offences during Protests, Demonstrations or Campaigns' was published in January 2019 and subsequently updated in May 2023, June 2023 and April 2024. It is unclear whether, based on the information that the Crown Prosecution Service has made publicly available, the original Guidance or the subsequent updated versions have been subject to a consultation or engagement process. The Crown Prosecution Service has published the results on consultations conducted on subjects as wide ranging as its: Domestic Abuse Policy Statement; public interest guidance on suicide pacts and 'mercy killings', Equality, Diversity and Inclusion Objectives 2019-2022, Mental Health Conditions and Disorders Legal Guidance; and crimes against older people policy guidance. However, the details and outcome of any consultation or engagement on protest is absent.

Recommendation: The Crown Prosecution Service must publish the full details of all consultations which they have conducted in relation

233. Ibid.

to their Legal Guidance on 'Offences during Protests, Demonstrations or Campaigns'. The full details of any future consultations must be published. Future consultations must ensure that the views of the wider public who are most directly affected by protests, including the views of businesses and local residents, are actively sought.

Advisory Groups

The second key source of advice for the police are the various external community and stakeholder groups which police forces have established. Since October 2023 there have been substantial concerns relating to individuals involved in the groups which exist to provide advice to the Metropolitan Police. One of the most egregious examples related to the Chair of the London Muslim Communities Forum (LMCF) – described by the Metropolitan Police when it was created in March 2012 as a "new strategic advisory body for the MPS [Metropolitan Police Service] to help build better relations with London's Muslim communities, and to improve how we engage and consult with them".[234] The Chair of the LMCF, Mr Attiq Malik, was alleged to have led chanting of the slogan "from the river to the sea" – interpreted by many as a call for the destruction of Israel – at a rally in Luton in 2021.[235] As a result the Metropolitan Police ended its relationship with Mr Malik stating that the "past language and views expressed by Attiq Malik that appear to be anti-Semitic and contrary with our values".[236]

In the aftermath of these events the Metropolitan Police stated, "We are already working on a new advisory group 'charter' that will include a shared commitment to engage through mutual respect and inclusivity".[237] As of August 2024, no such 'charter' has been published. The delay is difficult to comprehend. Any such 'charter' should include provisions for:

1. **Vetting (criminal records & police intelligence)** – Prior to taking up their position, every member of each Advisory Group must be appropriately vetted to ensure that they are suitable to hold the relevant position. This should include appropriate national security and police vetting alongside previous statements they have made and social media checks.
2. **Publicly accountable** – The membership of all relevant Advisory Groups should be published with at the very least each member's name and a short biographical summary available on the relevant force's website.
3. **Conflict of Interests** – Every member of each Advisory Group should provide a comprehensive written 'Conflict of Interest' declaration which is publicly available on the force's website.
4. **Openness and transparency** – The details of any advice provided by Advisory Groups to the police should be published on the relevant force's website alongside the full minutes of any meetings between police and the Advisory Group.

234. Metropolitan Police Service, London Muslim Communities Forum launched, 27th March 2012, accessed via webarchive on 23rd April 2024, link

235. The Telegraph, Met Police adviser led 'from the river to te sea' chant, 4th November 2023, link

236. Metropolitan Police Service, Response to video shared by the Telegraph, Attiq Malik's role on the London Muslim Communities Forum, 5th November 2024, accessed via webarchive on 10th June 2024, link

237. Ibid.

5. **Meeting the UK government's engagement standards –** As part of membership of every Group, each individual member should meet the UK government's engagement standards relating to extremism.[238]

Recommendation: The Metropolitan Police should publish their new 'charter' relating to Advisory Groups without delay. It should include the provisions outlined in this report – including the publication of all minutes of meetings between the police and Advisory Groups, including those involving meetings with internal police Staff Networks. The College of Policing should set the standard for all police forces nationally regarding Advisory Groups.

Recommendation: The current inspection into political impartiality being undertaken by His Majesty's Inspectorate of Constabulary and Fire and Rescue Services should explicitly consider whether there is evidence of 'Differential Policing' in the policing of protest.

The governance and oversight framework for policing in London

The existing governance and oversight regime for policing in London affords considerable latitude to the police to deal with protests, and other operational matters, as they see fit. It is worthwhile considering the core elements of that oversight regime and what changes might be made.

Between the creation of the Metropolitan Police under the Metropolitan Police Act 1829 and the implementation of the Greater London Authority Act 1999, accountability for oversight of the Metropolitan Police Service rested exclusively with the Home Secretary.

The Greater London Authority Act 1999 established the Mayor of London, the London Assembly and the Metropolitan Police Authority. For the first time, the creation of the Metropolitan Police Authority provided for a single London based point of oversight for the Metropolitan Police and the Commissioner although at least some elements of the force's accountability to the Home Secretary are generally understood to have remained, particularly in relation to national policing responsibilities.

Mayor's Office for Policing and Crime

Under the Police Reform and Social Accountability Act 2011, under which Police and Crime Commissioners outside London were created, a Mayor's Office for Policing and Crime was created for London. The Metropolitan Police Authority was abolished. Section 3 of the Police Reform and Social Responsibility Act 2011 requires the Mayor of London to:

"hold the Commissioner of Police of the Metropolis to account for the exercise of

a. the functions of the Commissioner, and
b. the functions of persons under the direction and control of the

238. Department for Levelling Up, Housing & Communities, Guidance on how to apply the UK government's engagement standards, 14th March 2024, link

Commissioner."

As part of section 3 of the Police Reform and Social Responsibility Act 2011 the Mayor must hold the Commissioner to account for:

a. his duty to have regard to the Mayor's police and crime plan,
b. his duty to have regard to the Strategic Policing Requirement issued by the Home Secretary,
c. his duty to have regard to any codes of practice issued by the Home Secretary,
d. the Commissioner's arrangements for co-operating with others,
e. his arrangements for engaging with local people
f. his duty to achieve value for money,
g. his duties in respect of equality and diversity, and
h. his duties relating to the safeguarding of children.

Under section 8 of the Police Reform and Social Responsibility Act 2011 the Commissioner must have regard to the Mayor's Police and Crime Plan.

London Assembly – Police and Crime Committee

The London Assembly must, under section 32 of the Police Reform and Social Responsibility Act 2011, arrange for a Police and Crime Panel to undertake a series of functions.[239] Section 33 of the Act requires that the Police and Crime Panel must review the draft police and crime plan provided to the Assembly by the Mayor's Office for Policing and Crime. In addition, the Assembly has the power under section 33(3) to investigate and prepare reports about:

a. any actions and decisions of the Mayor's Office for Policing and Crime;
b. any actions and decisions of the Deputy Mayor for Policing and Crime;
c. any actions and decisions of a member of staff of the Mayor's Office for Policing and Crime;
d. matters relating to the functions of the Mayor's Office for Policing and Crime;
e. matters in relation to which the functions of the Mayor's Office for Policing and Crime are exercisable; or
f. any other matters which the Assembly considers to be of importance to policing and crime reduction in the metropolitan police district.

The London Assembly is democratically elected by Londoners with fourteen Assembly Members representing specific constituencies across London and the remainder representing London as a whole. The meetings of the London Assembly Police and Crime Committee are public and livestreamed online. The papers and minutes are published online.

239. The Police Reform and Social Responsibility Act 2011 refers to a Police and Crime ***Panel*** while the website for the Mayor of London and London Assembly refer to the Police and Crime ***Committee.***

London Policing Board

Following one of the recommendations of the Baroness Casey Review (2023)[240] the Mayor of London established the London Policing Board, with the first meeting held in September 2023. According to the Board's Terms of Reference:

> *"The Board, chaired by the Mayor of London, will support MOPAC [Mayor's Office for Policing and Crime] to discharge its statutory and legal responsibilities to 'secure the maintenance of the MPS', 'secure that the MPS [Metropolitan Police Service] is efficient and effective', and to hold the Commissioner of Police for the Metropolis ("Commissioner") to account for the exercise of their functions, as part of MOPAC's strategic oversight framework."*[241]

Neil Basu QPM – A member of the London Policing Board

Neil Basu QPM, is a highly experienced former senior police officer having been Assistant Commissioner Specialist Operations with the Metropolitan Police Service and the national head of Counter Terrorism Policing between 2018–2021.[242] He retired from policing in November 2022.[243] Mr Basu was appointed to the London Policing Board by the Mayor of London in 2023.[244]

Although Mr Basu has retired from policing he remains a highly influential figure given his role as a member of the Mayor of London's Policing Board and senior role in policing prior to his retirement.

Mr Basu, has been reported as saying that suppressing people from "legitimate protests" over the Israel-Gaza conflict could "fuel more extremism" and might drive those on the fringes to look "somewhere else".[245] Mr Basu was quoted as saying:

> *"The whole point of a protest is to influence public policy. The whole point of terrorism is 'I can't influence you in any other way, so I'm going to use violence'.*
>
> *If we choose to suppress protest, you are fuelling more extremism — I have no doubt about that. Protest is a way of venting … as long as it's not criminal, we've got to allow it in a liberal democracy."*[246]

If these considerations – what might be termed a 'Basu Doctrine' – were a factor in the decision making around how the police deal with protests it would suggest that a strategic calculation has been made to tolerate large-scale protests and disruption in order to limit the activities of extremists. Whether such a calculation is appropriate is surely questionable – there is certainly no basis in legislation for such considerations being a factor in how police forces might approach the policing of a protest, such as which restrictive conditions under the Public Order Act 1986, if any, might be applied.

The members of the London Policing Board were appointed by the Mayor

240. Baroness Casey of Blackstock DBE CB, Independent review into the standards of behaviour and internal culture of the Metropolitan Police Service, March 2023, link
241. Mayor of London, London Policing Board Terms of Reference, link
242. Mayor of London, The London Policing Board, The Members of the London Policing Board, last accessed 23rd April 2024, link
243. Ibid.
244. Ibid.
245. The Times, Banning Gaza protests could lead to terror attacks, says ex police chief, 2nd March 2024, link
246. Ibid.

of London. There are five ex-officio members of the London Policing Board – as of August 2024 they were:

- Mayor of London
- Deputy Mayor for Policing and Crime
- London Victim's Commissioner
- Deputy Mayor for Communities and Social Justice
- London Councils Executive Member for Community Safety

In addition, there are twelve independent members of the London Policing Board.

The meetings of The London Policing Board are public and livestreamed online. The papers and minutes are published online.

On Wednesday the 22nd March 2024, at the London Assembly Police and Crime Committee, the Deputy Mayor for Policing and Crime, Sophie Linden, was asked by Keith Prince AM:

> *"The London Policing Board: you said the Mayor may well adopt that and run with that. With these quarterly meetings, is there going to be any sort of political representation on that? Is there going to be an attempt to have a balance of political view on that Board, do you know?"*[247]

In response the Deputy Mayor for Policing and Crime said:

> *"We have accepted all the recommendations within the report and that includes the London Policing Board, so it will happen. It is not "may well"; it will happen. We are looking at the moment as to how that Board will function. The key criterion around that is "What does the MPS [Metropolitan Police Service] need in order to be able to really drive for that Board to support and challenge and drive change". That will be the key criterion as to who needs to sit on it."*[248]

Following the creation of the London Policing Board, the Commissioner, Sir Mark Rowley, told the London Assembly Police and Crime Committee on the 6th September 2023:

> *"More transparency, public scrutiny, is really important and I support the recommendation and look forward to the LPB [London Policing Board] getting established. Something I just wanted to flag is that this potentially adds quite a big change in the landscape of governance, and the Deputy Mayor has made the point about significant time and resources. It is going to cause us to reflect on the balance of engagement with this Committee [The London Assembly Police and Crime Committee]. If we have, for example, more than monthly public meetings that myself and other members of the top team are serving for the LPB and associated committees, then we need to reflect on that balance of effort there where we have a legal duty to be held to account by the Deputy Mayor and the Mayor, compared to here.*
>
> *"Now clearly there is a long history of working with the [London Assembly] Police and Crime Committee (PCC) and there is no reason why certain*

247. London Assembly Police and Crime Committee - Wednesday 22 March 2023, Transcript of Agenda Item 6 - Independent Review into the Standards of Behaviour and Internal Culture of the Metropolitan Police Service – Panel Two, link
248. Ibid.

> *components, like the annual [London Assembly] Plenary [policing session] or the thematic work you do where our experts come along to those, should change. But I do question the amount of these appearances in terms of the question and answer (Q&A) sessions, if we are doing an awful lot of Q&A sessions within the LPB. Therefore, we are going to need to look at that balance as we see the final details of the frequency of meetings, etc, but it may well end up in fewer of these appearances from myself and the senior team."*[249]

The comments by the Commissioner appear to suggest that the creation of the London Policing Board had the potential to reduce the ability of London's democratically elected Assembly Members to investigate the performance of the Metropolitan Police, as they are entitled to under section 32(3)(f) of the Police Reform and Social Responsibility Act 2011.

This may appear to have been borne out – Assembly Member Unmesh Desai AM highlighted the failure of the Metropolitan Police Service to attend the London Assembly's Police and Crime Committee meeting held on the 17th July 2024. He said:

> *"Chair, can I also put on record my concern, and I know that it is shared by all Members of this Committee - I would hope so anyway - that the police are not here [at this Committee meeting] to support you, Deputy Mayor."*[250]

If this is to become a settled trend – with senior officers avoiding appearing at the Police and Crime Committee – this risks a weakening, rather than strengthening, in the system of police accountability.

The Home Secretary

Section 40 of the Police Act 1996 allows the Home Secretary to give directions to the local policing body (in London's case the Mayor's Office for Policing and Crime) where the Home Secretary is satisfied that "the whole or any part of a police force is failing to discharge any of its functions in an effective manner" or that "the whole or a part of a police force will fail to discharge any of its functions in an effective manner…. unless remedial measures are taken". This is a power which appears never to have been used. The Home Office confirmed to Policy Exchange that:

> *"We are able to disclose that as far as we are aware, we do not hold any records which show that the Home Secretary has formally used their powers under Section 40 Police Act 1996 to provide a direction to a local policing body over the last 14 years."*[251]

The Commissioner of the Metropolitan Police is appointed by the Monarch on the advice of the Home Secretary, pursuant to section 42 of the Police Reform and Social Responsibility Act 2011. Before making a recommendation to the Monarch, the Home Secretary is required to have regard to any recommendation made by the Mayor of London in their role as the occupant of the Mayor's Office for Policing and Crime.

The Commissioner can be suspended by the Mayor of London, with the approval of the Home Secretary under section 48 of the Police Reform and Social Accountability Act 2011. The Mayor may also, and with the

249. London Assembly Police and Crime Committee – Wednesday 6 September 2023, Transcript of Agenda Item 7 - Question and Answer Session with the Mayor's Office for Policing and Crime and the Metropolitan Police Service, link

250. London Assembly Police and Crime Committee, Wednesday 17 July 2024, Transcript of Agenda Item 7 - Question and Answer Session with the Mayor's Office for Policing and Crime, link

251. Home Office Response to Freedom of Information Act Request, Ref: FOI2024/04830, 5th June 2024

approval of the Home Secretary 'call for the Commissioner to resign or retire' having first:

a. given the Commissioner a written explanation of the reasons why they are proposing to call for their retirement or resignation;
b. given the Commissioner the opportunity to make written representations about the proposal to call for their resignation or retirement; and
c. consider any written representations made by the police officer.[252]

'Operational Independence'

In addition to the formal structures of governance and oversight in London and elsewhere is the concept of 'operational independence'. Although not defined in primary legislation or case law, 'operational independence' is frequently recognised as being central to how British policing operates.

The Policing Protocol 2023, issued by the Home Secretary pursuant to the requirements of section 79 of the Police Reform and Social Responsibility Act 2011, sets out to Police and Crime Commissioners, the Mayor's Office for Policing and Crime, Chief Constables, Police and Crime Panels and the London Assembly how their functions will be exercised in relation to each other. Paragraph 32 of the Policing Protocol 2023 states: "The operational independence of the police is a fundamental principle of British policing. It is expected by the Home Secretary that the professional discretion of the police service and oath of office give surety to the public that this shall not be compromised". In relation to Police and Crime Commissioner's, the Policing Protocol states, "...the PCC must not fetter the operational independence of the police force and the Chief Constable who leads it."

However, the precise scope of the concept of operational independence is elusive. The case law supporting the independence of police officers in operational matters in the main weighs toward police officers being accorded considerable discretion in how to deal with the operational challenges they face. For example, in R v Chief Constable of Sussex, ex parte International Trader's Ferry [1998] 2 AC 418 Lord Slynn stated:

> *"In a situation where there are conflicting rights and the police have a duty to uphold the law the police may, in deciding what to do, have to balance a number of factors, not the least of which is the likelihood of a serious breach of the peace being committed. That balancing involves the exercise of judgment and discretion."*[253]

In Attorney General v New South Wales Perpetual Trustees Co [1955] AC 457, Viscount Simonds stated that:

> *"His [The constable's] authority is original, not delegated, and is exercised at his own discretion by virtue of his office".*[254]

The Commissioner himself, is clear in his view as to the independence of his role. At the London Assembly Police and Crime Committee on the

252. The most recent example of a Commissioner leaving office where this legislation is particularly relevant concerns the departure of Dame Cressida Dick QPM as Commissioner of the Metropolitan Police in 2022. The circumstances were examined in detail by Sir Tom Winsor having been commissioned by the then Home Secretary. Sir Tom concluded that due process was not followed by the Mayor of London and the Mayor's Office for Policing and Crime in the actions they took and that the Mayor of London had taken steps which were not in accordance with the relevant legislation. See: Sir Tom Winsor (2022), Special Commission on the resignation of the Commissioner of Police of the Metropolis, Report, 24th August 2022, link
253. R v Chief Constable of Sussex, ex parte International Trader's Ferry [1998] 2 AC 418, link
254. Attorney General v New South Wales Perpetual Trustees Co [1955] AC 457, link

5th July 2023, in response to a question from then Assembly Member Rt Hon Baroness Pidgeon, Sir Mark Rowley said:

> *"Policing governance is a little different to most other organisations in the public sector because Parliament created a bit of a firebreak between the police force and the overseeing bodies to deal with issues of operational independence. An issue we have been discussing, for example, the plan that I am producing is the MPS's [Metropolitan Police Service's] plan and it does not have to slavishly follow anything the Home Office, MOPAC [Mayor's Office for Policing and Crime] or the Mayor's office produce. Legally, I have to take a lot of account of them, because clearly the politicians who represent the public are holding me to account, but there is a firebreak that gives me space to produce something that is half a step away. The Mayor's responsibility to Transport for London (TfL) is much more direct responsibility than the Mayor's oversight of policing. It is a slightly different relationship. I have an extra degree of independence."*[255]

In the Report into the Independent Commission on Policing for Northern Ireland chaired by the Rt Hon Lord Patten of Barnes and published in 1999 questioned the use of the term 'operational independence', as being misleading, strongly preferring instead the term 'operational responsibility':

> *"In a democratic society, all public officials must be fully accountable to the institutions of that society for the due performance of their functions, and a chief of police cannot be an exception. No public official, including a chief of police, can be said to be "independent". Indeed, given the extraordinary powers conferred on the police, it is essential that their exercise is subject to the closest and most effective scrutiny possible. The arguments involved in support of "operational independence" that it minimises the risk of political influence and that it properly imposes on the Chief Constable the burden of taking decisions on matters about which only he or she has all the facts and expertise needed – are powerful arguments, but they support a case not for "independence" but for "responsibility".*[256]

The Commission contended that the term 'operational responsibility' would still provide a chief constable with the:

> *"right and duty to take operational decisions, and that neither the government nor the Policing Board should have the right to direct the Chief Constable as to how to conduct an operation. It does not mean, however, that the Chief Constable's conduct of an operational matter should be exempted from inquiry or review after the event by anyone. That should never be the case. But the term "operational independence" suggests that it might be, and invocation of the concept by a recalcitrant chief constable could have the effect that it was. It is important to be clear that a chief constable, like any other public official, must be both free to exercise his or her responsibilities but also capable of being held to account afterwards for the manner in which he/she exercises them."*[257]

A key point made by the Metropolitan Police Commissioner is that it is after protests, marches and other incidents that the various bodies

255. London Assembly Police and Crime Committee – Wednesday 5 July 2023. Transcript of Agenda Item 7 – Question and Answer Session with the Mayor's Office for Policing and Crime and the Metropolitan Police Service, link

256. A New Beginning: Policing in Northern Ireland, The Report of the Independent Commission on Policing For Northern Ireland, September 1999, link

257. Ibid.

responsible can hold him and the Metropolitan Police to account. This is too late – the disruption and damage has already had a significant negative impact on local residents, visitors and tourists by this point. It is essential that it is possible that those who are able to represent the wider public are able to make representations to those making decisions about protest in advance of them occurring.

A new 'Protest Commission' for London

The existing powers afforded to the police in dealing with protest – by virtue of existing case law and legislation – are considerable. A key risk is that, as outlined in this report, the police are faced with confronting and making decisions about inherently political protests which then leads to them being inevitably accused of holding a political agenda by all sides. This is in some ways aggravated by the concept of 'operational independence' and the lack of precision in this concept. It is an invidious position for the police to find themselves in.

To an extent the Metropolitan Police accept that there are differing 'tiers' of public order policing, although they say that this is not to do with the nature of the cause that they are dealing with, but the nature of the threat the police are facing. Assistant Commissioner Matt Twist of the Metropolitan Police told Policy Exchange in May 2024:[258]

> *"In public order policing we are neutral as to the cause that is being protested. We base policing tactics on the threat, harm and risk based on the information and intelligence available to us. In that sense there is no such thing as 'two-tier or differential policing' – there are in fact an infinite number of tiers of policing, depending on the threat, harm and risk."*

The challenge for the Metropolitan Police, and indeed the Mayor of London and Home Secretary who have responsibility for oversight of the police, is that many people (both protestors and the wider public) have come to believe that the explanation provided by Assistant Commissioner Twist does not fully justify the police's approach.

In March 2024 Sir Mark Rowley, Commissioner of the Metropolitan Police made a strenuous defence of the Metropolitan Police against the accusation that they are acting more favourably towards one group or another; but in doing so acknowledged that this is the perception of many observers. At the London Policing Board on the 5th March 2024 he said:

> *"At the moment, one side of the debate seems to say that we are guilty of two-tier policing and the other side says that we are oppressive and clamping down on the right to freedom of speech. In this context of polarised public debate, I do think sometimes that we are the first people who are able to be labelled simultaneously woke and fascists."*[259] [259]

And yet, in the *Ziegler* [2021][261] judgment (discussed in Section 2 and Annex C), the Supreme Court in considering proportionality, attached weight to the fact that the protest concerned a 'serious matter of public concern' – in that case arms sales. This was also followed by the High

258. Assistant Commissioner Matt Twist, Metropolitan Police Service – interview with Policy Exchange, 21st May 2024

259. Mayor's Office for Policing and Crime, London Policing Board Minutes of Meeting, 5th March 2024, link

260. The objective is not of course, an equidistant point between these two perspectives – the idea that the Metropolitan Police Service is "fascist" is a perspective beyond credulity.

261. *DPP v Ziegler* [2021] UKSC 23, link

Court in *Leigh v Commissioner of the Metropolitan Police* [2022][262], which concerned events following the vigil on Clapham Common for Sarah Everard, a woman murdered by a serving Metropolitan Police officer.

Involving the police in such value judgements is in direct contrast to the policing tradition of acting "without fear or favour". Any perception that the Metropolitan Police is making decisions which impact on protestors, counter-protestors and the wider public based upon a value judgement of a particular cause has the potential to be deeply corrosive to the public's confidence in policing. The police must be insulated from even the appearance of their decision-making being based on value or political judgements. Avoiding such accusations relating to parades and marches was one of the reasons for the creation of the Parades Commission for Northern Ireland under the Public Processions (Northern Ireland) Act 1998.

The Independent Review of Parades and Marches, chaired by Dr Peter North, was launched on the 28th August 1996 as part of the preparatory steps towards the Belfast Agreement (also known as the 'Good Friday' Agreement) of the 10th April 1998. The North Report states that:

> *"The dispute in the summer of 1996 between the Loyal Orders and Nationalist residents' groups, which required major intervention by the police under the public order legislation, brought Northern Ireland close to anarchy. Controversy surrounding a parade on Sunday 7 July by the members of the Orange Order from Drumcree parish church down the Garvaghy Road on the outskirts of Portadown, which was opposed by Nationalist residents, led to widespread serious public disorder over the following week, first among Unionists and then among Nationalists. There were major costs to Northern Ireland:*
>
> - *two deaths and a significant number of injuries,*
> - *polarisation between the two parts of the community,*
> - *damage to the relationship between the police and the community,*
> - *public expenditure costs of at least £30 million,*
> - *losses to trade, tourism and inward investment."* [263]

Published in January 1997, the North Report made a total of forty-three recommendations including the creation of the Parades Commission, intended to deal with the challenges of loyalist marches and nationalist protests.[264] The Independent Review also proposed a series of fundamental principles – alongside the right to peaceful assembly, subject to certain qualifications, these principles included that:

> *"the exercise of that right brings with it certain responsibilities; in particular, those seeking to exercise that right should take account of the likely effect on their relationships with other parts of the community and be prepared to temper their approach accordingly"*[265]

262. *Leigh v Commissioner of the Metropolitan Police* [2022] EWHC 527 (Admin), link
263. The Independent Review of Parades and Marches in Northern Ireland, January 1997, Belfast: Stationary Office – a copy of the Review can be located at this link
264. Ibid.
265. Ibid.

and that:

> *"in the exercise of their rights and responsibilities, those involved must not condone criminal acts or offensive behaviour".*[266]

The independent review led to the creation of the Parades Commission under section 2 of the Public Processions (Northern Ireland) Act 1998, which outlines the functions of the Parades Commission as:

a. to promote greater understanding by the general public of issues concerning public processions;
b. to promote and facilitate mediation as a means of resolving disputes concerning public processions;
c. to keep itself generally informed as to the conduct of public processions and protest meetings;
d. to keep under review, and make such recommendations as it thinks fit to the Secretary of State concerning, the operation of this Act.

Perhaps most importantly when considered in the context of recent protest marches in London, section 2(2)(b) of the Public Processions (Northern Ireland) Act 1998 states that the Commissioner may: "issue determinations in respect of particular proposed public processions and protest meetings".

Under section 6 of the Public Processions (Northern Ireland) Act 1998 all public processions, except funerals and parades organised by the Salvation Army, are required to be notified to the police at least 28 days before the date of the parade. Parade related protests are required to be notified to the police at least 14 days before the date of the parade. The Police Service of Northern Ireland then pass these notifications on to the Parades Commission for review.

The Parades Commission of Northern Ireland provides a useful model through which highly sensitive and inherently political processions and protests can be considered and managed. Commenting on the policing of parades in mid-90s Northern Ireland Jarman (1998) said:

> *"Throughout 1995, the police tended to take a pragmatic approach to disputes over parades. Appeals were regularly made for the parties involved to negotiate a compromise or to take part in mediation but, …, this rarely proved successful and it was then left to the police to adjudicate between the opposing claims. Most often, the decision whether to allow the parade to take place or to re-route it was left to the last minute and was determined by which side had mobilized the largest crowd of supporters."*[266]

Recent protests in London and beyond, alongside the wider context, appears to have led to (or at least coincided with) an increase in hate crime. Giving evidence to the Home Affairs Select Committee in December 2023, the National Police Chiefs Council Lead for Race and Religion Chief Constable Chris Hayward, said:

266. Ibid.

267. N. Jarman (1998), Regulating Rights and Managing Public Order: Parade Disputes and the Peace Process, 1995-1998, Fordham International Law Journal, Vol 22 Issue 4, Article 15

> *"Alongside that, we have seen a rise in hate crime, most prevalent in metropolitan areas because that is where our largest Jewish communities are, but on a national level, the figure for antisemitic crime is up by 680% year on year and for Islamophobic crime up by 140% year on year. There does seem to be a pattern that coincides with national protests, when we see spikes on the weekends when those events are happening or when events of significance happen in Gaza."*[268]

This is a devastating indictment of the recent protests on the streets of London and beyond.

While the history and context of Northern Ireland and contemporary London is undoubtedly different and whilst far from being a only solution, the implementation of a Protest Commission for London would go some distance to insulating the police from taking, and appearing to take, decisions motivated by political partisanship. It is a model which should be adopted for London given the context of the highly politicised and confrontational protests which are becoming increasingly prevalent on the streets of the Capital.

Recommendation: The Government should legislate to establish a Protest Commission for London. This Commission should be established with independent Commissioners, appointed by the Home Secretary following consultation with the Mayor of London. The Commission should have the power to make determinations concerning the conditions applied to protests and processions. They should consider representations by groups that are representatives of local residents and businesses, such as local authorities and Business Improvement Districts, to understand the impact of marches, *in advance of marches being held*. They should have the power to apply to the Home Secretary to prohibit marches.

268. House of Commons, Home Affairs Committee, Oral evidence: Policing of Protests, HC 369, 12th December 2023, link

Annex A: Key legislation relating to protest

There are numerous enactments which create mechanisms by which protests can be regulated, through giving the police certain powers or through creating criminal offences which may apply to protestors. A non-exhaustive summary of the most relevant legislation is provided here.

Legislation (and common law) relating to police powers:

Section 12 Public Order Act 1986 – Imposing Conditions on Public Processions[269]

The police can impose conditions on a public procession if they reasonably believe that:

a. it may result in serious public disorder, serious damage to property or serious disruption to the life of the community,
b. the noise generated by persons taking part in the procession may result in serious disruption to the activities of an organisation which are carried out in the vicinity of the procession,
c. the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.

The police may give directions imposing conditions to prevent such disorder, damage, disruption, impact or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.

A person who does not follow the conditions applied commits a criminal offence.

Under regulations introduced by the Home Secretary[270], "serious disruption" was defined as disruption which caused "more than minor" hinderance to the activities of others. These regulations have since been declared unlawful by the Divisional Court[271] in *National Council for Civil Liberties v Secretary of State for the Home Department* [2024] EWHC, meaning this definition of serious disruption is ordered to be quashed, however, the

269. Section 12, Public Order Act 1986, link

270. Using powers granted to her by Parliament under the Police, Crime, Sentencing and Courts Act 2022, which allow the Home Secretary to amend primary legislation define any aspect of the term "serious disruption" or give examples of what is or is not serious disruption.

271. *National Council for Civil Liberties v Secretary of State for the Home Department* [2024] EWHC 1181 (Admin), link – this case is discussed in greater detail in below sections of this report.

regulations remain in place while subject to appeal by the Government.

Section 13 Public Order Act 1986 – Prohibiting Public Processions[272]

If the police believe that the powers under section 12 of the Public Order Act 1986 will be insufficient to prevent public processions from resulting in "serious public disorder", they can, with the consent of the Home Secretary, make an order prohibiting public processions for up to 3 months.

The threshold for prohibiting public processions under section 13 is far more narrowly defined that those under which conditions can be applied under section 12.

Outside of London it is necessary for the Chief Constable to make an application to the local council who can, with the consent of the Home Secretary, make a prohibition order. In London local councils are not involved and the submission is made directly to the Home Secretary.

A person who does not following the conditions applied commits a criminal offence.

Section 14 Public Order Act 1986 – Imposing Conditions on Public Assemblies[273]

The police can give directions to those taking part in or organising an assembly, to "prevent disorder, damage, disruption, impact or intimidation".

This can be done if the police reasonably believe that a public assembly may either:

a. result in serious public disorder, serious damage to property or serious disruption to the life of the community or
b. the noise generated by the assembly may be significant, including that it may cause someone to 'suffer alarm or distress', or
c. have the purpose of compelling others not to do an act they have a right to do, or to do an act they have a right not to do.

A person who does not following the conditions applied commits a criminal offence.

Under regulations introduced by the Home Secretary[274], "serious disruption" was defined as disruption which caused "more than minor" hinderance to the activities of others. These regulations have since been declared unlawful by the Divisional Court[275], meaning this definition of serious disruption is ordered to be quashed, however, the regulations remain in place while subject to appeal by the Government.

Section 14A Public Order Act 1986 – Prohibiting Trespassory Assemblies (Railways)[276]

272. Section 13, Public Order Act 1986, link
273. Section 14, Public Order Act 1986, link
274. Using powers granted to her by Parliament under the Police, Crime, Sentencing and Courts Act 2022, which allow the Home Secretary to amend primary legislation define any aspect of the term "serious disruption" or give examples of what is or is not serious disruption.
275. *National Council for Civil Liberties v Secretary of State for the Home Department* [2024] EWHC 1181 (Admin), link – this case is discussed in greater detail in below sections of this report.
276. Section 14A, Public Order Act 1986, link

Section 14A of the Public Order Act 1986 enables the police to apply to the Secretary of State to prohibit an assembly in a place related to the railways if it may result in serious disruption to the provision of railway services or cause serious disruption to the life of the community.

In such circumstances an order which prohibits trespassory assemblies for four days and extends to a five-mile radius can be put in place.

It is a criminal offence if the protests go ahead.

Part 3 Anti-social Behaviour, Crime and Policing Act 2014 – Dispersal Orders[277]

The police can impose a 'Dispersal Order' requiring people to leave a specified area for up to 48 hours if reasonable grounds exist for it to be necessary to prevent either:

a. members of the public being harassed, alarmed or distressed, or
b. to prevent crime or disorder in the locality.

If a police officer then has reasonable grounds to suspect that the behaviour of a person in the locality has contributed to or is likely to contribute to either of the two conditions above they can direct a person to leave for up to 48 hours. It is an offence if they do not comply.

Section 42 Criminal Justice and Police Act 2001 – Harassment of a Person in their Home[278]

The police have the power to give instructions to individuals outside someone's home who are seeking to persuade the resident that 'he should not do something that he is entitled to do' or that 'he should do something that he is not under any obligation to do', and who is reasonably believed to be harassing or 'causing alarm or distress' to the resident.

Protestors can be instructed to leave the vicinity and not return for up to 3 months. It is a criminal offence not to comply.

Common Law – Breach of the Peace[279]

Under the common law concept of 'Breach of the Peace', the police have powers to take reasonable action to intervene against an individual and/or make arrests when that individual has done, or appears likely to do, any of the following:

a. Cause harm to a person
b. Cause harm to that person's property in the person's presence
c. Put that person in fear of such harm being done through an assault, affray, a riot, unlawful assembly or other disturbance.

Where there is a reasonable belief that there are no other available

277. Part 3, Anti-social Behaviour, Crime and Policing Act 2014, link
278. Section 42, Criminal Justice and Police Act 2001, link
279. See the case of *R v Howell [1981] EWCA Crim J0413-5*, link and for a summary of the 'Breach of the Peace' powers see: College of Policing, 'Legal Framework and Legislation', 8th June 2023, link

means to prevent a breach of the peace, the lawful exercise by innocent third parties of their rights may be restricted by the police.

Legislation relating to criminal offences:

Section 1 Criminal Damage Act 1971 – Criminal Damage to Property[280]
It is a criminal offence if a person, without lawful excuse, destroys or damages any property belonging to another and intends to destroy or damage such property, or is being reckless as to whether any such property would be destroyed or damaged.

Section 137 Highways Act 1980 – Wilful Obstruction of the Highway[281]
It is a criminal offence if a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway. It does not matter whether free passage along the highway in question has already been temporarily restricted or temporarily prohibited.

Section 68 Criminal Justice and Public Order Act 1994 – Aggravated Trespass[282]
It is a criminal offence if a person trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect:

a. of intimidating those persons or any of them, so as to deter them or any of them from engaging in that activity,
b. of obstructing that activity, or
c. of disrupting that activity

Section 1 Public Order Act 2023 – Locking On[283]
It is a criminal offence if a person, without reasonable excuse,

a. attaches themselves to another person, object or land, or
b. attaches a person to another person, object or land, or
c. attaches an object to another object or land,

and this act causes, or is capable of causing, serious disruption to two or more individuals or an organisation (in a place other than a dwelling), and they intend this act to have such a consequence or are reckless as to whether it will have such consequences.
It is also a criminal offence to be equipped for locking on under section 2.

Section 3 Public Order Act 2023 – Causing Serious Disruption by Tunnelling[284]
It is a criminal offence if a person, without reasonable excuse, creates, or participates in the creation of, a tunnel where the creation or existence of

280. Section 1, Criminal Damage Act 1971, link
281. Section 137, Highways Act 1980, link
282. Section 68, Criminal Justice and Public Order Act 1994, link
283. 'Part 1 Section 1, Public Order Act 2023 link
284. Part 1 Section 3, Public Order Act 2023 link

the tunnel causes, or is capable of causing serious disruption to two or more individuals or an organisation (in a place other than a dwelling), and they intend the creation or existence of the tunnel to have a such consequences, or are reckless as to whether its creation or existence will have such consequences.

It is also a criminal offence, without reasonable excuse, to cause serious disruption by being present in a tunnel under section 4.

Section 6 Public Order Act 2023 - Obstructing Major Transport Works[285]

It is a criminal offence if a person, without reasonable excuse, obstructs the

a. setting out of the lines of major transport works or
b. the constructing or maintaining of major transport works, or
c. the taking of any steps reasonably necessary for the purposes of facilitating, or in connection with, the construction or maintenance of major transport works.

It is also a criminal offence if a person interferes with, moves or removes any apparatus which relates to the construction or maintenance of major transport works and belongs to a person involved with the transport works as defined under s6(5).

Section 7 Public Order Act 2023 – Interference with Use or Operation of Key National Infrastructure[286]

It is a criminal offence if a person, without reasonable excuse, does an act which interferes with the use or operation of key national infrastructure, and they intend that act to interfere, or are reckless as to whether it will interfere, with the use of or operation of the key national infrastructure.

The key national infrastructure is defined as:

a. road transport infrastructure,
b. rail infrastructure,
c. air transport infrastructure,
d. harbour infrastructure,
e. downstream oil infrastructure,
f. downstream gas infrastructure,
g. onshore oil and gas exploration and production infrastructure,
h. onshore electricity generation infrastructure, or
i. newspaper printing infrastructure.

Section 241 Trade Union and Labour Relations (Consolidation) Act

285. Part 1 Section 6, Public Order Act 2023 link
286. Part 1 Section 7, Public Order Act 2023, link

1992 – Intimidation or Annoyance by Violence or Otherwise[287]
It is a criminal offence for a person, with a view to compelling another person to abstain from doing or to do any act which that person has a legal right to do or abstain from doing, to use violence to or intimidate that person or his spouse, civil partner or children, or to injure his property.

A person guilty of this offence may be subjected to a six-month term of imprisonment, or a fine, or both.

Legislation relating to protests around Parliament:

Section 143 Police Reform & Social Responsibility Act 2011 – Prohibited Activities[288]
It is prohibited, among other activities defined in s143(2), to obstruct, by the use of any item or otherwise, the passage of a vehicle of any description into or out of an entrance into or exit from the Parliamentary Estate, where that entrance or exit is within, or adjoins, the Palace of Westminster controlled area.

It is also prohibited to use amplified noise equipment, including but not limited to loudspeakers and loudhailers, in the controlled area.

A constable who reasonably believes a person is doing, or is about to do, a prohibited activity can direct someone to cease this prohibited activity – if the person refuses they are guilty of a summary offence and liable to a fine.

287. Section 241, Trade Union and Labour Relations (Consolidation) Act 1992, link
288. Section 143, Police Reform and Social Responsibility Act 2011, link

Annex B: Key cases relating to protest

Case	CS v Germany [1988] (Application no. 13858/88) at [2], link
Background	The applicant participated in demonstrations in front of US military barracks in Germany, in protest against nuclear armament. The applicant and others blocked the road to the barracks, preventing military cars from using the road for several minutes. The police ordered the demonstrators three times to leave the road. The applicant was carried away when she did not comply. The applicant was convicted of unlawful coercion under s240 of the German Criminal Code. The applicant appealed the conviction on various grounds, including the argument that her conviction violated her Article 11 right.
Judgment	The ECtHR made clear that protests which have violent intentions do not fall under the protection of Article 11. The ECtHR found that in this case, the applicant had not been actively violent, thus her Article 11 rights were engaged. However, the ECtHR ultimately dismissed the appeal, holding that the interference with her Article 11 right was justified and necessary in a democratic society. By blocking the road the applicant caused more obstruction than would normally arise from the exercise of her Article 11 right. Her conviction was a proportionate interference with Article 11 in light of the public interest in the prevention of disorder.

Case	Steel and Others v UK [1999] (Application No. 24838/94), link
Background	The case concerned three separate events and five applicants: (i) disruption of a grouse shoot; (ii) attempts to disrupt motorway building works; and (iii) a group handing out leaflets outside an arms sale. Each applicant was convicted of various offences under UK law. The applicants appealed their police detention and convictions, each on various grounds, including the argument that the action against them violated their Article 10 and 11 rights.

Judgment	The ECtHR found all these actions could constitute a form of symbolic speech and therefore fell under the protection of Article 10. The ECtHR found that the interference with the applicants' Article 10 rights in the case of (i) and (ii) was justified and necessary in a democratic society. The applicants took part in activity physically obstructing the lawful activities of others and were persistent in doing so. The interference was proportionate to the need to prevent disorder and protect the rights of others. The ECtHR found that the interference with the applicants' Article 10 rights in the case of (iii) was a violation of the Convention. The court concluded there had been no threat to disorder at all by the applicants' activities. Their removal and convictions were disproportionate to the need to prevent disorder and protect the rights of others. Having considered Article 10, the court did not find it necessary to consider the applicants' claims under Article 11.

Case	Balçik v Turkey [2007] (Application no. 25/02), link
Background	Police in Istanbul received intelligence of a group's intention to gather in the city, read a press notice and block the tram line – in protest against the prison system. The group gathered and the police asked the applicants to disperse, informing them that the demonstration was unlawful as they had not submitted an advance notice to the authorities. The applicants refused to obey and were arrested after around 30 minutes of demonstration. Allegedly, truncheons and tear-gas were also used against the applicants. Among other arguments, the applicants claimed that the police intervention violated their Article 9, 10 and 11 rights.
Judgment	The ECtHR considered that this complaint should be examined from the standpoint of Article 11 alone. The court declared the arrest and detention of the applicants to be violation of their Article 11 right. The court found that there was 'no evidence to suggest that the group presented a danger to public order, apart from possibly blocking the tram line' and were 'struck by the authorities' impatience in seeking to end the demonstration'. The police action was disproportionate to the need to prevent disorder.

Case	Primov v Russia [2014] (Application no. 17391/06), link
Background	A direct administration in Russia refused to allow the applicant's demonstration, the applicants alleged this was a violation of their Article 10 and 11 rights.

Judgment	The ECtHR held there had been a violation of Article 11 in respect of the impossibility of the applicants to demonstrate. More significantly for this report, the court held that 'although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of its substance…The appropriate 'degree of tolerance' cannot be defined in abstracto: the Court must look at the particular circumstances of the case'.

Case	Kudrevičius and Others v. Lithuania [2015] (Application no. 37553/05), link
Background	The applicants were involved in a farmers' demonstration in front of the Lithuanian Parliament in protest about the state of the agricultural sector. The applicants were involved in blocking the three major roads of the country. The police claimed they had not received prior official notification of the demonstrators' intention to block the roads. The applicants were convicted for rioting offences under Lithuanian law. The applicants alleged their convictions violated their Article 10 and 11 rights.
Judgment	The ECtHR recognised that intentional disruption of traffic was not an uncommon occurrence in the exercise of freedom of assembly but that such disruption is not at the core of Article 11, therefore intentionally disrupting public life would have implications for any assessment of the proportionality of action against the protestor. The applicants had broken the conditions of their demonstration by blocking the highways and the applicants were aware that this would create significant inconvenience for users of the roads. The court also considered the fact that the ensuing delays on the roads lasted for more than 48 hours. The court held that criminal proceedings against the protestors in this case did not constitute a violation of the Convention. The convictions were proportionate to the need to prevent disorder and protect the rights of others. A further important aspect of this decision is the consideration by the court that, where protest is disruptive to public life, the state has a wider margin of appreciation in taking action against these protests

Case	Handzhiyski v Bulgaria [2021] (Application no. 10783/14), link
Background	The applicant was convicted of minor hooliganism under Bulgarian law after placing a Santa Claus cap on the head of a statute of a political figure, along with a sack at its base. The acts were committed in protest against the government. The applicant alleged that this conviction was a violation of his Article 10 right.
Judgment	Importantly, the ECtHR considered that proof of the ingredients of an offence does not automatically render a conviction proportionate under the Convention. However, the court also implies that, in the case of physical damage to public monuments, proof of the ingredients of the offence can be taken as sufficiently addressing the proportionality of the conviction with the Convention, without the need for a fact specific assessment. The ECtHR held here that no physical damage had been made to the property and thus the proportionality of the conviction did need to be specifically assessed, considering the precise nature of the act, the intention behind it, and the message sought to be conveyed. On the facts at hand, the ECtHR held there had been a violation with the applicant's Article 10 rights – there was no physical damage and the applicant only intended to protest against the government of the day, he did not intend to express any contempt or deep disdain toward the historical figure represented by the statute or cause upset to others. The conviction was not necessary in a democratic society.

Case	Genov v. Bulgaria [2022] (Application no. 52358/15), link
Background	The applicants were convicted for hooliganism under Bulgarian law after spray-painting a public monument in protest against a government chiefly supported by the Bulgarian Socialist (former Communist) Party. The applicants alleged that this conviction was a violation of their Article 10 right.
Judgment	The ECtHR suggests that the proportionality of the conviction with the applicants' Convention rights could not be assumed simply because there is physical damage, there must be irreversible or serious physical damage for this assumption to be made. The court found the convictions to be in violation of the Convention. It could not be said that the applicants' act caused serious or irreversible damage, or that the removing of the paint required significant resources. Nor was the act vulgar or gratuitously offensive. It was meant to criticise the government of the day, it did not intend to express disdain for deep seated social values, in contrast too, for instance, the desecration of tombstones. The convictions were not necessary in a democratic society.

Case	City of London v Samede [2012] EWCA Civ 160, link
Background	The local authority sought injunctions requiring the removal of an 'Occupy London' camp set up outside St Paul's Cathedral for more than 2 months. The protestors argued this would be in violation of their Article 10 and 11 rights.
Judgment	The Court of Appeal held that determining the limits to Article 10 and 11 was fact sensitive, dependent on factors such as the extent to which the protest breached domestic law, the protest's duration and the extent of the interference with the rights of others. Although Articles 10 and 11 were engaged, the court found it was difficult to see how these could ever prevail over the property rights of the landowner, particularly when the occupation was continuous, prolonged and also significantly interfering with the rights of the general public. An injunction would not violate the Convention.

Case	*Wri*ght v Commissioner of Police for the Metropolis [2013] EWHC 2739 (QB), link
Background	The police, concerned about insufficient police presence, contained a group of protestors outside a building being visited by the Israeli President. The protestors were contained for little over an hour. The applicant, among other claims, claimed that his containment was a violation of his Article 5, 10 and 11 rights.
Judgment	The High Court held that although Articles 10 and 11 were interfered with, this interference was proportionate and lawful since it was minimal and the Convention rights must yield in light of the strong public interest. There was no violation of the Convention.

Case	R (Hicks) v Commissioner of Police of the Metropolis [2017] UKSC 9, link
Background	During the wedding of the (then) Duke and Duchess of Cambridge, the police arrested protestors for a period of 2.5 to 5.5 hours, before releasing them without charge once the wedding was over. The applicants claimed this arrest and containment was a violation of Articles 5, 10 and 11.
Judgment	The Supreme Court held that an appreciation of the reality and practical implications of the police being able to perform their duty to protect lives and property was central to the test of proportionality. The arrests constituted a lawful and reasonable limitation of the Convention rights; the ability of the police to perform their duty would be severely hampered if, where there is insufficient time to give warning, they could not lawfully detain a person for a relatively short time. There was no violation of the Convention.

Case	Birmingham City Council v Afsar [2019] EWHC 3217, link
Background	For seven months, there had been regular protests outside a primary school from groups who objected to the school's curriculum in relation to same-sex relationships. The local authority applied for an injunction to restrict these protests. The protestors claimed this would be a violation of their Article 10 and 11 rights.
Judgment	The High Court found that although the protestors' Convention rights were interfered with, this interference was proportionate given the right of the children to access their education, and the Article 8 rights of the staff and local residents. The court explained that the level of noise generated by the protest was 'clearly excessive' and that whilst 'in a democratic society protest must be allowed…that does not carry with it a right repeatedly to cause distress to primary school children by aggressive shouting through megaphones…or to inflict months of distress on teachers and local residents, causing anxiety to the staff, and leading some residents to consider selling up their homes'. There was no violation of the Convention in granting an injunction.

Case	DPP v Ziegler [2021] UKSC 23, link
Background	This case concerned protests outside an arms fair at the Excel Centre, London. All four defendants lay in the middle of the carriageway approaching the Excel Centre, locking their arms onto a lock box designed to make disassembly, removal and arrest more difficult. The police arrested the four defendants soon after arrival, however it took 90 minutes to remove them, and the lock boxes, from the carriageway. The defendants were charged with wilful obstruction of the highway (s137 Highways Act 1980), being sentenced to a conditional discharge of 12 months after the case reached the High Court. The four defendants appealed their convictions, arguing it was in violation of their Article 10 and 11 rights. The key question was whether deliberate physical obstructive conduct as part of protest was capable of constituting the 'lawful excuse' defence contained in s137(1) Highways Act 1980.

Judgment	The Supreme Court held that the protestors could have a 'lawful excuse' if the interference with their Article 10 and 11 rights (specifically, the conviction) was disproportionate – interpreting the offence so as to be compatible with the Convention, under s3 HRA 1998. However, unlike the Divisional Court, the Supreme Court ruled that '[wilful obstruction of the highway] even with an effect that is more than de minimis does not automatically lead to the conclusion that any interference with the protesters' Articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case (emphasis added)'; significantly, this means protestors could argue a 'lawful excuse' defence even when their wilful obstruction of the highway is more than de minimis and actively (and intentionally) preventing others from using the highway and accessing public spaces. The court went on to find that, in this case, the prosecution had failed to prove the conviction was proportionate, and thus 'necessary in a democratic society'. The court considered factors including: the location of the protest, the duration, the degree to which the land was occupied and the extent of the actual interference with the rights of others. The court found: that although the carriageway was obstructed there was an alternative route of access to the Centre; that the obstruction for 90 minutes was not of a significant duration and; that it was important to accord relevance to the fact that the protest concerned a 'serious matter of public concern'. The appeals were granted and the convictions were found to be a violation of the defendants' Articles 10 and 11 rights.

Case	R(Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605, link
Background	The applicants in this case challenged the government regulations made in response to Covid-19 – making a claim for judicial review. They argued the regulations imposed restrictions on civil liberties which were unlawful on a number of grounds, including that they violated a number of Convention rights (including Articles 10 and 11).
Judgment	Ultimately the Court of Appeal found the regulations to be lawful. However, the significant aspect of this case for this report is that, when considering Articles 10 and 11 in particular, the Court of Appeal indicated that protests in breach of the lockdown regulations may be protected by the 'reasonable excuse' defence set out in the regulations.

Case	Leigh v Commissioner of the Metropolitan Police [2022] EWHC 527 (Admin), link
Background	The case arose after a vigil for Sarah Everard during lockdown. Although not directly concerned with the police action during the vigil or any criminal penalties imposed, the court provided guidance on such issues.

Judgment	The High Court accepted that the deliberate omission from the lockdown regulations of any express exception for protest provided a clear legislative steer that greater weight should be attached to the protection of health and less weight to Articles 10 and 11. Despite this, the court continued to apply Ziegler, emphasising that protestors in breach of the regulations could still argue the 'reasonable excuse' defence if the interference with their Convention rights was disproportionate, and stated that the need for a fact-specific proportionality test remained – public authorities were not entitled to assume that any gathering during a pandemic would pose a serious risk to public health, particularly if this gathering was for the purposes of protest on a political issue.

Case	The Colston Four Trial (2022). A description of the trial can be found in AG Reference (Colston Four) [2022] EWCA Crim 1259, link
Background	This case concerned four defendants charged with criminal damage to property under s1 Criminal Damage Act 1971. During a protest in Bristol, prompted by the murder of George Floyd, the defendants used rope to topple a statue of Edward Colston (a 17th century philanthropist and governor of The Royal African Company, a key company involved in the horrors of the Atlantic slave trade), before rolling it down into the harbour, causing damage to the statue. Section 1(2) of the Criminal Damage Act 1971 provides a 'lawful excuse' defence.
Judgment	The trial court followed the Ziegler line of reasoning when giving its instructions to the jury, specifying to jurors that protestors can be protected by the 'lawful excuse' defence if the conviction for criminal damage would be a disproportionate interference with their Article 10 and 11 rights - this was despite the damage to the statute being 'clearly significant' and the fact that the circumstances in which the damage was inflicted 'did not involve peaceful protest'. In the guidance to the jury, the trial judge subdivided the defence of 'lawful excuse' into several defences; the use of reasonable force to prevent a crime, the honest belief in the consent of the person(s) to whom the statue belonged and, finally, whether the conviction would be a disproportionate interference with the defendant's human rights. The jury found the defendants not guilty. Since, rightly, juries do not have to provide reasoning for their decisions, there is no mechanism for discovering the basis on which a jury has acquitted.

Case	AG Reference (Colston Four) [2022] EWCA Crim 1259 at [122], link
Background	After the Colston Four Trial (2022) above, the Attorney General referred the case to the Court of Appeal on several points of law, including the applicability of the 'lawful excuse' defence contained in the Criminal Damage Act 1971. (The reference by the Attorney General, rightly, was incapable of resulting in the jury's decision to acquit being overturned).
Judgment	The High Court accepted that the deliberate omission from The Court of Appeal declined to follow Ziegler's reasoning for the offence of criminal damage and concluded that 'conviction for causing significant damage to property during protest would fall outside the protection of the Convention either because the conduct in question was violent or not peaceful, alternatively even if theoretically peaceful prosecution and conviction would clearly be proportionate' (emphasis added); thus, protest causing significant damage to property is not protected by the 'lawful excuse' defence. The court however did recognise that the offence of criminal damage can encompass minor and temporary damage, and held as a result that proof of the ingredients of the offence is not always 'sufficient to justify any conviction as a proportionate interference' with Articles 10 and 11; in cases of minor damage, a fact-specific proportionality assessment is still required, however the court emphasised that 'the circumstances in which such as assessment would be needed are very limited'. On the facts, the Court of Appeal held that the 'circumstances in which the statue was damaged did not involve peaceful protest but the toppling of the statute was violent and the damage to the statue was significant'. The court thus concluded 'that the prosecution was correct in its submission at the abuse hearing that the conduct in question fell outside the protection of the Convention', meaning the 'lawful excuse' defence could not be proven on the grounds of the conviction being disproportionate with the Convention.

Case	DPP v Cuciurean [2022] EWHC 736 (Admin), link
Background	The case concerned a protestor convicted of aggravated trespass under s68 Criminal Justice and Public Order Act 1994, after digging and occupying a tunnel on private land in protest against the construction of the HS2 rail line. The protestor was then acquitted. The prosecution appealed against the acquittal, arguing that even if Articles 10 and 11 were engaged, a fact-specific assessment of proportionality is not required. And even if it were, conviction would be found proportionate.

Judgment	The High Court distinguished the case in hand from Ziegler, since the criminal offence relevant to Ziegler (wilful obstruction of a highway) contains a 'lawful excuse' defence whilst the offence of aggravated trespass does not. The court held that when someone is accused of an offence which does not encompass a 'lawful excuse' defence, then the proportionality of the conviction against the Convention rights does not necessarily have to be explicitly considered – to apply Ziegler to offences without a 'lawful excuse' defence would have 'wrenched [Ziegler] completely out of context'. The question in such a scenario instead turns on the nature of the offence; for some offences, simply establishing the ingredients of the offence may be enough to satisfy proportionality with Convention rights, in which case Ziegler will not apply. In the case of aggravated trespass, the High Court held that it was not necessary to assess the proportionality of the conviction with the defendant's Convention rights once the ingredients of the offence were proven. This was since inherent in the offence is the legitimate aim of protecting private property rights under Article 1 Protocol 1 ECHR, and trespassing on private property is not at the heart of protest. The appeal was allowed and the case remitted to Magistrate's Court with a direction to convict

Case	R v Brown [2022] EWCA Crim 6, link
Background	The case concerned a climate activist who superglued their hand to a commercial aircraft at London City Airport causing: the flight to be cancelled; the aircraft to be taken out of commission; cancellation of four other flights by the aircraft in question; delays on six other flights; the removal of two other aircrafts and; closure of an entire aircraft taxiway. The defendant appealed his conviction for the offence of public nuisance (for which he was sentenced to 12 months imprisonment). Among other arguments, the appellant sought to rely on Ziegler, arguing that his conviction was a disproportionate interference with his Convention rights.
Judgment	The Court of Appeal denied the appellant's appeal and did not accept that Ziegler simply applies to all public order offences, explaining that: 'the exact ramifications of the decision of the Supreme Court will call for exploration in other cases where they arise directly in any of three jurisdictions of the United Kingdom and possibly by the Supreme Court once more'. Though the appellant's sentence was reduced to four months, in light of the context of peaceful protest and his visual impairment, the court emphasised that 'the right to peaceful protest should not lead to tolerance of behaviour that is far removed from conveying a strongly held conviction but instead seeks to cause chaos and as much harm as possible to members of the public'.

Case	Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32, link
Background	The Northern Irish High Court considered and rejected a challenge to proposed Northern Ireland legislation restricting anti-abortion protests (including seemingly peaceful ones) in the vicinity of abortion facilities on the grounds that the restrictions were incompatible with Convention rights. The legislation was refered to the Supreme Court for a decision on its consistency with the Convention. There was a lengthy discussion of Ziegler and Cuciurean in the Supreme Court judgment.

Judgment	Some of what was said by the Court was welcome, including broad approval for the approach in Cuciurean to cases where the elements of the offence do not include a "reasonable" or "lawful" excuse defence. However its usefulness as a "correction" or clarification of the law as it stands after Ziegler remains limited, to say the least. In the NI case the court answered five questions arising out of the existing jurisprudence to be found in Ziegler and Cuciurean as follows (paras 63 to 67). 1. in a case where the exercise of rights under articles 9 to 11 of the Convention is raised by the defendant to a criminal interference with those rights, there does not always have to be an assessment of proportionality on the facts of the individual case. 2. Where an offence is liable to give rise to an interference with the exercise of rights under articles 9 to 11 of the Convention, it is not necessary for the ingredients of the offence in themselves to ensure the compatibility of a conviction with Convention rights under articles 9 to 11. It is not necessary for the ingredients of the offence to include (or be interpreted as including) the absence of reasonable or lawful excuse in order for a conviction to be compatible with the Convention rights. 3. It is possible for the ingredients of an offence in themselves to ensure the compatibility of a conviction with the Convention rights under articles 9 to 11. 4. An assessment of proportionality is not a question of fact, and so is appealable as a matter of law. 5. It is incorrect to assume that an assessment of proportionality in criminal proceedings must necessarily be carried out by the body responsible for determining the facts at the trial of the offence. There are two main reasons why these answers are an unsatisfactory basis for any assumption that the law as it stood after Ziegler has been satisfactorily clarified or settled. First, and most straightforwardly, the Court's views in the NI case lack sufficient unequivocal authority to create a stable new understanding of what the law requires In the NI case, the grounds of challenge originated in devolution legislation – and so the case had been brought as an abstract challenge to proposed legislative provisions in advance of their enactment and so by reference to their potential application in future, hypothetical circumstances. It was not, like Ziegler, a case about actual, past events. The importance of that distinction was, however expressly recognised by the Court in the NI case; and it went on to accept that the existing law required greater deference for legislative choices in cases involving the abstract review of legislation than in cases like Ziegler and Cuciurean, where there is a dispute about actual past events. Similar issues, involving the judicial review of legislation, rather than of actual events, are also justiciable throughout the UK under the HRA and represent a regrettable intrusion into the legislative process and an unwarranted interference with the finality of legislative decision making.

Annex C: An in-depth examination of the case law affecting protest

The following section of the report focuses on how the courts, both European and domestic, approach the so-called 'right to protest', how this approach has changed over the last 20 years, the current issues with the courts' reasoning, and whether the UK is in line with the approach of the European Court of Human Rights ('ECtHR').

Like the police, the judiciary through UK case law has, at times, prioritised a misunderstood concept of the 'right to protest'. The case law of the ECtHR can often appear uncertain and in flux, nevertheless, the ECtHR has made clear that there is no unqualified 'right to protest' in whichever way one wishes to convey their political message, especially if this brings (intentional) disruption and obstruction to other's lives – reflecting that balance and limitation are inherent features of Articles 10 and 11 in the first place. Despite this, in recent years the UK courts have seemingly adopted an unduly permissive approach to protest, which does not aptly appreciate the limitations inherent to Articles 10 and 11, at the expense of the public's rights, wellbeing and ability to go about their daily lives. This was seen particularly in the case of *Ziegler [2021]* and the cases which followed, the results of which suggest that when a protestor is prosecuted for a public order offence, proving the basic ingredients of the offence is not enough to ensure the proportionality of the conviction with Articles 10 and 11, *even* when the disruption caused is more than de minimis or is intentional. This makes it harder to convict deliberately disruptive protestors. Even with more recent cases reining in the impact of *Ziegler [2021]*, issues remain.

In a broader sense, the case law on protest can also be unpredictable. The proportionality test employed when courts determine the balance between different Convention rights is highly fact sensitive. Likewise, determining what level of disruption or damage inflicted by protest is serious enough to fall outside the protection of the Convention is a difficult exercise and again involves highly fact-specific considerations.

Although, as discussed above in Section 2 of this report, this legal framework does not fully permit the police to take an approach which entirely protects the 'rights' of protestors at the cost of the 'rights' of others, it does create considerable uncertainty for the police making arrests – particularly for the offence of wilful obstruction to the highway.

More significantly however, this uncertain and unduly permissive legal regime poses particular issues when it comes to the *prosecution and conviction* of disruptive protestors. Therefore, the legal framework is in urgent need of reform, for which Policy Exchange makes two key recommendations, set out below.

i. UK Domestic Case Law: Prior to the Human Rights Act 1998

The UK has long been home to protest movements. As Lord Hoffmann states, protest and civil disobedience have 'a long and honourable history in this country…[and] It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind'[289]. However, there has historically always been a strong sense of nuanced balance between protestors and the public - that only a certain level of disruption caused by protest will be tolerated, and that the courts will take a firm approach when protestors cross the line. Indeed, Lord Hoffmann goes on to summarise this attitude;

> *'But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account'.* [290]

The case law preceding the enactment of the Human Rights Act 1998 demonstrates a firm and appropriately balanced approach taken to disruptive or obstructive protest. In *Hubbard v Pitt* [1976][291], the majority of the High Court held that, de minimis apart, a stationary demonstration on the highway is necessarily a public nuisance. Lord Denning, in dissent, argued against this, stating that 'so long as good order is maintained, the right to demonstrate must be preserved' [178]. The primacy of the public's interest was confirmed again by Lord Irvine in *DPP v Jones* [1999][292], who stated that 'any "reasonable or usual" mode of using the highway is lawful, provided it is not inconsistent with the general public's primary right to use the highway for purpose of passage and repassage'.

ii. Protest and the European Convention on Human Rights & Human Rights Act 1998

The relevant Convention rights:

Despite colloquial references to 'the right to protest', no such right exists explicitly under the Human Rights Act 1998 (HRA), or the European Convention on Human Rights (ECHR) on which the HRA is based. The key rights applicable to protestors are

- Article 11: the right to freedom of peaceful assembly and

289. *R v Jones* [2006] UKHL 16 at [89], link
290. Ibid.
291. *Hubbard v Pitt* [1976] Q.B. 142, link
292. *DPP v Jones* [1999] UKHL 5, link

association.
- Article 10: the right to freedom of expression.

Courts will often consider these rights alongside each other, resulting in the bundle of rights commonly referred to as the 'right to protest'.[293]

Other rights which can be of particular relevance to protest include Article 9: the right to freedom of thought, conscience and religion, Article 5: the right to liberty and security of person, and Article 6: the right to fair trial.

These rights are incorporated into UK domestic law through s1(1)(a) HRA 1998. Under s3 of the Human Rights Act 1998, so far as is possible to do so, legislation must be read and given effect to in a way which is compatible with Convention rights. In the context of this report, this duty is especially relevant for criminal offences related to protest which, since the introduction of the Human Rights Act 1998 in October 2000, must now be read in a manner compatible with Convention rights, even if they were enacted before the HRA 1998. Under section 6(1) of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right**,** unless primary legislation has the effect that it cannot act otherwise or it is acting to give effect to, or to enforce, incompatible primary legislation.

The qualified nature of Convention rights:

Articles 10 and 11 are not absolute rights and do not serve as unqualified protection for protestors.

Fundamentally, these rights only apply to 'peaceful' assembly. Furthermore, by Articles 10(2) and 11(2), these freedoms may be subject to limitation and interference from public authorities as prescribed by law which are 'necessary in a democratic society in the interests of … national security…. public safety…for the prevention of disorder or crime… for the protection of the reputation or rights of others'.[294]

Once it has been determined that there has been an interference with an individual's Convention rights by a public authority, the court assesses if this interference is justified, by evaluating whether the interference is prescribed by law, in pursuance of a legitimate aim and necessary in a democratic society.[295] As will be seen below, the common approach of the courts in assessing the necessity in a democratic society is the test of proportionality – balancing the individual's Convention rights against the interests and rights of the public, in light of the nature of the protest and its impact on wider society. This assessment of proportionality has had significant consequences in the cases of more obstructive and/or destructive protests, which have a greater impact on the public; the focus of the following section will be on the case law surrounding such protests.

A further limitation on the section 6 unlawfulness of conduct by a public authority is contained in subsection 2 of that section. Section 6(2) declares that the public authority duty under section 6(1) does not apply if (a) as the result of one or more provisions of primary legislation, the

293. See for example, *Ezelin v France* [1992] 14 EHRR 362 at [37]: 'Article 11 must also be considered in the light of Article 10'. Link

294. The key 'rights of others' applicable during a protest include, Articles 10 and 11 (as set out above), Article 8: the right to respect for private and family life, Article 1 of Protocol 1: the right to peaceful enjoyment of property, Article 9: freedom of thought, conscience and religion and Article 17: protection of abuse of rights. The wording of Article 17, which protects 'any of the rights and freedoms set forth herein', suggests that perhaps other rights beyond the Convention, for example the public right of way, are also relevant, a suggestion echoed in the Strasbourg case law discussed below.

295. See for example, *Vyerentsov v. Ukraine* [2013] (Application No 20372/11), at [51], link

authority could not have acted differently, or; (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. This acts to further restrict the operation of Articles 10 and 11 in UK law.

As is clear, protestors (like everyone else) are only entitled to their suitably limited rights, the Convention rights provide the right to expression or assembly only to the extent that the State has not reasonably forbidden the relevant acts of speech or assembly, which it is entitled to do for the variety of reasons specified in the ECHR.

In *Nicklinson* [2014][296], Lord Hughes, provides a clear explanation of the inherently limited nature of the qualified Convention rights using Article 8 (the Right to Respect for Private and Family Life) as an example:

> *'The better view is that the fundamental right is to what article 8.1 actually speaks of - namely respect for private and family life. Whether there is a right to do the particular thing under consideration depends on whether the State is or is not justified in prohibiting it, or placing conditions upon it, and that in turn depends on whether the State's rules meet the requirements of article 8.2. To take a simple example unconnected with the present appeals, the consumption of drugs - whether for reasons of health, pain relief, athletic performance or simple recreation - may well be an aspect of private life within the reach of article 8.1. But it does not follow that there is a fundamental right to take cannabis or steroids, ecstasy or cocaine, still less for others to supply such drugs to would-be users. The great majority of European States prohibit at least some drug usage in the general public interest, and such prohibition is generally more than fully justified under article 8.2..'*

In this way, the true essence of the right to freedom of expression and the right to peaceful assembly is what is left over once one applies Articles 10(2) and 11(2) respectively, once the State has imposed reasonable limitations on such speech and assembly. Reasonable limitations by the State on Articles 10 and 11 are not de facto violations of any 'right to protest', rather an integral part of the qualified nature of these Convention rights, and should be framed as such. As will be seen, this is an understanding of the Convention which seems to be missing from some of the more recent decisions of the UK courts concerning disruptive protests.

iii. Strasbourg Case Law

Under section 2(1) of the Human Rights Act 1998, UK domestic courts must take into account judgments of the European Court of Human Rights (ECtHR).

Disruptive protest and the meaning of 'peaceful' assembly:

The ECtHR has emphasised on many occasions that Article 11 is concerned only with 'peaceful' actions. Whilst the exact meaning of 'peaceful' seems to be somewhat contentious, the court has made clear it does not cover

296. *R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent)*, [2014] UKSC 38, at [263], link

overtly violent actions. For example, in *CS v Germany* [1988], the court states 'the notion of "peaceful assembly" does not…cover a demonstration where the organisers and participants have violent intentions which result in public disorder'.[297] Indeed, this recognition of the importance of the intention of the protestor serves to support Policy Exchange's recommendation of an intention-based approach to convictions of protestors set out below. The court has also suggested that an individual does not lose the protection of their Convention rights if they remain peaceful, despite the wider protest turning violent – another reference to the importance of the intention of individual protestors.[298]

However, the ECtHR has also suggested that more disruptive protest can still fall under the protection of Article 10. This was the suggestion made in *Steel and Others v UK* [1999].[299] The case concerned three separate events: (i) disruption of a grouse shoot; (ii) attempts to disrupt motorway building works; and (iii) a group handing out leaflets outside an arms sale. The ECtHR found these actions could constitute a form of symbolic speech within Article 10, even in the cases of (i) and (ii) which involved physically impeding other's activities [143]. Nevertheless, the court maintained an overall strict approach to disruptive protest, finding at paragraph [164] that the convictions in (i) and (ii) were not a disproportionate limitation of Article 10. The convictions in (iii) were found to be disproportionate [166].

Moving into the 21st century, some cases suggest the ECtHR is growing more lenient as to what is considered 'peaceful' assembly and thus under the protection of Article 11, by increasingly accepting more disruptive action under the definition of 'peaceful'. In *Balçik v Turkey* [2007][299] it was alleged that protestors had blocked a tram line. Rather than considering this as symbolic speech under Article 10, or even excluding it from the protection of the Convention all together, the court explicitly dealt with this action under Article 11 [36], stating that disruptive protest of this kind was not an act of violence and that a certain level of tolerance towards disruptive protest is required so as to not deprive the Convention of all substance [52]. The court went on to declare the arrest and detention of the protestors to be an unjustified interference with their Article 11 rights, finding that there was 'no evidence to suggest that the group presented a danger to public order, *apart from possibly blocking the tram line* (emphasis added)' and being 'struck by the authorities' impatience in seeking to end the demonstration' (the authorities intervened after approximately 30 minutes of the start of the rally) [51].

This attitude of tolerance towards disruption was echoed more recently in *Primov v Russia* [2014].[301] The ECtHR reiterated that 'although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of its substance…The appropriate 'degree of tolerance' cannot be defined in abstracto: the Court must look at the particular

297. *CS v Germany* [1988] (Application no. 13858/88) at [2], link
298. *Ezelin v France* [1992] 14 EHRR 362 at [53], link
299. Steel and Others v UK [1999] (Application No. 24838/94), link
300. Balçik v Turkey [2007] (Application no. 25/02), link
301. *Primov v Russia* [2014] (Application no. 17391/06), link

circumstances of the case' [145].

The margin of appreciation for state action against disruptive protests: When examining whether restrictions on Articles 10 and 11 can be considered necessary in a democratic society, the Contracting States to the ECHR enjoy a certain margin of appreciation[302] – the idea being that these Contracting States have a better understanding of the wider needs of their public than the court in Strasbourg. In *Kudrevičius and Others v Lithuania* [2015][303], this margin of appreciation was held to be wider where the protests are more disruptive or obstructive to public life. This case concerned substantial disruption of three major roads in Lithuania. The ECtHR recognised that intentional disruption of traffic was not an uncommon occurrence in the exercise of freedom of assembly but that such disruption is not at the core of Article 11 and intentionality may thus have implications for any assessment of proportionality [97]. The court held that criminal proceedings against the protestors in this case did not constitute a violation of the Convention. Once again, the ECtHR's recognition of the importance of protestor intention here provides support for Policy Exchange's below recommendation of an intention-based approach to protestor convictions.

Nevertheless, the ECtHR has also made clear that this margin of appreciation is not unlimited, and that Contracting States do not enjoy an unrestricted discretion to derogate from Articles 10 and 11, for the purposes set out in 10(2) and 11(2), in any way they deem appropriate. See, for example, the comments at [91] in *Ekrem Can and Others v Turkey* [2022].[304] In the case of protest, this means states cannot take any measure they consider appropriate against protestors disturbing, for example, public order, public safety and the rights and freedoms of others. These limits to the state's margin of appreciation are held to be particularly relevant if the measures in question are criminal convictions or penalties. In *Perineck v Switzerland* [2016][305], the ECtHR stated that a criminal conviction is one of the most serious forms of interference with the Convention and calls for stricter scrutiny, and further ruled that 'it is not normally sufficient' that the conviction is imposed, without a consideration of proportionality with Convention rights, simply because the ingredients of the offence are made out [275].

Nonetheless, this is not to say that a fact-specific assessment of proportionality with Convention rights is required in every case involving a criminal conviction – importantly, the ECtHR only stated it is 'normally' impermissible for proportionality with Convention rights to not be directly considered, suggesting there are offences of sufficient severity such that, if proven, no further fact-specific consideration of the proportionality with Convention rights is necessary.[306] Indeed, the court states itself that what is required is 'that it was necessary in the *specific circumstances*' (emphasis added) [275].

This is a viewpoint echoed in the earlier case of *Animal Defenders International v UK* [2013][307] which discusses how the process of the legislature enacting

302. See for example, *Barraco v France* [2009], (Application No 31684/05), link
303. *Kudrevičius and Others v. Lithuania* [2015] (Application no. 37553/05), link
304. *Ekrem Can and Others v Turkey* [2022] (Application no. 10613/10), link
305. *Perineck v Switzerland* [2016] (Application no. 27510/08), link
306. This interpretation of the ECtHR's judgment is made by the UK Court of Appeal in *AG Reference (Colston Four)* [2022] EWCA Crim 1259 at [70], link
307. *Animal Defenders International v UK* [2013] (Application no. 48876/08), link

a criminal offence will very often involve detailed considerations of the proportionality of the offence with the Convention, implying that, in a trial court, further proportionality assessments are unnecessary in all cases if the offence is proven [114-115].

Protests resulting in criminal damage:

Beyond disruption to public order, the ECtHR has also considered cases involving protest that results in damage to property. Once again, the court reasons that member states must show some tolerance towards damage and applies a fact-specific approach as to whether action falls under the protection of the Convention. However, importantly, the court again suggests that, for some public order offences, when a certain threshold of disruption or damage is met, no fact-specific assessment of the proportionality of a protestor's conviction with their Convention rights is required.

The case of *Handzhiyski v Bulgaria* [2021][308] involved the offence of 'minor hooliganism' stemming from protest, but has important implications for cases of criminal damage. The applicant had been convicted of 'minor hooliganism' for placing a Santa Claus cap on the head of the statue of a political figure, along with a sack at its base, in protest against the government. Following their interpretation of *Perineck v Switzerland* [2016], the ECtHR reiterated that proof of the ingredients of an offence does not automatically render a conviction proportionate under the Convention, particularly so where the offence committed was minor. However, the court then states that:

> *'Measures, including proportionate sanctions, designed to dissuade acts which can destroy [public monuments] or damage their physical appearance may therefore be regarded as "necessary in a democratic society", however legitimate the motives which may have inspired such acts. In a democratic society governed by the rule of law, debates about the fate of a public monument must be resolved through the appropriate legal channels rather than by covert or violent means." (emphasis added)* [53]

These dicta seem to imply that in the case of criminal damage to public monuments, proof of the ingredients of the offence can be taken as sufficiently addressing the proportionality of the conviction with the Convention, without the need for a fact-specific assessment. This suggests that prosecuting those who physically damage monuments and statues during protest is proportionate.[309]

The question then turns to what qualifies as 'physical damage'. In *Handzhiyski* [2021], the court held that the applicant did not physically damage the statue [54]. In cases where no physical damage is made to the property, 'the question whether it can be "necessary in a democratic society" to impose sanctions…becomes more nuanced. In such situations, the precise nature of the act, the intention behind it, and the message sought to be conveyed by it cannot be matters of indifference' [55][310].

308. *Handzhiyski v Bulgaria* [2021] (Application no. 10783/14), link

309. This interpretation of the ECtHR's judgment is made by the UK Court of Appeal in *AG Reference (Colston Four)* [2022] EWCA Crim 1259 at [75], link

310. On the facts at hand, the ECtHR held there had been a violation with the applicant's Article 10 rights – there was no physical damage and the applicant only intended to protest against the government of the day, he did not intend to express any contempt or deep disdain toward the historical figure represented by the statute or cause upset to others. See paragraphs [53-59].

As in *Kudrevičius and Others v. Lithuania* [2015], the ECtHR's reference here to the importance of a protestor's intention is in line with Policy Exchange's recommendation for a legislative framework focused on intention, outlined below.

This line of reasoning has then been discussed, for example, in *Genov v. Bulgaria* [2022].[311] The applicants in question had been convicted for hooliganism after spray-painting a public monument in political protest. However, here, the ECtHR seems to go beyond merely assessing whether physical damage was caused and evaluates the extent of this physical damage. The court concluded that the action caused some inconvenience and expense to eliminate but did not cause irreversible harm to the monument [78]. Thus, the issue of whether it was 'necessary in a democratic society' to convict the applicant had to be assessed in light of context-specific factors [81]. In other words, the proportionality of the conviction with the applicants' Convention rights could not be assumed simply because there is physical damage, there must be irreversible or serious physical damage for this assumption to be made[312]. Nevertheless, the core message – that a protestor's conviction does not *always* demand an explicit, fact-specific assessment of proportionality with the Convention – remains intact.

Conclusion

The ECtHR case law can, at times, present uncertainty as to the exact boundaries of the protective sphere of Articles 10 and 11 and the reasoning of the courts can be unpredictable due to the fact-sensitive nature of the proportionality test. As will be seen below, similarities exist in UK domestic case law – indeed Ziegler [2021] relies heavily on ECtHR case law.

Nevertheless, one thing the ECtHR case law does make clear is that, although some tolerance is required of Contracting States in regard to disruption caused by protest, there is not a so called 'right to protest' or destruction – our democratic rights do not allow us to, without any constraint, engage in destruction or disruption to get a political message across and the constraints are real and substantial. Instead, the court requires a more nuanced discussion of the right to *peaceful* assembly and the right to freedom of expression, in balance with the rights and interests of the public. Of particular importance is the suggestion that, for some public order offences or when a certain threshold of damage and disruption is met, the conviction of a protestor can be deemed proportionate with the Convention, without a direct consideration of proportionality in the specific circumstances. This comes along with the suggestion that the intentional damage and disruption from protestors should be treated particularly seriously. This nuanced discussion is something the UK courts seem to have forgotten at points over recent years.

311. *Genov v. Bulgaria* [2022] (Application no. 52358/15), link

312. On the facts at hand, the ECtHR found that since the damage was not serious or irreversible, a fact-specific proportionality assessment regarding the conviction was required. The court found the convictions were a violation of Article 10. It could not be said that the applicants' act caused serious or irreversible damage, or that the removing of the paint required significant resources. Nor was the act vulgar or gratuitously offensive. It was meant to criticise the government of the day, it did not intend to express disdain for deep seated social values, in contrast too, for instance, the desecration of tombstones. See paragraphs [80-84].

iv. UK Domestic Case Law: Since the Human Rights Act 1998

After the introduction of the HRA 1998 in October 2000, initially, the courts' approach remained aware of the nuanced balance between protestors and the public, taking a fairly strict approach towards disruptive or obstructive protest.[313]

There are a series of cases, concerned with police action and injunctions, which did not unduly prioritise a 'right to protest' and contained discussions which properly recognised the limitations inherent in the very essence of Articles 10 and 11:

- *City of London v Samede* [2012][314]: The local authority sought injunctions requiring the removal of an 'Occupy London' camp set up outside St Paul's Cathedral. The Court of Appeal held that determining the limits to Article 10 and 11 was fact sensitive, dependent on factors such as the extent to which the protest breached domestic law, the protest's duration and the extent of the interference with the rights of others [39]. Although Articles 10 and 11 were engaged, the court found it was difficult to see how these could ever prevail over the property rights of the landowner, particularly when the occupation was continuous, prolonged (over 2 months) and also significantly interfering with the rights of the general public [49].
- *Wright v Commissioner of Police for the Metropolis* [2013][315]: The police, concerned about insufficient police presence, contained a group of protestors outside a building being visited by the Israeli President. The protestors were contained for little over an hour. The High Court held that although Articles 10 and 11 were interfered with, this interference was proportionate and lawful since it was minimal and the Convention rights must yield in light of the strong public interest [60-70].
- *R (Hicks) v Commissioner of Police of the Metropolis* [2017][316]: During the wedding of the (then) Duke and Duchess of Cambridge, the police arrested protestors for a period of 2.5 to 5.5 hours, before releasing them without charge once the wedding was over. This case concerned Article 5 alongside Articles 11 and 10. The Supreme Court held that an appreciation of the reality and practical implications of the police being able to perform their duty to protect lives and property was central to the test of proportionality [30]. The arrests constituted a lawful and reasonable limitation of the Convention rights; the ability of the police to perform their duty would be severely hampered if, where there is insufficient time to give warning, they could not lawfully detain a person for a relatively short time [31]. This decision was upheld by the ECtHR in *Eiseman-Renyard v UK* [2019].[317]
- *Birmingham City Council v Afsar* [2019][318]: For seven months, there had been regular protests outside a primary school from groups who objected to the school's curriculum in relation to same-sex

313. With the exception of cases such as *R (on the application of Laporte) v Chief Constable of the Gloucestershire Constabulary* [2006] UKHL 55, link. In this case, police, fearing a breach of the peace, forcibly returned protestors to London away from the scene of the protest, after finding items such as shields, crash helmets and safety flares on their coaches. The House of Lords found this police action to be disproportionate with the claimants' Convention rights – the action should not have been taken until a breach of the peace was imminent.
314. *City of London v Samede* [2012] EWCA Civ 160, link.
315. *Wright v Commissioner of Police for the Metropolis* [2013] EWHC 2739 (QB), link
316. *R (Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9, link
317. *Eiseman-Renyard v UK* [2019] (Application no. 57884/17), link
318. *Birmingham City Council v Afsar* [2019] EWHC 3217, link

relationships. The local authority applied for an injunction to restrict these protests. The High Court found that although the protestors' Convention rights were interfered with [115], this interference was proportionate given the right of the children to access their education, and the Article 8 rights of the staff and local residents. The court explained that the level of noise generated by the protest was 'clearly excessive' [120] and that whilst 'in a democratic society protest must be allowed…that does not carry with it a right repeatedly to cause distress to primary school children by aggressive shouting through megaphones…or to inflict months of distress on teachers and local residents, causing anxiety to the staff, and leading some residents to consider selling up their homes' [114].

***Ziegler [2021] and beyond**:*

Turning however to protest cases concerning criminal convictions/ penalties imposed on protestors, the approach of domestic courts seems, in recent years, to place more weight on Articles 10 and 11 than previously thought appropriate and seems to somewhat neglect the qualified nature of these rights and to create considerable uncertainty for the practical application and enforcement of the law.

DPP v Ziegler [2021]:

The pivotal case of *DPP v Ziegler* [2021][319] concerned protests outside an arms fair at the Excel Centre, London. All four defendants lay in the middle of the carriageway approaching the Excel Centre, locking their arms onto a lock box designed to make disassembly, removal and arrest more difficult. The police arrested the four defendants soon after arrival, however it took 90 minutes to remove them, and the lock boxes, from the carriageway. The defendants were charged with wilful obstruction of the highway (section 137 of the Highways Act 1980), being sentenced to a conditional discharge of 12 months after the case reached the High Court. The four defendants appealed their conviction, arguing it was in violation of their Article 10 and 11 rights. The key question was whether deliberate physical obstructive conduct as part of protest was capable of constituting the 'lawful excuse' defence contained in section 137(1) of the Highways Act 1980[320].

The district judge dismissed the charges on the grounds that the prosecution had failed to prove the charges to be necessary in a democratic society, in light of the defendants' Convention rights.

The Divisional Court allowed the appeal and remitted the cases for sentencing. The court held that the availability of a 'lawful excuse' defence

319. *DPP v Ziegler* [2021] UKSC 23, link
320. *DPP v Zielger*, [2021] UKSC 23 at [7], link

depends on the level of interference with the protestors Convention rights [62]. If the interference with the protestors' Article 10 and 11 rights was disproportionate and thus unjustified, the protestor will, by definition, have a 'lawful excuse' defence. Conversely, if the interference was proportionate and thus justified, the protestor will not have a 'lawful excuse' defence. The court went on to find that the charges imposed on the defendants were proportionate with their Convention rights since 'the ability of other members of the public to go about their lawful business was completely prevented by the physical conduct of these defendants for a significant period of time' [117]. Importantly, this judgment implies that where deliberately obstructive conduct by protestors has a more than de minimis impact on the public, it is assumed that interference with the protestors' Convention rights (including conviction) is proportionate, thus barring the protestors from arguing a 'lawful excuse' defence. This distinction of deliberately or intentionally obstructive conduct sits in line with Policy Exchange's recommendations for an intention-based approach to protestor convictions, as outlined below.

The Supreme Court took a different approach.[321] The court still held that the protestors could have a 'lawful excuse' if the interference with their Article 10 and 11 rights (specifically, the conviction) was disproportionate – interpreting the offence so as to be compatible with the Convention, under section 3 of the Human Rights Act 1998. However, unlike the Divisional Court, the Supreme Court ruled that '[wilful obstruction of the highway] even with an effect that is *more than de minimis* does not automatically lead to the conclusion that any interference with the protesters' articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case (emphasis added)' [70]; significantly, this means protestors could argue a 'lawful excuse' defence even when their wilful obstruction of the highway is more than de minimis and actively (and intentionally) preventing others from using the highway and accessing public spaces. This represents a significant shift to a more "pro-protest" approach from the UK courts which makes it harder to convict deliberately disruptive protestors, as well as representing a possible distortion of Articles 10 and 11 into a wider 'right to protest' which permits protestors to use far more disruptive means to make their political message, without regard to the impact on others.

The court went on to find that, in this case, the prosecution had failed to prove the conviction was proportionate, and thus 'necessary in a democratic society', with the defendants' Convention rights [87]. The court considered factors including: the location of the protest, the duration, the degree to which the land was occupied and the extent of the actual interference with the rights of others [72]. The court found: that although the carriageway was obstructed there was an alternative route of access to the Centre [81]; that the obstruction for 90 minutes was not of a significant duration [81] and; that it was important to accord relevance

321. The Supreme Court was composed of Lord Hodge, Lady Arden, Lord Sales, Lord Hamblen, Lord Stephens.

to the fact that the protest concerned a 'serious matter of public concern' [82] (this last factor potentially encouraging the courts and the police to make political and value judgments about the protests).

Lord Sales and Lord Hodge adopted a different analysis. They agreed that wilful obstruction which is more than de minimis is capable of protection by the 'lawful excuse' defence [154], however it is for the court to assess the proportionality of the police action (arrest and removal) with the Convention rights, not the proportionality of the conviction [126] – this is significant since the police may have had less information available to them than the courts and have to make decisions under greater pressure. Ultimately however, on the facts, they found this police action to be disproportionate.

It is also worth briefly assessing which ECtHR cases the Supreme Court considered in their reasoning. The court makes considerable reference to cases such as Kudrevičius v Lithuania [2016], Primov v Russia [2014] and Steel and Others v UK [1999] – all of which are discussed above. However, it is notable that the court fails to consider a significant line of ECtHR jurisprudence suggesting that a court does not always have to directly consider the proportionality of a conviction, where an assessment of such proportionality is inherent in proof of the ingredients of the offence or when a certain threshold (e.g. the severity or intention) of disruption caused by the protest is met. This includes: dicta from Perineck v Switzerland [2016] (discussed above); Animal Defenders International [2013][322] (discussed above); dicta in Handzhiyski v Bulgaria [2021][323] on criminal damage (discussed above) and how this might apply to obstruction of the highway and; Barraco v France [2009] (discussed below). By failing to consider key ECtHR judgments, the court in Ziegler [2021] puts the UK's approach to protest out of line with that of the ECtHR.

Irrespective of how the law impacts on the conduct and outcome of any subsequent criminal proceedings Ziegler [2021] may also lead some police officers to be hesitant as to whether it is lawful for them to arrest protestors who obstruct the highways, or at least to arrest them before significant disruption has been caused. The law in this area therefore requires urgent clarification. However, in the meantime it bears noting that while the Ziegler [2021] judgment clearly creates uncertainty, it does not necessarily make it unlawful for police to act swiftly in relation to protestors who block the roads. The judgment did not directly address which particular protests will constitute an offence under section 137 of the Highways Act 1980 nor did it directly address whether an arrest by the police in these circumstances is unlawful. Whilst the police must not defy the Supreme Court, they should also not overinterpret the judgment as preventing them from ever making arrests of protestors obstructing the highway. This is particularly so given that the standard for making an arrest, reasonable suspicion of the offence, is lower than the standard for conviction.

322. The implications of *Animal Defenders International v UK* were however well considered by the High Court in *DPP v Cuciurean*, discussed below.

323. Although it should be noted that this case was decided on the 6th April 2021, which was 3 months after Ziegler was initially heard (12th January 2021) and just over 2 months before Ziegler was decided (25th June 2021), this may play a role in the court's failure to consider it.

Furthermore, given the recent judicial limitations of *Ziegler* [2021] to the offence of obstruction of the highway (discussed below), it is important the police do not refrain from arresting protestors for other offences, this includes when protestors cause criminal damage, especially if this damage is significant.

The impact of Ziegler [2021] on other public order offences:

The *Ziegler* [2021] line of reasoning has since spilled over into cases relating to other criminal offences beyond the obstruction of the highway, particularly other offences with a lawful or reasonable excuse defence. This can in part be linked to the dicta of Lady Arden in *Ziegler* [2021] who stated that 'the Human Rights Act 1998 has had a substantial effect on public order offences and made it important not to approach them with any preconception as to what is or is not lawful' [92]. However, the absence of preconceptions about what is or is not an offence is not a privilege conferred on those required to enforce the law in real time on the streets.

This spillover can be seen, for example, in cases concerning breaches of the Covid-19 Regulations and penalties (such as fines) imposed for such breaches. In *Dolan* [2020][324], the Court of Appeal indicated that protests in breach of the lockdown regulations may be protected by the 'reasonable excuse' defence set out in the regulations[325]. This reasoning was applied by the High Court in *Leigh* [2022][326]. The case arose after a vigil for Sarah Everard during lockdown. Although not directly concerned with the police action during the vigil or any criminal penalties imposed, the court provided guidance on such issues. The court accepted that the deliberate omission from the lockdown regulations of any express exception for protest provided a clear legislative steer that greater weight should be attached to the protection of health and less weight to Articles 10 and 11. Despite this, the court continued to apply *Ziegler* [2021], emphasising that protestors in breach of the regulations could still argue the 'reasonable excuse' defence if the interference with their Convention rights was disproportionate, and stated that the need for a fact-specific proportionality test remained: public authorities were not entitled to assume that any gathering during a pandemic would pose a serious risk to public health, particularly if this gathering was for the purposes of protest on a political issue [80]. This reasoning was followed in both *Bolton v Merseyside Police* [2022][327] and *Reissmann and Gallagher v Greater Manchester Police* [2022][328]; both cases concerned fixed penalties issued for protests in breach of Covid-19 Regulations and in both cases the charges were dropped by the prosecution, who accepted this interference as disproportionate with Articles 10 and 11 after the decision in *Leigh* [2022].

Another example of the spillover from *Ziegler* [2021] can be seen in cases concerning criminal damage caused during protest, in particular the 'Colston Four Trial' [2022].[329] This case concerned four defendants charged with criminal damage to property under s1 Criminal Damage Act 1971. During a protest in Bristol, prompted by the murder of George

324. *R(Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, link

325. The 'reasonable excuse' defence is found, for example, in *Regulation 10 of Coronavirus: The Health Protection (Coronavius, Restrictions) (All Tiers) (England) Regulations 2020*, link

326. *Leigh v Commissioner of the Metropolitan Police* [2022] EWHC 527 (Admin), link

327. *Bolton v Merseyside Police* [2022], cited by the British Institute of Human Rights, November 2022, link

328. *Reissmann and Gallagher v Greater Manchester Police* [2022], cited by the British Institute of Human Rights, November 2022, link

329. A description of the judgment of the Crown Court can be found in *AG Reference (Colston Four)* [2022] EWCA Crim 1259, link

Floyd in the United States of America, the defendants used rope to topple a statue of Edward Colston (a 17th century philanthropist and governor of The Royal African Company, a key company involved in the horrors of the Atlantic slave trade), before rolling it down into the harbour, causing damage to the statue. Section 1(2) of the Criminal Damage Act 1971 provides a 'lawful excuse' defence and once again, the Crown Court followed the *Ziegler* [2021] line of reasoning when giving its instructions to the jury, specifying to jurors that protestors can be protected by the 'lawful excuse' defence if the conviction for criminal damage would be a disproportionate interference with their Article 10 and 11 rights - this was despite the damage to the statute being 'clearly significant' and the fact that the circumstances in which the damage was inflicted 'did not involve peaceful protest'.[330] In the guidance to the jury, the trial judge subdivided the defence of 'lawful excuse' into several defences; the use of reasonable force to prevent a crime, the honest belief in the consent of the person(s) to whom the statue belonged and, finally, whether the conviction would be a disproportionate interference with the defendant's human rights. The jury found the defendants not guilty. Since, rightly, juries do not have to provide reasoning for their decisions, there is no mechanism for discovering the basis on which a jury has acquitted; however, a previous report by Policy Exchange questions whether the defence of lawful excuse was legally available and whether it was right to direct to the jury that it was, something that the Court of Appeal seems to at least partly agree with by allowing the Attorney General's reference on this case (see below) .[331]

Resistance to Ziegler [2021]:

Despite the wide effects of the *Ziegler* [2021] reasoning, there has been growing judicial concern about the soundness of the decision, resulting in efforts to limit its application beyond the offence of wilful obstruction to the highway.

AG Reference (Colston Four):

After the *Colston Four Trial* [2022], the Attorney General referred the case to the Court of Appeal on several points of law, including the applicability of the 'lawful excuse' defence contained in the Criminal Damage Act 1971.[332] The reference by the Attorney General, rightly, was incapable of resulting in the jury's decision to acquit being overturned).

After examining the ECtHR case law (including *Perineck v Switzerland* [2016] and *Handzhiyski v Bulgaria* [2021], discussed above), the Court of Appeal declined to follow *Ziegler's* [2021] reasoning for the offence of criminal damage and concluded that 'conviction for causing *significant damage* to property during protest would fall outside the protection of the Convention either because the conduct in question was violent or not peaceful, alternatively even if theoretically peaceful prosecution and conviction would clearly be proportionate' (emphasis added) [115]; thus, protest causing significant damage to property is not protected by the 'lawful excuse' defence. The court however did recognise that the

330. Ibid.
331. C. Wide, Did the Colston trial go wrong?, Policy Exchange, 13th April 2022, link
332. *AG Reference (Colston Four)* [2022] EWCA Crim 1259 link

offence of criminal damage can encompass minor and temporary damage, and held as a result that proof of the ingredients of the offence is not always 'sufficient to justify any conviction as a proportionate interference' with Articles 10 and 11; in cases of minor damage, a fact-specific proportionality assessment is still required, however the court emphasised that 'the circumstances in which such as assessment would be needed are very limited' [116].

On the facts of the *Colston Four Trial*, the Court of Appeal held that the 'circumstances in which the statue was damaged did not involve peaceful protest but the toppling of the statute was violent and the damage to the statue was significant' [122]. The court thus concluded 'that the prosecution was correct in its submission at the abuse hearing that the conduct in question fell outside the protection of the Convention', meaning the 'lawful excuse' defence could not be proven on the grounds of the conviction being disproportionate with the Convention [123].

Whilst going some way to rein in the effect of *Ziegler* [2021] in relation to criminal damage in the context of protest, the 'lawful excuse' defence appears to remain available for less than significant damage. This also means cases will turn on the severity of the damage caused to the property, when it may not always be clear what constitutes 'significant damage'. There also remains unresolved legal uncertainty as to whether the threshold for 'significant damage' differs according to whether the damage is to private or public property.

DPP v Cuciurean [2022]:

The court has declined to extend the *Ziegler* [2021] reasoning to the criminal offence of aggravated trespass, seemingly along with other criminal offences which do not contain a 'lawful excuse' defence. The case of *DPP v Cuciurean* [2022][333] concerned a protestor convicted of aggravated trespass under section 68 Criminal Justice and Public Order Act 1994, after digging and occupying a tunnel on private land in protest against the construction of the HS2 rail line. The protestor was then acquitted, and the prosecution appealed against the acquittal arguing that even if Articles 10 and 11 were engaged, a fact-specific assessment of proportionality was not required (and, even if it were, the conviction would be proportionate).

The High Court distinguished the case in hand from *Ziegler, [2021]* since the criminal offence relevant to *Ziegler [2021]* (wilful obstruction of a highway) contains a 'lawful excuse' defence whilst the offence of aggravated trespass does not. The court held that when someone is accused of an offence which does not encompass a 'lawful excuse' defence, then the proportionality of the conviction against the Convention rights does not *necessarily* have to be explicitly considered – to apply *Ziegler* [2021] to offences without a 'lawful excuse' defence would have 'wrenched [*Ziegler*] completely out of context' [68]. The question in such a scenario instead turns on the nature of the offence; for some offences, simply establishing the ingredients of the offence may be enough to satisfy proportionality

333. *DPP v Cuciurean* [2022] EWHC 736 (Admin), link

with Convention rights, in which case *Ziegler* [2021] will not apply [69,70]. In coming to this decision, unlike the Supreme Court in *Ziegler* [2021], the High Court considered the implications of the ECtHR case of *Animal Defenders International v UK* [2013] (discussed above) and any potential duty of the courts to act compatibly with the Convention under section 6 of the Human Rights Act 1998, holding that 'we do not accept that section 6 imposes a freestanding obligation on a court to be satisfied that a conviction would be a proportionate interference with Convention rights if that is not an ingredient of a statutory offence. This suggestion would make it impossible for the legislature to enact a general measure which satisfactorily addresses proportionality itself, to make case-by-case assessment unnecessary' [71].

In the case of aggravated trespass, the High Court held that it was not necessary to assess the proportionality of the conviction with the defendant's Convention rights once the ingredients of the offence were proven. This was since inherent in the offence is the legitimate aim of protecting private property rights under Article 1 Protocol 1 ECHR [74], and trespassing on private property is not at the heart of protest [76]. The appeal was allowed, and the case remitted to Magistrate's Court with a direction to convict.

The High Court in Cuciurean goes some way to rein in Ziegler [2021], preventing the reasoning of the Supreme Court from automatically applying to those offences without a 'lawful excuse' defence. However, it is less clear for which of these offences, the mere proof of the ingredients of the offence is enough to disapply Ziegler [2021] altogether – this would likely require an offence-by-offence assessment in the courts or intervention from Parliament. The court also fails to make clear whether not having a 'lawful excuse' defence fully prevents section 3 of the Human Rights Act from being triggered or simply makes the application of section 3 to the offence more difficult. If section 3 is not applicable then, for the offences where Ziegler [2021] would still apply, this raises the question of whether it must be assumed that the only remedy available is a declaration of incompatibility of the legislation with the Convention under section 4 of the Human Rights Act 1998, rather than any consideration of the lawfulness of the conviction itself.

The rejection by the High Court of the idea that section 6 of the HRA imposes a free-standing obligation on the courts not to convict does suggest that it thought that subsection (2) of section 6 of the Human Rights Act 1998 requires the court to convict where the elements of the offence are made out and there is no "excuse defence. If that is right even where the terms of the offence are incompatible with Convention rights a declaration of incompatibility would be the only remedy in that case. However, that is not necessarily an authoritative decision about the confusing references to section 6 in the judgments of the Supreme Court in Ziegler and the waters are further muddied, as discussed below, by what is said about section 6 in the Supreme Court judgement in Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] It

also, perhaps, leaves open the question whether different considerations would apply at the arrest or prosecution stage, where there is an element of discretion and it would be paragraph (b) of section 6(2) that would be applicable (enforcing etc. incompatible primary legislation), rather than paragraph (a) (duty to act in accordance with incompatible primary legislation). And, of course, different considerations might also apply in the case of offences created by subordinate legislation."

R v Brown [2022]:

In *R v Brown* [2022][334], once again, the Court of Appeal made clear its reluctance to apply *Ziegler* beyond the offence of wilful obstruction of the highway and expressed concern over the broad interpretations of *Ziegler* [2021];

> *'The decision appears to have been misunderstood by some as immunising peaceful protesters from arrest and from the operation of the criminal law in broad circumstances, which on any view it does not'* [29].

The case concerned a climate activist who had superglued their hand to a commercial aircraft at London City Airport causing: the flight to be cancelled; the aircraft to be taken out of commission; the cancellation of four other flights by the aircraft in question; delays to six other flights; the removal of two other aircrafts; and the closure of an entire aircraft taxiway. The defendant appealed his conviction for the offence of public nuisance (for which he was sentenced to 12 months imprisonment). Among other arguments, the appellant sought to rely on *Ziegler* [2021], arguing that his conviction was a disproportionate interference with his Convention rights – referring specifically to the dicta of Lady Arden at [96] (noted above). The Court of Appeal denied the appellant's argument and did not accept that *Ziegler* [2021] simply applies to all public order offences, explaining that: 'the exact ramifications of the decision of the Supreme Court will call for exploration in other cases where they arise directly in any of three jurisdictions of the United Kingdom and possibly by the Supreme Court once more.' [29].Though the appellant's sentence was reduced to four months, in light of the context of peaceful protest and his visual impairment [71], the court emphasised that 'the right to peaceful protest should not lead to tolerance of behaviour that is far removed from conveying a strongly held conviction but instead seeks to cause chaos and as much harm as possible to members of the public' [68]. The phrase 'seeks to cause' places the focus on what the protestor desires and aims for, providing further judicial support for the importance of individual protestor intention and for Policy Exchange's recommendation for an intention-based approach to protestor convictions, outlined below.

Once again, the Court of Appeal works to rein in *Ziegler* [2021] by clarifying it does not apply to every public order offence associated with protest – not every conviction of a protestor will necessarily need to be explicitly proven proportionate with the Convention rights. However, as with *DPP v Cuciueran* [2022], much turns on the nature of the offence and

334. *R v Brown* [2022] EWCA Crim 6, link

extent of the harm caused. It is not entirely clear, beyond wilful obstruction to the highway, to which further offences *Ziegler* [2021] might apply, if any, or, if *Ziegler* [2021] does apply, what level of harm is required from the protest before a conviction will be held to be proportionate.

Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022]

There was a lengthy discussion of *Ziegler* and *Cuciurean* in the Supreme Court judgment in *Reference by the Attorney General for* Northern *Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 ("the NI case").

In the NI case, the Court considered and rejected a challenge to proposed Northern Ireland legislation restricting anti-abortion protests (including seemingly peaceful ones) in the vicinity of abortion facilities on the grounds that the restrictions were incompatible with Convention rights.

Some of what was said by the Court was welcome, including broad approval for the approach in Cuciurean to cases where the elements of the offence do not include a "reasonable" or "lawful" excuse defence. However its usefulness as a "correction" or clarification of the law as it stands after *Ziegler* remains limited, to say the least.

In the NI case the court answered five questions arising out of the existing jurisprudence to be found in *Ziegler* and *Cuciurean* as follows (paras 63 to 67).

- First, in a case where the exercise of rights under articles 9 to 11 of the Convention is raised by the defendant to a criminal interference with those rights, there does not always have to be an assessment of proportionality on the facts of the individual case.
- Secondly, where an offence is liable to give rise to an interference with the exercise of rights under articles 9 to 11 of the Convention, it is not necessary for the ingredients of the offence in themselves to ensure the compatibility of a conviction with Convention rights under articles 9 to 11. It is not necessary for the ingredients of the offence to include (or be interpreted as including) the absence of reasonable or lawful excuse in order for a conviction to be compatible with the Convention rights.
- Thirdly, it is possible for the ingredients of an offence in themselves to ensure the compatibility of a conviction with the Convention rights under articles 9 to 11.
- Fourthly, an assessment of proportionality is not a question of fact, and so is appealable as a matter of law.
- Fifth, it is incorrect to assume that an assessment of proportionality in criminal proceedings must necessarily be carried out by the body responsible for determining the facts at the trial of the offence.

There are two main reasons why these answers are an unsatisfactory basis for any assumption that the law as it stood after *Ziegler* has been

satisfactorily clarified or settled.

First, and most straightforwardly, the Court's views in the NI case lack sufficient unequivocal authority to create a stable new *understanding* of what the law requires In the NI case, the grounds of challenge originated in devolution legislation – and so the case had been brought as an abstract challenge to proposed legislative provisions in advance of their enactment and so by reference to their potential application in future, hypothetical circumstances. It was not, like Ziegler, a case about actual, past events.

The importance of that distinction was, however expressly recognised by the Court in the NI case; and it went on to accept that the existing law required greater deference for legislative choices in cases involving the abstract review of legislation than in cases like *Ziegler* and *Cuciurean*, where there is a dispute about actual past events. Similar issues, involving the judicial review of legislation, rather than of actual events, are also justiciable throughout the UK under the HRA and represent a regrettable intrusion into the legislative process and an unwarranted interference with the finality of legislative decision making.

But the recognition by the Court for how the NI case was fundamentally different from *Ziegler* and *Cuciurean*– taken together with the fact that the Court also said that it was not the occasion to carry out a "comprehensive review" of those cases because only "certain parts" of the earlier judgments were relevant to the issues before the Court (para 20) - considerably diminishes the practical relevance of the NI case to how the reasoning in *Ziegler* should be applied in future, particularly in cases about actual, past protest where the relevant offence is one subject to a "reasonable" or "lawful" excuse defence.

The absence of binding authority for whatever elaborations of the *Ziegler* reasoning there are in the NI case - because it is not clear which (if any) of those elaborations form the basis for the conclusion in the very different sort of case before the Court – means that any reliance on them has to be qualified accordingly, and to take account of the fact that they are inevitably vulnerable to future judicial elucidation or modification. The law remains correspondingly unpredictable.

That instability in the law is aggravated by the second reason why the NI case cannot be regarded as making any significant improvement to the situation created by *Ziegler*.

The second reason is the absence of sufficient legal clarity from the substance of what was actually said in the NI case about the earlier jurisprudence.

Re-reading the answers to the five questions set out above will quickly cause the reader to realise that they pose many more questions than they answer. It may, for example be a good thing that the test of "proportionality" is a legal question that can be worked out in a consistent way by appellate courts, but it is no help at all, so far as practical policing is concerned, if that is a form of clarification carried out piecemeal in retrospect after a number of visits to the Supreme Court or if it relies on a level of complexity or subtlety that is capable of being understood only

there.

The approach in the NI case is a paradigm for both the inadequacy of judicial correction as a remedy for judicial error and its tendency to aggravate, rather than mitigate, legal uncertainty. In the absence of the exercise of the express power to overrule (which was not available here and is constitutionally questionable, particularly in cases involving statutory interpretation) judicial development of the law, or "correction" of judicial error, inevitably operates by assuming that both the "overruled" and the "overruling" decision can continue to be treated as correct. The NI case expressly suggests, in more than one place, that the Ziegler case has been "misunderstood", rather than that it took a wrong path. This technique then uses a more subtle analysis, as well as "distinguishing" techniques to narrow the impact of the "misunderstood" decision. It piles complexity on error without clearly abandoning the latter.

The qualifications in the NI case take just that form and that undermines any attempt to create legal certainty. The methodology of judicial self regulation can only work at all for improving the law if you accept the misconceived assumption that the principal function of law is to provide a mechanism for resolving disputes about past events, rather than as setting the context in which the subjects of the law (including government) plan and carry on their conduct.

In that connection, paragraph 53 of the judgment is a fine example of this process of identifying the scope for future complexity without resolving how to deal with it in practice the meantime. Underlining has been added to identify the words that particularly trigger further questions.

> "53. *It is important not to make the mistake of supposing that all offences can be placed into one of those categories, or to suppose that a reference to lawful or reasonable excuse in the definition of an offence necessarily means, in cases concerned with protests, that an assessment of proportionality can or should be carried out. The position is more nuanced than that.*"

A further lack of clarity also emerges from the way the judgment in the NI case deals with section 6 of the HRA, aggravating a similar level of confusion in some of the *Ziegler* judgments. There is an apparent assumption that the duty in section 6(1) of that Act has some sort of phantom, independent existence or effect outside the parameters set for it by section 6(2). Paragraph 56 of the judgment, though far from clear, implies that the phantom duty somehow requires judicial manipulation of the law to avoid a conviction in contravention of Convention rights even where all the elements of an offence have been proved beyond reasonable doubt in a criminal court. This disregards the fact that, in those circumstances, having no discretion or dispensing power not to convict, the court "could not act differently", has to convict and so is not subject to the duty in section 6(1) in the first place.

Finally, it has to be said, sadly, that any impact of the NI decision, as a useful "correction" of *Ziegler*, is further diminished by the reference by

Lord Reed in para 156 of the judgment to the fact that "some might think" it "ironical" that the unsuccessful opponents of the legislation – and so of the decriminalisation he describes as conferring a "right" to abortion – were bringing proceedings based on the "liberal values protected by the Convention". It is true that he does not expressly adopt that thought as his own or attribute it to the Court; but it is, to say the least, unfortunate that the judgment's conclusion refers, without the condemnation it deserves, to an argument implying that reliance on Convention rights should be restricted to those who are otherwise signed up to "liberal values". That can only further complicate any analysis of the NI case any cast extra doubt on the scope of any qualification of the *Ziegler* reasoning in the NI case.

So nothing in what was said the NI case judgment mitigates the principal, practical mischief created by the *Ziegler* decision – the way the complexity and uncertainty to which it gives rise create a level of legal unpredictability that results in a risk averse approach to policing protests that is detrimental to the interests of ordinary people going about their day to day lives.

What is needed is an unequivocal statement of the law that would enable those with responsibility for policing protests on the ground to have the confidence, in practice, to carry out their duties robustly enough properly to protect the wider public – and indeed for those protesting to be able clearly to identify the lines the law requires them not to cross.

A statutory correction not vulnerable to further challenge is the only effective remedy to that mischief.

Conclusion:

In the near quarter century since the Human Rights Act 1998 came into force, the domestic courts seem to have shifted to an excessively risk averse approach to protest, attaching more weight to the Article 10 and 11 rights of protestors than necessary, and arguably neglecting the rights and interests of the public as a result. Indeed, at the peak of this pro-protest approach - *Ziegler* [2021] and the cases which followed it – the domestic courts come dangerously close to a primacy of the 'the right to protest' where interference with Convention rights must always be justified on a case-by-case basis, rather than reasonable interference being recognised as an inherent element of the Convention rights. This approach makes it harder to convict deliberately disruptive protestors and comes at the expense of the public's rights, interests, health, and wellbeing. The better view is that protestors, like everyone else, are entitled to speak and assemble subject to any reasonable limitations by the State in order to protect, among other things, public order, public safety and the rights of others. It is important that reasonable limitations on Articles 10 and 11 by the State are not framed as de facto violations of a 'right to protest' – reasonable limitations are rather an integral part of the qualified nature of the Convention rights.

The above case law also places the UK somewhat out of line with the approach of the ECtHR. The UK courts seem to be unnecessarily adopting

an unduly permissive approach to protest when this is not obviously required to ensure compatibility with the approach of the ECtHR. The ECtHR as explained above, have made clear that the discussions surrounding Articles 10 and 11 must be more nuanced. This is particularly so in cases involving convictions of protesters, where the domestic courts have failed to consider key ECtHR judgments indicating that a fact-specific assessment of proportionality is not always required by the trial courts. In addition, this excessively risk averse approach also fails to sufficiently recognise the scope for inferring a stricter approach to protest in the UK legislation, an approach which is permissible considering the UK's wider margin of appreciation on such matters.

Whilst some admirable efforts have been made by the domestic courts to more appropriately follow the ECtHR jurisprudence, to rein in the *Ziegler* reasoning and the excessively lenient approach to protests, the issues are not fully resolved and indeed may not be without the intervention of legislation.

v. Key Features Drawn from the Case Law:

Across the approaches to protest seen at both international and domestic level, a number of key features of the case law can be established:

- The true essence of the right to freedom of expression and the right to peaceful assembly is what is left over having applied Articles 10(2) and 11(2) (which list legitimate reasons for the regulation of the exercise of speech and assembly, like public safety and national security) once the State has imposed reasonable limitations on such speech and assembly. Reasonable limitations by the State on Articles 10 and 11 are not de facto violations of any 'right to protest', rather they are an integral part of the very essence of the qualified nature of these Convention rights, and should be framed as such.
- In line with this idea, although at times the case law can be uncertain and in flux, the ECtHR often makes clear that there is no unqualified 'right to protest' in whatever way one wishes to convey their political message. Articles 10 and 11 are inherently limited and an internal characteristic of these rights is that they must be balanced against the rights of others as well as the public interest and public order. Protestors cannot cause unlimited disruption and destruction and then rely on their 'right to protest' to immunise them from punishment. The ECtHR also often suggests that *intentional* disruption or damage by protestors should also be taken particularly seriously.
- Common justifications for interference with Articles 10 and 11 include: the public need for major building works; the public's right to access to public spaces; a child's right to education; the Article 8 rights of others (to respect for private and family life) and; others' right to private property under Article 1 Protocol 1.

- Nevertheless, it is not clear that the courts have always aptly understood, or given enough significance too, the inherently qualified nature of the Convention rights. This is especially so in the UK, where the balance seems to have tipped to place undue weight on protestors' rights, prioritising a 'right to protest' and insisting interferences be assessed on a case-by-case basis as a result. This comes at the expense of the public's rights and wellbeing. In doing so, the UK has failed to consider key jurisprudence from the ECtHR, which has come at a high cost in terms of the clarity and predictability of the law.
- The case law concerning convictions of protestors for public order offences is particularly murky. The *Ziegler* [2021] line of reasoning suggests that merely proving the ingredients of the offence is not enough to ensure the proportionality of the conviction with the Convention. On the other hand, the ECtHR (in cases like *Pernick v Switzerland* [2013]) and domestic cases like *DPP v Cuciurean* [2022] suggest that for some offences, proof of the ingredients of the offence may be enough to ensure conviction is proportionate, particularly when the offence contains no reasonable/lawful excuse defence, thus implying convictions cannot be challenged themselves rather the legislation would need to be declared incompatible with the Convention under section 4 of the Human Rights Act 1998.
- The central test involved in these cases – that of proportionality – has also proven to be highly fact-specific, increasing the unpredictable nature of cases. It also risks creating uncertainty in the law for those charged with upholding and enforcing the law.
- What appears to be an attempt by the Supreme Court in *Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] to *"row back" from some of the more problematic implications of the earlier UK jurisprudence is not a reliable basis for assuming that UK law has been restored to a satisfactory state.*
- There is some uncertainty over what level of disruption and damage inflicted by protest falls under the protection of Articles 10 and 11, with one line of case law suggesting serious disruption/damage does not fall under the protection of the Convention; yet another line of case law suggesting it can in specific circumstances. It is also unclear where the line is drawn between serious and less than serious disruption/damage – emphasizing, once again, the fact-sensitive nature of cases.

vi. The Public Order Act 2023:

It is worth briefly noting that The Public Order Act 2023[335] goes some way in limiting the *Ziegler* line of reasoning. The Act introduces several new criminal offences such as locking-on, obstructing major transport works, causing serious disruption via tunnelling and interference with key national infrastructure.

335. Public Order Act 2023, link

The Act responds to the techniques deployed by protestors in recent years, which the Government termed "guerilla tactics used by a small minority of protestors [which] have caused a disproportionate impact on the hardworking majority seeking to go about their everyday lives".[336]

However, many of these offences continue to contain a reasonable excuse defence – leaving cases further open to the application of *Ziegler* via section 3 of the Human Rights Act 1998, something which Policy Exchange previously warned against.[337]

Many of these offences also continue to turn on the question of serious disruption and *Ziegler* [2021] suggests that even serious disruption may still fall under the protection of the Convention (and thus interference with serious disruption may still need to be proven proportionate with the defendant's Convention rights).

The term "serious disruption" is a relatively uncertain one. The Government attempted to provide certainty on the term for police and courts. In April 2023, using Henry VIII powers (which enable ministers to amend or repeat provisions in an Act of Parliament using secondary legislation) granted by Parliament under the Police, Crime, Sentencing and Courts Act 2022, the Home Secretary introduced regulations[338] defining "serious disruption" as disruption which was more than minor, for the purposes of police intervention in protest under the Public Order Act 1986.[339] In particular, this provided the police with increased certainty as to the level of disruption required in order for them to intervene.

However, in May 2024 in the case of *National Council for Civil Liberties v Secretary of State for the Home Department* [2024][340], the Divisional Court has held these regulations to be unlawful and ordered for them to be quashed. Four different grounds were argued by the pressure group Liberty (as the National Council for Civil Liberties is more commonly known) – the most important for the context of this report is the argument that the regulations were ultra vires – they were not made in proper accordance with the Henry VIII enabling power mentioned above. The Divisional Court agreed with this argument and held that in empowering the Home Secretary to clarify the meaning of "serious disruption", including by providing examples, the Henry VIII power did not authorise the substitution of the much lower threshold of "more than minor disruption". The Government has appealed this decision, with the Divisional Court suspending their quashing order until the appeal has been decided.

The Court was right to hold that the 2022 Act did not authorise the Home Secretary to make these regulations. Henry VIII clauses should be interpreted narrowly. However, there is no doubt that this creates an operational problem for the police who have been relying extensively on these regulations. In addition, hundreds of convictions that rely on these regulations may well prove to be unsafe.

If the decision of the Divisional Court is upheld (which, indeed, it should be) and the regulations are quashed, it is vital the new Government acts urgently with primary legislation (which is not vulnerable to quashing orders) to resolve the issues both *Ziegler* [2021] and the "serious

336. Home Office, Public Order Bill: factsheet, 30th August 2023, link

337. R. Ekins, P. Stott, D. Spencer (2022), *The 'Just Stop Oil' protests. A legal and policing quagmire'*, Policy Exchange, link

338. Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023, link

339. The 'Henry VIII' powers (powers enabling ministers to amend primary legislation through secondary legislation) declared that the Home Secretary could define any aspect of the term "serious disruption" or give examples of what is or is not serious disruption.

340. *National Council for Civil Liberties v Secretary of State for the Home Department* [2024] EWHC 1181 (Admin), link

disruption" threshold pose to police operations. Policy Exchange sets out its core recommendations for legislative change below.

However, until the appeal is decided, this standard for "serious disruption" – more than minor disruption – remains in place and, in the absence of any other statutory guidance, remains the most authoritative standard for the police to follow when deciding whether arrest a protestor.

vii. Recommendations

The law in this area is in need of reform, particularly that relating to the *Ziegler* line of reasoning and the thresholds for 'serious disruption'. Attempts to resolve these issues were sought through the recent Criminal Justice Bill[341], however the intervention of the 2024 General Election has meant that the next Government will be left to complete the task. An amendment to the Criminal Justice Bill had stated that a protestor has no "lawful or reasonable" excuse defence to public order offences if his actions cause "serious disruption", which is defined as hinderance of 'more than a minor degree' to the activities of others. This amendment, though doing some work to restrict *Ziegler* [2021] by reducing the opportunity for protestors to argue a 'lawful excuse' defence does not fully solve the problems at hand.

To provide further clarity in the law and re-establish a more appropriate balance between the rights of protestors and public order, public safety and the rights of others it is necessary to shift the focus away from the *level* of disruption or damage caused by a protestor to the individual protestor's *intention* in causing any disruption or damage.

Recommendation: The Government should clarify the legal position for public order offences by legislating for an express reversal of the judgment of the Supreme Court in the case of *DPP v Ziegler* [2021], regarding the offence of wilful obstruction to the highway. Legislation should make clear that no protestor can have a lawful excuse for obstructing the highway if he or she intends to obstruct, harass, inconvenience or harm others.

A draft amendment (to Highways Act 1980) to this effect might be:

> (1) Section 137 of the Highways Act 1980 is amended as follows.
>
> (2) After subsection (1C), insert –
>
> "(1D) A person has no lawful excuse wilfully to obstruct free passage along a highway if the obstruction —
>
> (a) is intended to intimidate, provoke, inconvenience or otherwise harm members of the public by interrupting or disrupting their freedom to use the highway or to carry on any other lawful activity;

341. House of Commons, Criminal Justice Bill, As Amended (Amendment Paper), 13th May 2024, link - for the amendment discussed above see amendment NC102.

> or
>
> (b) is designed to influence the government or public opinion by subjecting any person, or their property, to a risk, or increased risk, of loss or damage.
>
> (1E) It is immaterial that there are or may be other ex cuses or reasons for wilfully obstructing the highway or that the person's main purpose may be different.
>
> (1F) For the purposes of the Human Rights Act 1998, this section must be treated as necessary in a democratic society for the protection of the rights and freedoms of others."

Recommendation: The Government should legislate for a general reversal of the line of reasoning created by the Supreme Court case of *DPP v Ziegler [2021]*, with a view to public order offences that include a reasonable or lawful excuse defence – making clear that no protestor can have a lawful excuse to a charge of any public order offence if he or she intends to obstruct, harass, inconvenience or harm others.

A draft amendment in more general terms (which would apply, amongst other provisions, to the Public Order Act 2023, section 137 of the Highways Act 1980 and section 1 of the Criminal Damage Act 1971) might be:

> (1) This section applies to any offence that makes conduct unlawful unless there is an excuse for it and specifies either that the excuse must be a lawful excuse or that it must be a reasonable one.
>
> (2) A person has no excuse for the conduct if—
>
> > (a) it is intended to intimidate, provoke, inconvenience or otherwise harm members of the public by interrupting or disrupting their freedom to carry on a lawful activity;
> >
> > or
> >
> > (b) it is designed to influence the government or public opinion by subjecting any person, or their property, to a risk, or increased risk, of loss or damage.
>
> (3) It is immaterial that there are or may be other excuses or reasons for the conduct or that its main purpose may be different.
>
> (4) In this section "conduct" includes any act or omission;
>
> (5) For the purposes of the Human Rights Act 1998, this section must be treated as necessary in a democratic society for the pro-

tection of the rights and freedoms of others.

The focus on the intention of the protestor is key in these amendments. This draws a clear line between protest which causes some level disruption/damage as a side effect and protest which actively seeks to cause disruption/damage to public life and the rights of others. As noted above throughout the discussion of the case law, the intention of the protestor is often referenced as an important factor by the ECtHR, by other European Courts and by the Divisional Court's decision in Ziegler [2021].

By denying the lawful/reasonable excuse defence to protestors intending to cause harm or disruption, these provisions help to prevent the re-emergence in the case law of an excessively risk averse approach to protest which insists on a case-by-case assessment of proportionality of a conviction at the expense of the rights, safety, and wellbeing of others. Rather than approaching convictions with 'the right to protest' as a starting point, the above amendments ensure courts can more appropriately recognise the balance between protestors and public order/ others' freedoms, and the reasonable limitations on protest which are inherent in the very essence of the Convention rights.

Intention, unlike effect or consequences, can be tested individually. So, this approach also satisfactorily addresses the issue about the combined effect of the conduct of many protestors. Furthermore, focusing on intention does not make criminal liability turn on case-by-case assessment of fact sensitive terms such as "serious disruption".

Focusing on intention also ensures police officers will have greater protection from inappropriate accusations of wrongful arrest. It is harder to challenge the good faith view of a constable or prosecutor about whether someone has acted with intent to cause disruption (as this involves ascertaining the internal mental state of the police officer or prosecutor), than it is to challenge a view about whether undisputed consequences have crossed the legal threshold of a test of seriousness.

It should also be made clear on the face of the relevant Acts that the purposes of these provisions is to assert the UK margin of appreciation on Articles 10 and 11, and to engage in a dialogue with the ECtHR (as intended by the HRA). These provisions deploy the wording of the Convention not to disapply Convention rights, but rather to demonstrate what Parliament thinks those rights require in practice. Subsections (1F) and (5), respectively, make clear that as a matter of UK law the provisions strike the relevant balance for the purposes of Article 10(2) and 11(2).

viii. Other European Approaches to Protest

To complete this assessment of the legal regime on protest in the UK, it is worth considering some approaches from European countries who are also Contracting States to the ECHR. Although it must be borne in mind that, due to the wider scope for a state to exercise its margin of appreciation in the case of disruptive protest, these cases have only limited direct relevance to the UK.

In some of these cases, which involve convictions of disruptive protestors for various public order offences, the courts (and the legislation) consider coercive protest or protest *deliberately* going beyond the acceptable level of disruption. These references support Policy Exchange's proposed recommendation set out below – an approach based on the intention of the individual protestor.

France

An interesting comparison can be made with the French courts' approach to protest causing wilful obstruction of the highway in the case of *Barraco [2009]*.[342] This case concerned a French lorry driver who participated in a traffic-slowing operation in a protest against the French government. The lorry drivers drove along the motorway at 10kph, forming a rolling barricade across several lanes. The lorry driver was arrested by police and charged with the offence of obstructing the public highway. The first instance court in France held the defendant bore no criminal responsibility, finding that the traffic had been impeded in an acceptable manner, rather than completely blocking it.

The Lyons Court of Appeal set aside this judgment, taking a strict approach to disruptive protest and finding that the drivers had committed the offence of obstructing traffic on the public highway by deliberately placing their cars across the motorway for that purpose. It decided that the offence in question could not be justified by the right to strike (a constitutional right in France) or, more relevant to this paper, the right to peaceful assembly. The Court of Cassation dismissed the defendant's appeal – agreeing with the Lyons Court of Appeal.

The defendant then applied to the ECtHR[343], who agreed with the reasoning of the French Court of Cassation. As in similar cases above, the ECtHR acknowledged that any demonstration in a public place could cause some disruption as a side effect (distinct from disruption caused as an intended end to the protest) and considered that a certain tolerance was required of the authorities in such circumstances. Nevertheless, the ECtHR agreed with the French Court of Cassation that the offence could not be justified by Article 11, where serious disruption was caused. The ECtHR held there had been no violation of Article 11 observing that the complete blockage of motorway traffic went beyond the disruption inherent in any demonstration. Furthermore, the police had displayed a high level of tolerance, giving several warnings to protestors.

France has continued to adopt a strict approach to disruptive protest. For example, in June 2023, the French Government banned climate activism group 'SLT' after one of their protests turned into a violent clash between protestors and police, with 200 injured and two left in a coma[344]. However, the French Council of State (France's top administrative court) has since overturned the dissolution of the group, ruling that it had not provoked violence[345].

342. Barraco v France [2009] (Application no. 31684/05), link
343. Ibid.
344. Reuters, '*Insight: Europe cracks down after rise in 'direct action' climate protests*', 10th August 2023, link
345. Reuters, '*France's top administrative court overturns climate group's dissolution*', 9th November 2023, link

The Netherlands:

In the Netherlands, the case of *Laurijsen* [2023][346] also concerned an obstruction to the highway. Five applicants were involved in a protest against the eviction of squatters and were arrested for blockading the road in front of and near the squat. The Regional Court partly acquitted the applicants; however the Dutch Court of Appeal and Supreme Court overturned the acquittals. The Dutch Supreme Court agreed with the Court of Appeal's finding that the protest 'did not (primarily) have the character of common expression of opinion but was aimed at preventing the police from proceeding with the announced eviction by means of de facto coercion' and thus fell outside the protection of the Convention [4.4]. Assessments of the proportionality of the conditions with the Convention were therefore not required. In contrast, in a demonstration of the often uncertain and in flux nature of the Strasbourg position, the ECtHR[347] held that the action in question did fall under the protection of Article 11 [52-59]. It concluded that a proportionality assessment was required, before going on to find the charges were not a justified interference with the applicants' Article 11 rights [66-67].

The courts in the Netherlands have continued their strict approach to criminal offences committed by protestors, recently convicting 'Extinction Rebellion' activists of sedition after a protest blocking a highway (a judgment which Extinction Rebellion has expressed its intention to appeal).[348]

Germany:

In general, Germany is taking a strict approach to disruptive protest. It seems that those involved in disruptive protest are increasingly being convicted. The District Court in Munich convicted three individuals of coercion in connection with a climate protest for their involvement in a road blockade.[349] Another Court in Berlin has convicted a member of the climate activist group 'Last Generation' for attempted coercion and obstructing the police, after she glued herself to the road as part of a road blockade.[350] The activist was sentenced to eight months in prison without parole.

The city of Passau in the state of Bavaria has taken a particularly restrictive approach to convictions and fines, issuing fines of up to €50,000 against climate activists who had glued themselves to the street.[351] Police in Bavaria have also been involved in preventative detention (permitted under Bavarian legislation) of members of the 'Last Generation' climate group.[352]

346. *Laurijsen and Others v. the Netherlands* [2023] (Applications nos. 56896/17, 56910/17, 56914/17, 56917/17 and 57307/17), link

347. *Laurijsen and Others v. the Netherlands* [2023] (Applications nos. 56896/17, 56910/17, 56914/17, 56917/17 and 57307/17), link

348. NL Times, '*Climate activists convicted of sedition; Community service for A12 highway blockade*', 2nd August 2023, link

349. The Independent, '*German court convicts, fines Jesuit priest over climate protest*', 16th May 2023, link

350. Clean Energy Wire, '*German court hands out heftiest punishment to date for climate protester, Last Generation group says*', 22nd September 2023, link

351. Politico, '*Europe's climate activists face 'repressive tide''*, 30th August 2023, link

352. Ibid.

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