

## **The Right to Protest and NI Coronavirus regulations**

### **CAJ Briefing Note**

### **June 2021**

#### **Summary**

- The main regulations impacting on restricting the right to protest have been the ‘restrictions on gatherings’ and (when in force) the ‘stay at home’ rule (*‘restrictions on movement’*).
- The ‘first generation’ NI Regulations (March-July 2020) made no provision for protests. The enforcement of these Regulations at Black Lives Matter (BLM) protests in June 2020 resulted in the recent PPS decision not to prosecute, not least as ECHR rights to protest had to be consequently read into the Regulations.
- The ‘second generation’ Regulations from July 2020 originally contained provisions that could accommodate safe protests in permitting gatherings of over 30 persons for ‘political purposes’ where a risk assessment had been conducted and implemented by organisers.
- This exemption was removed in late December 2020 with the tightening of restrictions in the second wave of the pandemic. In Spring 2021, there was a gradual relaxation of restrictions on gatherings in particular categories. However, no specific exemption to accommodate protest was reintroduced.
- This remained the case with the advent of ‘third generation’ Regulations in April 2021. Ultimately the lessening of restrictions on the 24 May 2021 led to a general provision for most outdoor gatherings of up to 500 persons (dependent on a risk assessment) which accommodates protests.
- Whilst the BLM figures are known, the PSNI do not keep statistics of enforcement action specific to protests -it is collated jointly with enforcement information for other unrelated types of gatherings (e.g., house parties).
- We would like to highlight the following issues:
  1. The risk that any future tightening of the Regulations will result in no express provisions for safe protests, re-creating a legal lacuna.
  2. There is still a lack of clarity as to whether socially distanced groups of protestors are to be considered separate gatherings.
  3. The current regulations permit protests of up to 15 persons without conditions. From 15-500 persons requires an approved and applied risk assessment. Such a process will be familiar to some organisations but not all who organise (static) protests (for which in normal times there are usually no administrative requirements) yet there appears to be no Guidance or outreach on this issue.
  4. It is unclear the extent to which the concept within the third generation regulations of ‘spectators’ is to apply to protests.
  5. Enforcement powers throughout regulations remain vague, uncodified and reminiscent of the special powers acts.

## First Generation NI Regulations – March- July 2020

- The ‘first generation’ NI Regulations were in force from 28 March 2020 and were amended 11 times. Public gatherings were largely restricted to two persons, until late May when ‘outdoor gatherings’ of up to six persons were provided for.<sup>1</sup> There was also a qualified ‘stay at home’ rule. There was no express provision for protests, no definition of ‘gathering’ and, as recorded in a Police Ombudsman investigation,<sup>2</sup> an inconsistent approach in practice as to whether socially distanced protests (or other gatherings) were counted as *one* or *separate* gatherings. Acting outside the regulations was only an offence if you did not have a ‘reasonable excuse’ for doing so.
- It was under these Regulations that the June 2020 Black Lives Matter (BLM) protests occurred, albeit enforcement powers over ‘six person’ gatherings had only been extended the night before.<sup>3</sup> The PPS decision *not* to prosecute BLM organisers was grounded in having a ‘reasonable excuse’ defence– given 1) the need to interpret the Regulations and defence compatibility with ECHR rights to protest 2) the protests having been organised in a way to minimise Covid transmission risks (social distancing etc); 3) the lack of legal clarity in the regulations over definitions of ‘gathering’ and ‘outdoor activity’ and 4) the proportionality and inconsistency of the PSNI approach.<sup>4</sup>
- There had also been relevant criticism of the Regulations and the BLM policing operation in the Policing Board Human Rights Advisors report into in the Boards Thematic Review of Covid-19 policing.<sup>5</sup> The Police Ombudsman investigation also identified differential and discriminatory treatment of the BLM protests.

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<sup>1</sup> The first-generation regulations were the: *Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020*. Regulation 6 restricted gatherings in a public place to two persons (with some limited exemptions) and were subject to enforcement powers under Regulation 7 and breaches constituted an offence under Regulation 8 (subject to a ‘reasonable excuse’ defence).

<sup>2</sup> <https://www.policeombudsman.org/Media-Releases/2020/Discrimination-concerns-are-justified,-but-not-on->

<sup>3</sup> Regulation 6A was then inserted into the Regulations on the 19 May 2020 (Reg. 6A inserted (19.5.2020 at 11.00 p.m.) by *The Health Protection (Coronavirus, Restrictions) (Amendment No. 3) Regulations (Northern Ireland) 2020 (S.R. 2020/84), regs. 1, 2(5) (with reg. 3)*. It permitted participation in an ‘outdoor gatherings’ of up to six persons who are not members of the same household, or any number of persons who are members of the same household. Consequential amendments were also made to Regulation 5 (the stay-at-home regulations) which added ‘outdoor activities’ and ‘outdoor gatherings’ in accordance with Regulation 6A to the list of explicit ‘reasonable excuses’ for permitting persons to leave their homes. However, no amendment was made to Regulations 7 or 8 which would have made breaches of Regulation 6A on outdoor gatherings an offence/subject to enforcement powers. Such an amendment was made controversially on Friday 5 June coming into force at 11pm that same night on the eve of the BLM protests. (*The Health Protection (Coronavirus, Restrictions) (Amendment No. 5) Regulations (Northern Ireland) 2020, regulation 1(3).*)

<sup>4</sup> <https://www.ppsni.gov.uk/news-centre/no-prosecutions-relation-2020-black-lives-matter-protests>

<sup>5</sup> Among the recommendations are that “All laws, especially those having a significant effect on peoples’ lives or creating crimes, should be accessible and written in a way that they are easy to understand;” and “Such Regulations and laws should include human rights principles and any guidance should make issues of overlap or contradictions with human rights clear and there should be an accompanying human rights assessment document;” <https://www.nipolicingboard.org.uk/thematic-review-policing-response-covid-19>

## Second generation of NI Regulations – July 2020-April 2021

- In late July 2020 in the context of easing of lockdown ‘second generation’ NI Coronavirus Regulations were introduced.<sup>6</sup> These removed the ‘stay at home’ rule, defined ‘gathering’<sup>7</sup> and generally permitted outdoor gatherings of up to 30 persons. They also permitted larger outdoor gatherings for a number of permitted purposes (including ‘political purposes’ which would include protests) provided that organisers had undertaken and implemented a risk assessment (e.g. to ensure steps for social distancing.)<sup>8</sup>
- The enforcement powers remain vague and uncodified (as in the previous Regulations) and reminiscent of the Special Powers Act “*A relevant person may take such action as is necessary to enforce any requirement*” etc.
- Around Christmas 2020 in the context of the second wave restrictions were tightened with a new ‘stay at home’ rule. The above conditional exemption providing for protests was removed. It was not reinstated despite other express exemptions on gathering restrictions being added (e.g. for worship, education).

## The ‘third generation’ NI Regulations (April 2021-present)

- In April 2021 the ‘third generation’ regulations were introduced.<sup>9</sup> The ‘stay at home’ rule was dropped. Public outdoor gatherings were restricted to a maximum of 10 persons from two households. There were six qualified<sup>10</sup> exemptions to this, but none related to protests.<sup>11</sup> This list was subsequently extended to include matters such as outdoor band practice,<sup>12</sup> but not protest, with the exception of trade union pickets (from the 20<sup>th</sup> May 2021).
- On the 24 May 2021 the regulations were changed to permit an ‘outdoor gathering’ of up to 500 persons (dependent on a risk assessment). The changes also stipulated that ‘spectators’ attending any outdoor event were to be treated as a separate gathering to those in the event itself. The numbers for (most) outdoor gatherings not requiring a risk assessment were increased to 15. The present situation is therefore in practice, protests of under 15 face no restrictions. Protests from 15-500 can take place if a risk assessment is conducted, and protests over 500 will conflict with the Regulations.

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<sup>6</sup> The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020

<sup>7</sup> “There is a gathering when two or more persons are present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other.”

<sup>8</sup> In general gatherings were restricted to 30 persons (outdoor and indoor, save for private dwellings which had stricter rules). This 30 person rule was conditionally disapplied for “gathering which is organised or operated for cultural, entertainment, recreational, outdoor sports, social, community, educational, work, legal, religious or political purposes and which fulfils the conditions”. The conditions exempting the above 30 person rule however are that organisers: 1) undertake a health and safety risk assessment (see <https://www.hseni.gov.uk/articles/risk-assessment>); 2: take “all reasonable measures to limit the risk of transmission of the coronavirus.” This was binding on organisers, including of protests relying on the exemption, it includes implementing measures from the risk assessment and following official guidance.

<sup>9</sup> Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021)

<sup>10</sup> By the need to conduct and implement a risk assessment.

<sup>11</sup> <https://www.legislation.gov.uk/nisr/2021/93/regulation/9/2021-04-09>

<sup>12</sup> <https://www.legislation.gov.uk/nisr/2021/93/regulation/9>

## Enforcement action in practice.

Whilst the issuing of fines for the BLM protests is well known the extent to which fines have been issued for any other protests is not clear. This is as the PSNI capture enforcement activity under a limited number of Offence Codes and the statistics are not available in a way that distinguishes protests from other unrelated types of 'gatherings' for which fines have been issued (e.g. house parties). The PSNI did advise that most, if not all present outdoor enforcement, would relate to parades.<sup>13</sup>

## Issues with Current Situation

- As set out above the July 2020 second-generation regulations initially expressly included provisions for (risk-assessed) protests these were removed in late December 2020. Whilst restrictions on other forms of gatherings were gradually loosened in Spring 2021 with a number of exemptions added, none contained provisions relating to or which would accommodate protests. This remained the case until 24<sup>th</sup> May where general provisions on (risk assessed) gatherings up to 500 were introduced. Should the public health situation require a tightening of Regulations again it is possible, without remedial action, that we could revert to a pre-24 May situation where there is no clear accommodation of protest at all.
- We would therefore urge any tightening of Regulations (on gatherings and movement) expressly accommodates the right to protest with proportionate provisions to assist protests taking place in a manner which minimises risk of Covid transmission. The provisions in place from July-December 2020 went someway to doing this but could be improved.
- In relation to the current Regulations, it is not clear whether specific consideration was given to the facilitation of safe protest in their formulation. There is no reference to protest in the official Guidance on the Regulations.<sup>14</sup>
- A common outstanding problem across all sets of Regulations, is that although Gatherings have been defined since the 'second generation' regulations in July 2020, yet there was still a lack of clarity as to when social distanced groups of protestors (etc) will be treated as *separate* or the same gathering(s). The formulation in the current regulations would imply if there are 'spectators' the event will be treated as two gatherings only. Certain events are exempt from this provision (e.g. funerals, marriage ceremonies) but not protests.
- The issue of consideration *separate* gatherings therefore remains in relation to small groups of socially distanced protestors. For example when a protest is spontaneous in reaction to a domestic or international event, or has multiple informal organisers. Such consideration would be a route to ensure such protests could take place safely. Clearly some socially distanced accumulations of persons for expressive purposes have (rightly) through the pandemic been treated as separate gatherings, the most prominent example being the 'NHS clap'. The present definition of gathering requires persons to engage in social interaction or other activity *with each other...*

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<sup>13</sup> General enforcement stats are here: [https://www.psni.police.uk/advice\\_information/COVID-19/](https://www.psni.police.uk/advice_information/COVID-19/) above information from correspondence with Command Secretariat 19 May 2021.

<sup>14</sup> <https://www.health-ni.gov.uk/publications/guidance-accompany-health-protection-coronavirus-restrictions-regulations-northern-ireland-2021>

which would not necessarily be the case with socially distanced protests. At present there is no Guidance on this.

- The provision for a Risk Assessment is a process organisers of commercial, cultural and social outdoor events will be used to. This will also be the case with larger organisations who are used to organising larger protests (and other events) who will be used to making provisions for safety, stewards etc. For those who organise parades (in law, '*public processions*'<sup>15</sup>) there will also be a familiarity with both this and the procedural requirements on notification with the Parades Commission. However, other less formal groups organising static protests (in law, '*open air public meetings*'<sup>16</sup>) will not be used to such a process. There are no notification or other requirements at present for a static protest.<sup>17</sup>
- Yet there to date appears to be no current guidance or outreach to publicise this being a requirement for protests of over 15 persons beyond the general health guidance on gatherings. This is likely to result in confusion in practice.
- It is not clear how the requirement to separately risk assess 'spectators' in the present Regulations could apply to protests and as to whether this has been considered. Spectators, a concept usually associated with sports and cultural events, is not defined in the Regulations. Parades tend to have 'spectators' and this concept is presently codified in parades legislation as a reference to persons 'supporting' the parade.<sup>18</sup> Static protests tend to have onlookers rather than 'spectators' or supporters as such. Protests can of course attract counter-protests, who by definition are not 'supporters' but could in some senses be 'spectating' the original protest. The issue with the present drafting is that if a static protest is 'attended by spectators' (regardless of whether this is within the control of organisers) it is captured by the Regulations. Depending on how the concept of 'spectators' is interpreted it could render organisers of the protest responsible for a 'risk assessment' of spectators, potentially even counter protestors. The intended scope of 'spectators' could be clarified in the Regulations or in Guidance.

**CAJ, June 2021**

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<sup>15</sup> <https://www.legislation.gov.uk/ukpga/1998/2/contents>

<sup>16</sup> <https://www.legislation.gov.uk/nisi/1987/463/part/II>

<sup>17</sup> With the exception of counter protests to parades <https://www.legislation.gov.uk/ukpga/1998/2/section/7>

<sup>18</sup> E.g. see <https://www.legislation.gov.uk/ukpga/1998/2/section/8>