

**HEALTH PROTECTION
(CORONAVIRUS, RESTRICTIONS)
REGULATIONS 2020: BRIEFING
[MAY 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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Big Brother Watch's Briefing for Motion on the Health Protection (Coronavirus, Restrictions) Regulations 2020

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INTRODUCTION

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,¹ Wales² and Scotland³ respectively on 26th March 2020, and in Northern Ireland on 28th March 2020 (hereafter “the Regulations”).⁴

These are the most severe restrictions imposed on liberty in British modern history. The Regulations effectively put the nation under house arrest, leaving limited reasons for which a person can lawfully leave their place of residence. The 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, the strain on the NHS, and thus the loss of human lives to the virus. However, these extreme measures to curtail freedom have costs too, through the obstruction of health services, unprecedented psychological pressures, severe economic hardship, isolation of the most vulnerable and domestic violence. Each of these consequences of the Regulations will have a long-term impact – soaring national debt, unemployment, poverty, crime, dependencies, a mental health epidemic and undiagnosed and untreated health problems - causing thousands of premature deaths and reduced quality of life in the years to come.⁵ Rarely has such an urgent and complex decision pertaining to the public’s right to life and liberty faced a government.

Decisions of such magnitude require not only legal authority but democratic consent.

The Motion to approve the Regulations in the House of Commons has been scheduled for the afternoon of Monday 4th May 2020.

The Motion will not go to a division. Two hours has been allotted for debate. We understand that Members are likely to be afforded only five minutes each to speak.

1 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020: http://www.legislation.gov.uk/uksi/2020/350/pdfs/uksi_20200350_en.pdf

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

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

4 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>

5 UK government concerned over deaths that could be caused by Covid lockdown – Sebastian Payne, Financial Times, 10th April 2020: <https://www.ft.com/content/8027d913-2e2f-4d4c-93db-89bd726105f0>

However, we believe that major concerns must be put on the record during the debate, particularly given the historic nature of the Regulations and their uncertain future impact.

KEY RECOMMENDATIONS

1: Exit strategy

The Government must publish its plan for an exit strategy to ease these Regulations if it is to achieve democratic consent. 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 he will make this analysis, the public is effectively at the behest of ministerial decree and Parliament cannot examine whether these extraordinary restrictions are strictly necessary and proportionate.

2: The rule of law

2a: Ultra vires?

The Government should publish legal advice taken on its use of these Regulations, made by statutory instrument under the Public Health Act 1984, to impose the lockdown restrictions.

2b: Guidelines and laws

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. 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.

3: The role of Parliament

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

4: National discrepancies

The Regulations and the accompanying exit strategies 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.

5: Disability rights

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: Avoiding criminalisation

The Regulations to restrict freedom of movement would be better constructed as a general prohibition. Only if an officer reasonably believes an individual has seriously breached the prohibition and caused an unreasonable risk to others should an offence be constituted that could incur a Fixed Penalty Notice.

7. Avoiding a surveillance state

The Regulations must not give way to a surveillance state. Police guidance is clear that roadside checks must not be arbitrary. Use of the ANPR surveillance network, the existence of which lacks a clear legal basis, should be suspended. 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. Parliamentary time should be afforded to review the use of ANPR and drones in policing and develop clear limitations on their use.

1: EXIT STRATEGY

The Regulations, 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”⁶ 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.⁷ It appears that the exit strategy is still being deliberated. Even since the broad “five tests” were published, one of the tests has been quietly altered (the fifth test is now that “adjustments to the current measures will not risk a second peak of infections *that overwhelms the NHS*”).⁸ Both sides of the House have called for the Government to be more open with the public and publish its exit strategy.⁹

The governance of this decision-making has also been criticised. For example, the Nuffield Council on Bioethics 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.¹⁰ Democratic engagement, as the Council eloquently stated,

⁶ Coronavirus lockdown: Are the five tests being met? - Nick Triggle, BBC News, 22nd April 2020: <https://www.bbc.co.uk/news/health-52374513>

⁷ 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>

⁸ Jason Groves, Twitter, 28th April 2020: <https://twitter.com/JasonGroves1/status/1255167987507748865?s=20>

⁹ For example, [Theresa Villiers MP](#), HC Deb (27th April 2020) vol. 675, col.112; and 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/>

¹⁰ 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.”

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 1

The Government must publish its plan for an exit strategy to ease these Regulations if it is to achieve democratic consent. 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 he will make this analysis, the public is effectively at the behest of ministerial decree and Parliament cannot examine whether these extraordinary restrictions are strictly necessary and proportionate.

2: THE RULE OF LAW

2a: 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 clear role for ongoing, meaningful parliamentary oversight.¹¹ 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.¹²

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 constitute a disproportionate interference with rights protected by the European Convention on Human Rights (incorporated by the Human Rights Act 1998), including Article 8 privacy rights and Article 11 rights to freedom of assembly.¹³

These questions have been addressed with considerable legal scholarship,¹⁴ which we do not try to emulate or repeat here. We have also sent Members a briefing for your attention provided to us by Tom Hickman QC, Rachel Jones and Emma Dixon of Blackstone Chambers who have caution that the Regulations are "likely to be ultra vires".

11 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>

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

13 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/>

14 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/>

We believe 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 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.

On Friday 30th April, a judicial review of the Regulations was initiated, claiming that they are both ultra vires and breach fundamental rights protected by ECHR.¹⁵

RECOMMENDATION 2A

The Government should publish legal advice taken on its use of these Regulations, made by statutory instrument under the Public Health Act 1984, to impose the lockdown restrictions.

2b: Guidelines and laws

Government communications

A major problem associated with enforcing of the “lockdown” is that police have misinterpreted the Regulations towards an excessively prohibitive reading that goes far beyond the restrictions in law. As such, the police have regularly undermined the rule of law, and continue to. One of the reasons for this is that

¹⁵ Wedlake Bell pre-action letter to GDL, 30th April 2020: <https://wedlakebell.com/content/uploads/Letter-to-The-Rt-Hon-Matt-Hancock-MP-Secretary-of-State-for-Health-and-Social-Care-30-April-2020.pdf>

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.

To be clear, it is right that the Government issues advice at this time in addition to communicating the new rules provided by the Regulations. For example, the advice to those aged over 70 to self-isolate for 12 weeks has been rightly communicated as important health advice, not as a legal restriction. However, some of the Government's communications of general prohibitions on freedom of movement have been much less clear and even employed the language of enforceable "rules".

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, providing care or assistance to a vulnerable person, and attending work where it is not possible to work from home.¹⁶ These restrictions do not apply to any person who is homeless (Regulation 6, para. 4).

A "reasonable excuse" to leave one's home is the key test for what is and is not lawful under Regulations. However, Government guidance advises that only "essential travel" is permitted, people can leave their homes for "one form of exercise a day"¹⁷ and some Ministers suggested a one hour limit,¹⁸ all of which exceeds the Regulations in most of the UK. 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 [in England] 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 leave their home as many times as they need, for as long as they need, provided they have a 'reasonable excuse'."¹⁹

¹⁶ The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, regulation 6(2)

¹⁷ 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>

¹⁸ 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/>

¹⁹ 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>

Our review published last week, Emergency Powers and Civil Liberties, catalogues pages and pages of examples of over-policing, unlawful enforcement and even wrongful convictions.²⁰ For example, we have collected a vast amount of evidence of officers enforcing restrictions on people driving to a place to exercise, imposing “once a day” exercise restrictions and distance limitations on cyclists, refusing to allow disabled and elderly people to rest during walks, banning certain types of exercise in public spaces, fining and berating people for buying “non-essential” items such as alcohol, attempting to stop convenience stores selling Easter chocolates, requiring IDs and proof of work at road checkpoints, and even policing people off their own gardens. None of these “rules” have any legal authority.

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. The document, like much of the policing that followed, confused the Regulation with the stricter government guidance (as well as with the Coronavirus Act) *and* treated the Regulation’s 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 has been concerning to see police confuse Government guidance with the law. However, this was followed with revised guidance on 31st March 2020,²¹ which amended this confusion and clarified particularly contentious points,²² such as those relating to travel to a place to exercise and police use of road checks. We welcomed the revised guidance, but the confusion has already resulted in policing beyond the law, and continues to.

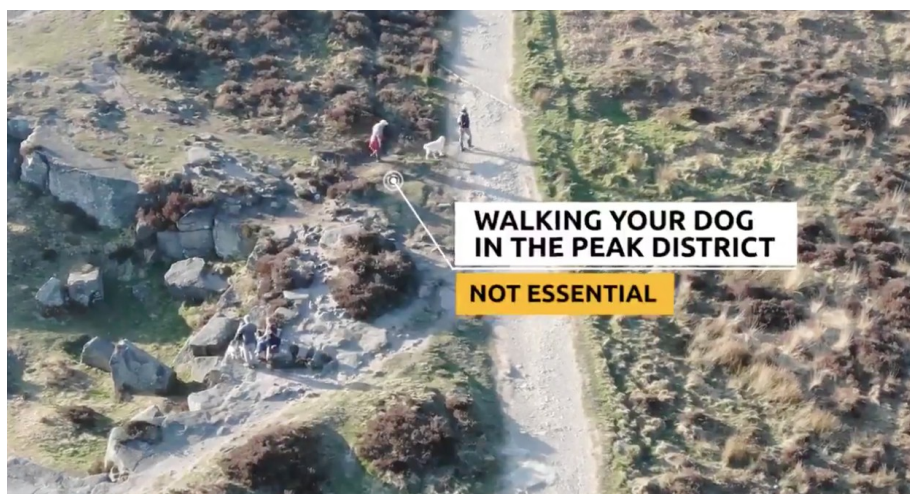
Derbyshire Police attracted significant public attention after posting a social media video on 26th March 2020 of drone surveillance footage it had taken of people who were walking and exercising in the Peak District. The video shames the walkers and states, “The Government advice is clear. You should only travel if it is essential. Travelling to remote areas of the Peak District for your exercise is not essential.”²³

20 Emergency Powers and Civil Liberties – Big Brother Watch, 28th April 2020: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>

21 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>

22 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>

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



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)²⁴, similarly instructed the public via Facebook “Don’t risk a fine (...) If you want to exercise – walk, jog 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).



The National Police Chiefs’ Council (NPCC), the College of Policing and the CPS has issued further clarificatory documents still, stating what the Regulations do and do not allow. Further helpful guidance,

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

'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.²⁵ 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 enforcement of the guidance.²⁶

Furthermore, these clarificatory documents about precisely what the Regulations do and do not permit appear to have been rejected by some senior police figures. Shaun Sawyer, Chief Constable of Devon and Cornwall Police, described the NPCC document as "some of the poorest guidance I have seen for a long time" due to discrepancies with Government communications, whilst Julia Mulligan, Police and Crime Commissioner for North Yorkshire, opined that the "new guidelines go completely against [government advice] and are hugely unhelpful".²⁷

On 18th April, Dorset Police issued a statement on the new clarifications 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."²⁸ 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."²⁹ 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."³⁰ This is a misrepresentation of the law. For police forces to openly disregard what the Regulations do and do not permit in favour of Government guidance is inappropriate and is leading to arbitrary policing.

25 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

26 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)

27 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>

28 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/>

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

30 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/>

This discrepancy between the Regulations and Government communication of the “rules” has resulted in 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:³¹

“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’”.³² 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.”

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.

Pre-emptive Dispersals

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” that

³¹ 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->

³² 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>

restrictions were “in force” 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 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”.³³ 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](https://www.gov.uk/coronavirus) Stay at home. Protect the NHS. Save lives”.³⁴

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.”³⁵

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 official can give orders and expect to be obeyed without any apparent legal basis.”³⁶

These points are not mere technicalities, Lord Sumption wrote:

33 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>

34 Coronavirus: SMS messages – 10 Downing Street, 24th March 2020:

<https://www.gov.uk/government/news/coronavirus-sms-messages>

35 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

36 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>

“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.”

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.³⁷ 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.³⁸ There were no laws in place at this time which restricted people’s ability to travel.



2:21 PM · Mar 25, 2020 · Orlo

³⁷ 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/>

³⁸ Crewe Police, Twitter, 25th March 2020: <https://twitter.com/PoliceCrewe/status/1242818838330257408?s=20>

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 we've not been that satisfied with their reason why they they're travelling today.”³⁹ 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 our Emergency Powers and Civil Liberties report, published 28th April 2020.⁴⁰ 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 2B

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. 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.

³⁹ 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/>

⁴⁰ Emergency Powers and Civil Liberties – Big Brother Watch, 28th April 2020: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>

3: THE ROLE OF PARLIAMENT

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,⁴¹ Wales⁴² and Scotland⁴³ respectively on 26th March 2020, and in Northern Ireland on 28th March 2020 (hereafter “the Regulations”).⁴⁴

The Regulations must be approved by Parliament within 28 days. Due to the Easter recess, this means the Regulations would expire in England unless they receive parliamentary approval by 18th May 2020.⁴⁵

The Regulations must be reviewed by the Secretary of State every three weeks. Upon review on 16th April 2020, the First Secretary of State announced the “lockdown” restrictions would remain in place pending review in another three weeks (7th May 2020). When approved, the Regulations can last for up to six months, until 25th September 2020.

The British public has been under house arrest for almost six weeks via the most extreme Regulations imposed in modern history, in absence of any parliamentary scrutiny or approval.

On 1st April, the Regulations were approved by Scottish parliament.⁴⁶

On 21st April, the Regulations were approved by the Northern Ireland Assembly.⁴⁷

On 29th April, the Regulations were approved by the Welsh Assembly.⁴⁸

On 4th May, the Regulations are scheduled to be approved by a Motion in the House of Commons.

41 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020: http://www.legislation.gov.uk/uksi/2020/350/pdfs/uksi_20200350_en.pdf

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

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

44 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>

45 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.

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

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

48 Welsh Assembly Plenary Record, 29th April 2020: <http://www.senedd.assembly.wales/documents/g6291/Printable%20minutes%20Wednesday%2029-Apr-2020%2013.30%20Plenary.htm?T=1&CT=2>

These are the most severe restrictions imposed on liberty in British modern history. The Regulations effectively put the nation under house arrest, leaving limited reasons for which a person can lawfully leave their place of residence. The 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, the strain on the NHS, and thus the loss of human lives to the virus. However, these extreme measures to curtail freedom have costs too, through the obstruction of health services, unprecedented psychological pressures, severe economic hardship, isolation of the most vulnerable and domestic violence. Each of these consequences of the Regulations will have a long-term impact – soaring national debt, unemployment, poverty, crime, dependencies, a mental health epidemic and undiagnosed and untreated health problems - causing thousands of premature deaths and reduced quality of life in the years to come.⁴⁹ Rarely has such an urgent and complex decision pertaining to the public’s right to life and liberty faced a government.

Decisions of such magnitude require not only legal authority but democratic consent.

The Motion will not go to a division. Two hours has been allotted for debate. Given time restrictions, Members are likely to be afforded only five minutes each to speak.

However, the role of Parliament cannot be overstated in the current crisis. 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.”⁵⁰

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 excuse⁵¹ - i.e., if a person leaves their home with a reasonable excuse but remains outside without one, they are in breach of the Regulations.

49 UK government concerned over deaths that could be caused by Covid lockdown – Sebastian Payne, Financial Times, 10th April 2020: <https://www.ft.com/content/8027d913-2e2f-4d4c-93db-89bd726105f0>

50 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>

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

The manner in which these amendments were imposed risks creating retrospective offences. The Government claims that the amendments, made urgently and without having been laid before Parliament, are merely clarificatory.⁵² 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.⁵³

For example, if an individual leaves their home to attend work (because they cannot work from home), they have a reasonable excuse and do so lawfully. Under the initial Regulations, if they were to stop off on Westminster Bridge after work to applaud care workers, they may well have done so lawfully as they had left home with a reasonable excuse (work). However, under the amended and more restrictive Regulations, stopping on Westminster Bridge after work would be an offence as they would now “be outside of” home without a reasonable excuse. The amendment clearly makes for a more restrictive Regulation and merits close attention.

Some commentators have even suggested that the “covertly” amended Regulations make it unclear whether it is lawful for any person to be at work.⁵⁴ This is because the Regulation explicitly states that it is a “reasonable excuse” for a person to “travel for the purposes of work” (Reg. 6(f)) but not to necessarily *be* at work – such explicit permission was not necessary when the initial Regulation only prohibited individuals from leaving the home. However, now that the amended Regulation prohibits individuals from both leaving and being outside of the home, the “reasonable excuse” permissions are, arguably, dysfunctional. That said, the “reasonable excuse” permissions are a non-exhaustive list. However, lawyer David Allen Green has termed the amendment a “blunder”, an “example of how not to legislate” and of and of why the “legislation

⁵² 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/uksi/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>

⁵³ 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/>

⁵⁴ A blunder in the amended Coronavirus regulations – how the Home Office inadvertently made the work “reasonable excuse” unclear – David Allen Green, The Law and Policy Blog, 27th April 2020: <https://davidallengreen.com/2020/04/a-blunder-in-the-amended-coronavirus-regulations-how-the-home-office-inadvertently-made-the-work-reasonable-excuse-unclear/>

should be scrutinised and approved by parliament, not slipped out into force without such scrutiny and approval.”⁵⁵

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, the Regulations and any amendments 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.”⁵⁶

RECOMMENDATION 3

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

⁵⁵A blunder in the amended Coronavirus regulations – how the Home Office inadvertently made the work “reasonable excuse” unclear – David Allen Green, The Law and Policy Blog, 27th April 2020:

<https://davidallengreen.com/2020/04/a-blunder-in-the-amended-coronavirus-regulations-how-the-home-office-inadvertently-made-the-work-reasonable-excuse-unclear/>

⁵⁶The 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/>

4: NATIONAL DISCREPANCIES

Regulations

The Regulations in England⁵⁷, Scotland⁵⁸ and Northern Ireland⁵⁹ state that a person may leave home 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, but further specify that a person may exercise “no more than once a day”.⁶⁰

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.”⁶¹

UK Government guidance advises that people can leave their homes for “one form of exercise a day”⁶² but this exceeds the Regulations in the UK, except for Wales. This is a matter of considerable confusion in England. Despite the lack of legal authority in England, 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,⁶³ multiple police forces and councils in England have informed people they are only permitted to leave their home to exercise once per day.

Exit strategy

There are also discrepancies between the English and Welsh tests for lifting the lockdown and ceasing the Regulations. The Welsh tests are different and more substantial than the English tests, with seven instead of five requirements for ending the emergency measures. These include far broader and less precise questions

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

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

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

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

61 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>

62 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>

63 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>

including: would ending the lockdown “have a positive economic benefit?”; would “it have a positive impact on people’s wellbeing?”; would “it have a positive impact on equality?”⁶⁴ Mark Reckless, leader of the Brexit Party in the Welsh Assembly, argued that “if you put these regulations with this degree of strictness, that’s not that short of house arrest, you need the strongest possible requirement in order to keep [the regulations]” and that the seven tests do not “have any basis in law.”⁶⁵

Whilst speaking to the Public Administration and Constitutional Affairs Committee on 29th April, Michael Gove made it clear that the Government’s intention was to lift lockdown measures across the UK simultaneously. It is unclear how this can happen if Wales has an entirely different set of criteria for lifting the Regulations.

RECOMMENDATION 4

The Regulations and the accompanying exit strategies 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.

⁶⁴ The seven questions the Welsh Government will ask before it lifts lockdown – Will Hayward, Wales Online, 24th April 2020, <https://www.walesonline.co.uk/news/politics/drakeford-coronavirus-lockdown-welsh-government-18142796>

⁶⁵ Plenary 29 April 2020 - Welsh Assembly, 29th April 2020, <http://www.senedd.assembly.wales/ieListDocuments.aspx?CId=401&MId=6314>

5: DISABILITY RIGHTS

The Regulations require that a person has a “reasonable excuse” to leave or be outside of the home, which expressly includes exercise. However, as described in part 2B of this briefing, Government communications of the “rules” have been more prescriptive and restrictive than the Regulations leading to confusion about what is and is not permitted. This has caused particular anxiety for those with, or caring for people with, disabilities.

People with physical disabilities or limited mobility have been 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.

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.⁶⁶

⁶⁶ https://twitter.com/polski_smakdown/status/1249006032975728640?s=20



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”.⁶⁷ 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.⁶⁸

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.⁶⁹

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

⁶⁷ Twitter, 15th April: https://twitter.com/jo_hauge/status/1250479202882772995

⁶⁸ 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>

⁶⁹ Coronavirus fines: Lancashire Police issues most lockdown penalties – BBC, 16th April 2020: <https://www.bbc.co.uk/news/uk-england-52301650>

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.”⁷⁰

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.⁷¹ 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).⁷² 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.”⁷³

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.

⁷⁰ 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)

⁷¹ 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>

⁷² 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>

⁷³ 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>

6: AVOIDING CRIMINALISATION

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,⁷⁴ 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, the police’s enforcement of the Regulations has too often been excessive.

Faced with a tough job in rapidly adapting to the new Regulations, police have too often swung from apology to apology in this first month. However, 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”.⁷⁵ However, the public needs more reassurance about the structures in place to remedy failures, protect policing by consent and avoid criminalisation in the pandemic.

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”.⁷⁶ When a neighbour tried to intervene, the officer warned her “you’ll be next.” Police can use force under the Regulations, but only reasonable force where necessary. The man was later issued with a fixed penalty notice.

Greater Manchester Police stated that they were investigating the incident and rightly apologised for the way it was handled.⁷⁷

74 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>

75 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>

76 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>

77 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>

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 small 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.

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 Regulations⁷⁸ - a considerable threshold. However, 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.⁷⁹ This sets a low threshold for an officer to instigate enforcement actions, and is lower than the requirement of "reasonable grounds" to suspect a person is carrying prohibited items before conducting a stop and search.

8,877 Fixed Penalty Notices (FPNs) have been recorded by forces in England up to 27th April for breaches of the Regulations,⁸⁰ including one issued to a 100 year old.⁸¹ There is a concerning disparity in the number of FPNs issued between forces, with Thames Valley Police issuing 649 FPNs in the period whilst Warwickshire issued only 22. Even accounting for population size, Thames Valley issued over 5 times as many FPNs as Warwickshire.

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

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

80 Police chiefs welcome positive start to recruitment drive – NPCC, 30th April 2020:

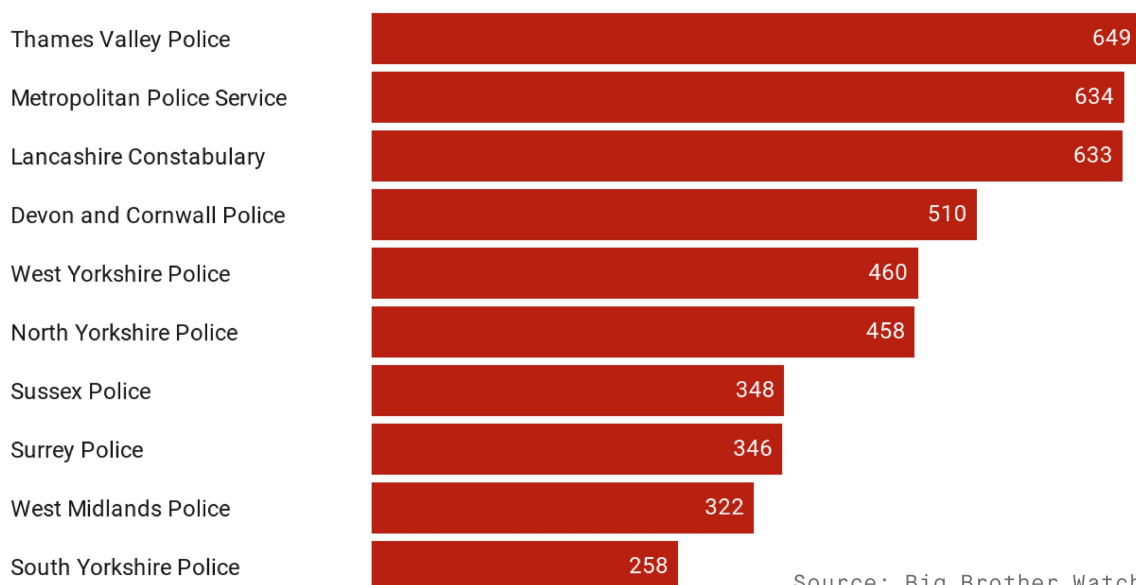
<https://news.npcc.police.uk/releases/police-chiefs-welcome-positive-start-to-recruitment-drive>

81 Coronavirus fines: Lancashire Police issues most lockdown penalties – BBC, 16th April 2020:

<https://www.bbc.co.uk/news/uk-england-52301650>

Police fixed penalty notices in England

(Dates from 27th March to 27th April)



Source: Big Brother Watch

Responding to the publication of disparate FPN figures for the first two weeks emergency powers were in force, the Home Affairs Select Committee rightly questioned how consistently the law is being applied.⁸²

Convictions under the Regulations

The only way to contest a FPN is to risk prosecution. This carries legal and financial risks. We are aware of many prosecutions and are attempting to collate data from news reports. However, there are no transparency figures published as to how many people have been prosecuted under the Regulations. We are deeply concerned that the thresholds in the Regulations for an offence are too low and risk criminalising ordinary people for behaviours that until just a few weeks ago were entirely normal and lawful.

RECOMMENDATION 6

The Regulations to restrict freedom of movement would be better constructed as a general prohibition. Only if an officer reasonably believes an individual has seriously breached the prohibition and caused an unreasonable risk to others should an offence be constituted that could incur a Fixed Penalty Notice.

⁸² Home Office preparedness for COVID-19 (Coronavirus): Policing – Home Affairs Select Committee, 15th April 2020, para.7 p.4

7: AVOIDING A SURVEILLANCE STATE

Roadside checks

Over the past month, police have increasingly used roadside checks to enforce the Regulations, asking 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. Much 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.”⁸³

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”.⁸⁴ At a rate of one vehicle stop a minute, it is highly likely these vehicle stops were indiscriminate and arbitrary.



⁸³ 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>

⁸⁴ Gloucester City Police, Twitter, 7th April 2020: <https://twitter.com/GlosCityPolice/status/1247549935664410624?s=20>, <https://twitter.com/GlosCityPolice/status/1247553446678577166?s=20>

ANPR

Police have used the Automatic Number Plate Recognition network to surveil, spot and fine hundreds of motorists in the first month of the Regulations.

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.⁸⁵

It is important that people do not travel without reasonable excuse, but also 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.

Drones

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

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".⁸⁶

85 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/>

86 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/>



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 2018,⁸⁷ nor does 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.⁸⁸

Neath Port Talbot Council has used drones with speakers attached to them to "distribute public information messages".⁸⁹ 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 were 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.

⁸⁷ 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/>

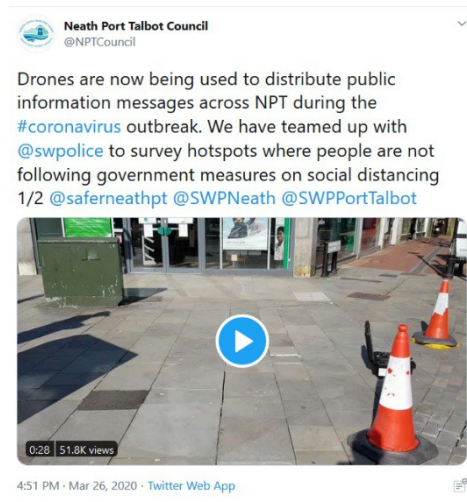
⁸⁸ For example, Lord Sumption interviewed on BBC Radio 4 Today Programme, 30th March 2020. A transcript is available here: <https://www.spectator.co.uk/article/former-supreme-court-justice-this-is-what-a-police-state-is-like->

⁸⁹ Neath Port Talbot Council, Twitter, 26th March 2020:

<https://twitter.com/NPTCouncil/status/1243218979851821056?s=20>

“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.”⁹⁰

Police in Wrexham have also used drones to photograph local parks and Welsh rural spots.⁹¹



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.”⁹² 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.

90 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>

91 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/>

92 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>

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.⁹³ 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 drones 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.⁹⁴ 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 7

The Regulations must not give way to a surveillance state. Police guidance is clear that roadside checks must not be arbitrary. Use of the ANPR surveillance network, the existence of which lacks a clear legal basis, should be suspended. 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. Parliamentary time should be afforded to review the use of ANPR and drones in policing and develop clear limitations on their use.

⁹³ 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>

⁹⁴ Policing the COVID-19 lockdown, YouGov / Crest Survey Results (3-5 April 2020) – 8th April 2020, YouGov: https://docs.cdn.yougov.com/7jr26rsm5q/Crest_CoronaPolicing_200405.pdf