

**EMERGENCY POWERS AND
CIVIL LIBERTIES REPORT
[APRIL 2020]**

About Big Brother Watch

Big Brother Watch is a civil liberties and privacy campaigning organisation, fighting for a free future. We're determined to reclaim our privacy and defend freedoms at this time of enormous change.

We're a fiercely independent, non-partisan and non-profit group who work to roll back the surveillance state and protect rights in parliament, the media or the courts if we have to. We publish unique investigations and pursue powerful public campaigns. We work relentlessly to inform, amplify and empower the public voice so we can collectively reclaim our privacy, defend our civil liberties and protect freedoms for the future.

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Emergency Powers & Civil Liberties Report

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INTRODUCTION

The publication of this report marks approximately one month since the Coronavirus Act 2020 was passed into law on 25th March 2020, and since the Health Protection (Coronavirus, Restrictions) Regulations 2020 were made by statutory instrument on 26th March.¹ This remarkable legislative change has fundamentally altered the balance of power between citizens and the state and afforded breath-taking powers to Ministers and law enforcement authorities.

Big Brother Watch and thousands of our supporters campaigned for a shorter duration of the Coronavirus Act. Whilst we welcome the Government's amendment for a motion in parliament after six months, this provides inadequate scrutiny and review of the appropriateness and necessity of the host of extraordinary powers in the Act. As we advised in our briefing on the (then) Bill, the emergency powers should be subjected to a monthly sunset clause – as would be the case had the powers been introduced via the Civil Contingencies Act 2004 rather than a standalone Act – to ensure thorough ongoing parliamentary scrutiny and frequent review of the necessity and proportionality of such broad and extreme measures.

Therefore, this report, and our subsequent monthly Emergency Powers and Civil Liberties reports, will provide vital evidence, policy scrutiny and analysis to support crucial ongoing monthly examination of emergency powers in parliament, the press and the public forum.

Over the past month, the Coronavirus Act has been applied by police, the Crown Prosecution Service (CPS) and magistrates disastrously, with convictions subsequently overturned. However, the Health Protection Regulations made by statutory instrument the following day have been relied on to enforce the so-called "lockdown" restrictions on freedom of movement. These Regulations, despite accounting for the greatest loss of liberty ever imposed on the British public, have not benefitted from full parliamentary scrutiny, oversight, or approval.

These Regulations too have been wielded by police in an inconsistent, incompetent and exceedingly heavy-handed manner. It is understandably difficult for police to incorporate new Regulations so rapidly. However, this critical process appears to have been thoroughly mismanaged. We welcome the publication of further guidance by the National Police Chiefs' Council (NPCC), the College of Policing and the CPS and hope this goes some way to treating the immediate problems on the ground. However, this wave of excessive policing is likely to have a lasting impact on policing practices and public attitudes. A YouGov survey conducted 3-5th April showed within the first week of emergency legislation, policing had caused concern and discomfort: 40% of people

¹ In England, Wales and Scotland; and in Northern Ireland on 28th March.

criticised policing, saying either that some cases had gone too far or that the overall approach was too heavy-handed. As police have increased intrusive surveillance methods, 43% of people polled were uncomfortable with the use of drone surveillance, 42% were uncomfortable with the encouragement to report on others who breach restrictions and 24% were uncomfortable with road checks.²

The pandemic is a public health emergency, not a public order crisis. The institutional failures that have been exposed in the early weeks of this crisis must be addressed at the soonest possibility and demand serious rectification in the long run. We make a series of recommendations in this report.

Civil liberties have been drastically compromised in the imposing of the lockdown and, unnecessarily so, are at further risk in some of the Government's proposals for an exit strategy. In this report, we consider early proposals for a contact tracing app and immunity certificates, both of which could have remarkable rights implications.

The Coronavirus pandemic has, within weeks, drastically changed the world more than any other event since World War II. Our country, and indeed all nations of the world, face one of the greatest challenges. History shows we face challenges of such magnitude best when we hold onto the values that define us, not when we abandon them. This is a pivotal moment and a crucial time for parliamentarians to increase scrutiny and limitations on powers. As we learned in the post 9/11 years, freedoms are too easily lost in the heat of crises; emergency responses naturally extend and endure to create a new political order in absence of serious early intervention, frequent review and an unyielding commitment to democracy and human rights.

Such intervention is required now, one month after the introduction of emergency law and Regulations, to ensure the measures that remain in place are strictly necessary, proportionate and last not a moment longer than needed. We must make the right decisions now, as they will define the new United Kingdom that is to come.

² Policing the COVID-19 lockdown, YouGov / Crest Survey Results (3-5 April 2020) – 8th April 2020, YouGov: https://docs.cdn.yougov.com/7jrz6rsm5q/Crest_CoronaPolicing_200405.pdf

RECOMMENDATIONS

EMERGENCY LAWS

1. The extraordinary “lockdown” restrictions require not only legal authority but democratic legitimacy. It is a matter of priority that Parliament urgently considers and scrutinises the Regulations.
2. The role of Parliament cannot be overstated in the current crisis. The Government must seek parliamentary approval of all meaningful changes to the “lockdown” restrictions and has no legitimate reason to avoid doing so, particularly when parliament is in session.
3. The Government is right to give advice to the public in an emergency situation. However, no matter the circumstances, neither the Government nor the police should imply legal authority where there is none, or act outside of the law. This is vital to preserve the rule of law.
4. The Government’s communications of the “rules” must be harmonised with the Regulations to avoid enduring confusion among the public and the police as to precisely what the restrictions, and individuals’ legal rights, are.
5. The Regulations should be amended to expressly acknowledge that it is a reasonable excuse for a person to leave or remain outside their home if required for any medical, mental health or disability needs.
6. The Regulations should, as far as possible, be harmonised across the nations of the United Kingdom to avoid arbitrary discrepancies and public confusion, and to enable clear, unified Government communications about the restrictions.
7. Inconsistencies and inaccuracies in interpretation of the Regulations persist across police forces nationally. The NPCC, the College of Policing and the CPS should urgently conduct a review of police forces’ implementation and communication of the “lockdown” restrictions following the publication of the revised guidance.
8. Councils that intend to restrict access to parks, green spaces or obstruct benches should first conduct an Equality Impact Assessment and consider the impact on those who are disabled, elderly and vulnerable.
9. Police cannot maintain trust simply by swinging from public apology to public apology. Police officers who attempt to adjudicate which parts of a person’s home they are allowed in are acting outside of the law and in absence of the minimal requirements of professional competence. Where these errors have been made, police forces must reassure the public of their rights and demonstrate that meaningful action has been taken to prevent the issue reoccurring.

10. The NPCC and College of Policing should issue further guidance to clarify that there is no requirement for those who need to leave their homes for work to carry special proof of work or an ID card. Only journalists are expected to carry a press card.

11. Police use of social media offers a vital way to communicate with the public and has proven particularly significant in this time of crisis. However, too often, police social media use has been confusing, controversial and on occasion crude. A full scale review of police social media guidelines and practices is required to further professionalise forces' public communications.

12. The Regulations to restrict freedom of movement would be better constructed as a general prohibition. Only reasonable grounds to suspect a serious breach of the prohibition that causes an unreasonable risk to others should constitute an offence that can incur a Fixed Penalty Notice.

13. In light of the extraordinary nature of the emergency restrictions, the presumption against enforcement, and the inconsistency with which police have employed new powers, any decision to prosecute under emergency powers should be made by the Director of Public Prosecutions.

14. Drones are an extreme, militaristic form of surveillance that should be reserved for the most serious, strictly necessary cases. Police should immediately cease use of drones for public communications and generalised surveillance. Parliament should review the use of drones in policing and develop clear limitations on their use.

15. Police use of megaphones in quiet parks and residential streets breaches the peace, instils anxiety and creates oppressive atmospheres – particularly when the public is experiencing extraordinary psychological pressure. Further police guidance should strongly advise against the use of megaphones unless strictly necessary.

16. Setting up roadblocks to arbitrarily question people as to their movements is intimidating, disproportionate, and goes beyond the necessary measures for policing the pandemic. The NPCC and College of Police is clear that "road checks on every vehicle is [...] disproportionate". Our recommendation for a review by the NPCC, College of Police and the CPS should ensure this guidance is being followed.

17. The ANPR surveillance network lacks a clear legal basis. Its use to police the pandemic should be suspended, and ANPR should be tabled for future parliamentary examination.

18. There have been a number of concerning incidents where children have wrongly been arrested or issued with fixed penalty notices. Police forces must demonstrate that they are training officers effectively in use of the new Regulations to prevent such instances. Police forces should each seek to identify, review and rescind any FPNs issued under the Regulations to children.

19. Social media posts threatening to report parents to social services in the course of pandemic policing are absurd, disproportionate and unacceptable. This should be investigated by the force and clear training provided to the staff involved. Greater professional standards in police use of social media should prevent such errors of judgment in future.

20. We oppose police inviting public reports of Regulation breaches via online portals as it is likely to encourage suspicion and surveillance in communities, eroding social trust, and leading to largely speculative reports that may waste police time. If police do continue to use these portals, they should be used with clearer language to permit only the most serious reports. Reporting portals must not invite speculative intelligence about individuals' travel or health status, which could encourage discrimination within communities.

21. Parliament should consider the question of whether the lockdown restrictions, as made, are *intra vires*. Government should seek, and if possible publish, legal advice on the appropriateness of secondary legislation under the Public Health Act to impose the lockdown restrictions.

22. The Government must publish its plan for an exit strategy from the lockdown. The Secretary of State is legally required to terminate any Regulations that are not necessary or proportionate to control the transmission of the virus. Without a full and detailed understanding of the terms on which the Government will make this analysis, we are effectively at the behest of ministerial decree - neither Parliament nor the public can examine whether these extraordinary restrictions are appropriate and the lockdown cannot be said to have continued democratic consent.

23. Police guidance is clear that the Regulations should be relied on to impose the restrictions on movement and gatherings, rather than the Coronavirus Act, at this time. Given that we have already experienced a peak of the virus, Schedule 21 and 22 powers in the Act have not been (lawfully) utilised, and Schedule 22 powers have not even been invoked in England, Wales or Northern Ireland, a serious question is posed as to their necessity. We urge parliamentarians to consider the necessity of these Schedules.

24. Misuse of the Coronavirus Act has only come to light through diligent journalism and chance transparency and we have little idea of the true extent of this serious problem. All fines or convictions issued to individuals under the Coronavirus Act should be carefully and independently reviewed by the CPS.

CONTACT TRACING

25. There is an absence of evidence to support the immediate national deployment of a contact tracing app. Transparency and civil society engagement during technical and policy development on this project is vital. Proposals for a contact tracing app should

be considered not only through the lens of this pandemic but in the wider social and political context. If a contact tracing app does go ahead, it must be voluntary; non-punitive and non-discriminatory; built to permit transparency, protect privacy, promote security and minimise data collection, retention and access; and limited to a specific legitimate purpose and time period.

LOCATION DATA

26. It is unacceptable that nationwide mobile phone monitoring has been discussed, and is possibly in progress, without public transparency. The Government should publicly disclose the nature and scope of any mobile phone tracking surveillance measures as well as the statutory route and safeguards applied.

SHIELDED PATIENTS DATABASE

27. Government has shared patient data with supermarkets that could risk being repurposed. Such data could be extremely valuable to supermarkets, who offer a range of products and services including banking, loans, insurance, energy, legal services and funerals. The Government must publish data sharing agreements relating to the exchange of shielded patient data with supermarkets.

NHS COVID-19 DATASTORE

28. It is unacceptable that a large-scale project involving patient data is being pursued in absence of stakeholder engagement or public transparency. NHSX must be fully open and transparent about the 'Covid-19 datastore', the nature of contracts with private technology companies, the use of patient data, the confidentiality of 111 calls, and make details of any predictive and anonymisation techniques available for public audit at the soonest possibility. NHSX must also engage with and consult stakeholders, privacy groups and patient representatives as a priority.

IMMUNITY CERTIFICATES

29. Following WHO advice against 'immunity certificates', the Government must now be clear with the public that immunity passports will not be pursued, at least unless compelling new evidence comes to light, in which case the full social, economic and health impacts of such a scheme would require careful evaluation.

JUDICIAL COMMISSIONERS

30. The Investigatory Powers Commissioner should be required to appoint temporary Judicial Commissioners only after consultation with senior judges and Scottish Ministers if practicable, rather than simply notifying them by default.

FREEDOM OF EXPRESSION

31. We welcome the promotion of health information at this critical time. However, the important promotion of reliable scientific information does not necessitate the censorship of views that are scientifically unproven. This is particularly relevant in a pandemic, where scientific discovery is rapidly developing.

32. Government must provide transparency and civil society engagement in relation to the activities of the new 'Rapid Response Unit' and its role in removing 'harmful' content online. Social media companies should carefully consider the impact of their new content restrictions and benefit from the advice and expertise of rights groups. Supplanting critical literacy with censorship ultimately harms the public forum, trust in authorities, and as such can harm public health.

FREEDOM OF INFORMATION

33. Freedom of information is likely to be frustrated by staffing and capacity issues, but proactive openness through the default publication of information, particularly around public health and policing, can help to fill the gap. Transparency and freedom of information must be part of the strategy for dealing with the pandemic, as the crisis requires a well-informed public and high levels of trust and co-operation.

34. The effective suspension of police FOIs relating to coronavirus is concerning in the context of new coronavirus laws, inflated police powers and the recent wave of excessive, on occasion unlawful, policing. Parliament, and the ICO, should carefully review the appropriateness of the NPCC's FOI strategy under Operation Talla.

35. Scotland is the first country in the world to relax freedom of information laws as a result of the coronavirus outbreak. This sets a dangerous precedent. Flexibility in FOI response times can be achieved without changing primary legislation. We urge MSPs to review this decision.



We could have a parallel epidemic of authoritarian and repressive measures following close if not on the heels of a health epidemic.”

— Fionnuala Ni Aolain, the U.N. Special Rapporteur on counterterrorism and human rights.³

³ For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power – Selam Gebrekidan, New York Times, 30th March 2020: <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html>

EMERGENCY LAWS

HEALTH PROTECTION REGULATIONS: IMPOSING LOCKDOWN

One month ago, a series of statutory instruments were made under the Public Health Act 1984 to enforce so-called “lockdown” restrictions. These are the Health Protection (Coronavirus, Restrictions) Regulations 2020 made in England,⁴ Wales⁵ and Scotland⁶ respectively on 26th March 2020, and in Northern Ireland on 28th March 2020 (hereafter “the Regulations”).⁷ The Regulations must be reviewed every three weeks, approved by Parliament within 28 days, and expire after six months. Upon review on 16th April 2020, the Government announced these “lockdown” restrictions would remain in place pending review in another three weeks (7th May 2020).

The main purpose of the Regulations is to restrict the freedom of movement of all members of the public, prohibit gatherings and close businesses and premises with the aim of limiting transmission of Coronavirus and thus the strain on the NHS.

These are the most restrictive rules placed on our liberty in a generation. The Regulations effectively put the public under house arrest, leaving limited reasons for which a person can lawfully leave their place of residence. However, the rules are overwhelmingly being respected and adhered to by the public, who clearly understand the risks to themselves and others. The rapid behavioural change and adoption of new ways of living – social distancing, working from home, home-schooling, limited shopping and exercise – has been remarkable. Many people voluntarily wear masks and gloves when they do leave the home for essential purposes.

Despite the high-level of public co-operation in observing the restrictions, some police forces have approached the pandemic as a public order challenge rather than a public health crisis. We have seen police misinterpret the Regulations and enforce them unnecessarily harshly. This punitive approach has alienated and alarmed members of the public, eroded trust in authorities, sown confusion and undermined the rule of law.

4 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020: http://www.legislation.gov.uk/ukSI/2020/350/pdfs/ukSI_20200350_en.pdf

5 The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020: http://www.legislation.gov.uk/wsi/2020/353/pdfs/wsi_20200353_mi.pdf

6 The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020: http://www.legislation.gov.uk/ssi/2020/103/pdfs/ssi_20200103_en.pdf

7 The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020: <https://www.health-ni.gov.uk/sites/default/files/publications/health/Coronavirus-Restrictions-Regs-2020.pdf>

The role of Parliament

As described, the Regulations were made in England, Wales and Scotland respectively on 26th March 2020, and in Northern Ireland on 28th March 2020.

The Regulations must be approved by Parliament within 28 days (when it is in session). Due to the Easter recess, this means the Regulations will expire in England unless they receive parliamentary approval by 18th May 2020.⁸

On 1st April, the Regulations were approved by Scottish parliament.⁹

On 21st April, the Regulations were approved by the Northern Ireland Assembly.¹⁰

The Regulations are currently scheduled for consideration in the Welsh Assembly on 29th April 2020.¹¹

It is critical, now that Westminster Parliament is back in session, that the Regulations receive urgent consideration and scrutiny. As remarked by the Institute for Government:

“The lockdown measures currently in force amount to the most draconian restrictions imposed on the UK population in living memory, and possibly ever. It is a mark of how extraordinary the situation is that such restrictions were imposed by ministers under secondary legislation. Endowing them with the legitimacy of parliamentary approval, at the earliest possible opportunity, is vital.”¹²

RECOMMENDATION 1: The extraordinary “lockdown” restrictions require not only legal authority but democratic legitimacy. It is a matter of priority that Parliament urgently considers and scrutinises the Regulations.

8 The Public Health (Control of Disease) Act 1984, s.45R(4-6) provides that the Regulations cease to have effect 28 days (whilst parliament is in session) after the instrument is made, unless approved by Parliament.

9 Scottish Parliament Minutes, 1st April 2020:
https://www.parliament.scot/S5_BusinessTeam/Chamber_Minutes_20200401.pdf

10 Northern Ireland Assembly Official Record, 21st April 2020:
<http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2020/04/21&docID=300445>

11 Welsh Assembly Plenary Record, 22nd April 2020:
<https://record.assembly.wales/Plenary/6291#A57541>

12 Parliament’s role in the coronavirus crisis – Raphael Hogarth, Institute for Government, 17th April 2020: <https://www.instituteforgovernment.org.uk/sites/default/files/publications/parliament-role-coronavirus.pdf>

Amended Regulations

The Regulations (for England) were amended on 21st April 2020 to expand Regulation 6 (restrictions on freedom of movement), whereby it is now an offence to leave or “be outside of” the home without a reasonable excuse¹³ – i.e., if a person leaves their home with a reasonable excuse but remains outside without one, they are in breach of the Regulations.

Similarly, the Regulations for Wales were amended on 24th April 2020 so that no person may leave the place where they are living “or remain away from that place” without reasonable excuse.¹⁴ The Regulations for Wales were also amended on 3rd April to impose a 2 metre social distancing requirement on permitted premises that remain open.¹⁵

The manner in which these amendments were imposed risks creating retrospective offences. The Government (and Welsh Ministers) claim that the amendments, made urgently and without having been laid before or approved by Parliament (or the Welsh Assembly), are merely clarificatory.¹⁶ However, the amendments mean that certain actions that previously would not have constituted an offence under the Regulations now would under the amended Regulations. To introduce this amendment as clarificatory rather than substantive is to imply that any outstanding prosecutions under the Regulations, initiated prior to the amendments, should apply the same test – though ultimately, this will be open to the interpretation of the courts. As lawyer and legal commentator David Allen Green noted, it is not normally lawful to create retrospective offences.¹⁷

For example, if the Commissioner of the Metropolitan Police leaves her home to attend work, she has a reasonable excuse and does so lawfully. Under the initial Regulations, if she were to stop off on Westminster Bridge after her shift to applaud care workers, she may well have done so lawfully as she had left the home with a reasonable excuse (work). However, under the amended Regulations, stopping on Westminster Bridge after work would be an offence as she would now “be outside of” her home without a reasonable

13 The Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020

14 The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 2) Regulations 2020: <http://www.legislation.gov.uk/wsi/2020/452/contents/made>

15 The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) Regulations 2020: http://www.legislation.gov.uk/wsi/2020/399/pdfs/wsi_20200399_mi.pdf

16 The headnote of the amendment to the Regulation in England says “the Secretary of State is of the opinion that, by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament”: <http://www.legislation.gov.uk/ukxi/2020/447/introduction/made> The headnote of the amendment to the Regulation in Wales has the same effect: <http://www.legislation.gov.uk/wsi/2020/452/introduction/made>

17 The significant extension of the Coronavirus restriction on movement – and why it is concerning – David Allen Green, The Law and Policy Blog, 23rd April 2020: <https://davidallengreen.com/2020/04/the-significant-extension-of-the-coronavirus-restriction-on-movement-and-why-it-is-concerning/>

excuse. The amendment clearly makes for a more restrictive Regulation and merits close attention.

These amendments were imposed by “ministerial fiat” on the basis of unjustified urgency. Since Parliament is in session and the Regulations provide legal authority for the unprecedented lockdown measures imposed on the nation, any amendment to the Regulations should be priority parliamentary business and receive close democratic oversight. As David Allen Green commented:

“Criminalising otherwise normal social activity should have the greatest possible mandate by parliament before it has effect, not be slipped out with no parliamentary approval at all. Something worrying is happening here.”¹⁸

RECOMMENDATION 2: The role of Parliament cannot be overstated in the current crisis. The Government must seek parliamentary approval of all meaningful changes to the “lockdown” restrictions and has no legitimate reason to avoid doing so, particularly when parliament is in session.

¹⁸ The significant extension of the Coronavirus restriction on movement – and why it is concerning – David Allen Green, The Law and Policy Blog, 23rd April 2020: <https://davidallengreen.com/2020/04/the-significant-extension-of-the-coronavirus-restriction-on-movement-and-why-it-is-concerning/>

Pre-emptive Dispersals

Before either the Regulations were made or the Coronavirus Act received royal assent, Government communications of restrictions “in force” began and police started to enforce the Government’s guidance.

On 23rd March 2020, when the Coronavirus Bill had only just been introduced to Parliament, Prime Minister Boris Johnson appeared to impose the “lockdown” restrictions via a press conference. He announced, “I must give the British people a very simple instruction – you must stay at home”.¹⁹ Given the urgency of the crisis, it is understandable that the Prime Minister spoke using such terms, but Government should have stopped short of implying legal authority and penalties for non-compliance until the Regulations and/or Act were in force. However, the Prime Minister described measures that would be taken “immediately” to “ensure compliance” and warned, “If you don’t follow the rules the police will have the powers to enforce them, including through fines and dispersing gatherings.”

The following day on 24th March, the Government sent a text message to people across the UK which said:

“GOV.UK ALERT CORONAVIRUS new rules in force now: you must stay at home. More info and exemptions at gov.uk/coronavirus Stay at home. Protect the NHS. Save lives”.²⁰

This drew criticism from The Bingham Centre for the Rule of Law, which commented that it was not accurate to describe new rules being “in force” and advised the Government to “be careful to ensure that it does not compound the legal uncertainty caused by the emergency by making ambiguous statements about what rules apply, when they apply, and the consequences for people if they are breached.”²¹

Former Supreme Court Justice Lord Sumption wrote an opinion piece in the Times raising concerns about the devaluing of parliamentary scrutiny and the rule of law, commenting that the Prime Minister’s instructions “are no doubt valuable as ‘advice’, even ‘strong advice’. But under our constitution neither has the slightest legal effect without statutory authority (...) we are entitled to wonder what kind of society we have become when an

19 PM address to the nation on coronavirus: 23 March 2020 – 10 Downing Street: <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020>

20 Coronavirus: SMS messages – 10 Downing Street, 24th March 2020: <https://www.gov.uk/government/news/coronavirus-sms-messages>

21 Coronavirus Bill: A Rule of Law Analysis (Supplementary Report – House of Lords) – Dr. Ronan Cormacain, Bingham Centre for the Rule of Law, 25th March 2020, p.10: https://binghamcentre.biicl.org/documents/84_coronavirus_bill_rule_of_law_scrutiny_supplementary_report_upload.pdf

official can give orders and expect to be obeyed without any apparent legal basis.”²² These points are not mere technicalities, Lord Sumption wrote:

“There is a difference between law and official instructions. It is the difference between a democracy and a police state. Liberty and the rule of law are surely worth something even in the face of a pandemic.”

The Health Protection (Coronavirus, Restrictions) Regulations (England) 2020 came into force at 1.00pm on 26th March 2020. These are the only emergency powers which police currently possess to restrict public gatherings of those from different households. However, after the Prime Minister’s “instructions” and before the Regulations were made (or the Coronavirus Act was passed), there were multiple incidents of police forces across the UK enforcing government guidance, without a legal basis.

On 24th March, West Midlands Police forcibly dispersed a barbecue attended by a group of people including children and over-60s in Coventry. One woman shouted, “my children need to eat,” but officers tipped over the barbecue.²³ No laws were in place at that time that would have rendered the gathering illegal.



Our officers were forced to tip the BBQ over as the defiant group initially refused to leave

On 25th March, officers in Crewe stopped cars to ascertain whether they were making essential journeys.²⁴ There were no laws in place at this time which restricted people’s ability to travel.

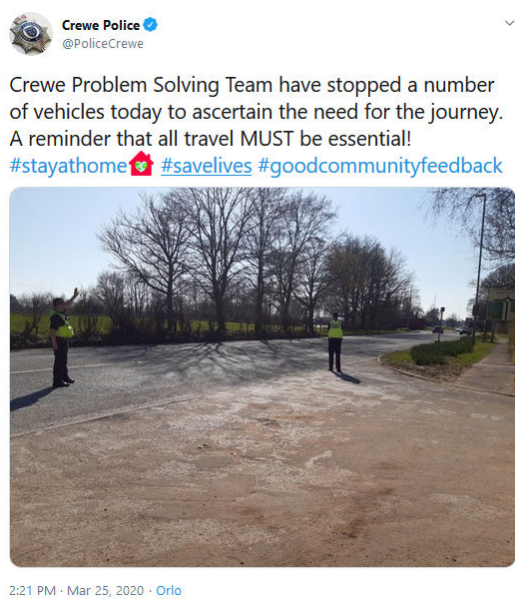
On 25th March, the British Transport Police stopped and questioned people on trains in and around London as to their reasons for travel. Chief Constable Paul Crowther said, “we’ve had a few examples where we’ve persuaded people not to travel or indeed where

22 There is a difference between the law and official instructions – Lord Sumption, The Times, 26th March 2020: <https://www.thetimes.co.uk/article/there-is-a-difference-between-the-law-and-official-instructions-j9tthqnr>

23 Police break up 20-strong barbecue buffet during coronavirus lockdown – Express and Star, 24th March 2020: <https://www.expressandstar.com/news/uk-news/2020/03/24/police-break-up-20-strong-barbecue-buffet-during-coronavirus-lockdown/>

24 Crewe Police, Twitter, 25th March 2020: <https://twitter.com/PoliceCrewe/status/1242818838330257408?s=20>

we've not been that satisfied with their reason why they they're travelling today.”²⁵ Officers seemed to have been aware that laws were not yet in force to restrict travel, warning the public “We don't want to see you tomorrow.”



There are further examples of pre-emptive policing in this report. Whilst we appreciate their good intentions, it has been concerning how rapidly police have been willing to act without legal authority - the rule of law is the foundation of our democracy.

RECOMMENDATION 3: The Government is right to give advice to the public in an emergency situation. However, no matter the circumstances, neither the Government nor the police should imply legal authority where there is none, or act outside of the law. This is vital to preserve the rule of law.

²⁵ Police tell some commuters: 'We don't want to see you tomorrow' – Simon Harris, ITV News, 25th March 2020: <https://www.itv.com/news/london/2020-03-25/police-tell-commuters-we-don-t-want-to-see-you-tomorrow/>

Interpretation

A major problem associated with policing of the “lockdown” is that the Regulations have been misinterpreted towards an excessively prohibitive reading that goes far beyond the restrictions in law.

One of the reasons for this is that police have sought to enforce the Government’s guidance, which has been well-publicised, rather than the Regulations which have not been as widely communicated. This resulted in policing beyond the law and attracted some of the most serious criticism of policing in recent years from newspapers, commentators, rights groups, lawyers – and notably, from former Supreme Court Justice Lord Sumption, who drew comparisons to a police state:²⁶

“The tradition of policing in this country is that policemen are citizens in uniform. They are not members of a disciplined hierarchy operating just at the government’s command. Yet in some parts of the country, the police have been trying to stop people from doing things like travelling to take exercise in the open country, which are not contrary to the Regulations, simply because ministers have said that they would prefer us not to.

“The police have no power to enforce ministers’ preferences, but only legal regulations - which don’t go anything like as far as the government’s guidance. (...)”

“This is what a police state is like. It’s a state in which the government can issue orders or express preferences with no legal authority and the police will enforce ministers’ wishes. (...) Derbyshire police have shamed our policing traditions.”

The Chair of the Joint Committee on Human Rights, Harriet Harman MP, raised concerns with the Health Secretary Matt Hancock over “heavy-handed policing” and “significant confusion between what is unlawful (in the Regulations) and what is merely contrary to ‘guidance’ or ‘advice’”.²⁷ Where penalties and charges have been wrongly imposed, even if then reversed, she warned “Article 7 ECHR [European Convention on Human Rights], which guarantees no punishment without the law, is potentially violated.”

The Regulations (Regulation 6, para. 1) prohibit individuals leaving “the place where they are living without reasonable excuse.” The Regulations do not define a “reasonable excuse” but provide a non-exhaustive list of reasons why a person may need to leave their house. These include obtaining basic necessities, exercise, seeking medical assistance,

26 Lord Sumption interviewed on BBC Radio 4 Today Programme, 30th March 2020. A transcript is available here: <https://www.spectator.co.uk/article/former-supreme-court-justice-this-is-what-a-police-state-is-like->

27 Letter from Harriet Harman MP to Health Secretary Matt Hancock, 9th April 2020: <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/correspondence/200409-Letter-to-Matt-Hancock-regarding-Health-Protection-Coronavirus-Restrictions-England-Regulation-2020.pdf>

providing care or assistance to a vulnerable person, and attending work where it is not possible to work from home.²⁸ These restrictions do not apply to any person who is homeless (Regulation 6, para. 4).

RECOMMENDATION 4: The Government’s communications of the “rules” must be harmonised with the Regulations to avoid enduring confusion among the public and the police as to precisely what the restrictions, and individuals’ legal rights, are.

Policing guidance

The National Police Chiefs’ Council (NPCC) and College of Policing issued guidance titled ‘COVID-19 – Policing brief in response to Coronavirus Government Legislation’ on 26th March 2020. However, this was followed with revised guidance on 31st March 2020,²⁹ as the original document was vague, inaccurate and punitive. The initial document, like much of the policing that followed, confused the Regulations with the stricter government guidance (as well as with the Coronavirus Act) and treated the example list of reasonable excuses for leaving one’s home as complete and exhaustive: it stated, “People may only leave the place where they are living for the reasons listed in government guidance”. It is concerning to see police confuse Government guidance with the law. We welcomed the subsequent police guidance document which amended this confusion and clarified particularly contentious points,³⁰ such as those relating to travel to a place to exercise and police use of road checks.

Further helpful guidance, ‘Policing the pandemic: the Act, the Regulations and guidance’ was issued by the NPCC and College of Policing on 7th April 2020, clarifying the differences between the Regulations, the (non-enforceable) Government guidance and the Coronavirus Act.³¹ Nevertheless, some police forces continue to portray fundamental misunderstandings of these distinctions - such as Lancashire Police, which has an information webpage confusing the Regulations with the Act whilst also referring to

28 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, regulation 6(2)

29 COVID-19 – Policing brief in response to Coronavirus Government Legislation – NPCC and College of Policing, 31st March 2020: <https://www.college.police.uk/Documents/COVID-19-Police-brief-in-response-to-Coronavirus-Government-Legislation.pdf>

30 See also, Differences between versions of the COVID-19 – Policing brief in response to the Coronavirus Government Legislation issued 26 March 2020 and 31 March 2020 – NPCC and College of Policing: <https://www.college.police.uk/Documents/NPCC-CoP-Version-differences-COVID-19-Policing-brief.pdf>

31 Policing the pandemic: the Act, the Regulations and guidance – NPCC and College of Policing, 7th April 2020: https://www.college.police.uk/What-we-do/Support/Health-safety/Documents/Policing_the_pandemic.pdf

enforcement of the guidance.³² Incidentally, Lancashire Police has been one of the most punitive forces in the pandemic.³³

On 8th April 2020, the Government updated its guidance to clarify the Regulations in relation to medical needs, disabilities and mental health: "If you (or a person in your care) have a specific health condition that requires you to leave the home to maintain your health - including if that involves travel beyond your local area - then you can do so. This could, for example, include where individuals with learning disabilities or autism require specific exercise in an open space two or three times each day."³⁴ This welcome acknowledgement followed legal action by two families with children with autistic spectrum disorder whose conditions necessitate them leaving the house more than once a day for their own well-being.³⁵ However, this allowance may not be clear from the list of "reasonable excuses" for leaving one's home in the Regulations which, whilst non-exhaustive, does not include such reasons. Indeed, the general restriction to one form of exercise a day has no clear legal authority in the (English) Regulations. The discrepancies between the law and guidance merit review.

More recently, on 15th April 2020, the NPCC and College of Policing reproduced CPS guidance on what constitutes a "reasonable excuse" to leave the place you live, clarifying Regulation 6 (in England).³⁶ The document does not specifically include the allowance around disabilities but rather states that exercise more than once per day is "likely to be reasonable", though this judgement is largely discretionary: "the only relevant consideration is whether repeated exercise on the same day can be considered a 'reasonable excuse' for leaving home."³⁷ The document does helpfully state that "stopping to rest or to eat lunch while on a long walk" is likely to be reasonable. It also advises that "Moving to a friend's address for several days to allow a 'cooling-off'

32 The New Coronavirus Act: What It Means For You – Lancashire Police: <https://www.lancashire.police.uk/covid-19/the-new-coronavirus-act-what-it-means-for-you/> (accessed 22nd April 2020)

33 Coronavirus fines: Lancashire Police issues most lockdown penalties – BBC, 16th April 2020: <https://www.bbc.co.uk/news/uk-england-52301650>

34 Coronavirus outbreak FAQs: what you can and can't do – Cabinet Office, 29th March 2020 (updated 8th April 2020): <https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do#can-i-walk-my-dog--look-after-my-horse> (accessed 22nd April 2020)

35 Government guidance changed to permit people with specific health needs to exercise outside more than once a day and to travel to do so where necessary – Bindmans, 8th April 2020: <https://www.bindmans.com/news/government-guidance-changed-to-permit-people-with-specific-health-needs-to-exercise-outside-more-than-once-a-day-and-to-travel-to-do-so-where-necessary>

36 What constitutes a reasonable excuse to leave the place where you live – NPCC, College of Policing, CPS, 15th April 2020: <https://www.college.police.uk/What-we-do/COVID-19/Documents/What-constitutes-a-reasonable-excuse.pdf>

37 What constitutes a reasonable excuse to leave the place where you live – NPCC, College of Policing, CPS, 15th April 2020: <https://www.college.police.uk/What-we-do/COVID-19/Documents/What-constitutes-a-reasonable-excuse.pdf>

following arguments at home” is likely to be reasonable, which is important at a time when domestic violence has spiked³⁸ and households are experiencing undue pressure.

RECOMMENDATION 5: The Regulations should be amended to expressly acknowledge that it is a reasonable excuse for a person to leave or remain outside their home if required for any medical, mental health or disability needs.

Exercise

The Regulations on exercise have been consistently misinterpreted, particularly due to the discrepancy between the Regulations and government guidance, the latter being more restrictive.

The Regulations in England³⁹, Scotland⁴⁰ and Northern Ireland⁴¹ state that a person may leave their house to take exercise alone or with members of the same household, and state no further limitation. The Regulations in Wales similarly state that a person may leave their house to take exercise alone or with members of the same household, but further specify that a person may exercise “no more than once a day”.⁴² Government guidance advises that people can leave their homes for “one form of exercise a day”⁴³ and some Ministers suggested a one hour limit,⁴⁴ both of which exceed the Regulations in most of the UK.

38 Coronavirus: Domestic abuse calls up 25% since lockdown, charity says - June Kelly and Tomos Morgan, BBC News, 6th April 2020: <https://www.bbc.co.uk/news/uk-52157620>

39 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, regulation 6(2)(b)

40 The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, regulation 8(5)(b)

41 The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020, regulation 5(2)(b)

42 The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, regulation 8(2)(b)

43 Government Guidance, Staying at home and away from others (social distancing) – Cabinet Office, 29 March 2020: <https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others>

44 Daily walk or run should be for a maximum of one hour and near home during coronavirus lockdown, Michael Gove says – Natasha Clark, The Sun, 30th March 2020: <https://www.thesun.co.uk/news/11284289/daily-walk-or-run-maximum-one-hour-coronavirus/>

Once a day?

As discussed, the Regulations in England⁴⁵, Scotland⁴⁶ and Northern Ireland⁴⁷ state that a person may leave their house to take exercise alone or with members of the same household without further limitation. Only the Regulations in Wales specify that a person may exercise “no more than once a day”.⁴⁸ However, Government guidance goes beyond most of the Regulations and advises that people can leave their homes for “one form of exercise a day”.⁴⁹

Without intrusive surveillance, this restriction would be difficult to enforce. Nonetheless, and despite the lack of legal authority in England, multiple police forces and councils have informed people they are only permitted to leave their home to exercise once per day. Despite the Government’s updated guidance as of 8th April to clarify reasonable excuses for those with disabilities to be outside of the home, and the CPS guidance published on 15th April which (though ultimately advising discretion) states that exercise more than once per day is “likely to be reasonable” in England,⁵⁰ this incorrect message has continued to be communicated to the public.

This issue was examined in the Joint Committee on Human Rights Chair’s Briefing Paper, which noted the “confusing” discrepancy between the Regulations in Wales and the rest of the UK and commented that “It is difficult to understand why a blanket ‘once per day’ restriction on exercise might be considered necessary and proportionate” in Wales. The paper acknowledged that this “is an important issue for tens of millions of people so guidance and law must be as clear as possible.”⁵¹

Importantly, there are no legal restrictions on the number of times a person can leave their home in England, Scotland and Northern Ireland with a reasonable excuse. The point is well put in the recent Commons Library Briefing:

“The Regulations do not limit the number of times a person can leave their home per day or the length of time they can spend outside. Individuals are permitted to

45 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, regulation 6(2)(b)

46 The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, regulation 8(5)(b)

47 The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020, regulation 5(2)(b)

48 The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, regulation 8(2)(b)

49 Government Guidance, Staying at home and away from others (social distancing) – Cabinet Office, 29 March 2020: <https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others>

50 What constitutes a reasonable excuse to leave the place where you live – NPCC, College of Policing, CPS, 15th April 2020: <https://www.college.police.uk/What-we-do/COVID-19/Documents/What-constitutes-a-reasonable-excuse.pdf>

51 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 & the Lockdown Restrictions: Chair’s Briefing Paper – Joint Committee on Human Rights, 8th April 2020, p.9: <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/correspondence/Chairs-briefing-paper-regarding-Health-Protection-Coronavirus-Restrictions-England-Regulation-2020.pdf>

leave their home as many times as they need, for as long as they need, provided they have a 'reasonable excuse'.⁵²

RECOMMENDATION 6: The Regulations should, as far as possible, be harmonised across the nations of the United Kingdom to avoid arbitrary discrepancies and public confusion, and to enable clear, unified Government communications about the restrictions.

Travel to exercise

In addition, there has been great confusion over whether travelling to a place to exercise is permitted as a "reasonable excuse" to leave the home under the Regulations. During the first two weeks of the "lockdown" restrictions, police frequently took concerted action against people who travelled to a place to exercise including issuing warnings on social media, road checks and drone surveillance. The Regulations do not specify where a person may exercise or how they reach this place.

Police confusion around the Regulations led to a series of concerning incidents of over-policing and chaotic public communications from police around exercise and travel. The aforementioned 'COVID-19 – Policing brief' guidance was amended on 31st March 2020 to advise officers: "Use your judgement and common sense; for example, people will want to exercise locally and may need to travel to do so, we don't want the public sanctioned for travelling a reasonable distance to exercise."⁵³

This followed police forces issuing notices on social media and on cars around parks, the coast and beauty spots threatening fines and warning against driving to a place to exercise.

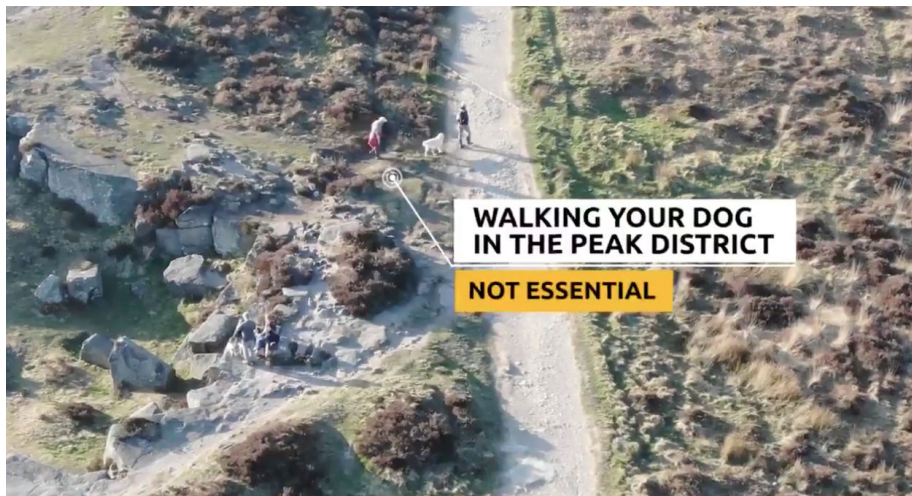
In particular, Derbyshire Police attracted significant public attention after posting a social media video on 26th March 2020 of drone surveillance footage it had taken of people who were walking and exercising in the Peak District. The video shames the walkers and states, "The Government advice is clear. You should only travel if it is essential. Travelling to remote areas of the Peak District for your exercise is not essential."⁵⁴ The role of the police is to enforce the law, not Government advice. The Regulations do not prohibit travel

52 Coronavirus: Policing the instruction to stay at home – Jennifer Brown, Commons Library Briefing No. 8875, 22nd April 2020, p.3: <http://researchbriefings.files.parliament.uk/documents/CBP-8875/CBP-8875.pdf>

53 COVID-19 – Policing brief in response to Coronavirus Government Legislation – NPCC and College of Policing, 31st March 2020: <https://www.college.police.uk/Documents/COVID-19-Police-brief-in-response-to-Coronavirus-Government-Legislation.pdf>, p. 15

54 Derbyshire Police on Twitter, 26th March 2020: <https://twitter.com/DerbysPolice/status/1243168931503882241>

to exercise and, as subsequent police guidance clarified, people may wish to travel a reasonable distance to safely exercise.



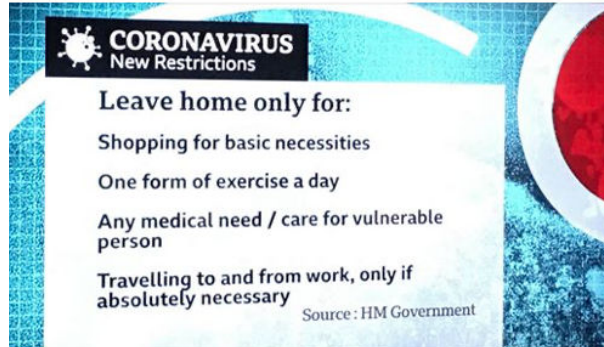
Despite the public controversy this caused, including accusations of a police state, serious misinterpretations of the Regulations towards a more prohibitive set of rules persisted.

Lancashire Police, which issued vastly more fines than any other force in England in the first fortnight after the Regulations came into force (380 fines in the first 2.5 weeks)⁵⁵, instructed the public via Facebook “No driving to exercise” (29th March, 2020, now deleted); warned “Don’t risk a fine (...) If you want to exercise – walk, job or cycle from home. Do not drive anywhere” (28th March 2020); and stated “our officers will be taking a zero tolerance approach with those who ignore government guidance” (25th March 2020, which was before the Regulations had even been made). All of these statements misinterpret the Regulations and go beyond the rules in law.

55 Coronavirus fines: Lancashire Police issues most lockdown penalties – BBC, 16th April 2020: <https://www.bbc.co.uk/news/uk-england-52301650>

 **Lancashire Police**
28 March at 17:00 · 🌐

Don't risk a fine. Please follow the stay at home rules here <http://orlo.uk/CUpld> and only go out for one of the specified reasons.
If you want to exercise - walk, jog or cycle from home. Do not drive anywhere.
#StayHomeSaveLives #Covid19






 **Lancashire Police**
25 March at 17:28 · 🌐

Thankyou to those taking heed of our messages and being mindful to reduce our demand, by staying home & not making unnecessary trips.
We'd like to assure you that over the coming days you'll be seeing increased police presence on the streets and our officers will be taking a zero tolerance approach with those who ignore government guidance.

 **Lancashire Police**
10 hrs · 🌐

We'll be out patrolling this weekend making sure people follow **#StayHomeSaveLives**

We'll engage, explain and encourage but if we need to enforce, we will.

-  No barbecues with friends
-  No house parties
-  No driving to exercise

#Covid19

Up until early April, Dyfed-Powys Police, which issued 368 fines in the four weeks after the Regulations came into force,⁵⁶ placed signs in parks in Pembrokeshire stating “The Government restrictions currently in place **DO NOT** permit you to use your vehicle to travel to this location to exercise/walk your dog” and further, “The details of your vehicle have

56 Police officers hand out 368 fines since coronavirus legislation came into force – Paul Evans, Tenby Observer, 22nd April 2020: <http://www.tenby-today.co.uk/article.cfm?id=127386&headline=Police%20officers%20hand%20out%20368%20fines%20since%20coronavirus%20legislation%20came%20into%20force§ionIs=news&searchyear=2020>

been recorded and further infractions could result in a fine and or arrest.”⁵⁷ However, this goes far beyond the Regulations and contradicts the police guidance amended on 31st March clarifying that “people will want to exercise locally and may need to travel to do so, we don’t want the public sanctioned for travelling a reasonable distance to exercise.”⁵⁸ The force later confessed that contrary to its notices it had not, in fact, recorded details of any vehicles for future fines.⁵⁹

However, public communications remain mixed and confusing. As recently as 15th April, the Welsh Government tweeted, “Remember: Driving to a different location to exercise is not essential travel”.⁶⁰ However, “essential travel” is not the test in law but rather a “reasonable excuse” to leave the home is required, and driving a reasonable distance to a location to exercise has been expressly acknowledged as one such reasonable excuse.



Furthermore, some police figures reject the guidance explaining what the law does and does not allow. Shaun Sawyer, Chief Constable of Devon and Cornwall Police, described the revised NPCC guidance as “some of the poorest guidance I have seen for a long time”,

⁵⁷ Dyfed-Powys Police puts up inaccurate coronavirus signs – George Thompson, Western Telegraph, 4th April 2020: <https://www.westerntelegraph.co.uk/news/18358605.dyfed-powys-police-puts-inaccurate-coronavirus-signs/>

⁵⁸ COVID-19 – Policing brief in response to Coronavirus Government Legislation – NPCC and College of Policing, 31st March 2020: <https://www.college.police.uk/Documents/COVID-19-Police-brief-in-response-to-Coronavirus-Government-Legislation.pdf>, p. 15

⁵⁹ Dyfed-Powys Police puts up inaccurate coronavirus signs – George Thompson, Western Telegraph, 4th April 2020: <https://www.westerntelegraph.co.uk/news/18358605.dyfed-powys-police-puts-inaccurate-coronavirus-signs/>

⁶⁰ Welsh Government, Twitter, 15th April 2020: <https://twitter.com/WelshGovernment/status/1250310448227876864?s=20>

whilst Julia Mulligan, Police and Crime Commissioner for North Yorkshire, opined that the “new guidelines go completely against [government advice] and are hugely unhelpful”.⁶¹

On 18th April Dorset Police issued a statement on the new police guidance that seemed to disregard the law, stating, “Government advice remains the same (...) Officers will continue to make individual judgements based on the specific circumstances presented to them.(...) It is also not within the spirit of what we are trying to achieve if you drive from the north of the county to the coast for surfing, regardless of whether that is 'lawful' or not.”⁶² The force has put posters near green open spaces saying “Driving to this location is not in the spirit of the Government restrictions currently in place (...) You are entitled to exercise once daily. You are being asked to stay at home and carry out your daily exercise from your home.”⁶³ Similarly, Sussex Police appears to prioritise officer discretion over the clear guidance, telling its social media followers that you can only exercise “where you live” and “as long as you can walk there.”⁶⁴ This is a misrepresentation of the law. For police forces to openly disregard CPS guidance is inappropriate and only adds to concerns about arbitrary policing.

This is fast developing into a policing crisis, with citizens subject to a postcode lottery version of the law. It is unsustainable. The need to harmonise Government’s communications of the rules with the Regulations is overwhelming.

RECOMMENDATION 7: Inconsistencies and inaccuracies in interpretation of the Regulations persist across police forces nationally. The NPCC, the College of Policing and the CPS should urgently conduct a review of police forces’ implementation and communication of the “lockdown” restrictions following the publication of the revised guidance.

61 Police chief slams national guidance on driving for exercise – Luke Andrews, 24th April 2020: <https://www.dailymail.co.uk/news/article-8253457/Police-chief-slams-national-guidance-driving-exercise.html>

62 New guidance on travelling for exercise – but Dorset Police will not be changing its stance – Jennifer Mulcahy, Dorset Echo, 18th April 2020: <https://www.dorsetecho.co.uk/news/18388520.new-guidance-travelling-exercise---dorset-police-will-not-changing-stance/>

63 Baroness Jenny Jones, Twitter, 21st April 2020: <https://twitter.com/GreenJennyJones/status/1252588359085686785?s=20>

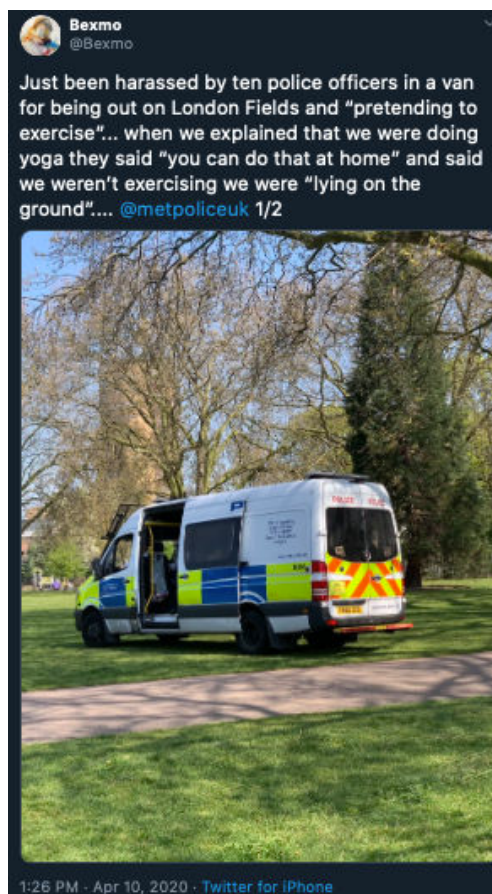
64 Sussex Police tell people not to drive to their walks though it is allowed – Jody Doherty-Cove, the Argus, 20th April 2020: <https://www.theargus.co.uk/news/18390295.sussex-police-tell-people-not-drive-walks-though-allowed/>

Policing types of exercise

There are many accounts of police moving people on from parks who are exercising without running or walking, but doing strength exercises such as press-ups, sit-ups and so on. Typically, this is policed on the basis that such exercise could be done at home, which not only goes beyond the Regulations but discounts the importance of fresh air, sunlight and makes assumptions about individuals' living situations.

Journalist Paul Burston stated on Twitter that he was directed to go home by an officer who told him that walking did not count as exercise, and that only jogging or cycling were permitted.⁶⁵ West Midlands Police posted a video where an officer tells men who are boxing in the park that they must go home, as this form of exercise can be done at home.⁶⁶ A woman complained that her son had been told to go home while exercising; his cycling did not count as exercise as he "wasn't sweating."⁶⁷

In one case on 10th April 2020, a woman felt "harassed" when she was moved on by police from a London park whilst doing yoga and accused of "pretending to exercise".⁶⁸



65 Paul Burston, Twitter, 18th April 2020: <https://twitter.com/PaulBurston/status/1251486146242260992?s=20>

66 West Midlands Police, Twitter, 19th April 2020: <https://twitter.com/WMPolice/status/1251799972451942400?s=20>

67 Twitter, 16th April 2020: <https://twitter.com/COYSRach/status/1250887257764093952?s=20>

68 <https://twitter.com/Bexmo/status/1248588173447442432>

There have also been reports of people being moved on from tending allotments,⁶⁹ despite this being explicitly referenced as a “reasonable excuse” in the CPS guidance.⁷⁰ All of these forms of exercise are valid and pose no risk to the public. The CPS guidance has been used to remind officers that “exercise can take many forms”, specifically noting that walking and yoga are forms of exercise. Exercise is vital for physical and mental health. Placing arbitrary restrictions over what constitutes exercise is unnecessary and threatens public wellbeing.

Exercise and disabilities

As discussed earlier, the Government has already had to issue a clarification to the guidelines to make clear that it is a “reasonable excuse” for individuals with learning disabilities or autism to leave their home to exercise in an open space two or three times each day, if required.⁷¹

People with physical disabilities or limited mobility are also at risk from overly-stringent interpretation of the Regulations. We have seen many reports of police instructing people in parks to “keep moving” and many councils have taped benches to make them inaccessible. Whilst well-intended, this disadvantages people, particularly those with disabilities, injuries or limited mobility, who may need to briefly rest during essential exercise or travel.

69 Sheila Dillon, Twitter, 9th April 2020: <https://twitter.com/SheilaDillon/status/1246901508324691971?s=20>

70 What constitutes a reasonable excuse to leave the place where you live – NPCC, College of Policing, CPS, 15th April 2020: <https://www.college.police.uk/What-we-do/COVID-19/Documents/What-constitutes-a-reasonable-excuse.pdf>

71 Coronavirus outbreak FAQs: what you can and can't do – Cabinet Office, 29th March 2020 (updated 8th April 2020): <https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do#can-i-walk-my-dog--look-after-my-horse> (accessed 22nd April 2020)

A woman with a joint condition reported being questioned by police in Queen’s Park, Glasgow on 11th April after resting with a heavy load of shopping. She reported that, despite explaining she was disabled, she was threatened with a fine, yelled at, asked if she was going to disinfect the bench, ordered to move on and followed to ensure she was travelling home.⁷²



Several days later on 15th April, Glasgow Police threatened a woman, who has a disability, with a fine for resting. Despite telling the officers she was in pain, they reportedly told her “you’re not disabled”.⁷³ The following day in Queen’s Park again, a disabled woman resting on a bench with her autistic son was “shouted” at by a police officer who demanded that they leave the park.⁷⁴ As per our earlier recommendation, explicit recognition of the needs of people with disabilities and mental health conditions is required in the Regulations to support consistent, non-discriminatory policing. However, some of these reports also suggest better disabilities awareness training is required for police.

72 https://twitter.com/polski_smakdown/status/1249006032975728640?s=20

73 Twitter, 15th April: https://twitter.com/jo_hauge/status/1250479202882772995

74 Disabled woman forced to leave park after police 'warn her for taking a rest' – Daniel Morrow, Daily Record, 16th April 2020: <https://www.dailyrecord.co.uk/news/scottish-news/disabled-woman-forced-leave-park-21878816>

We have also received reports of elderly people being approached in a similar way by police when taking a brief rest during a walk. Indeed, the NPCC said people as old as 100 have been issued with fines.⁷⁵

Neither the Regulations nor the Government's guidance on access to green spaces prohibits sitting down in parks or open spaces.⁷⁶ Yet, across London, public benches have been taped off in attempt to reduce transmission of the virus.⁷⁷ This well-intended move will do little to deter those who are not concerned about the risk of transmission, while overlooking the impact on disabled, elderly and vulnerable people who rely on benches out of necessity rather than luxury.

RECOMMENDATION 8: Councils that intend to restrict access to parks, green spaces or obstruct benches should first conduct an Equality Impact Assessment and consider the impact on those who are disabled, elderly and vulnerable.

75 Coronavirus fines: Lancashire Police issues most lockdown penalties – BBC, 16th April 2020: <https://www.bbc.co.uk/news/uk-england-52301650>

76 Coronavirus – Guidance on access to green spaces – DEFRA, 27th March 2020 (updated 3rd April 2020): <https://www.gov.uk/government/news/coronavirus-guidance-on-access-to-green-spaces>

77 Coronavirus: Clapham Common park benches taped off by council – Isobel Frodsham, Sky News, 10th April 2020: <https://news.sky.com/story/coronavirus-clapham-common-park-benches-taped-off-by-council-11971641>

Home

In one particularly alarming case, a police officer appeared to misunderstand what constitutes a person's home. On 9th April, an officer from South Yorkshire Police was recorded instructing a family that they were not allowed to be in their front garden. The officer was recorded telling the man, whose young children are heard crying in the background, "You cannot come onto your front garden. I'm recording. You cannot come on your front garden (...) We have Government powers to ask people to stay indoors."⁷⁸



Despite the negative publicity that followed this case, West Midlands Police posted a video to Twitter on 19th April which includes body worn camera footage of them instructing a family eating dinner on their front drive to return inside their home.⁷⁹ This led to a spate of press reports shaming the family as "covidiot" for "flouting" the rules, despite their behaviour plainly posing no risk, nor flouting the rules.⁸⁰

78 Coronavirus: Police apologise for telling family they weren't allowed in their own front garden – Peter Stubley, Independent, 10th April 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-garden-lockdown-rules-south-yorkshire-police-rotherham-a9459146.html>

79 West Midlands Police, Twitter, 19th April 2020: <https://twitter.com/WMPolice/status/1251799972451942400?s=20>

80 For example, Police catch covidiot having sit-down meal in street and exercising in park as angry passer-by berates 'selfish' pair grilling in open air despite Covid-19 lockdown – Kishan Vaghela, Mail Online, 20th April 2020: <https://www.dailymail.co.uk/news/article-8236267/Police-catch-family-enjoying-kebab-chips-street-break-coronavirus-lockdown-rules.html>

It is concerning to see policing in action that is so lacking in basic competence and common sense, particularly at such a critical time. For avoidance of doubt, the Regulations define a person's place of living as the "premises where they live together with any garden, yard, passage, stair, garage, outhouse or other appurtenance of such premises."⁸¹

West Midlands Police's video remains online. South Yorkshire Police later apologised, stating "this encounter was well-intentioned but ill-informed."⁸² This was not only ill-informed but unlawful policing that jeopardised trust at a time of national crisis. Trust can only be restored when such incidents are treated seriously and remedied.

RECOMMENDATION 9: Police cannot maintain trust simply by swinging from public apology to public apology. Police officers who attempt to adjudicate which parts of a person's home they are allowed in are acting outside of the law and in absence of the minimal requirements of professional competence. Where these errors have been made, police forces must reassure the public of their rights and demonstrate that meaningful action has been taken to prevent the issue reoccurring.

Shopping

One of the "reasonable excuses" to leave one's home listed in the Regulations is to "obtain basic necessities, including food and medical supplies for those in the same household (...) and supplies for the essential upkeep, maintenance and functioning of the household."⁸³ This is not an exhaustive list of what constitutes "basic necessities", which will be different for every household.

On 29th March, Warrington Police announced that they had summonsed a number of people including "multiple people from the same household going to the shops for non-essential items."⁸⁴ There have been multiple reports of people in Scotland being fined under the Regulations for buying wine and snacks.⁸⁵ Whilst the Regulation requires that people have a reasonable excuse to be outside of the home, it does not confer power to police to judge "non-essential items," nor does it limit the number of members of a

81 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Regulation 6(3)

82 Coronavirus: Police apologise for telling family they weren't allowed in their own front garden – Peter Stubley, Independent, 10th April 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-garden-lockdown-rules-south-yorkshire-police-rotherham-a9459146.html>

83 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Regulation 6(2)(a)

84 Warrington Police, Twitter, 29th March 2020: <https://twitter.com/PoliceWarr/status/1244163251799195649?s=20>

85 Buying wine amongst reasons people are reportedly being fined in Edinburgh and elsewhere in UK – Hilary Mitchell, edinburghlive, 8th April 2020: <https://www.edinburghlive.co.uk/news/edinburgh-news/buying-wine-amongst-reasons-people-18064286>

household who can visit shops at a time. After public criticism of the arbitrary nature of these charges, Cheshire Police announced that it was “reviewing the circumstances of each case to ensure it was proportionate.”⁸⁶



On 30th March 2020, the Association of Convenience Stores complained that officials were trying to restrict the range of goods convenience stores can sell and several of their members had been told that, as Easter eggs were “non-essential” items, they could not be sold.⁸⁷ This is not the case and is a vast overreach. The Regulations state the types of businesses that must close, not the items that permitted businesses can or cannot sell. As such, authorities have no legal power deriving from the Regulations to restrict the sale of any goods sold by a business that is allowed to remain open. When questioned at the daily press briefing, Foreign Secretary Dominic Raab called for “common sense” policing but also stated the “message the police are rightly trying to convey is people need to follow the guidance not just to the letter but also the spirit.”⁸⁸ Yet again, the communications blurred Government guidance and the law, whilst also supporting significant police discretion where it had already been exercised badly.

86 Cheshire Police reviews ‘coronavirus legislation breaches’ - Adam Everett, Warrington Guardian, 31st March 2020: <https://www.warringtonguardian.co.uk/news/18348309.cheshire-police-reviews-coronavirus-legislation-breaches/>

87 Coronavirus: Easter egg crackdown over essential status ‘wrong’ – BBC News, 30th March 2020: <https://www.bbc.co.uk/news/business-52090441>

88 Coronavirus: ‘Overzealous’ police officers tell shops to stop selling Easter eggs – Dean Kirby and Jane Merrick, I News, 30th March 2020: <https://inews.co.uk/news/coronavirus-overzealous-police-council-officers-easter-eggs-row-steven-kinnock-2523263>

On 6th April, Gloucester City Police reported that they were questioning people entering the Gloucester Quays Retail Park and “checking the reasons for travel”.⁸⁹

On 9th April, the Chief Constable of Northamptonshire Police, Nick Adderley, announced that while the force was not currently searching people’s shopping, it was prepared to do so:

“We will not, at this stage, start to marshal supermarkets and checking the items in baskets and trolleys to see whether it's a legitimate, necessary item. But again, be under no illusion, if people do not heed the warnings and the pleas I'm making today, we will start to do that.”⁹⁰

Adderley backtracked on the threat hours later,⁹¹ and the force stated “To clarify some suggestions made in the media, we absolutely will NOT be searching people's shopping trolleys in Northamptonshire.”⁹²

On 10th April, Cambridge Police tweeted that officers had visited a Tesco “as part of their patrols around supermarkets” where it was “Good to see everyone was abiding by social distancing measures and the non essential aisles were empty”.⁹³ The announcement generated confusion, concern and questions as to how “non-essential aisles” were defined. The tweet was later deleted and the force explained, “(...) we are not monitoring what people are buying from supermarkets. This message was sent with good intentions by an over exuberant officer.”⁹⁴

89 Gloucester City Police, Twitter, 6th April 2020: <https://twitter.com/GlosCityPolice/status/1247068953597431809?s=20>

90 Police warn public they will prosecute people who break coronavirus rules over Easter weekend – ITV News, 9th April 2020: <https://www.itv.com/news/anglia/2020-04-09/police-warn-public-they-will-prosecute-people-who-break-coronavirus-rules-over-easter-weekend/>

91 Nick Adderley, Twitter, 9th April 2020: <https://twitter.com/NorthantsChief/status/1248230120789282818>

92 Northants Police, Twitter, 9th April 2020: <https://twitter.com/NorthantsPolice/status/1248238009360793601?s=2>

93 Coronavirus: Cambridge Police checks no one is in non-essential aisles at supermarket – David Chipakupaku, Sky News, 10th April 2020: <https://news.sky.com/story/coronavirus-cambridge-police-checks-no-one-is-in-non-essential-aisles-at-supermarket-11971517>

94 Coronavirus: Cambridge Police checks no one is in non-essential aisles at supermarket – David Chipakupaku, Sky News, 10th April 2020: <https://news.sky.com/story/coronavirus-cambridge-police-checks-no-one-is-in-non-essential-aisles-at-supermarket-11971517>



Cambridge Police
@CambridgeCops

Officers visited Tesco Barhill this morning as part of their patrols around supermarkets and green spaces this weekend. Good to see everyone was abiding by social distancing measures and the non essential aisles were empty. #1732



Also on 10th April, the Prime Minister’s official spokesperson made a statement to clarify that the Government had “set out a list of shops which could remain open and if the shops are on that list then they are free to sell whatever they have in stock, obviously providing its legal to do so.”⁹⁵

The subsequent CPS guidance on what constitutes a “reasonable excuse”, published 15th April, provides police with what might be examples of reasonable shopping for “basic necessities”.⁹⁶ The guidance reaffirmed that whether buying several days’ worth of food, including luxury items and alcohol, or buying a small amount of staples such as “a newspaper, pet food, a loaf of bread or pint of milk”, both are likely to be reasonable. The CPS advised that “If a person is already out of the address with good reason, then it would not be proportionate to prevent the person from buying non-essential items.” However, this could feasibly change in light of the amendments to the Regulations of 22nd April, which now require that a person has not only a reasonable excuse to leave their home but to remain outside of their home. The guidance clarified there is “no need for all a person’s shopping to be basic food supplies; the purchase of snacks and luxuries is still permitted.” However, the guidance advises that buying “paint and brushes” for decorating purposes is not likely to be reasonable.

This guidance confirmed that much of the policing around shopping, including attempts to restrict the sale of goods in permitted shops, “patrols” of “non-essential aisles” in supermarkets and threats to search shopping baskets had been excessive and a misinterpretation of the law. The fact of the guidance also confirmed that the Regulation is not prescriptive – it requires discretion and common sense, which both the First

95 Coronavirus: Government confirms shops can sell whatever they have in stock, after police criticised for patrolling 'non-essential aisles' in supermarket – Harry Cockburn, Independent, 10th April 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-police-essential-items-shops-supermarket-stock-lockdown-a9459346.html>

96 What constitutes a reasonable excuse to leave the place where you live – NPCC, College of Policing, CPS, 15th April 2020: <https://www.college.police.uk/What-we-do/COVID-19/Documents/What-constitutes-a-reasonable-excuse.pdf>

Secretary of State⁹⁷ and Home Secretary⁹⁸ have publicly asked officers to employ, and yet which seems worryingly absent in some of the pandemic policing, even at senior levels. As recommended above, the NPCC, the College of Policing and the CPS should urgently conduct a review of police forces' implementation and communication of the "lockdown" restrictions following the publication of the revised guidance.

Work

The Regulations allow individuals to travel for the purposes of work only "where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living."⁹⁹

There have been reports of police asking people travelling for work to show a 'key worker letter' to justify their travel and ordering workers to return home if they do not have a letter. This matter has caused significant confusion. There is no requirement to carry proof of work, a work letter or form, or even ID. A Department for Transport guidance document confirms "There is no system of passes to show who should or should not be working."¹⁰⁰ However, police requests for work IDs and letters have been so frequent that many organisations have produced template letters as a result and encourage staff to carry them, including NHS England,¹⁰¹ the Agriculture and Horticulture Development Board (AHDB) for workers in food supply chains,¹⁰² Road Haulage Association,¹⁰³ National Farmers' Union Scotland¹⁰⁴ and many more.

Police in Cambridge were reported to have been stopping NHS staff on their way to work, stating that their NHS IDs were not sufficient proof that they were travelling for an essential reason. In a newsletter seen by the Guardian, Cambridge University hospital

97 Coronavirus: 'Overzealous' police officers tell shops to stop selling Easter eggs – Dean Kirby and Jane Merrick, I News, 30th March 2020: <https://inews.co.uk/news/coronavirus-overzealous-police-council-officers-easter-eggs-row-steven-kinnock-2523263>

98 Priti Patel finally speaks publicly as she tells police to exercise common sense – Sam Corbishly, Metro, 10th April 2020: <https://metro.co.uk/2020/04/10/priti-patel-finally-speaks-publicly-tells-police-exercise-common-sense-12536667/>

99 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Regulation 6(2)(f)

100 Questions and Answers concerning police enforcement of travel and retail restrictions due to COVID 19 – Department for Transport: <https://www.college.police.uk/Documents/Q%20and%20A%20COVID-19%20Transport.pdf>

101 Template letter for key workers – NHS England, 20th March 2020: <https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2020/03/annex-1-hr-template-letter-20-03-20.docx>

102 Coronavirus: essential travel letter template – AHDB: <https://ahdb.org.uk/knowledge-library/coronavirus-essential-travel-letter-template>

103 Updated RHA letter for haulage key workers – RHA, 25th March 2020: <https://www.rha.uk.net/getmedia/db7eaf0f-406a-4044-b9d1-3dd569cac56c/Updated-RHA-Key-Worker-Letter-25-March-2020.docx.aspx>

104 Movement to undertake work during lockdown – NFU Scotland: <https://www.nfu.org.uk/coronavirus/template-letters-for-staff-movements.aspx>

confirmed that it had been in contact with the police force in question and asked it to “remind all police officers that such an explanation together with an NHS ID badge is sufficient evidence.”¹⁰⁵

Journalism

Journalists perform an essential duty, particularly during national crises. The need to keep the public informed and hold power to account is critical during a public health emergency. On 20th March 2020, Culture Secretary Oliver Dowden reiterated that “public service news across TV, radio and print has never been more important than it is right now” and confirmed that “broadcasters, journalists and the necessary ancillary staff are included as Key Workers”.¹⁰⁶ On 31st March, the NPCC issued guidance on ‘Working with journalists during Covid-19 outbreak’¹⁰⁷ which reaffirms that journalists are covered as key workers, though stipulates that “Journalists will be expected to carry a UK Press Card or other official record of employment.” Some journalists we have spoken to have also been issued with ‘key worker’ letters by their employers.

On 5th April, a worrying incident occurred in Finsbury Park, London, where journalist Michael Segalov was prevented from reporting by police.¹⁰⁸ Segalov was filming police arrest a “distressed” woman when he was surrounded by five police officers who repeatedly shouted, including through a megaphone, that he should stop filming and “go away” or risk a fine. One officer shouted “Go home! You’re killing people! Go home!” as Segalov filmed police actions from a reasonable distance.¹⁰⁹ This policing was wrong, disproportionate and unnecessary, breaching not only Government and NPCC guidance about journalists but also infringing on the right to freedom of expression protected by Article 10 ECHR. Segalov has sought legal advice and is now seeking an apology and investigation.

105 UK coronavirus live: Hancock announces contact-tracing app as UK hospital death toll passes 10,000 – as it happened – The Guardian, 12th April 2020: <https://www.theguardian.com/uk-news/live/2020/apr/12/coronavirus-live-news-nhs-staff-deaths-boris-johnson-latest-updates?page=with:block-5e92f2e68f08db3109f21079#block-5e92f2e68f08db3109f21079>

106 Oliver Dowden, Twitter, 20th March 2020: <https://twitter.com/OliverDowden/status/1241004056702828545?s=20>

107 Working with journalists during Covid-19 outbreak – NPCC, 31st March 2020: <https://www.nuj.org.uk/documents/national-police-chiefs-council-guidance-on-working-with/>

108 Michael Segalov, Twitter, 5th April 2020: <https://twitter.com/MikeSegalov/status/1246848400835973122?s=20>

109 Watch Police Accuse a Man of 'Killing People' for Filming Them – Simon Childs, Vice, 16th April 2020: https://www.vice.com/en_uk/article/epgegi/police-power-trip-coronavirus-lockdown

RECOMMENDATION 10: The NPCC and College of Policing should issue further guidance to clarify that there is no requirement for those who need to leave their homes for work to carry special proof of work or an ID card. Only journalists are expected to carry a press card.

Enforcement

We welcome the “four Es” strategy set by the NPCC to engage, explain and encourage adherence to the rules, only using enforcement as a last resort,¹¹⁰ which reflects the British tradition of policing by consent. This approach should also avoid a wave of criminal convictions for entirely ordinary behaviours that until a few weeks ago were lawful, as criminal records can have a serious impact on a person’s life course.

However, in addition to misinterpretation of what the Regulations do and do not permit, the police’s enforcement of the rules has been inconsistent, sometimes counter-productive and often excessive.

Some of the public concern about excessive enforcement has been caused by unprofessional or misguided use of social media rather than enforcement itself. We have described some examples earlier in this report, but there have been too many to include. On 15th March 2020, Cann Hall Police took to Twitter to describe receiving the early Coronavirus Regulations like “kids at Christmas” and joked about new detention powers to “play with”.



The new Regulations impose extremely serious and unprecedented restrictions on our civil liberties and police forces should deal with the measures with exceptional care, professionalism and diligence. This kind of language is highly inappropriate and erodes public trust in policing at a critical time.

Faced with a tough job in policing the pandemic, police have too often swung from blunder to blunder, and apology to apology in this first month. We have welcomed the

110 COVID-19 – Policing brief in response to Coronavirus Government Legislation – NPCC and College of Policing, 31st March 2020: <https://www.college.police.uk/Documents/COVID-19-Police-brief-in-response-to-Coronavirus-Government-Legislation.pdf>

publication of revised guidelines but make recommendations in this report to address not only the immediate but the fundamental issues in policing that have been exposed in this situation. These problems cannot be solved with rhetoric and good intentions alone. Chair of the NPCC, Martin Hewitt, acknowledged in the Times that there had been “well-publicised instances” of “overzealous” policing during early adjustment, but that he was assured the public would read them as “well-meant attempts to encourage responsible behaviour”.¹¹¹ However, the public needs more reassurance about the actions and structures in place to remedy failures and protect policing by consent going forward.

As with interpretation, some confusion and mistakes with early enforcement of the new rules is to be expected – but some of the enforcement issues are worryingly persistent.

RECOMMENDATION 11: Police use of social media offers a vital way to communicate with the public and has proven particularly significant in this time of crisis. However, too often, police social media use has been confusing, controversial and on occasion crude. A full scale review of police social media guidelines and practices is required to further professionalise forces’ public communications.

Fixed penalty notices

According to the “four Es” strategy, fixed penalty notices (FPNs) should be issued under the Regulations as a last resort. However, the Regulations do not appear to require an officer (or PCSO/other authorised person) to issue a direction before issuing a FPN.

An officer may issue a FPN to any adult they “reasonably believe” has committed an offence under the Regulations.¹¹² They need only “consider” that a person is breaching the Regulations in order to direct or remove them to their place of living, including with the use of force.¹¹³ This sets a low threshold for enforcement, and lower than the requirement of “reasonable grounds” to suspect a person is carrying prohibited items before conducting a stop and search. On 24th April, the Regulations for Wales were amended to raise the threshold to “reasonable grounds”.¹¹⁴

111 Police need your help in the fight against coronavirus – Martin Hewitt, The Times, 4th April 2020: <https://www.thetimes.co.uk/past-six-days/2020-04-04/comment/police-need-your-help-in-the-fight-against-coronavirus-9nt92t7pw>

112 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Regulation 10

113 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Reg. 8(3) and (4)

114 The Health Protection (Coronavirus, Restrictions) (Wales) (Amendment) (No.2) Regulations 2020, Regulation 5

Police fixed penalty notices in England

Lancashire Constabulary

380

Thames Valley Police

219

Surrey Police

205

Devon and Cornwall Police

169

Sussex Police

163

North Yorkshire Police

150

British Transport Police

148

West Midlands Police

139

Norfolk Constabulary

126

West Yorkshire Police

121

Fines per 100,000 people

Lancashire Constabulary

25.5

North Yorkshire Police

18.29

Surrey Police

17.23

Cleveland Police

15.96

Norfolk Constabulary

14

Suffolk Constabulary

12.5

Sussex Police

9.76

Devon and Cornwall Police

9.66

Wiltshire Police

9.58

Bedfordshire Police

9.55

Hertfordshire Constabulary

8.81

South Yorkshire Police

8.49

Cumbria Constabulary

8

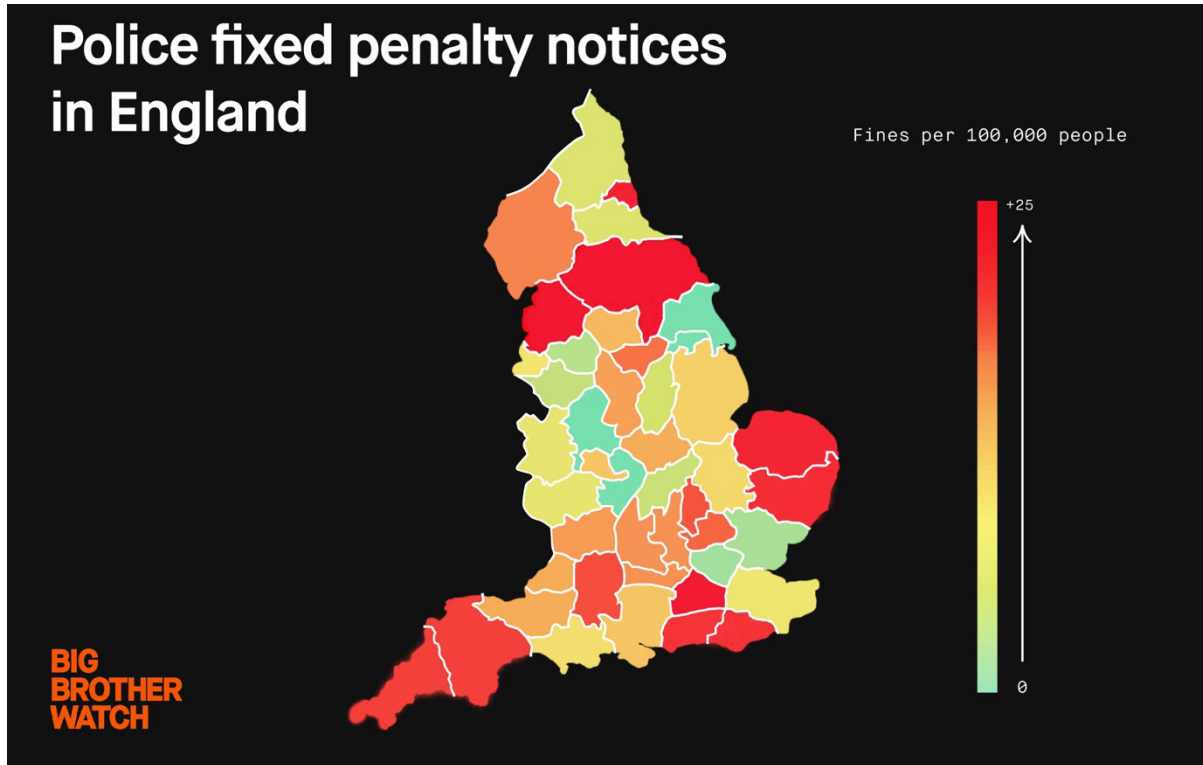
Thames Valley Police

7.37

Dates from 27th March to 13th April 2020

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Police fixed penalty notices in England



Dates from 27th March to 13th April 2020

Police issued 3,203 FPNs in England alone in the 2.5 weeks between 27th March and 13th April,¹¹⁵ including to a 100 year old.¹¹⁶ There is a concerning disparity in the number of FPNs issued between forces, with Lancashire Police issuing 380 FPNs in the period whilst Humberside issued only 2.¹¹⁷ Even accounting for population size, Lancashire issued 116 times as many FPNs as Humberside Police (see infographic). Part of the reason could be that the Lancashire force has to police Blackpool beach, but then again Sussex police issued less than half the number of FPNs in the same period (163) despite policing Brighton beach. The Home Affairs Select Committee has rightly questioned how consistently the law is being applied, in light of these figures.¹¹⁸

RECOMMENDATIONS:

12. The Regulations to restrict freedom of movement would be better constructed as a general prohibition. Only reasonable grounds to suspect a serious breach of the

115 Police chiefs: keep reporting crime to us during Coronavirus outbreak – we are still here for you – NPCC, 15th April 2020: <https://news.npcc.police.uk/releases/police-chiefs-keep-reporting-crime-to-us-during-coronavirus-outbreak-we-are-still-here-for-you>

116 Coronavirus fines: Lancashire Police issues most lockdown penalties – BBC, 16th April 2020: <https://www.bbc.co.uk/news/uk-england-52301650>

117 Coronavirus fines issues in England, 27th March - 13th April – NPCC: <https://cdn.prgloo.com/media/1b5704836f564b04a937301aa90c4daa.png>

118 Home Office preparedness for COVID-19 (Coronavirus): Policing – Home Affairs Select Committee, 15th April 2020, para.7 p.4

prohibition that causes an unreasonable risk to others should constitute an offence that can incur a Fixed Penalty Notice.

13. In light of the extraordinary nature of the emergency restrictions, the presumption against enforcement, and the inconsistency with which police have employed new powers, any decision to prosecute under the emergency powers should be made by the Director of Public Prosecutions.

Drones

Police forces have been using drones to follow, surveil and photograph members of the public in the course of policing the pandemic.

As described earlier, Derbyshire Police faced criticism for using drones to film a couple walking their dog in a remote area and publicly sharing these images to shame them. The purpose appeared to be to 'get the message through', and Chief Constable of Derbyshire Police, Peter Goodman, later commented that the drone surveillance footage "reached an audience far wider than our self-same messages that had gone completely unreported".¹¹⁹

This use of extreme surveillance may have violated the Data Protection Act 2018 and breached the individuals' right to privacy protected by Article 8 of the European Convention on Human Rights, as Derbyshire Police's justification does not easily fit the law enforcement purpose under section 31 of the Data Protection Act 2018,¹²⁰ nor does



119 Derbyshire Police explain drone footage decision – Adam Higgins, Quest Media Network, 31st March 2020: <https://www.questmedianetwork.co.uk/news/daily-coronavirus-updates/derbyshire-police-explain-drone-footage-decision/>

120 Coronavirus and Police Use of Drones – Act Now Training, 3rd April 2020: <https://actnowtraining.wordpress.com/2020/04/03/covid-19-police-drone-footage-and-the-law/>

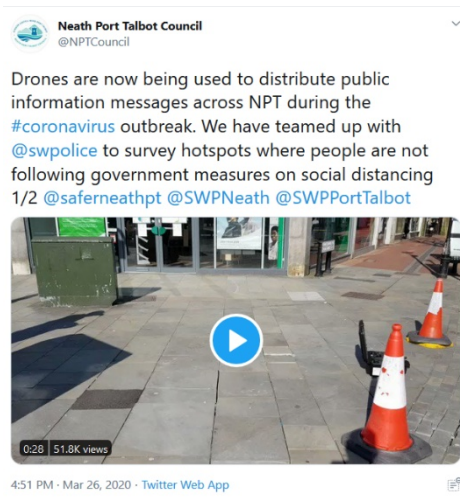
the measure appear to be proportionate to the aims. Indeed, the activity captured by the drones was widely regarded to be both safe and lawful.¹²¹

Neath Port Talbot Council has used drones with speakers attached to them to “distribute public information messages”.¹²² Footage posted to social media by council shows the drone ordering people to “follow the government rules” and telling people “you must stay home”. However, the drone was deployed above a Boots pharmacy where people had been queuing for hours for prescriptions. One local resident said:

“This upset a lot of people today at Neath Boots. People were waiting for prescriptions and people were very orderly and staying two metres apart. This drone turned up and changed the mood.

“As people were perplexed where it's [sic] had come from and what they could do as they were waiting for Boots. People were annoyed to be told to go home when they were already stressed and fed up waiting hours for medications.”¹²³

Police in Wrexham have also used drones to photograph local parks and Welsh rural spots.¹²⁴



121 For example, Lord Sumption interviewed on BBC Radio 4 Today Programme, 30th March 2020. A transcript is available here: <https://www.spectator.co.uk/article/former-supreme-court-justice-this-is-what-a-police-state-is-like->

122 Neath Port Talbot Council, Twitter, 26th March 2020: <https://twitter.com/NPTCouncil/status/1243218979851821056?s=20>

123 Now COUNCILS use talking DRONES to spy on people 'ignoring coronavirus isolation advice' - and order them back inside with loudspeakers – Amie Gordon, Mail Online, 27th March 2020: <https://www.dailymail.co.uk/news/article-8159665/COUNCILS-use-talking-DRONES-spy-people-ignoring-coronavirus-isolation-advice.html>

124 Look at these images of our empty green spaces as Wrexham police use a drone to patrol parks – Matt Warner, The Leader, 27th March 2020: <https://www.leaderlive.co.uk/news/18339185.look-images-empty-green-spaces-wrexham-police-use-drone-patrol-parks/>

Surrey and Sussex police forces have also used a talking drone to patrol towns searching for people who appear to be in violation of the Regulations. Drones are used to approach people considered to be in breach of the Regulations and announce: "Attention, this a Police message. You are gathering in breach of government guidelines to stay at home in response to the coronavirus. You are putting lives at risk. Please disperse immediately and return home."¹²⁵ This enforcement-first approach means police cannot first ascertain why a person may be outside of their home.

Meanwhile, on 23rd March, Chief Constable of Northamptonshire Police Nick Adderley (who later threatened to search people's shopping baskets) said that he planned to increase the force's number of drones from two to eight and deploy them as a "cost-effective" way to transmit messages to the public.

On 15th April 2020, the Civil Aviation Authority relaxed air safety regulations on drones (Air Navigation Order 2016) to allow police to deploy the technology to enforce the emergency Regulations.¹²⁶ Police may now fly drones up to 500ft above the ground, up from 400 ft. They may also fly drones within 33ft (10m) of individuals, whereas previously the limit was 165ft (50m). Drones may also be flown beyond the visual line of sight of the pilot if there is a 'competent observer.'

Several police forces have used them aggressively in place of measured public health communications, which has alarmed and antagonised members of the public. A recent survey found that 43% of people are uncomfortable with the use of drone surveillance.¹²⁷ The growing use of drones, coupled with relaxed safeguards, demonstrates a new manner of police enforcement that is likely to endure far beyond the present pandemic unless parliament takes concerted action.

RECOMMENDATION 14: Drones are an extreme, militaristic form of surveillance that should be reserved for the most serious, strictly necessary cases. Police should immediately cease use of drones for public communications and generalised surveillance. Parliament should review the use of drones in policing and develop clear limitations on their use.

125 Surrey Police use drone to break up gatherings during coronavirus lockdown – Kit Heren, Evening Standard, 11th April 2020: <https://www.standard.co.uk/news/uk/drones-surrey-police-gatherings-coronavirus-lockdown-a4412486.html>

126 Coronavirus: Police with emergency powers will use drones to spot crowds – Graeme Paton and Rhys Blakely, The Times, 15th April 2020: <https://www.thetimes.co.uk/edition/news/coronavirus-police-with-emergency-powers-will-use-drones-to-spot-crowds-wvmmvdklz>

127 Policing the COVID-19 lockdown, YouGov / Crest Survey Results (3-5 April 2020) – 8th April 2020, YouGov: https://docs.cdn.yougov.com/7jrz6rsm5q/Crest_CoronaPolicing_200405.pdf

Megaphones

Police in London have been patrolling parks in vans with megaphones, ordering people not exercising to leave. This tactic breaches the peace, instils anxiety and creates oppressive atmospheres. This is especially problematic in London, where high density housing means public parks are often the only places families can enjoy fresh air and exercise outdoors. This approach also contradicts the “4 Es” strategy set by the NPCC. Considering that the vast majority of people are complying with the Regulations, a proportionate response would be for police to engage with the minority of individuals who breach the rules, rather than harass every person in a park.

In Peckham Rye, a police van drove across the (largely empty) park, repeating “no sunbathing, exercise only” through a megaphone.¹²⁸ In Finsbury Park, a local authority vehicle with alarms and a speaker played a recording warning, “You should only be here for exercise. If you’re not, please go home” on a loop.¹²⁹ Locals reported that, although people had been socially distancing, some were actually drawn to the noise disturbance as it was “such a spectacle.”

One of the most bizarre uses of a megaphone came from Derbyshire Police, yet again, on 24th March 2020 (before the Regulations were made). An officer drove a police car to a deserted, residential lane at 8.41pm, flashed the lights, sounded the sirens and used a megaphone from the car to announce, “You must stay indoors. This is a police message. Please stay indoors.(...) This is serious. We need to beat corona”. The force later issued a supportive statement, saying “While this was not the way in which we had anticipated the message being delivered, his request, and the information within it, still very much stand.”¹³⁰

RECOMMENDATION 15: Police use of megaphones in quiet parks and residential streets breaches the peace, instils anxiety and creates oppressive atmospheres – particularly when the public is experiencing extraordinary psychological pressure. Further police guidance should strongly advise against the use of megaphones unless strictly necessary.

128 Griff Ferris, Twitter, 4th April 2020: https://twitter.com/g_ferris/status/1246475565072371712?s=20

129 London coronavirus: Video shows Finsbury Park driver's 'chilling' message about lockdown rules – Danielle Manning, My London, 12th April 2020: <https://www.mylondon.news/news/north-london-news/london-coronavirus-video-shows-finsbury-18080913>

130 Derby cop uses megaphone to order people to stay indoors – Tom Bokros, DerbyshireLive, 25th March 2020: <https://www.derbytelegraph.co.uk/news/derby-news/derby-cop-uses-megaphone-order-3981139>

Roadside checks

Over the past month, police have increasingly used roadside checks to ask motorists for their reason for travel. We found reports of police conducting roadside checks across the country, with people asked to provide documentation to evidence their work, sent away for travelling for “non-essential shopping”, or ordered to go home for travelling to exercise. Some of this enforcement goes beyond the Regulations and is unlawful.

While police are entitled to stop vehicles for any reason under the Road Traffic Act 1988 (s.163), the amended police guidance on the emergency laws from the NPCC and College of Police is clear that “road checks on every vehicle is (...) disproportionate.”¹³¹

However, a week after the revised police guidance was issued, Gloucestershire Police reported stopping 63 vehicles in an hour at what they described as a “checkpoint” where officers were “conduction [sic] road side checks ensuring people are only making essential journeys”.¹³² At a rate of one vehicle stop a minute, it is highly likely these vehicle stops were indiscriminate and arbitrary.



RECOMMENDATION 16: Setting up roadblocks to arbitrarily question people as to their movements is intimidating, disproportionate, and goes beyond the necessary measures

131 COVID-19 – Policing brief in response to Coronavirus Government Legislation – NPCC and College of Policing, 31st March 2020: <https://www.college.police.uk/Documents/COVID-19-Policing-brief-in-response-to-Coronavirus-Government-Legislation.pdf>

132 Gloucester City Police, Twitter, 7th April 2020: <https://twitter.com/GlosCityPolice/status/1247549935664410624?s=20>, <https://twitter.com/GlosCityPolice/status/1247553446678577166?s=20>

for policing the pandemic. The NPCC and College of Police is clear that “road checks on every vehicle is (...) disproportionate”. Our recommendation for a review by the NPCC, College of Police and the CPS should ensure this guidance is being followed.

ANPR

Police have used the Automatic Number Plate Recognition network to surveil, spot and fine hundreds of motorists in the first month of emergency powers. The UK’s ANPR network is one of the largest non-military surveillance networks in the world, recording 40 million number plates every day. In particular, coastal police forces have used the surveillance method to catch vehicles travelling from outside the county. For example, Sussex Police issued over 100 fixed penalty notices after identifying vehicles with ANPR that had travelled from outside the county over Easter weekend.¹³³

It is important that the restrictions are policed proportionately. Exploiting a mass surveillance network to issue penalties, particularly without enquiring as to the purpose for travel, is plainly disproportionate. There is no specific law underpinning ANPR, and we have long warned that this mass surveillance network would be used for low level offences as long as it operated in such a legal vacuum. The use of ANPR in this public health context sets an unwelcome precedent for the expansion of its use. Considering that the ANPR network originates from a counter-terror context, it is a reminder of the expansion and endurance of emergency measures.

RECOMMENDATION 17: The ANPR surveillance network lacks a clear legal basis. Its use to police the pandemic should be suspended, and ANPR should be tabled for future parliamentary examination.

Closure of public spaces

Authorities have attempted to deter the public from public spaces that they expect people may either unnecessarily travel to or congregate in. This has been through a mix of public communications, policing and actual closures of parks.¹³⁴

Derbyshire Police attracted public criticism, again, when it dyed a poolblack in a disused quarry, known locally as ‘Blue Lagoon’, to deter visitors from the beauty spot. Whilst the pool had been dyed before to deter swimmers for safety reasons, use of the tactic on 25th

133 Police use number plate recognition technology to catch 'holidaymakers' in the wrong place at the wrong time – Charles Hymas, The Telegraph, 14th April 2020: <https://www.telegraph.co.uk/politics/2020/04/14/police-use-number-plate-recognition-technology-catch-holidaymakers/>

134 Coronavirus: Closing parks and open spaces in lockdown should be 'last resort' – BBC News, 6th April 2020: <https://www.bbc.co.uk/news/uk-52181808>

March (the day before the Regulations were made) was justified on the basis that “gathering [at the site] is in contravention of the current instruction of the UK Government”, and “it has never been so important to discourage these types of gatherings.”¹³⁵

Lincolnshire Police went so far as to post photos declaring the East Coast as “closed” over the Easter holiday.¹³⁶ Neither the Regulations nor the Coronavirus Act gives police the power to ‘close’ whole sections of the country. Spaces where people can exercise are vital to maintain physical and mental health, particularly in stressful times such as these.



Threats of force

Thankfully, we have seen few examples of policing of the Regulations using disproportionate force. However, in one concerning case in Manchester, a man was arrested, handcuffed and repeatedly threatened with pepper spray whilst dropping off supplies for vulnerable family members. In a recording of the incident, the arresting officer is heard saying “Put your hands on your head or you’re going to get sprayed”.¹³⁷ When a neighbour tried to intervene, the officer warned her “you’ll be next.” The man was later issued with a FPN.

Police can use force under the Regulations, but only reasonable force where necessary. The fact that this level of excessive force was used against a black man is concerning and

135 Buxton Police SNT, Facebook, 25th March 2020: <https://www.facebook.com/521087308354394/posts/854390878357367>

136 The East Coast is closed this weekend, police warn – Lincolnshire Reporter, 3rd April 2020: <https://lincolnshirereporter.co.uk/2020/04/the-east-coast-is-closed-this-weekend-police-warn/>

137 UK lockdown: police apologise after man threatened with pepper spray – Matta Busby, the Guardian, 11th April 2020: <https://www.theguardian.com/uk-news/2020/apr/11/uk-lockdown-police-apologise-after-man-threatened-with-pepper-spray>

sadly unsurprising, as statistics show police in England and Wales disproportionately use force against black men.¹³⁸ This is a serious problem that demands rectification. Greater Manchester Police stated that they were investigating the incident and rightly apologised for the way it was handled.¹³⁹

It is unclear why the officer intervened in the first place. Providing supplies for vulnerable people, as the man was doing, is one of the listed 'reasonable excuses' in the Regulations. A possible factor may be that after dropping off the supplies, he removed a tree from the home. Whilst a common sense approach would recognise this poses no risk and does not require policing, this may have drawn the police's attention. It is interesting to note that this still would be unlikely to fall foul of the Regulations as they then were, as a person only required a reasonable excuse for leaving their home, but under the amended Regulations it is an offence to remain out of the home even if the purpose for leaving was a reasonable excuse. Nonetheless, such draconian rules do not require draconian enforcement, and certainly not spurious threats of force.

Children

The Regulations are clear that, whilst offers may direct a child to return to their home, parents or guardians ultimately bear responsibility for ensuring children comply with the Regulations and they may be issued with a FPN if their children leave their home without a reasonable excuse.¹⁴⁰ However, on 16th April, the Independent reported that 39 fines had been issued to children between 27th March and 13th April.¹⁴¹ Fining children under the Regulations is unlawful, as acknowledged by NPCC Lead for Charging and Out of Court Disposals, Deputy Chief Constable Sara Glen, who said the penalties "will be rescinded because the legislation doesn't allow it."¹⁴²

A Facebook post by Paignton Police¹⁴³ in Devon on 25th March (the day before the Regulations were made) warned parents that they were responsible for their children. However, the force went further, stating "THIS IS NOT A GAME" and threatening that

138 Police use force disproportionately against black people in England and Wales, figures suggest – Lizzie Dearden, Independent, 14th December 2018: <https://www.independent.co.uk/news/uk/crime/police-racism-force-violence-black-people-uk-white-race-mental-health-taser-restraint-firearms-a8682516.html>

139 UK lockdown: police apologise after man threatened with pepper spray – Matta Busby, the Guardian, 11th April 2020: <https://www.theguardian.com/uk-news/2020/apr/11/uk-lockdown-police-apologise-after-man-threatened-with-pepper-spray>

140 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Regulation 8(5)-(7), Regulation 9(1)(a)

141 Police wrongly fining children under coronavirus law – Lizzie Dearden, Independent, 15th April 2020: <https://www.independent.co.uk/news/uk/crime/coronavirus-lockdown-uk-children-fine-police-latest-a9466541.html>

142 Police wrongly fining children under coronavirus law – Lizzie Dearden, Independent, 15th April 2020: <https://www.independent.co.uk/news/uk/crime/coronavirus-lockdown-uk-children-fine-police-latest-a9466541.html>

143 Paignton Police, Facebook, 25th March 2020: <https://www.facebook.com/PaigntonPolice/photos/a.142811724127137/2581355942136037/?type=3&theater>

“failure to adhere to the above government instructions could be deemed as a failure to safeguard your children and the community in general” and that “partner agencies will be informed” if there were concerns about a child’s activity.¹⁴⁴ These absurd, disproportionate and misplaced threats that parents will be reported to the local authorities or social workers in the course of pandemic policing should never have been publicised, nor viewed as acceptable within the force.

On 28th March, a 13 year old boy in Leeds was arrested in a park and taken into custody for apparently violating the Regulations by refusing to tell a police officer his name or home address.¹⁴⁵ However, there are no stop and account powers conferred by the Regulations. This came to light after a West Yorkshire Police officer, Ste Richardson, tweeted about the case (now deleted). Following press interest, the force issued a statement explaining that the child was later de-arrested for the Regulation breach and re-arrested for a separate offence.¹⁴⁶ No apology was issued, or wrongdoing acknowledged. This extremely concerning case involving the unlawful arrest of a child only came to light because an officer opted to tweet about it. This chance transparency is unacceptable and clearly does not support rectification and remedy where wrongdoing has occurred.

RECOMMENDATIONS:

18. There have been a number of concerning incidents where children have wrongly been arrested or issued with fixed penalty notices. Police forces must demonstrate that they are training officers effectively in use of the new Regulations to prevent such instances. Police forces should each seek to identify, review and rescind any FPNs issued under the Regulations to children.

19. Social media posts threatening to report parents to social services in the course of pandemic policing are absurd, disproportionate and unacceptable. This should be investigated by the force and clear training provided to the staff involved. Greater professional standards in police use of social media should prevent such errors of judgment in future.

144 Police in Torbay warn parents to keep children indoors – Edward Oldfield, Devon Live, 25th March 2020: <https://www.devonlive.com/news/devon-news/police-torbay-warn-parents-keep-3981665>

145 Police release more details after Leeds boy, 13, arrested under new coronavirus law - <https://www.leeds-live.co.uk/news/leeds-news/police-release-more-details-after-18008137>

146 Police issue update after Leeds 13-year-old boy arrested for breaking coronavirus laws – Alex Evans, 30th March 2020: <https://www.yorkshireeveningpost.co.uk/news/crime/police-issue-update-after-leeds-13-year-old-boy-arrested-breaking-coronavirus-laws-2523101>

Citizen policing

The majority of police forces in England and Wales now have online portals where members of the public can make reports about anyone who may be breaching the Regulations.¹⁴⁷ This is concerning for a number of reasons.

Firstly, there is considerable confusion over precisely what activity is prohibited and a general perception that the restrictions are more stringent than the Regulations actually provide – in part, due to the promotion of Government guidelines over the Regulations. The two are not harmonised and only the latter has legal authority. Furthermore, the online reporting portals encourage users to make sure they understand the Government guidance before reporting – not the Regulations – to which a link is provided.¹⁴⁸ This is likely to lead to the impression that it is a reportable offence, for example, for someone to exercise more than once a day – something that is advised against in the Government guidance but is not prohibited in law. Such reports have already been made to police.¹⁴⁹

Secondly, most breaches of the Regulations orientate around the absence of a reasonable excuse for being outside of the home and as such cannot be 'seen'. This is one of the reasons why the "4 Es" policing strategy is so important. Therefore, inviting public reports may encourage suspicion and surveillance in communities, leading to largely speculative reports that may waste police time, whilst breeding distrust. This is seriously counter-intuitive at a time when cohesion and care in communities are paramount. The Joint Committee on Human Rights rightly raised concerns that encouraging citizens to report on one another "will almost certainly engender an atmosphere of mutual distrust and intrusive behaviour which arguably the state should not be encouraging."¹⁵⁰ Given the wide range of reasons a person could be leaving their household, asking members of the public to report their neighbours to the police is unlikely to prove useful and undermines the community spirit that is so vital in times of crisis.

Furthermore, some of the online reporting portals invite particularly intrusive information or intelligence gathering. Humberside Police, the first force to launch an online reporting form in relation to coronavirus, asks people "Has the subject travelled through a Category

147 Tool to report lockdown rule-breakers 'risks fuelling social division' – Josh Halliday and Nazia Parveen, The Guardian, 9th April 2020: <https://www.theguardian.com/uk-news/2020/apr/09/uk-police-tool-report-covid-19-rule-breakers-risks-fuelling-social-division>

148 Tell us about a possible breach of coronavirus (Covid-19) measures – Metropolitan Police: <https://www.met.police.uk/tua/tell-us-about/c19/tell-us-about-possible-breach-coronavirus-measures/> (accessed 23rd April 2020)

149 A snoopers' charter? Police invite public to report coronavirus rule-breakers through online forms – Charles Hymas, The Telegraph, 27th March 2020: <https://www.telegraph.co.uk/politics/2020/03/27/snoopers-charter-police-invite-public-report-coronavirus-rule/>

150 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 & the Lockdown Restrictions: Chair's Briefing Paper – Joint Committee on Human Rights, 8th April 2020, para.32: <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/correspondence/Chairs-briefing-paper-regarding-Health-Protection-Coronavirus-Restrictions-England-Regulation-2020.pdf>

1 country in past 14 days?” and “Is the subject exhibiting symptoms?”¹⁵¹ Encouragement of this type of particularly intrusive peer surveillance is unwelcome and could extend discrimination against targeted groups.

It has been suggested that such online reporting portals have been created to divert and discourage non-urgent reports of Regulation breaches to emergency lines, rather than to encourage citizen reporting. However, a police press release on the online portals opened with the line, “Police are urging members of the public to report breaches of the Coronavirus restrictions online with a newly-created web form and information page.”¹⁵² Language that “urges” people to report breaches, yet does not discourage phone calls, seems to encourage citizen reporting rather than not. Furthermore, some forces, such as the Metropolitan Police, have a fixed banner on their website which provides links to the Government guidance and a link to the online reporting form.¹⁵³

The encouragement of citizen reporting focuses a public order lens on the present situation, when a public health response is more appropriate. We must preserve the limited role for citizens in policing and avoid becoming a nation of informants. Citizen policing is characteristic of authoritarian regimes and does not reflect the community spirit with which most people are tackling the crisis.

RECOMMENDATION 20: We oppose police inviting public reports of Regulation breaches via online portals as it is likely to encourage suspicion and surveillance in communities, eroding social trust, and leading to largely speculative reports that may waste police time. If police do continue to use these portals, they should be used with clearer language to permit only the most serious reports. Reporting portals must not invite speculative intelligence about individuals’ travel or health status, which could encourage discrimination within communities.

Ultra vires?

In our briefing on the Coronavirus Bill, we argued that the Civil Contingencies Act 2004 should have been used to introduce emergency powers as it is permanent legislation designed precisely for such purposes, containing the relevant safeguards, and creates a

151 Report a breach of Covid-19 (Coronavirus) guidance – Humberside Police: <https://www.reportingcrime.uk/HPBreachOfCovid19Guidance/index.html>

152 New reporting methods for Coronavirus breaches – Cambridgeshire Constabulary, 7th April 2020: <https://www.cambs.police.uk/news-and-appeals/new-reporting-methods-for-coronavirus-breaches>

153 <https://www.met.police.uk> (accessed 23rd April 2020)

clear role for ongoing, meaningful parliamentary oversight.¹⁵⁴ This view was shared by many in Parliament, including David Davis MP who requested the advice of the Speaker's Counsel, which was unequivocal on the appropriateness of the Civil Contingencies Act 2004 for the task.¹⁵⁵

The choice to impose national house arrest under neither the Civil Contingencies Act, nor the Coronavirus Act, but via statutory instruments under the Public Health Act 1984 has raised questions as to whether parts of the Regulations are ultra vires, that is, whether they go beyond the legal powers of the UK government. These are not questions of the necessity of the restrictions for the protection of public health, but of whether they are lawful in their current form. There is also compelling analysis that the Regulations are a disproportionate interference with rights protected by the European Convention on Human Rights, including Article 8 privacy rights and Article 11 rights to freedom of assembly.¹⁵⁶

These questions have been addressed with considerable legal scholarship,¹⁵⁷ which we do not try to emulate or repeat here. However, we believe their expertise, and this serious matter, merits parliamentary attention.

To broadly outline the issue, the legal basis for the Regulations is the Public Health (Control of Disease) Act 1984. Section 45C(1) allows a relevant Minister to introduce restrictions across England and Wales to prevent the spread of an infectious disease, and allows for "imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health."

These restrictions or requirements can require children to be kept away from school, prohibit public gatherings, and can include "a special restriction or requirement" (s.45C(4)). Requiring the population to stay at home unless they have a "reasonable

154 Big Brother Watch Briefing on the Coronavirus Bill, 23rd March 2020: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/03/briefing-coronavirus-bill-final.pdf>

155 David Davis MP, Twitter, 23rd March 2020: <https://twitter.com/DavidDavisMP/status/1242005618581483523/photo/1> or see p.5 of the above

156 A disproportionate interference with rights and freedoms – Francis Hoar, Field Court Chambers, 21st April 2020: <https://fieldcourt.co.uk/wp-content/uploads/Francis-Hoar-Coronavirus-article-on-ECHR-compatibility-20.4.2020-2.pdf> ; see also a summary, A disproportionate interference: the Coronavirus Regulations and the ECHR – Francis Hoar, UK Human Rights Blog, 21st April 2020: <https://ukhumanrightsblog.com/2020/04/21/a-disproportionate-interference-the-coronavirus-regulations-and-the-echr-francis-hoar/>

157 Can we be forced to stay at home? - David Anderson QC, 26th March 2020: <https://www.daqc.co.uk/2020/03/26/can-we-be-forced-to-stay-at-home/> ; Coronavirus and Civil Liberties in the UK - Tom Hickman QC, Emma Dixon and Rachel Jones, Blackstone Chambers, 6th April 2020: https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#_edn4 ; Lockdown: A Response to Professor King – Robert Craig, UK Human Rights Blog, 6th April 2020: <https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/> ; Ultra Virus – the constitutionality and legality of the Coronavirus Regulations – David Allen Green, the Law and Policy Blog, 8th April 2020: <https://davidallengreen.com/2020/04/ultra-virus-the-constitutionality-and-legality-of-the-coronavirus-regulations/>

excuse” as per Regulation 6 in the present statutory instrument could be considered to fit the definition of a special requirement or restriction.

However, this special restriction or requirement can only be imposed by a magistrate (s.45C(6)(a)) or a Minister when it may not be practical for magistrate to oversee individual cases (s.45D), but 45D(3) explicitly prohibits the relevant Minister from imposing special restrictions that pertain to the detention or isolation of an individual. Given this limitation on ministerial power to impose physical confinement on a person, it is questionable whether the blanket nature of the Regulation 6 restrictions on movement applying to the whole population have a clear basis in the Act.

RECOMMENDATION 21: Parliament should consider the question of whether the lockdown restrictions, as made, are intra vires. Government should seek, and if possible publish, legal advice on the appropriateness of secondary legislation under the Public Health Act to impose the lockdown restrictions.

Lifting the lockdown

The lockdown restrictions, prohibiting the nation from leaving our homes without reasonable excuse, have imposed the most draconian limitations on liberty in our living memory. It is clear why the Government made this decision in this health crisis, facing a serious threat to an already-strained NHS and the prospect of great loss of life. The public has been extraordinarily compliant with these unprecedented restrictions.

However, if the Government is to achieve continued support, decision-making on matters of such magnitude must be made openly and transparently. Furthermore, decision-making must account for the complex impact that the loss of liberty has on the public. Our rights, freedoms and civil liberties are not mere luxuries – they protect the health, wellbeing and ultimately the lives of the people.

The decision to impose the lockdown restrictions for three weeks received wide public support. There is a statutory duty on the Secretary of State to review the necessity of the Regulations every 21 days and to terminate them when they are no longer necessary “to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus” (Reg. 3(2-3)). However, the decision to continue the lockdown for a further three weeks with an additional, albeit threadbare, “five tests”¹⁵⁸ to lift restrictions has been met with concerns that less restrictive measures that might meet the legal test but not the vague “five tests” are not being considered,¹⁵⁹ and with calls for the Government to be more open with the public and publish its exit strategy.¹⁶⁰

The governance of this decision-making has also been criticised by the Nuffield Council on Bioethics, which described the Government’s public communications as “one-dimensional and one directional”, and the five-point test as “massively simplified” despite the complexity of the challenge.¹⁶¹ The Nuffield Council on Bioethics complained that “the Westminster Government does not seem to want to engage or take on board other views on any of these [ethical] issues; nor is it evident that they are thinking about them, or taking advice on them from a social and ethical perspective.” Democratic engagement, as the Council eloquently stated,

158 Coronavirus lockdown: Are the five tests being met? - Nick Triggle, BBC News, 22nd April 2020: <https://www.bbc.co.uk/news/health-52374513>

159 A disproportionate interference with rights and freedoms – Francis Hoar, Field Court Chambers, 21st April 2020: <https://fieldcourt.co.uk/wp-content/uploads/Francis-Hoar-Coronavirus-article-on-ECHR-compatibility-20.4.2020-2.pdf>

160 Government must publish exit strategy this week – Sir Keir Starmer, Labour Party, 14th April 2020: <https://labour.org.uk/press/government-must-publish-exit-strategy-this-week-starmer/>

161 Statement: COVID-19 and the basics of democratic governance – Nuffield Council on Bioethics, 25th April 2020: <https://www.nuffieldbioethics.org/news/statement-covid-19-and-the-basics-of-democratic-governance>

“(…) is not merely a matter of curiosity. It is a matter of fundamental democratic accountability. Decisions are being made and are due to be made that go to the very heart of what governments are there to do: to protect the freedom and well-being of their people. But they must do so openly, transparently, and accountably, especially where those decisions impinge on precisely that freedom or aspects of well-being. Democratic governments must be subjected to public debate and challenge.”

The Council has called for transparency of government thinking and action across the range of issues of concern and for wider civic engagement.

Importantly, the Council also pointed out that the mantra that government is “following the science” is not necessarily reassuring in and of itself, as “following the science is not politically or morally neutral” and science cannot deliver the complex policy answers now being made. The rhetoric of government simply “following the science” could be compared to the assurance that government was “following the intelligence” during the war against Iraq – a claim to rationality beyond impunity when in fact, it transpired over time, that intelligence was manipulated, decisions were highly political, and the result was many thousands of deaths.

RECOMMENDATION 22: The Government must publish its plan for an exit strategy from the lockdown. The Secretary of State is legally required to terminate any Regulations that are not necessary or proportionate to control the transmission of the virus. Without a full and detailed understanding of the terms on which the Government will make this analysis, we are effectively at the behest of ministerial decree - neither Parliament nor the public can examine whether these extraordinary restrictions are appropriate and the lockdown cannot be said to have continued democratic consent.



Dictatorships and authoritarian societies often start in the face of a threat. That is why it is important to be vigilant today and not give away all our freedoms.”

— Joseph Cannataci, the U.N. Special Rapporteur on the right to privacy.¹⁶²

¹⁶² Coronavirus surveillance poses long-term privacy threat, U.N. expert warns – Umberto Bacchi, Reuters, 31st March 2020: <https://www.reuters.com/article/us-health-coronavirus-privacy/coronavirus-surveillance-poses-long-term-privacy-threat-un-expert-warns-idUSKBN2111XG>

CORONAVIRUS ACT

The Coronavirus Act 2020 came into force on 25th March 2020 after three days of parliamentary consideration. Across 342 pages, it contains the most draconian powers ever seen in peace-time Britain.

Parliamentary review

Big Brother Watch published a briefing on the Bill before it was debated in parliament,¹⁶³ and successfully campaigned with parliamentarians of all parties to secure an amendment for a six month review of the Act, which is otherwise set to be in force for at least two years. As such, Parliament will have an opportunity to vote again on the Coronavirus Act in late September of this year (if Parliament is sitting; otherwise, after conference season in October).

Meanwhile, the Coronavirus Act requires the Health Secretary to report to Parliament on key provisions in the Act every two months – this should be expected around 26th May and before the House rises at the end of July.

The parliamentary debate

The parliamentary debate on the (then) Bill was expectedly sombre. Parliamentarians were naturally mindful of the urgency of the situation and the gravity of the request to equip the Government with the powers it requested to protect public health – but were also concerned by the short time afforded to consider the incredible powers within.

We are concerned that there was more time available to engage Parliament on the legislative response to the emergency than the three days afforded. The Health Secretary Matt Hancock delivered the Bill to the House of Commons, with the apparent reassurance that,

“... the Bill has been drafted over a long period, because it started on the basis of the pandemic flu plan that was standard before coronavirus existed and has been worked on over the past three months at incredible pace by a brilliant team of officials right across Government.”¹⁶⁴

163 Big Brother Watch Briefing on the Coronavirus Bill, 23rd March 2020: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/03/briefing-coronavirus-bill-final.pdf>

164 HC Deb (23rd March 2020) vol. 674, col. 38: <https://hansard.parliament.uk/Commons/2020-03-23/debates/F4D06B4F-56CD-4B60-8306-BAB6D78AC7CF/CoronavirusBill>

However, this raises the question as to why Parliament was not engaged sooner in those three months.

Some of the greatest anxiety was voiced from the Government's own benches. Steve Baker MP's powerful speech on the (then) Bill merits quoting at length:

"When I got into politics, it was with the purpose of enlarging liberty under parliamentary democracy and the rule of law. When I look at this Pandora's box of enlargement, discretion and extensions of power, I can only say what a dreadful, dreadful thing it is to have had to sit here in silence and nod it through because it is the right thing to do.

"My goodness, between this and the Prime Minister's announcement tonight, what have we ushered in? I am not a good enough historian to put into context the scale of the infringement of our liberties that has been implemented today through the Prime Minister's announcement and this enormously complicated Bill, which we are enacting with only two hours to think about amendments.

"I could speak for the time I have available several times over just on the provisions relating to the retention of DNA, which we addressed in the Protection of Freedoms Act 2012. I see from the expression on the face of the Paymaster General, my right hon. Friend the Member for Portsmouth North, that she understands the anguish—she probably knows it better than any of us—that we are all going through in passing this Bill.

"Let me be the first to say that tonight, through this Bill, we are implementing at least a dystopian society. Some will call it totalitarian, which is not quite fair, but it is at least dystopian. (...)

"Every time I dip into the Bill, I find some objectionable power. There is not enough time to scrutinise the Bill, but I can glance at it—I am doing it now—and see objectionable powers.

"I implore my right hon. Friend, for goodness' sake, let us not allow this dystopia to endure one moment longer than is strictly necessary."¹⁶⁵

It is deeply regretful that the Government rejected more robust amendments to ensure frequent review of the Act, as it is now at risk of being seen as a two-year Act by default. During the debate, Chris Bryant MP expressed his concern to the House,

165 HC Deb (23rd March 2020) vol. 674, col. 142: <https://hansard.parliament.uk/Commons/2020-03-23/debates/1BF3C655-EAD2-45DF-BAE2-30052908F7E6/CoronavirusBill>

“it sounds as if the Government are intending to drive this through for two years, come hell or high water, and to keep all the powers in place for that time.”¹⁶⁶

It is absolutely vital that this Act remains to be seen through the lens of the premise on which it was passed - as an emergency statute that must only be in place for as long as is absolutely necessary. During the debate, the Shadow Health Secretary Jon Ashworth MP voiced his concern about the emergency powers:

“Like many Members across the House, the Opposition support this Bill with a very heavy heart—heavy not just with the shock and grief that this deadly virus has brought, but given the very real threats that emergency powers of this nature pose to human rights”¹⁶⁷

and personally vowed to ensure the powers are repealed as soon as they are no longer necessary:

“None of us came into politics to put a Bill like this on the statute book, and I for one will never rest until the day comes, hopefully not too far away, when I can come to this House and vote to get to get rid of it.”¹⁶⁸

We urge all parliamentarians to bear this sentiment in mind.

Of particular concern are the broad detention and dispersal powers in the Act – Schedules 21 and 22 respectively. They contain powers to detain and test potentially infectious members of the public, including children, in unidentified isolation facilities; and powers to shut down any gathering, which could impede the ability to protest against the overall handling of the crisis or against the abuse of the powers themselves.

Detention powers

Schedule 21 of the Coronavirus Act gives vast powers to the police, immigration officers and public health officials to detain members of the public, including children, potentially indefinitely. Our briefing on the (then) Bill examines the implications of Schedule 21 (then Schedule 20) in detail. It contains some of the most extraordinary powers proposed in a Western democratic nation in peacetime.

166 HC Deb (23rd March 2020) vol. 674, col. 136: <https://hansard.parliament.uk/Commons/2020-03-23/debates/1BF3C655-EAD2-45DF-BAE2-30052908F7E6/CoronavirusBill>

167 HC Deb (23rd March 2020) vol. 674, col. 60: <https://hansard.parliament.uk/Commons/2020-03-23/debates/F4D06B4F-56CD-4B60-8306-BAB6D78AC7CF/CoronavirusBill>

168 HC Deb (23rd March 2020) vol. 674, col. 61: <https://hansard.parliament.uk/Commons/2020-03-23/debates/F4D06B4F-56CD-4B60-8306-BAB6D78AC7CF/CoronavirusBill>

Schedule 21 of the Act states that, if the Secretary of State (para. 4), Scottish Ministers (para. 25), Welsh Ministers (para. 48), or Department of Health in Northern Ireland (para. 69) respectively are of the view that the transmission of coronavirus constitutes a serious and imminent threat to public health and declares a “transmission control period”, police, public health officers and immigration officers can detain anyone they have reasonable grounds to suspect is “potentially infectious” (paragraphs 6(1), 7(1), 27(1), 28(1), 50(1), 51(1), 72(1), 73(1)).

These powers have been invoked in England, Wales¹⁶⁹ and Scotland¹⁷⁰ where “transmission control periods” have been declared.

Dispersal powers

Schedule 22 of the Coronavirus Act confers powers to issue directions in relation to events, gathering and premises. Under this Schedule the Secretary of State (or Scottish Ministers, Welsh Ministers, or the Northern Ireland Executive Office respectively) may declare a “public health response period” if the transmission of coronavirus constitutes a “serious and imminent threat to public health” and the powers conferred would prevent, delay or control the transmission of the virus (Sch. 22, para. 3). Declaration of such a period empowers the Secretary of State to “issue a direction prohibiting (...) the holding of an event or gathering” which may be a specific event or “events or gathering of a specified description” (Sch. 22, para. 5). It also confers powers to stop people entering premises, or force people to remain in them (Sch. 22, para. 6), allowing the Secretary of State to “issue a direction imposing prohibitions, requirements or restrictions in relation to the entry into, departure from, or location of persons in premises”.

Safeguards on this extraordinary executive power are threadbare. Before issuing a direction, the Secretary of State “must have regard” to any relevant advice from the Chief Medical Officer, which means such advice need not actually be followed and is not required to endorse a direction made (Sch. 22, para. 8). There is no protection for political assemblies, gatherings, demonstrations or protests in Schedule 22. Unlike Schedule 21, these powers are not designed for use in conjunction with public health officers.

The Act makes it an offence to fail, without reasonable excuse, to comply with a prohibition, requirement or restriction imposed under the Schedule.

169 CORONAVIRUS REGULATIONS: WRITTEN STATEMENT BY THE MINISTER FOR HEALTH AND SOCIAL SERVICES, 7th April 2020: <https://www.thegazette.co.uk/notice/3546514>

170 DECLARATION UNDER SCHEDULE 21, PART 3, PARA 25(1), 27th March 2020: <https://www.thegazette.co.uk/notice/3540996>

These powers have only been invoked in Scotland,¹⁷¹ where a “public health response period” has been declared.

Police guidance

Police guidance has been critical in limiting the use of Coronavirus Act powers. Guidance published by the NPCC and College of Policing published on 3rd April 2020 clarifies that the Act contains “exceptional powers for exceptional circumstances only”.¹⁷²

Unlike the Regulations, which are used for day to day policing of the “lockdown” restrictions, the Schedule 21 detention powers in the Act are designed specifically to support public health officials and this message appears to be clearly received by the NPCC and College of Policing. The police guidance emphatically states:

“We cannot impress on you strongly enough, that these powers are for use in conjunction with Public Health (...) We do not envisage you ever acting without their express request or on their advice.”

Furthermore, the guidance states that the use of Schedule 21 powers to direct, remove and detain “should be pre planned with medical practitioners and contingencies and risks discussed”. This important guidance helps to ensure these extraordinary powers are not used responsively in public order policing but rather in the context of genuine public health support.

However, as discussed in our briefing on the (then) Bill, the legal powers afforded to officers under Schedule 21 are far more enabling, and this is reflected in the guidance which states: “Our advice is to never act without the prior advice of Public Health, but the Act does make provision for you to do so of your own accord.”

Misuse of the Act

There have been repeated misapplications of the Act by police forces, the CPS and the courts. The Act has been used to arrest and convict people for being outside their homes without a reasonable excuse, despite the advice of a public health official not being sought and the purpose not being for testing. The correct legal authority to enforce the general restrictions on movement is the Regulation. A violation of the Health

171 DECLARATION UNDER SCHEDULE 22, PART 3, PARA 13(1), 27th March 2020:
<https://www.thegazette.co.uk/notice/3540998>

172 Coronavirus Act 2020 (The Act) – NPCC and College of Policing, 3rd April 2020:
<https://www.college.police.uk/What-we-do/Support/Health-safety/Documents/Coronavirus-Act-2020-030420-public.pdf>

Protection Regulations may result in a £60 fixed penalty notice (reduced to £30 if paid within 14 days).¹⁷³ A violation of the Coronavirus Act can result in fine up to £1,000, as well as a criminal record.¹⁷⁴

Marie Dinou

Marie Dinou was arrested and fined £660 for committing an offence under Schedule 21, para. 23(1)(a) and (2) of the Coronavirus Act, after 'loitering' between platforms at Newcastle train station and refusing to tell officers her identity or reason for travel.¹⁷⁵ Schedule 21 criminalises "failing without reasonable excuse to comply with any direction, reasonable instruction, requirement or restriction," but is in the context of powers to detain, screen, assess and test "potentially infectious persons" which should be used on the advice of public health officials. The Schedule does not confer a general stop and account power to police. Without clear evidence to suspect that Ms Dinou was infectious, Schedule 21 should not have been used. This conviction was overturned following questions asked by Times journalist Fariha Karim and public commentary by human rights lawyer Kirsty Brimelow QC.¹⁷⁶ Deputy Chief Constable of British Transport Police Adrian Hanstock said:

"we fully accept that this shouldn't have happened and we apologise. It is highly unusual that a case can pass through a number of controls in the criminal justice process and fail in this way. BTP and the CPS will undertake a more detailed review of the case to ensure that any lessons to be learned are integrated into our shared justice processes."¹⁷⁷

It is highly concerning that Ms Dinou was arrested on this charge, let alone prosecuted and found guilty.

173 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Regulation 10 (6)-(7)

174 Coronavirus Act 2020, Schedule 21 para 23(2)

175 Coronavirus: How woman 'loitering' at train station was wrongfully convicted in shambolic case – Lizzie Dearden, Independent, 2nd April 2020: <https://www.independent.co.uk/news/uk/crime/coronavirus-marie-dinou-lockdown-stay-at-home-loitering-arrest-fine-police-a9444311.html>

176 Woman fined £660 for crime that 'doesn't exist' – Fariha Karim and John Simpson, The Times, 2nd April 2020: <https://www.thetimes.co.uk/article/police-fine-woman-660-for-breaching-coronavirus-lockdown-laws-at-train-station-5ftr9qlOf>

177 Coronavirus: How woman 'loitering' at train station was wrongfully convicted in shambolic case – Lizzie Dearden, Independent, 2nd April 2020

Misuse of Coronavirus Act in London

A 21-year-old man was also incorrectly charged under Schedule 21 para 23(1)(a) and (2) of the Coronavirus Act and fined £60.¹⁷⁸ The Metropolitan Police later admitted it had been wrong to charge the man under Schedule 21, which again, only applies to “potentially infectious persons”, and set aside the Coronavirus Act charges.

It was reported that the Crown Prosecution Service was also re-examining a case in which a 15-year-old boy in London was charged under Schedule 21 para 23(1)(a) and (2) of the Coronavirus Act.¹⁷⁹

These cases were only brought to light thanks to investigations by Henry Vaughan of the Press Association.

Misuse of Coronavirus Act in Coventry

Three men were wrongly charged under the Coronavirus Act 2020, before the charge was rapidly changed to a breach of the Regulations at Coventry Magistrates’ Court on 30th March. The men were jailed for three months and fined for fuel thefts in Warwickshire and handed an extra £100 fine and a one-day sentence for the Regulations breach.

Again, this case was only brought to light following an investigation by Henry Vaughan of the Press Association – who was initially also told by the CPS that the Coronavirus Act had been wrongly used for the conviction.

The Crown Prosecution Service said: “The incorrect coronavirus-related offence should have been withdrawn at court before a plea was entered. We have asked the court to relist the case and will seek to have that conviction and sentence set aside. (...) We are working with all police forces to make sure the new Coronavirus Act and the regulations are being correctly applied in these challenging times.”¹⁸⁰

178 Man wrongly convicted under coronavirus law, Met police admit – Owen Bowcott, the Guardian, 14th April 2020: <https://www.theguardian.com/uk-news/2020/apr/14/man-wrongly-convicted-under-coronavirus-law-met-police-admit>

179 Ibid.

180 Three men handed extended jail terms after wrongful coronavirus convictions – Henry Vaughan and Flora Thompson, PA, 17th April 2020: <https://www.msn.com/en-gb/news/uknews/three-men-handed-extended-jail-terms-after-wrongful-coronavirus-convictions/ar-BB12LXrS?ocid=st>

Misuse of Coronavirus Act in Oxford

Despite assurances that the CPS would closely review misuse of the Coronavirus Act, we have identified a case in Oxford that seems to involve misapplication of Schedule 21.

Lewis Brown, an 18-year-old from Oxford, was charged under Schedule 21 of the Coronavirus Act, para. 67(a) and (b), after reportedly visiting his vulnerable mother to give her money. We identified this case through a local press report¹⁸¹ and ultimately after contacting Oxford Magistrate's Court to clarify the charges. There is nothing to suggest that Mr Brown was considered potentially infectious, or that the officers involved sought the advice of a public health officer. It is even more concerning that Mr Brown, in England, was charged under the Schedule 21, para. 67 - the Welsh section of the Schedule. This is a very basic failing and points to a total lack of training for police officers and magistrates on these new powers.

Clearly, there are serious problems with the enforcement of these extraordinary new powers, with police officers using them incorrectly across the country.

It is astounding that so many layers of the criminal justice system are repeatedly misunderstanding and misusing the new emergency legislation. These are serious institutional failings that undermine trust in the rule of law, yet it seems lessons are not being learnt. Police chiefs and the CPS must take more serious action to prevent the pandemic becoming a punitive Wild West. Given the eye-watering set of powers in the Coronavirus Act, it is chilling to consider how these powers could be wielded if this law is persistently misused.

RECOMMENDATIONS:

23. Police guidance is clear that the Regulations should be relied on to impose the restrictions on movement and gatherings, rather than the Act, at this time. Given that we have already experienced a peak of the virus, Schedule 21 and 22 powers have not been (lawfully) utilised, and Schedule 22 powers have not even been invoked in England, Wales or Northern Ireland, a serious question is posed as to their necessity. We urge parliamentarians to consider the necessity of these Schedules.

24. Misuse of the Coronavirus Act has only come to light through diligent journalism and chance transparency and we have little idea of the true extent of this serious problem. All fines or convictions issued to individuals under the Coronavirus Act should be carefully and independently reviewed by the CPS.

¹⁸¹ Teen fined for flouting lockdown rules after 'visiting his mum' - Will Walker, Oxford Mail, 21st April 2020: <https://www.oxfordmail.co.uk/news/18393065.teen-fined-flouting-lockdown-rules-visiting-mum/?ref=rss>



Use of technologies, including artificial intelligence and big data, to enforce emergency and security restrictions or for surveillance and tracking of impacted populations raise concerns. The potential for abuse is high: what is justified during an emergency now may become normalised once the crisis has passed. Without adequate safeguards, these powerful technologies may cause discrimination, be intrusive and infringe on privacy, or may be deployed against people or groups for purposes going far beyond the pandemic response.”

— António Guterres, U.N. Secretary General¹⁶²

162 Coronavirus surveillance poses long-term privacy threat, U.N. expert warns – Umberto Bacchi, Reuters, 31st March 2020: <https://www.reuters.com/article/us-health-coronavirus-privacy/coronavirus-surveillance-poses-long-term-privacy-threat-un-expert-warns-idUSKBN2111XG>

CONTACT TRACING

Over the past month, the Government has referenced development of a contact tracing app to automate tracking of coronavirus in the community.

On 21st March, we joined responsible technologists to sign an open letter calling on NHSX to follow best ethical practice to ensure any app protects human rights and cannot be used as a means of social control.¹⁸³ In the letter, we cautioned that whilst technologies will play a role in the crisis they will not be a magic bullet to “solve” unsolvable problems. We called for transparency and strong governance, including an expert governance panel with public and patient participation, and privacy and rights impact assessments. For avoidance of doubt, any contact tracing app must respect human rights and the rule of law and be proportionate.

Efficacy

When weighing up the necessity and proportionality of a surveillance measure such as a tracking app, one must factor how effective the measure could be in achieving legitimate stated aims. In our joint letter, we pointed out that a contact tracing app is unlikely to be effective in a country such as the UK, where 22% of adults do not have a smartphone, rising to 45% of adults over the age of 55.

Furthermore, since testing is low in the UK, the app is proposed to operate largely on self-reporting of common symptoms and guesstimation, which will be highly prone to inaccuracy and exploitation. For example, if a person wanted to close their college or workplace, they presumably need only to self-diagnose via an app to send self-isolation instructions to their peers, teachers or colleagues.

In addition, Bluetooth tracing can create a data trail between people who have not actually had physical contact – for example, neighbours, who are separated only by a wall.

A recent report by the Ada Lovelace Institute concluded, “There is an absence of evidence to support the immediate national deployment of symptom tracking applications, digital contact tracing applications and digital immunity certificates” and cautioned that “ineffective apps could undermine public trust and confidence in the long-term.”¹⁸⁴

183 Open Letter: Contact Tracking and NHSX, 23rd March 2020: <https://medium.com/@rachelcoldicutt/open-letter-contract-tracking-and-nhsx-e503325b2703>

184 COVID-19 Rapid Evidence Review: Exit through the App Store? – Ada Lovelace Institute, 20th April 2020: <https://www.adalovelaceinstitute.org/our-work/covid-19/covid-19-exit-through-the-app-store/>

NHSX plans

On 24th April, NHSX published a blog revealing that the NHS will launch a contact tracing app “in the coming weeks”.¹⁸⁵ The app will use Bluetooth Low Energy to judge the distance between your phone and other phones nearby to build an “anonymous log” of how close you are and to whom, which will be “stored securely on your phone”. A user who later develops symptoms of coronavirus can choose to inform the app and thus the NHS, which will trigger an alert to be sent to those the user has been in contact with such that, according to the Bluetooth proximity tracking, they could be at risk of transmission. The purpose is that this alerted group is expected to “take action” - most likely to self-isolate for two weeks to protect others in case they have indeed contracted the virus – to slow onward transmission.

The blog post includes welcome promises on privacy and data protection, but worryingly little in the way of detail. The authors promise to “keep the app data secure” and that they “have prioritised security and privacy in all stages of the app’s development”. However, engagement with civil society has been extremely poor and vital transparency is still lacking.

We will return to this issue in our next Emergency Powers and Civil Liberties Report, when more detail is in the public domain.

Key principles

However, aside from serious, fundamental question marks over the efficacy and impact, these important principles¹⁸⁶ should be used to evaluate whether a contact tracing app respects rights:

Is it, and will it always be, truly voluntary?

Any tracking app must not be compulsory, nor incentivised through access to more social, work or travel rights.

185 Digital contact tracing: protecting the NHS and saving lives – Matthew Gould and Dr Geraint Lewis, NHSX, 24th April 2020: <https://www.nhsx.nhs.uk/blogs/digital-contact-tracing-protecting-nhs-and-saving-lives/>

186 See also, Principles for Technology-Assisted Contact-Tracing – Daniel Kahn Gillmor, ACLU, 16th April 2020: <https://www.aclu.org/report/aclu-white-paper-principles-technology-assisted-contact-tracing>

Is it non-punitive, and non-discriminatory?

The app must not be deployed in a way that disadvantages those who use it, whether they receive alerts or not; or in a way that disadvantages those who do not use it. The app must not create any further risk of discrimination, whether based on age, ethnicity, migration status, disability, medical condition, socio-economic status or pregnancy.

Is it built to permit transparency, protect privacy, promote security and minimise data collection, retention and access?

On the question of privacy, it is important that NHSX is honest and open about the limitations on the ability to truly “anonymise” location data. Guidelines on the use of location data in the context of the COVID-19 outbreak from the European Data Protection Board (EDPB), published 21st April 2020, warn:

“(...) a large body of research has shown that location data thought to be anonymised may in fact not be. Mobility traces of individuals are inherently highly correlated and unique. Therefore, they can be vulnerable to re-identification attempts (...)”¹⁸⁷

For avoidance of doubt, the guidelines state:

“A single data pattern tracing the location of an individual over a significant period of time cannot be fully anonymised.”

A 2019 study by researchers from Imperial College London and UCLouvain found that “even heavily sampled anonymised datasets are unlikely to satisfy the modern standards for anonymisation set forth by GDPR.”¹⁸⁸ In essence, ‘anonymised’ data can rarely be totally anonymous.¹⁸⁹

Location data, particularly during lockdown and isolation periods, can quickly identify a person. Furthermore, location data can reveal sensitive information about life patterns, social networks and relationships, political and religious affiliations, sexual orientation, health problems and more.

187 Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak – European Data Protection Board, 21st April 2020, p.6 para.20: https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf

188 Estimating the success of re-identifications in incomplete datasets using generative models – L. Rocher, J. Hendrickx, Y. Montjoye, Nature Communications 3069 (2019): <https://www.nature.com/articles/s41467-019-10933-3>

189 ‘Anonymised’ data can never be totally anonymous, says study – Alex Hern, the Guardian, 23rd July 2019: <https://www.theguardian.com/technology/2019/jul/23/anonymised-data-never-be-anonymous-enough-study-finds>

There are no easy solutions. The EDPB guidelines merely state that it “is crucial for any controller implementing anonymisation solutions to monitor recent developments in this field, especially concerning location data”.¹⁹⁰ However, “monitoring developments” in re-identification capabilities is not a satisfactory basis on which to roll out national health tracking systems with a public promise that the data will be safely anonymised.

Furthermore, re-identification is likely to serve both medical and political aims in the future. Official documents seen by the Guardian revealed that the Government has considered whether to build the app with future de-anonymisation in mind.¹⁹¹ The memo stated that “controversially” the app could use smartphones’ uniquely identifying device IDs “to enable de-anonymisation if ministers judge that to be proportionate at some stage”.¹⁹² The memo did not state why or under what circumstances ministers may seek to re-identify app users in the future.

Is it limited to a specific legitimate purpose and time period?

The app is proposed specifically to identify transmission risks associated with the present COVID-19 pandemic, but will be vulnerable to mission creep. This has already been evidenced. Internal documents seen by WIRED during the app development revealed that additional features such as monitoring and enforcement of social distancing measures have already been considered, following a meeting between Health Secretary Matt Hancock, the government’s Chief Scientific Adviser Patrick Vallance and NHSX CEO Matthew Gould.¹⁹³ It was considered whether the app could, for example, alert users when they have spent too long outside. This worrying memo feeds our concern that a Government-backed tracking app is dangerously prone to function creep.

It is also important to consider purpose limitation beyond this pandemic. There are many contagious diseases and illnesses for which such an app could also be used. If the app does receive the mass adoption NHSX will aim for, in order for the app to have any noticeable effect in the current crisis, the temptation to expand its utility for other medical purposes will be difficult to resist. As such, the promotion of automated, peer to peer contact tracing should be considered not only through the lens of this pandemic but in

190 Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak – European Data Protection Board, 21st April 2020, p.6, para.19

191 NHS coronavirus app: memo discussed giving ministers power to ‘de-anonymise’ users – David Pegg and Paul Lewis, the Guardian, 13th April 2020: <https://www.theguardian.com/world/2020/apr/13/nhs-coronavirus-app-memo-discussed-giving-ministers-power-to-de-anonymise-users>

192 NHS coronavirus app: memo discussed giving ministers power to ‘de-anonymise’ users – David Pegg and Paul Lewis, the Guardian, 13th April 2020: <https://www.theguardian.com/world/2020/apr/13/nhs-coronavirus-app-memo-discussed-giving-ministers-power-to-de-anonymise-users>

193 The NHS coronavirus app could track how long you spend outside – Gian Volpicelli, WIRED, 7th April 2020: <https://www.wired.co.uk/article/nhs-coronavirus-tracking-app>

the wider social and political context. The wide-ranging social, economic and legal consequences should be carefully evaluated alongside the immediate medical concerns.

RECOMMENDATION 25: There is an absence of evidence to support the immediate national deployment of a contact tracing app. Transparency and civil society engagement during technical and policy development on this project is vital. Proposals for a contact tracing app should be considered not only through the lens of this pandemic but in the wider social and political context. If a contact tracing app does go ahead, it must be voluntary; non-punitive and non-discriminatory; built to permit transparency, protect privacy, promote security and minimise data collection, retention and access; and limited to a specific legitimate purpose and time period.

LOCATION DATA

There have been multiple media reports of government discussions with telecommunications companies regarding the use of mobile phone data to monitor the public's compliance with lockdown restrictions, including reports of Downing Street and Cabinet Office meetings with BT and EE in March.¹⁹⁴

Some companies have provided limited information about talks through public statements. A spokesman for BT said the company was in talks with the government to "assist with the national public health effort", including "actively exploring possibilities" in relation to the use of mobile data. BT owns EE, which is one of the largest UK mobile operators. An O2 spokesperson said the company was "fully engaged in helping in the fight against Covid-19" and that it has "the potential to build models that help to predict broadly how the virus might move" without identifying individuals.¹⁹⁵ The ICO was reported to have approved the notion of nationwide mobile phone monitoring.¹⁹⁶

However, no surveillance measures have been expressly avowed by the government and no further details have been provided by it, nor the ICO, the Investigatory Powers Commissioner's Office (IPCO) or the Parliamentary Intelligence & Security Committee (which is not yet constituted).

One of our concerns is that the draconian Investigatory Powers Act 2016 could be used in the pandemic context. It is possible that sweeping powers could be used to collect and analyse bulk datasets under Part 7 powers, or potentially even to access and track identifiable location data of individuals in the UK with the virus or subject to isolation restrictions under Part 3, s.60A(7). However, on our analysis the use of secret surveillance powers to track individuals in this context could never be necessary or proportionate.

Big Brother Watch is taking steps to demand openness from the Government as to what surveillance measures have been taken, the statutory routes used and the safeguards applied. We will return to this issue in future reports.

RECOMMENDATION 26: It is unacceptable that nationwide mobile phone monitoring has been discussed, and is possibly in progress, without public transparency. The Government should publicly disclose the nature and scope of any mobile phone tracking surveillance measures as well as the statutory route and safeguards applied.

194 Phone location data could be used to help UK coronavirus effort – Mark Sweney and Alex Hern, the Guardian, 19th March 2020: <https://www.theguardian.com/world/2020/mar/19/plan-phone-location-data-assist-uk-coronavirus-effort>

195 Ibid.

196 Watchdog approves use of UK phone data to help fight coronavirus – Mark Sweney, the Guardian, 27th March 2020: <https://www.theguardian.com/world/2020/mar/27/watchdog-approves-use-uk-phone-data-if-helps-fight-coronavirus>

SHIELDED PATIENTS DATABASE

The Government has shared data on hundreds of thousands of vulnerable people, termed the 'shielded patient list',¹⁹⁷ with supermarkets to help ensure those people can get essential supplies during the lockdown period. Reports indicate that supermarkets have also used their own datasets to match government-provided data and identify further customers who require prioritisation.¹⁹⁸

A letter from NHS Digital to the Government Digital Service in the Cabinet Office sets out the 'Terms of Release of Vulnerable Patient List Contact Details for COVID-19 Vulnerable Patients Online and Telephone Service'¹⁹⁹ from the NHS to the Cabinet Office. It states that the Department for the Environment, Food and Rural Affairs (DEFRA) will co-ordinate with supermarkets to "deliver essential food and other supermarket supplies to patients at their homes [and] organise for supermarkets to prioritise these patients for their online delivery services."

However, the data sharing agreements between government and supermarkets have not been made publicly available. Furthermore, neither government nor supermarkets have answered questions about whether sensitive medical data have been included in the transfers.²⁰⁰ It is important to remember that such data would be extremely valuable to these companies, who offer a range of products and services including banking, loans, insurance, energy, legal services and funerals. Disappointingly, while the ICO has provided commentary to the press about the basic applicable data protection principles, advising that authorities "share only the minimum amount of information required and ensure that it is not retained for longer than needed",²⁰¹ we have seen no evidence of further scrutiny by the ICO or efforts to promote transparency.

To foster trust around these arrangements, it is vital that government is entirely open and transparent about the nature of this data sharing.

Big Brother Watch has taken action to request data sharing agreements between government and supermarkets.

197 Coronavirus: Shielded patients list – NHS Digital: <https://digital.nhs.uk/coronavirus/shielded-patient-list> (accessed 26th April 2020)

198 UK supermarkets contacting vulnerable patients 'must delete data when crisis abates' – Alex Hern, the Guardian, 7th April 2020: <https://www.theguardian.com/business/2020/apr/07/uk-supermarkets-contacting-vulnerable-patients-must-delete-data-when-crisis-abates>

199 NHS Digital letter to Cabinet Office with terms of release for the shielded patient list, 26th March 2020: <https://digital.nhs.uk/coronavirus/shielded-patient-list/distribution>

200 UK supermarkets contacting vulnerable patients 'must delete data when crisis abates' – Alex Hern, the Guardian, 7th April 2020: <https://www.theguardian.com/business/2020/apr/07/uk-supermarkets-contacting-vulnerable-patients-must-delete-data-when-crisis-abates>

201 Ibid.

RECOMMENDATION 27: Government has shared patient data with supermarkets that could risk being repurposed. Such data could be extremely valuable to supermarkets, who offer a range of products and services including banking, loans, insurance, energy, legal services and funerals. Government must publish data sharing agreements relating to the exchange of shielded patient data with supermarkets.

NHS COVID-19 DATASTORE

According to media reports, the Government has contracted technology companies to build a “Covid-19 datastore” to give ministers “real-time information about health services, showing where demand is rising and where critical equipment needs to be deployed”.²⁰² The plans emerged following reports of a technology ‘summit’ at Downing Street on 11th March 2020.

Little information about the project has been made public. However, documents seen by the Guardian revealed that large volumes of confidential UK patient data are being used for the project, which involves US big data company Palantir and UK artificial intelligence start-up Faculty, as well as Microsoft, Google and Amazon products. Furthermore, the documents appear to show that the bulk data includes “protected health information, Covid-19 test results, the contents of people’s calls to the NHS health advice line 111 and clinical information about those in intensive care”, and it could include phone location data in future. Reportedly, the confidential 111 information includes people’s gender, postcode, symptoms, prescription dispatch details and the time of the call. It appears that the project also includes controversial geo-demographic segmentation data.

This project raises serious privacy and medical confidentiality questions. It is remarkable, and unacceptable, that such a large-scale project involving patient data is being pursued in absence of stakeholder engagement or public transparency.

RECOMMENDATION 28: It is unacceptable that a large-scale project involving patient data is being pursued in absence of stakeholder engagement or public transparency. NHSX must be fully open and transparent about the ‘Covid-19 datastore’, the nature of contracts with private technology companies, the use of patient data, the confidentiality of 111 calls, and make details of any predictive and anonymisation techniques available for public audit at the soonest possibility. NHSX must also engage with and consult stakeholders, privacy groups and patient representatives as a priority.

²⁰² UK government using confidential patient data in coronavirus response – Paul Lewis, David Conn and David Pegg, the Guardian, 12th April 2020: <https://www.theguardian.com/world/2020/apr/12/uk-government-using-confidential-patient-data-in-coronavirus-response>

IMMUNITY CERTIFICATES

On 2nd April 2020, Health Secretary Matt Hancock announced that the Government had “a very strong interest” in introducing so-called “immunity certificates” - a record to certify a person’s recovery status from COVID-19:

“We are looking at an immunity certificate - how people who have had the disease, have got the antibodies and therefore have immunity can... get back as much as possible to normal life.”²⁰³

No details have been provided about any government work in this area. However, such a scheme would almost certainly rely on a mass digital ID programme – something the British public has always rejected – only more invasive, centred on sensitive medical data. Much like with contact tracing, such a mass programme would inevitably lead to additional purposing for other medical and vaccination data. The scheme is premised on the idea of health segregation, whereby “immune” people enjoy liberties and socio-economic advantages that others do not – which would risk incentivising healthy people to contract the virus in attempt to develop such immunity.

On 24th April, the World Health Organisation (WHO) published an evidence brief warning against the adoption of immunity certificates, since there is insufficient evidence to suggest individuals are risk-free after contracting the virus:

“At this point in the pandemic, there is not enough evidence about the effectiveness of antibody-mediated immunity to guarantee the accuracy of an ‘immunity passport’ or ‘risk-free certificate.’ People who assume that they are immune to a second infection because they have received a positive test result may ignore public health advice. The use of such certificates may therefore increase the risks of continued transmission.”²⁰⁴

RECOMMENDATION 29: Following WHO advice against ‘immunity certificates’, the Government must now be clear with the public that immunity passports will not be pursued, at least unless compelling new evidence comes to light, in which case the full social, economic and health impacts of such a scheme would require careful evaluation.

203 <https://www.telegraph.co.uk/politics/2020/04/02/government-looking-introducing-immunity-passports-matt-hancock/>

204 "Immunity passports" in the context of COVID-19 – WHO Evidence Brief, 24th April 2020: <https://www.who.int/publications-detail/immunity-passports-in-the-context-of-covid-19>

JUDICIAL COMMISSIONERS

On 26th March 2020, a new statutory instrument was made under the Coronavirus Act: The Investigatory Powers (Temporary Judicial Commissioners and Modification of Time Limits) Regulations 2020. This allows for the appointment of temporary Judicial Commissioners to approve authorities' use of investigatory powers including highly intrusive bulk powers.

Subsequently, on 21st April, the Investigatory Powers Commissioner appointed 10 new temporary Judicial Commissioners (JCs).²⁰⁵

Normally, under the Investigatory Powers Act 2016 (IPA), any appointment must be approved by five senior figures: the Lord Chancellor, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland, and the Investigatory Powers Commissioner (IPC). The Scottish Ministers must also be consulted.²⁰⁶ However, new regulations have bypassed this requirement.²⁰⁷ Under these regulations the IPC may unilaterally appoint temporary JCs themselves for up to 12 months only by notifying the people above who would normally be required to jointly recommend an appointment. Furthermore, under the IPA, a JC must have held a high judicial office (within the meaning of Part 3 of the Constitutional Reform Act 2005) – but there is no such requirement set out in the Coronavirus Act for a temporary JC.

It is sensible to appoint temporary JCs in the circumstances. However, it is unclear why the process should be a unilateral one, or why those who would ordinarily jointly recommend a JC would be unable to jointly recommend a temporary JC.

RECOMMENDATION 30: The Investigatory Powers Commissioner should be required to appoint temporary Judicial Commissioners only after consultation with senior judges and Scottish Ministers if practicable, rather than simply notifying them by default.

205 Temporary Judicial Commissioners appointed, Investigatory Powers Commissioner's Office, 21st April 2020 <https://www.ipco.org.uk/default.aspx?mid=4.39>

206 Investigatory Powers Act 2016, Section 227(4)-(6)

207 The Investigatory Powers (Temporary Judicial Commissioners and Modification of Time Limits) Regulations 2020 3(3): <http://www.legislation.gov.uk/uksi/2020/360/contents/made>

FREEDOM OF EXPRESSION

The UN Special Rapporteur on Freedom of Expression, David Kaye, recently warned that “the pandemic is also a crisis of free expression”.²⁰⁸ Information and communications are key to dealing with a public health crisis and some countries, and indeed companies, have sought growing levels of control over information flows, whether for a perceived benefit to public health, to protect the reputation of institutions, or simply as an opportunistic power grab. In particular, many governments around the world have introduced measures to crack down on ‘fake news.’ Countries including South Africa, Romania, Hungary, Singapore, and Russia have passed legislation to allow government mandated content removal, and even offences carrying sentences of up to five years imprisonment, to control information.

UK ‘Rapid Response Unit’

A Government press release on 30th March 2020, titled “Government cracks down on spread of false coronavirus information online”,²⁰⁹ revealed that a Rapid Response Unit has been set up to operate from within the Cabinet Office and No.10 to tackle “harmful narratives online”. The press release explained that the unit is working with the ‘Counter Disinformation Cell’ led by the Department for Digital, Media, Culture and Sport (DCMS).

Little information has been provided about the make up or activities of these teams. The press release states that “When false narratives are identified, the government’s Rapid Response Unit coordinates with departments across Whitehall to deploy the appropriate response” which can include “working with platforms to remove harmful content.” It remains that “harmful” content is an elusive and undefined concept that includes lawful, free expression. The relationship between Government and social media companies, particularly where the removal of lawful content is concerned, has been the topic of considerable debate in relation to the proposed Online Harms Bill and has profound implications for human rights in the UK including privacy and freedom of expression. We have analysed and strongly cautioned against the Government’s censorious approach to “harmful” content over the past year.²¹⁰

208 Disease pandemics and the freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, HRC 44/49, 23rd April 2020: https://freedex.org/wp-content/blogs.dir/2015/files/2020/04/A_HRC_44_49_AdvanceEditedVersion.pdf

209 Government cracks down on spread of false coronavirus information online – Cabinet Office and DCMS, 30th March 2020: <https://www.gov.uk/government/news/government-cracks-down-on-spread-of-false-coronavirus-information-online>

210 Big Brother Watch’s response to the Online Harms White Paper Consultation – July 2019: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/02/Big-Brother-Watch-consultation-response-on-The-Online-Harms-White-Paper-July-2019.pdf>

We welcome the promotion of health information at this critical time. Indeed, Article 15 of International Covenant on Economic, Social and Cultural Rights²¹¹ acknowledges the right of everyone to “enjoy the benefits of scientific progress and its applications.” However, the important promotion of reliable scientific information does not necessitate the censorship of views that are scientifically unproven. This is particularly relevant in a pandemic, where scientific discovery is rapidly developing and research - for example, on the impact of face masks, the development of immunity, the validity of tests, and certain drug interactions - is in early and inconclusive stages.

Supplanting critical literacy with censorship ultimately harms the public forum, trust in authorities, and as such can harm public health. It is through a free forum of ideas that citizens understand, contextualise and trust information, not through harsh restrictions on information sharing. The right to freedom of expression protects our ability to freely share ideas, opinions and information without interference. This vital democratic right has never been restricted to the expression of views that are rational, desirable or proven to be true.

Social media companies

Tech companies including Facebook, Google, Twitter, Vimeo, WhatsApp and YouTube have rapidly developed policies to tackle what they consider to be harmful information in relation to coronavirus.

Although well-intended, these policies are likely to have unintended consequences. During this crisis, trust is incredibly important and it is a dangerous time to hastily re-write rules without considering the consequences, and especially without time limits. Trust is easily eroded when freedom of expression and information is suppressed. Furthermore, the blanket, automated mechanisms used to deploy these new content policies may suppress truthful information.

We understand that tech companies have come under considerable government pressure to tighten content policies in relation to the pandemic. However, some censorship efforts by both social media companies and governments around the world have already been realised to be misguided and even to harm public health efforts. Great care must be taken in this area and measures must have close regard to the importance of the right to freedom of expression.

211 International Covenant on Economic, Social and Cultural Rights:
https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf

Facebook

For example, on 25th March Facebook announced that since January it has removed “posts that make false claims about cures, treatments, the availability of essential services or the location and severity of the outbreak” as well as “claims that physical distancing doesn’t help prevent the spread of the coronavirus” and the platform “banned ads and commerce listings that imply a product guarantees a cure or prevents people from contracting COVID-19.”²¹² There is little transparency about precisely how Facebook judges content falling into the above categories and so the new policy is difficult to analyse.

However, the company has publicised the fact that under the new policies, adverts for face masks have been banned.²¹³ This is despite the fact that “wearing a medical mask is one of the prevention measures that can limit the spread of certain respiratory viral diseases, including COVID-19”²¹⁴ and emerging research supports the role of masks in slowing the transmission of the virus.²¹⁵

Meanwhile, Facebook continues to exploit mass personal data for micro-targeting. This is the single most dangerous feature of the platform that feeds echo chambers, narrows information flows and warps perceptions. An investigation by The Markup recently found that Facebook allowed advertisers to target users with data-derived ‘interests’ such as ‘pseudoscience’.²¹⁶ The investigation found the pseudoscience interest category, which includes 78 million people, was used to target one company’s adverts for ‘radiation-blocking apparel’. Predictably, Facebook has now removed this interest category for advertisers. However, PR-driven policy making only obscures the problem. Mass surveillance and micro-targeting on Facebook harms privacy, freedom of expression and information, and could endanger public health.

212 Combating COVID-19 Misinformation Across Our Apps – Nick Clegg, Facebook, 25th March 2020: <https://about.fb.com/news/2020/03/combating-covid-19-misinformation/>

213 Banning Ads and Commerce Listing for Medical Face Masks – Facebook, 6th March 2020: <https://about.fb.com/news/2020/04/coronavirus/#banning-ads>

214 Advice on the use of masks in the context of COVID-19 – World Health Organisation, 6th April 2020: [https://www.who.int/publications-detail/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-\(2019-ncov\)-outbreak](https://www.who.int/publications-detail/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-(2019-ncov)-outbreak)

215 For example, Using face masks in the community - Reducing COVID-19 transmission from potentially asymptomatic or pre-symptomatic people through the use of face masks – European Centre for Disease Prevention and Control, 8th April 2020: <https://www.ecdc.europa.eu/en/publications-data/using-face-masks-community-reducing-covid-19-transmission>; and Times letters: Masks and protection measures for the UK – 100 doctors, 18th April 2020: <https://www.thetimes.co.uk/article/times-letters-masks-and-protection-measures-for-the-uk-t3sn5bfdx>

216 What to Find a Misinformed Public? Facebook’s Already Done It – Aaron Sankin, The Markup, 23rd April 2020: <https://themarkup.org/coronavirus/2020/04/23/want-to-find-a-misinformed-public-facebooks-already-done-it>

YouTube

YouTube announced it is banning all content containing conspiracy theories linking coronavirus symptoms and 5G networks “after the BBC questioned why [a conspiracy video] was permitted”.²¹⁷ A spokeswoman for YouTube told the BBC, “Now any content that disputes the existence or transmission of Covid-19, as described by the WHO and local health authorities is in violation of YouTube policies”. Though now in force, this apparently PR-driven policy is not present in YouTube’s content policy at the time of writing²¹⁸ so it is difficult to examine the policy in full.

The video in question gained notoriety and has been reposted to various online spaces (though it was also banned on Vimeo), attracting millions of views and being translated into various languages. The censorship of the video led the content creator to tell online followers, “If YouTube doesn’t want you to see it, you need to see it”; “all they do is confirm I’m right” and “they are terrified of people knowing what [the video] says”. It is unclear that YouTube and Vimeo’s censorship will aid public health, particularly for the groups who are now intrigued by this content and engaging with it in online spaces where rebuttals are unlikely.

Twitter

Twitter has broadened its definition of ‘harmful content’ to include “content that goes directly against guidance from authoritative sources of global and local public health information.”²¹⁹ The expanded policy includes “denial of global or local health authority recommendations”, “alleged cures” that are “ineffective” even if unharmed, denial of “transmission guidance”, “specific and unverified claims that invite people to action” that could cause “social unrest”, and “encouraging people to not socially distance themselves”. Given the politicisation of restrictions across the world and differing views on the extent of lockdown measures in the UK, the policy will clearly risk obstructing freedom of expression if people are prohibited from contesting authorities’ health advice, which includes lockdown restrictions, or if they are prevented from opposing extended lockdown restrictions, which could be read as encouraging people to not socially distance.

The company announced it had removed more than 1,100 tweets in two weeks (18th March – 1st April) under this policy.²²⁰ Whilst we have serious reservations about this new policy,

217 Coronavirus: YouTube tightens rules after David Icke interview – Leo Kelion, BBC, 7th April 2020: <https://www.bbc.co.uk/news/technology-52198946>

218 Harmful or dangerous content policy – YouTube: <https://support.google.com/youtube/answer/2801964> (accessed 25th April 2020)

219 Coronavirus: Staying safe and informed on Twitter – Twitter Inc., 3rd April 2020: https://blog.twitter.com/en_us/topics/company/2020/covid-19.html

220 Ibid.

we welcome the transparency reporting and encourage continued publication of these enforcement figures.

Big Brother Watch has written to DCMS and several social media companies to invite transparency and engagement on these policies.

RECOMMENDATIONS:

31. We welcome the promotion of health information at this critical time. However, the important promotion of reliable scientific information does not necessitate the censorship of views that are scientifically unproven. This is particularly relevant in a pandemic, where scientific discovery is rapidly developing.

32. Government must provide transparency and civil society engagement in relation to the activities of the new 'Rapid Response Unit' and its role in removing 'harmful' content online. Social media companies should carefully consider the impact of their new content restrictions and benefit from the advice and expertise of rights groups. Supplanting critical literacy with censorship ultimately harms the public forum, trust in authorities, and as such can harm public health.

FREEDOM OF INFORMATION

At a time when government, local authority and police powers are rapidly changing, it is vital that we have mechanisms to ensure transparency and accountability. Freedom of information is essential in these uncertain, fast changing circumstances. This principle is recognised by Government, which says “In fast moving situations, transparency should be at the heart of what the government does” - we agree.²²¹

However, as explored in many areas of this report, transparency has been lacking. Reduced capacity to provide transparency is understandable – decisions must be made fast, which limits public engagement; and staff may be out of work due to illness or isolation, which can delay Freedom of Information (FOI) responses. However, proactive openness through the default publication of information, particularly around public health and policing, can help to fill the gap. In any event, usual channels for transparency must remain as open and functioning as possible. Transparency and freedom of information must be part of the strategy for dealing with the pandemic. This crisis cannot be met by state power alone – it requires a well-informed public and high levels of trust and co-operation.

The ICO has indicated it will relax transparency obligations on authorities, stating “We understand that there may be extreme circumstances where public authorities have no option but to temporarily reduce or suspend elements of their information access function.”²²² Furthermore, the ICO stated it will not enforce statutory requirements on public authorities to respond with appropriate timeframes: “Whilst we can’t extend statutory timescales, we will not be penalising public authorities for prioritising other areas or adapting their usual approach during this extraordinary period.”²²³ However, it does also encourage proactive transparency: “We encourage public authorities to proactively publish information they know will be of importance to their communities.”²²⁴

NPCC

In March 2020, the National Police Chief’s Council issued instructions to police forces that could centralise and effectively suspend freedom of information relating to policing and coronavirus. The document, issued under the policing preparedness strategy ‘Operation

221 Coronavirus (COVID-19): scientific evidence supporting the UK government response – Government Office for Science, 20th March 2020: <https://www.gov.uk/government/news/coronavirus-covid-19-scientific-evidence-supporting-the-uk-government-response>

222 The ICO’s regulatory approach during the coronavirus public health emergency – ICO, 15th April 2020: <https://ico.org.uk/media/about-the-ico/policies-and-procedures/2617613/ico-regulatory-approach-during-coronavirus.pdf>

223 ICO blog on its information rights work – ICO: <https://ico.org.uk/about-the-ico/news-and-events/icos-blog-on-its-information-rights-work/> (accessed 26th April 2020)

224 The ICO’s regulatory approach during the coronavirus public health emergency – ICO, 15th April 2020

Talla', declared that "all FOI requests capturing information relating to the Coronavirus, are until further notice, considered to be a mandatory referral to the NPCC Freedom of Information and Data Protection Unit (NPFDU)".²²⁵ The NPCC advises that "the application of NCND [neither confirm nor deny] will be strictly maintained wherever possible" and also that "the NPCC FOI publication strategy has been formulated in order to allow any public authorities to take advantage, when appropriate, of the exemption within FOI legislation found at Section 22." Whilst the ultimate decision on disclosure must be that of the recipient of the FOI request, the document is clear that those decisions must be "based on a national corporate view" and warns that "not complying with the Section 22" could "undermin[e] other PAs [public authorities'] ability to engage the exemption." The language of compliance suggests that the strategy is intended to significantly centralise and effectively suspend FOI relating to coronavirus.

Section 22 of the Freedom of Information Act 2000 allows authorities to refuse FOI requests if the information is "held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not)" (s.22(1)(a)). Importantly, this exemption can only be used if the decision for future publication is made before the FOI request is received and so in this same document, the NPCC published a table of vast categories of data it says it will publish by July 2021. This includes categories as vast as "National Guidance", "National Figures" and "National Decisions", the latter of which relates to "accountability/recorded decision making", all of which can now be exempted from FOI under Section 22.

Police forces' FOI pages now typically include a request to consider whether or not the information is vital to the public interest, and advise that responses may be delayed, both of which are understandable in the circumstances. However, the pages also advise that information relating to coronavirus is likely to be exempt. For example, Avon and Somerset Police advise:

"It is likely that the information will be exempt under Section 22 of the Freedom of Information Act 2000 (Information intended for future publication), in line with the National Policing Publication Strategy – Operation Talla."²²⁶

Lancashire Police, which has used disproportionate enforcement of coronavirus laws compared to other forces (as described earlier in this report) features a similar warning.²²⁷ This effective suspension of FOI relating to coronavirus is especially concerning in the

225 Operation Talla Publication Strategy (COVID-19) – NPCC, 9th March 2020: <https://www.npcc.police.uk/FreedomofInformation/Reportsreviewsandresponsetoconsultations.aspx>

226 Make an FOI Application – Avon and Somerset Police: <https://www.avonandsomerset.police.uk/about-us/freedom-of-information/make-an-foi-application/> (accessed 26th April 2020)

227 Freedom of Information – Lancashire Police: <https://www.lancashire.police.uk/about-us/accessing-information/freedom-of-information/> (accessed 26th April 2020)

context of new coronavirus laws, inflated police powers and the recent wave of excessive, and on occasion unlawful, policing.

Scotland

The Coronavirus (Scotland) Act 2020, which passed on 6th April 2020, amended the Freedom of Information (Scotland) Act 2002 despite objections from campaigners and MSPs.²²⁸ The emergency Act has extended the timescale for responses to FOI requests from 20 working days to 60 working days²²⁹ and confers power to Scottish Ministers to extend the timescale further by up to 40 additional days.²³⁰

It is concerning that emergency legislation has been used to amend primary legislation that provides such a core democratic function. The Open Knowledge Foundation observed that “Scotland is now in the unenviable position of being the first country in the world to introduce new restrictions on freedom of information as a result of the coronavirus outbreak.”²³¹

RECOMMENDATIONS:

33. Freedom of information is likely to be frustrated by staffing and capacity issues, but proactive openness through the default publication of information, particularly around public health and policing, can help to fill the gap. Transparency and freedom of information must be part of the strategy for dealing with the pandemic, as the crisis requires a well-informed public and high levels of trust and co-operation.

34. The effective suspension of police FOIs relating to coronavirus is concerning in the context of new coronavirus laws, inflated police powers and the recent wave of excessive, on occasion unlawful, policing. Parliament, and the ICO, should carefully review the appropriateness of the NPCC’s FOI strategy under Operation Talla.

35. Scotland is the first country in the world to relax freedom of information laws as a result of the coronavirus outbreak. This sets a dangerous precedent. Flexibility in FOI

228 Freedom of Information during the pandemic – mySociety, 2nd April 2020: <https://www.mysociety.org/2020/04/02/freedom-of-information-during-the-pandemic/>

229 Coronavirus (Scotland) Act 2020, Schedule 6 para. 3: <http://www.legislation.gov.uk/asp/2020/7/schedule/6/part/2>

230 Coronavirus (Scotland) Act 2020, Schedule 6 para. 5

231 Scotland ‘first country in the world’ to delay freedom of information access because of coronavirus – Tom Peterkin, The Press and Journal, 2nd April 2020: <https://www.pressandjournal.co.uk/fp/news/politics/scottish-politics/2120917/scotland-first-country-in-the-world-to-delay-freedom-of-information-access-because-of-coronavirus/>

response times can be achieved without changing primary legislation. We urge MSPs to review this decision.