Written evidence from Professor David Mead, School of Law, University of East Anglia (CIL1514)

1. I have been Professor of UK Human Rights in the Law School at the University of East Anglia (UEA) since 2013. My main area of academic interest over the past twenty years has been the law and practice of protest & public order. Full details of my research output can be found here https://www.uea.ac.uk/law/people/profile/d-mead. For completeness, I should disclose that from February 2021 – March 2022, I shall be a Parliamentary Academic Fellow hosed by the JCHR, looking at protest, public order and policing.

2. I develop most of these points in 'Policing Protest in a Pandemic', due to be published by the Kings Law Journal in early 2021.

3. Firstly, the legal context. Exercising the right to protest, in human rights terms, is a combination of Art 10 (freedom of expression) and Art. 11 (the right to peaceful assembly). Both are qualified rights – such that restrictions must serve a legitimate government aim, be prescribed by law and be proportionate, properly balancing the exercise of those rights with the wider countervailing public or social interest. Further, coronavirus undoubtedly poses such a threat that it engages the UK's positive duty under Art 2 to take action to save life, and not to impose "harm" as an aspect of Arts 3 and 8 – for both citizens, and officers sent out to police a protest.

SUMMARY

4. I shall limit my observations to five, all of which illustrate the fragility of the right to protest in practice and possible 'chilling' of the right

- The uncertainty of the legal position
- Unsuitability of ex post facto resolution
- Misleading police-public communications
- Divergent policing practices
- The disproportionate nature of the fines levied

THE LEGAL FRAMEWORK

5. The various bans on gatherings – of differing sizes and in different locations – since March clearly constitute restrictions on the right to protest contained in Articles 10 and 11. For many months on their face, the Regulations (as now in January 2021) appear to constitute a near-total ban. The Regulations therefore require justification under Art 11(2). Critical here will be whether the Regulations are lawful – both as a matter of domestic law and in terms of certainty and foreseeability – and whether they constitute a proportionate restriction given the clear and imminent threat to health and life? There are concerns with both. I set out several of these in earlier evidence to this Committee.

6. First, a caveat. Much stock is often put on the ECHR decision in *Lashmankin v Russia* App 57818/09 7th February 2017) and especially the part of the judgment that seems to speak to "a general ban on demonstrations" as being lawful, though only if there is a real

danger of their resulting in disorder which cannot be prevented by other less stringent measures (para 434). This proposition might seem capable of justifying our contemporary position. I do not think it necessarily does. The assertion about a general ban is clearly being made in the context of a general statutory ban on protesting at particular places, viz. courts. It is not authority that can be used in support of a general absolute ban on protest gatherings of more than two as we have seen across England, and the UK, for much 2020.

Uncertainty

7. There have been six main sets of Regulations that cover gatherings:
   - 23rd March – 2nd July
   - 3rd July – 13th September
   - 14th September – 4th November
   - 5th November – 1st December
   - 2nd December – 5th January
   - 6th January and continuing

   as well as from 28th August, provisions for fining those who hold or are involved in holding certain unlawful gatherings of 30+ up to £10,000. Some of the Regulations have banned groups of more than two, some more than six, some more than 30.

8. What is critical here, aside from the limited, oftentimes ex post facto parliamentary scrutiny on which the Committee has already heard evidence, is the obvious difficulty of keeping track, especially when changes are announced very late: my own search of http://legislation.gov.uk at 23:48 on 13th September did not produce any evidence of the new 'rule of six' Regulations, due to have come into force 13 minutes later.

9. Adding to the confusion here are also two more issues: (i) that it took until July for a (limited) definition of 'gathering' to appear; (ii) the on and off specific exemption for protest.

   (i) Defining a 'gathering' as "two or more people present together in the same place" simply disguises the underlying 'true' question which still remains (see my earlier evidence): how close together must A and B be? Given the health-protection origins not public order origins of all the Regulations, I maintain my earlier position: if A and B are 2m+ apart, and wearing masks, they cannot in law constitute a "gathering".

   (ii) An informed citizen might reasonably conclude that where a law deliberately removes protection for protest, then such gatherings are as a class unprotected, and so unlawful. That is not the only possible or I would argue likeliest conclusion. Either a gathering is given a less absolutist meaning (see (i)) or (on which too see *ex p Dolan* [103]-[106]) the general qualifier of "without reasonable excuse" allows for a reading in under s.3 HRA of an Art 10/11 defence.

Ex post facto resolution

10. We should not have to rely on going to court to have our rights upheld. The protection of rights should be equal for all, not simply (using the focus of this paper) to those political campaigners who are legally trained, or who have access to such advice (and/or have significant wealth to afford it). There are obvious harms if those rights only "appear" when a case is brought to court i.e. after someone is arrested and removed from the protest site, harms suffered both by those who wish to make a political point and

instrumentally by us all. More tangibly, many would likely be dissuaded because they would see no protection for protest on the face of the Regulations.

11. All that is aside from the related point that officers at a protest will likely only enforce the law as they can read it i.e. the law patently in the Regulations.

Police/public communications

12. Some of my recent research has been directed at studying what is conveyed by the police on (usually) social media, specifically seeking to assess whether what is conveyed is an accurate and (reasonably) complete picture of the law. Two examples might assist. On 31st October, in relation to a planned protest outside the French Embassy, the Met tweeted a warning that you "must submit a risk assessment where applicable"; the Regulations do not require it to be submitted – they simply require one to be carried out. More worrying is this from West Midlands police (18th December) that because they had not been able to identify an organiser "such protests were unlawful" (from 0.56). That is not what either the POA 1986 or the Regulation say. That there might well be, in fact almost certainly would be, defences supposes a willingness to litigate or to raise such defences collaterally if charges are brought. As likely an outcome of publishing those messages might well be to dissuade many/some/several. The reality of protest is often at odds with its legality.

Policing practices

13. I have two observations here, that I would be happy to develop but imagine the Committee will likely have received much evidence on the first.

    (i) Differential policing – without or with little explanation (before or after) of why there were/were not arrests or crack downs. Why did the Met (under the same March-July Regulations) allow a massive BLM protest in central London on 4th June but break up an anti-HS2 protest at Euston in early May despite, as the video of the event shows, the protesters standing at least 2m apart and wearing masks? There are countless examples of such protests without any really discernible reason, why they were treated differently.

    (ii) Reliance on existing public order laws not on COVID powers. On 8th November, Greater Manchester Police decided to deal with a large gathering in Piccadilly Gardens using dispersal powers in s.34-35 of the Anti-social Behaviour, Crime and Policing Act 2014 rather than powers under any of the Regulations, specifically those that came into force on 5th November: the rule of two. An XR protest on 9th September in Parliament Square was controlled by the Metropolitan Police through a combination of s.14 powers and the Regulations. I think there might be a myriad of reasons: the speed of introduction and consequent unfamiliarity; subcultural norms; officer intransigence; the known or perceived public and political disquiet.

Proportionality of fines

14. Being exposed to up to £10,000 fine (FPN) for holding or having been involved in the holding of gatherings of 30+ without a risk assessment (see e.g. Piers Corbyn's challenges) – arguably constitutes a disproportionate restriction under Art 11 and discriminatory incidence. While it would be trite to suggest that the fine is in effect a tax

on protesting, there would surely be some room to dispute the fine on human rights grounds because of the likely chill it brings about? In fact, for a few days in November, forces suspended imposition of the maximum since so many had appealed and had fines reduced by courts to reflect what they could afford. The suspension was lifted only after forces agreed to explain that people could fight it in court.

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