

**EMERGENCY POWERS AND  
CIVIL LIBERTIES REPORT**

**[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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**Emergency Powers & Civil Liberties Report, May 2020**

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## INTRODUCTION

The publication of this report marks approximately two months since the Coronavirus Act 2020 was passed into law on 25<sup>th</sup> March 2020, and since the Health Protection (Coronavirus, Restrictions) Regulations 2020 (“lockdown” Regulations) were made by statutory instrument on 26<sup>th</sup> March.<sup>1</sup> These emergency laws represent the most severe restrictions on basic rights and freedoms in British history.

Exceptional times call for exceptional measures – but history teaches us how states of exceptionalism are prone to expand and endure, reshaping the societies they sought to protect. In these weeks and months, citizens and parliamentarians must be vigilant to the threats to fundamental rights, lives and liberties and unwavering in our defence of democratic norms. In this series of monthly reports, we aim to document and analyse an array of emergency powers and make recommendations that seek to protect human rights, civil liberties, the rule of law and parliamentary democracy.

The protection of lives and liberties cannot be considered as distinct from one another. At the time of writing, there have been over 39,000 deaths where a positive test for coronavirus was recorded, and over 10,000 excess deaths where coronavirus was not recorded.<sup>2</sup> The extraordinary toll of the virus is tragically measurable in the lives lost – and so too is a picture emerging of the toll of lockdown, hospital discharges and other emergency measures.<sup>3</sup> Both the pandemic and the policies that seek to tackle it are responsible for public health. Whilst severe lockdown restrictions have been popularly portrayed by some as unilaterally responsible for saving lives, the reality is that the restrictions also cost lives, let alone inflict severe human suffering and untold long term effects.

The Government is faced with an unenviable and deeply complex balancing task.

However, how that balancing task is being conducted is entirely unknown. The law requires that the necessity of the lockdown Regulations is assessed by the Health Secretary every three weeks. However, there is no legal duty to publish the reviews. Despite pertaining to the greatest threat to lives and freedoms since World War II, parliament and the public have been completely denied transparency as to these periodic assessments. In fact, the first two reviews, on 16<sup>th</sup> April and 7<sup>th</sup> May respectively, took place before parliament had even authorised the Regulations. The lockdown has been effectively dictated by Ministerial rule with little scrutiny in a manner that contradicts the principle of parliamentary sovereignty – the heart of our

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

2 Almost 55,000 excess UK deaths during Covid-19 outbreak, says ONS – Haroon Siddique and Pamela Duncan, the Guardian, 19 May 2020

3 Covid-19: “Staggering number” of extra deaths in community is not explained by covid-19 – BMJ 2020;369:m1931

constitutional democracy. This should lead all of us to question what kind of democracy we have become.

Our country passed the peak of coronavirus infections on 21<sup>st</sup> April 2020,<sup>4</sup> though subsequent peaks may follow. It is vital that the lessons of this period inform the policy choices going ahead. This is an important time to review of the vast array of extraordinary powers conferred to Government and repeal or reform those powers that have been proven excessive or unnecessary.

There is now a clear case for the repeal of Schedule 21 of the Coronavirus Act. The schedule contains the main criminal offence under the Act relating to “potentially infectious” persons. This Schedule caused us, and parliamentarians, extreme concern when proposed in the (then) Bill. The Schedule’s powers to forcibly detain, isolate, test and quarantine “potentially infectious” individuals, even children, have not been needed during this pandemic peak. However, they have been exercised, exclusively unlawfully, against society’s most vulnerable people.

In our last report, we exposed the unlawful conviction of an Oxford teenager under the Coronavirus Act and, in light of mounting evidence that the Act was being repeatedly misinterpreted and abused, we called for a review of all fines and convictions under the emergency laws. We welcomed the CPS’ subsequent decision to review every charge, sentence and conviction under both the Coronavirus Act and the “lockdown” Regulations. The initial findings were damning - every single one of the 44 Coronavirus Act prosecutions reviewed so far was unlawful.

Furthermore, the initial review found that over 6% of the prosecutions so far under the lockdown Regulations were unlawful. This is likely just the tip of an iceberg of injustice inflicted during the lockdown. Over 14,000 fixed penalty notices have been issued under the Regulations, of course without the checks and scrutiny involved in a prosecution. If 6% of those were issued wrongly, it would account for almost 1,000 unjustified fines. The true figure is likely to be much higher. We are now calling for an urgent review of all fines issued under emergency laws. Our call is backed by the Joint Committee on Human Rights, Police Action Lawyers Group, and NGOs Fair Trials, INQUEST, Liberty, Netpol and StopWatch.

Civil liberties have rarely faced such extraordinary threats. Those threats are compounded by the erosion of the rule of law and parliamentary democracy we are presently witnessing. It is against this backdrop that a digital coup is taking place. Major technology companies including Palantir, Amazon and Faculty have swooped in on the state, rapidly picking up health-related contracts with no transparency. The surveillance state is expanding, with intrusive thermal surveillance now deployed in workplaces and airports.

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4 Has the UK passed its coronavirus peak? - Lizzie Roberts, The Telegraph, 10 May 2020

The conditions of crisis bend democracies towards authoritarianism when democrats fail to act. We urge parliamentarians to use the recommendations in this report to protect citizens and the democracy we live in. This is a time to act.

## RECOMMENDATIONS

**RECOMMENDATION 1:** The lockdown restrictions in England have ever been in place with the full approval of Parliament. The Government must seek parliamentary approval of all meaningful changes to the “lockdown” restrictions and has no legitimate reason to avoid doing so when parliament is in session.

**RECOMMENDATION 2:** We urge parliamentarians to increase pressure on Government to respect the sovereignty of parliament and prevent the misuse of “urgency” to avoid democratic procedures in future.

**RECOMMENDATION 3:** The Secretary of State should issue written and oral statements in the House of Commons (or, during recess, online) following each review of the necessity of the Health Protection (Coronavirus, Restrictions) Regulations 2020 to foster transparency and to open subsequent measures to democratic scrutiny. The same process should take place by respective Ministers in devolved administrations.

**RECOMMENDATION 4:** The English Regulations should be amended so as to require a proportionality assessment as part of each review, as required by the Welsh Regulations.

**RECOMMENDATION 5:** Illogical laws undermine the authority of the law and are likely to lead people to reject the rules in favour of common sense. Parliament should urgently debate the amended lockdown Regulations. Moreover, Government must stop introducing restrictions on fundamental rights by ministerial decree. Not only is it damaging to parliamentary democracy, it is damaging to the quality of law and public health efforts.

**RECOMMENDATION 6:** The steep rise in stop and searches, combined with declining arrest rates, are cause for serious concern – particularly as these powers are disproportionately used against black and minority ethnic groups. The Commissioner for the Metropolitan Police must be held to account and measures put in place to prevent the harassment of innocent people via stop and search.

**RECOMMENDATION 7:** The NPCC should instigate a national review of all FPNs issued under the lockdown Regulations.

**RECOMMENDATION 8:** The Government should introduce a means for individuals to challenge lockdown FPNs by way of administrative review or appeal, without having to risk magistrates’ court proceedings.

**RECOMMENDATION 9:** Setting up roadblocks to arbitrarily question people as to their movements is intimidating, disproportionate, and goes beyond the necessary measures for policing the pandemic. Police chiefs must ensure the guidance is being followed and stop conducting roadside checks in relation to the Regulations.



**RECOMMENDATION 10:** 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.

**RECOMMENDATION 11:** Schedule 21 of the Coronavirus Act poses an extraordinary risk to fundamental rights, has been abused to pursue 44 unlawful prosecutions, and has proved of little use for public health despite the country enduring a peak of the pandemic. Schedule 21 should be urgently repealed.

**RECOMMENDATION 12:** Schedule 22 of the Coronavirus Act has not been used at all during the pandemic, yet contains draconian powers to restrict gatherings and protests that remain on the statute books. Schedule 22 should be urgently repealed.

**RECOMMENDATION 13:** Plans for a contact tracing app should be put to Parliament, and accompanied with primary legislation to ensure any app remains strictly voluntary, non-discriminatory and protects our rights.

**RECOMMENDATION 14:** NHSX must provide full disclosure of the contact tracing app trial, including any pre-defined parameters for success and subsequent results.

**RECOMMENDATION 15:** The Track and Trace scheme is a privacy nightmare that undermines trust in a vital public health function. The NHS must revise and justify the data retention periods and complete a DPIA urgently.

**RECOMMENDATION 16:** 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.

**RECOMMENDATION 17:** We urge Ministers to release any plans for so-called health certificates and to make it clear what the scientific basis is for any such certificates.

**RECOMMENDATION 18:** 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.

**RECOMMENDATION 19:** Users of health tracking apps should be fully informed if their data is shared with jHub or NHSX under Project OASIS. NHSX should provide clearer explanation as to the use of data collected under Project OASIS.

**RECOMMENDATION 20:** The Intelligence and Security Committee should be urgently convened. The ISC should report on activity conducted under the GCHQ Directive in six months and report to Parliament.

**RECOMMENDATION 21:** We urge all companies, authorities and institutions to immediately cease use of thermal surveillance, absent a strong evidence base and robust safeguards.

**RECOMMENDATION 22:** 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.

**RECOMMENDATION 23:** Social media companies should not censor content beyond the limitations on free speech set by domestic law. Platforms should carefully consider the impact of their new content restrictions not only on their PR but on the health of the right to freedom of expression online.

**RECOMMENDATION 24:** As lockdown measures begin to ease, we urge the Government to add an exemption on the prohibition of gatherings for those of a political nature and restore the right to peaceful protest as a matter of urgency. In the context of authoritarian measures, upholding the right to freedom of expression is essential to preserve our democracy.

**RECOMMENDATION 25:** NHS whistleblowers should be protected and staff should be able to publicly raise any concerns they wish. Denying staff the opportunity to flag serious gaps in healthcare provisions is not only a violation of their freedom of expression, but also a threat to their lives and broader public health.

**RECOMMENDATION 26:** It is wrong for the ICO to delay decision notices as a precautionary measure on behalf of other public authorities. The ICO should be performing its full regulatory role, particularly at a time when freedom of information and data protection are vitally needed legal rights.

**RECOMMENDATION 27:** Councils must not use this emergency to shut out democracy, but instead seek the input of councillors, residents and experts alike for current critical decision making. Councils should use technology to reopen democratic processes like most other organisations and conduct business as usual, as far as possible.



*We must never lose sight through this process of what normal means.*

*'Normal' is not being tracked centrally.*

*'Normal' is not being afraid.*

*'Normal' is not being suspicious of every stranger.*

*'Normal' is not reporting on our neighbours."*

— Marcus Fysh MP – House of Commons debate, 4th May 2020

# EMERGENCY LAWS

## Health Protection Regulations

Two months ago, a series of statutory instruments were made under the Public Health Act 1984 to enforce the lockdown restrictions. These are the Health Protection (Coronavirus, Restrictions) Regulations 2020 made in England,<sup>5</sup> Wales<sup>6</sup> and Scotland<sup>7</sup> respectively on 26<sup>th</sup> March 2020, and in Northern Ireland on 28<sup>th</sup> March 2020 (hereafter “the Regulations”).<sup>8</sup> They remain in place but have been significantly amended.

On 1<sup>st</sup> April, the Regulations for Scotland were approved by Scottish parliament.<sup>9</sup> On 21<sup>st</sup> April, the Regulations for Northern Ireland were approved by the Northern Ireland Assembly.<sup>10</sup> On 29<sup>th</sup> April, the Regulations were approved by the Welsh Assembly.<sup>11</sup>

### *The role of Parliament*

Astonishingly, the original Regulations for England were approved by Parliament 7 weeks after being made by Government, long after the peak of the virus, on 14<sup>th</sup> May.<sup>12</sup> The Regulations received a two hour debate in the House of Commons on 4<sup>th</sup> May<sup>13</sup> and a one and a half hour debate in the House of Lords on 12<sup>th</sup> May.<sup>14</sup> We sent a briefing on the Regulations to all members of both Houses of Parliament in advance,<sup>15</sup> and also provided

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5 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020: [http://www.legislation.gov.uk/ukxi/2020/350/pdfs/ukxi\\_20200350\\_en.pdf](http://www.legislation.gov.uk/ukxi/2020/350/pdfs/ukxi_20200350_en.pdf)

6 The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020: [http://www.legislation.gov.uk/wsi/2020/353/pdfs/wsi\\_20200353\\_mi.pdf](http://www.legislation.gov.uk/wsi/2020/353/pdfs/wsi_20200353_mi.pdf)

7 The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 [http://www.legislation.gov.uk/ssi/2020/103/pdfs/ssi\\_20200103\\_en.pdf](http://www.legislation.gov.uk/ssi/2020/103/pdfs/ssi_20200103_en.pdf)

8 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>

9 Scottish Parliament Minutes, 1<sup>st</sup> April 2020: [https://www.parliament.scot/S5\\_BusinessTeam/Chamber\\_Minutes\\_20200401.pdf](https://www.parliament.scot/S5_BusinessTeam/Chamber_Minutes_20200401.pdf)

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

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

12 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020: Timeline, <https://statutoryinstruments.parliament.uk/timeline/zVxJasSr/SI-2020350/>

13 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 441: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

14 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 597: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

15 Health Protection (Coronavirus, Restrictions) Regulations 2020: Briefing (May 2020) – Big Brother Watch, 1<sup>st</sup> May 2020: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/05/Health-Protection-Regulations-Motion-Briefing-4-May-2020-Big-Brother-Watch.pdf>

a short briefing from Blackstone Chambers summarising the argument that the Regulations are ultra vires.<sup>16</sup>

Serious concerns were raised in the House of Commons debate about the timing and brevity of the debate, by Shadow Health Minister Justin Madders and Conservative MPs alike. Justin Madders MP stated:

*“(...) whether we support these measures or not, given that they represent the biggest peacetime restrictions that this country has ever seen, they do demand full parliamentary scrutiny (...) a couple of hours’ debate weeks after the Regulations were introduced cannot in future be sufficient to provide the level of examination and scrutiny that such sweeping laws require.”<sup>17</sup>*

Conservative MP Andrew Griffith expressed “regret” that the debate on the Regulations was taking place so late:

*“I am afraid that, by some distance, the House could not be said to be debating them at the first possible opportunity.”<sup>18</sup>*

He also noted the lack of representation in the debate:

*“I note that, for whatever reason, fewer than 3% of Members are participating in a debate on a subject of such magnitude, which may have consequences for the liberty of the individual for generations to come.”<sup>19</sup>*

Indeed, the debate was somewhat imbalanced by the fact that the Shadow Health Minister Justin Madders was the only Labour MP to speak in the debate, despite him rightly calling for “scrutiny at a greater level than we would ordinarily see.”

In the House of Lords debate, Shadow Health Minister Baroness Thornton called for “full parliamentary monitoring and scrutiny” of the Regulations as they represent the “biggest peacetime restrictions that this country has ever seen.” She rightly argued:

*“a couple of hours of debate weeks after [the Regulations] were introduced cannot in future be sufficient to provide the level of examination and scrutiny that such sweeping laws require.”<sup>20</sup>*

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16 Briefing: Coronavirus and Civil Liberties in the UK – Tom Hickman QC, Emma Dixon, Rachel Jones (Blackstone Chambers), 1<sup>st</sup> May 2020: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/05/Briefing-THEDRJ-Blackstone-Chambers-for-Big-Brother-Watch.pdf>

17 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 444: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

18 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 465: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

19 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 465: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

Baroness Jones of Moulsecoomb condemned the Government's undervaluing of parliamentary oversight:

*"(...) it is a democratic and constitutional outrage that [the Regulations] were implemented on 26 March and are finally being debated in this House only on Tuesday 12 May. The regulations mark the greatest loss of liberty ever imposed in Britain, yet they were slipped in as emergency secondary legislation the day after Parliament closed early for a month-long recess.*

*"Parliament had just passed the Coronavirus Act and we were told to go early to recess, as it was job done. Yet it turns out that the real measures had absolutely nothing to do with that Act. Why did we break up a week early for Easter, rather than sit to give proper scrutiny to such drastic legislation? It was wrong to do it like that; it reminded me all too well of the illegal prorogation of Parliament last year."<sup>21</sup>*

Baroness Barker similarly criticised the lack of parliamentary engagement as "hugely damaging to democracy":

*"(...) the Government have taken unto themselves enormous powers which remove from citizens many basic legal rights. Having done so, the Government should be under an obligation to subject their decision-making to scrutiny which is reasonable and timely."<sup>22</sup>*

Of course, statutory instruments do not ordinarily receive significant parliamentary scrutiny. However, this is not an ordinary statutory instrument but one that directly impacts the lives and liberties of every single person in the country.

Parliamentary scrutiny of decisions of such magnitude is vital to ensure not only democratic legitimacy but also quality of the law. As Andrew Griffith MP said in the belated Commons debate on the Regulations, "it is hard to argue that a touch more parliamentary scrutiny would not have exposed, and therefore narrowed sooner, the gaps between legislation and guidance."<sup>23</sup>

Similarly, in the Lords debate the Shadow Defence Minister Lord Rosser described the "unenviable" and "difficult, if not impossible" job of police in enforcing confusing

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20 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 614: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

21 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 610: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

22 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 612: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

23 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 465: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

Regulations “which did not receive proper parliamentary scrutiny prior to being introduced.”<sup>24</sup>

Conservative peer Lord Wei pointed to the flaws of the Regulations and said:

*“Moving forward, we will need to have a much wider debate to shape these laws, rather than the Government generating and issuing them and noble Lords in this House commenting around the edges.”*<sup>25</sup>

Speaking for the Government, Lord Bethell said the delay in bringing the debate to Parliament was “not for me to comment on.”<sup>26</sup> If it is not for a Minister leading a debate on to explain why the debate is so late as to be rendered pointless, it is a mystery as to who it is for to comment on.

The result of undermining parliamentary scrutiny speaks for itself. The Regulations have been misinterpreted by police forces, the Crown Prosecution Service (CPS) and magistrates across the country. As Justin Madders MP said in the Commons debate, one “need only to look at the way in which some of those rules were interpreted and applied in the early days to know that there was confusion about their exact meaning (...) even recently we have seen a divergence between ministerial pronouncements and what the law actually allows.”<sup>27</sup>

The Regulations have been so unclear as to give way for a national debate as to whether the Prime Minister’s chief advisor Dominic Cummings himself broke the law by taking a 500 mile round trip from London to Durham and a day trip to Barnard Castle. Whatever one’s view of the situation, it is deeply unsatisfactory that the lockdown Regulations are open to such confusion.

The Joint Committee on Human Rights urged the Government to “introduce a method of making regulations which allows for more timely and stringent Parliamentary scrutiny which is proportionate to the significant restrictions on human rights which the regulations impose.”<sup>28</sup>

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24 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 61: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

25 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 602: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

26 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 616: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

27 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 444-5: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

28 Chair’s Second Briefing Paper on the Lockdown Regulations – Harriet Harman MP, Joint Committee on Human Rights, 20<sup>th</sup> May 2020: <https://committees.parliament.uk/writtenevidence/5454/pdf/>

Regretfully, the Government has not done so and continues to manage the lockdown by ministerial decree.

### *The evasion of Parliament and lockdown amendments*

Shadow Health Minister Justin Madders also called for parliamentary oversight of any amendments to the Regulations:

*“(...) there ought to be time and space to ensure that any future changes have democratic consent before they are introduced.”*

Similarly, Conservative MP Mark Harper made a direct request, and hinted towards a backbench rebellion if parliamentary scrutiny is denied:

*“I request that before any changes to these Regulations come into force — indeed, there has already been one set of amendments—any amended Regulations are brought forward and debated and decided on by the House. (...) I would prefer the process to remain consensual, but it will only if the Government behave in that way.”<sup>29</sup>*

However, Government did not heed these calls – the lockdown Regulations have been significantly changed three times by amendment without democratic consent.

Parliamentary scrutiny was such an afterthought for Government that the House of Lords debate on the original Regulations was just one day before the lockdown was substantially relaxed and the Regulations amended by ministerial fiat. At the start of the Lords debate, the Parliamentary Under-Secretary of State for Health Lord Bethell even gave an outline of the changes to the Regulations that were to come, mischaracterising them as forthcoming “clarifications”<sup>30</sup> when in fact they represented a significant easing of the lockdown. Baroness Hamwee expressed concern that the Regulation being debated was “about to be superseded.”<sup>31</sup>

In fact, the Amendment that eased the lockdown was made (i.e. signed by the Minister) on 12<sup>th</sup> May – the same day that the House of Lords debated the original Regulations. The Amendment was laid before Parliament and thus came into force the following day,

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29 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 462: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

30 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 597: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

31 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 605: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)



on 13<sup>th</sup> May. The day after that on 14<sup>th</sup> May, Parliament approved the original Regulations – approval that was now outdated.

Thus, due to severely delayed and poorly timed parliamentary debates, it still cannot be said that the lockdown restrictions in England have ever been in place with the full approval of Parliament.

**RECOMMENDATION 1: The lockdown restrictions in England have ever been in place with the full approval of Parliament. The Government must seek parliamentary approval of all meaningful changes to the “lockdown” restrictions and has no legitimate reason to avoid doing so when parliament is in session.**

### *Urgency as an excuse*

On 12<sup>th</sup> May the Secretary of State made a significant Amendment to the Regulations, easing the lockdown in England without any parliamentary scrutiny on the basis of unjustified urgency. The introductory text to the Amendment states, “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.”<sup>32</sup> This is patently false as Parliament was sitting to review the original Regulations on the very same day the Amendment was made.

Under the same unjustified “reason of urgency” a prior amendment was passed in April that risked creating retrospective offences. We examined this in our April report.<sup>33</sup>

It is incumbent on Government to ensure that any amendments to the Regulations, which directly impact the lives of every person in the country, are afforded full and prompt democratic scrutiny. On 13<sup>th</sup> May, after the Amendment was laid before Parliament, the Shadow Attorney General Lord Falconer commented on Twitter:

*“Yesterday government by executive decree passed regs to make the changes to lockdown. Those regulations could have been debated and voted on by Commons, but govt decided they were too urgent. They weren’t. They could have been debated yesterday. Careful about democracy.”<sup>34</sup>*

We are alarmed that the Government is using urgency as an excuse to evade parliamentary scrutiny of the greatest decisions. This evasion may not result from

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32 The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020, Introductory Text

33 Emergency Powers & Civil Liberties Report, April 2020 – Big Brother Watch, p.15: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>

34 Charlie Falconer, Twitter, 13<sup>th</sup> May 2020: <https://twitter.com/LordCFalconer/status/1260687425355108353?s=20>

malintent but does indicate a worrying undervaluing of parliamentary oversight and democratic legitimacy. We made this point in our April report and parliamentarians raised alarm bells in the subsequent debates on the Regulations – it is disappointing they have not been heard by Government.

**RECOMMENDATION 2: We urge parliamentarians to increase pressure on Government to respect the sovereignty of parliament and prevent the misuse of “urgency” to avoid democratic procedures in future.**

### *Three-week reviews*

The Regulations required that their necessity be assessed by the Health Secretary every three weeks. However, there is no legal duty to publish the reviews and neither the public nor parliament has any idea as to what the review considered or found.

After the first three-week review on 16th April 2020, the Government simply announced the lockdown restrictions would remain in place pending review in another three weeks (7th May 2020). It took Matt Hancock until 28<sup>th</sup> April to report back on the review via a written statement – which was the only time we are aware he has directly reported back on a review. He stated:

*“In this review it was agreed that no change would be made to the existing restrictions and that they would remain in place for at least three more weeks. Recognising the potential for harm to public health and the economy if measures were relaxed too soon, it was agreed that five conditions would need to be met before the measures are eased.”<sup>35</sup>*

However, the five tests are insufficient to determine the necessity and crucially the proportionality of such extraordinary restrictions to fundamental rights, and thus the compatibility of the Regulations with the Human Rights Act 1998. There is no clear requirement of a proportionality assessment in England, whereas in Wales, Amendment 3 to their Regulations introduced a requirement that Welsh Ministers consider “whether those restrictions and requirements are proportionate to what the Welsh Ministers seek to achieve by them” in each three-week review.<sup>36</sup>

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35 Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 - Health Secretary Written Statement, 28<sup>th</sup> April 2020: [https://hansard.parliament.uk/commons/2020-04-28/debates/20042818000013/HealthProtection\(CoronavirusRestrictions\)\(England\)\(Amendment\)Regulations2020](https://hansard.parliament.uk/commons/2020-04-28/debates/20042818000013/HealthProtection(CoronavirusRestrictions)(England)(Amendment)Regulations2020)

36 The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 3) Regulations 2020: <http://www.legislation.gov.uk/wsi/2020/497/made>

The second three-week review (presumably) took place on 7<sup>th</sup> May. However, no announcement was made on the day. Announcements were made of forthcoming changes on 10<sup>th</sup> May and amendments to ease the lockdown followed on 13<sup>th</sup> May.

The third three-week review was due on 28<sup>th</sup> May. In the daily press briefing on the same day, the Prime Minister announced that from Monday 1<sup>st</sup> June, groups of up to six people from different households will be able to meet outside in England. He said this is because the “five tests” are being met.<sup>37</sup>

The lack of public transparency and parliamentary engagement following the three-week reviews is clearly unsatisfactory. The Joint Committee on Human Rights raised the concern that there has been “an almost complete absence of meaningful engagement by the Government with Parliament” in relation to the reviews, and pointed out Ministers’ duty to make important announcements first to Parliament as per the Ministerial Code.<sup>38</sup>

In the Commons debate on the Regulations on 4<sup>th</sup> May, Shadow Health Minister Justin Madders suggested:

*“A statement in the House following the review will provide a helpful examination of that [three week review] requirement. I hope that when the Minister responds he will commit to that and to an oral statement after each subsequent review. If that review envisages some relaxation of the measures, we hope that any new Regulations on the back of that are debated here before they are implemented.”<sup>39</sup>*

Conservative MP Mark Harper also made the case for more transparency around reviews:

*“with each of the review periods, it is not for others to justify the regulations going away; the Government must rejustify why they have to remain in place so we do not consider that they become the new norm.”<sup>40</sup>*

However, the Minister did not respond to these suggestions. He vaguely stated:

*“The shadow Minister and others made the point very clearly that they would expect this House to be very much involved, as swiftly as possible, in any further*

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37 Coronavirus: Lockdown easing to allow groups of six to meet – BBC News, 28<sup>th</sup> May 2020: <https://www.bbc.co.uk/news/uk-52839182>

38 Chair’s Second Briefing Paper on the Lockdown Regulations – Harriet Harman MP, Joint Committee on Human Rights, 20<sup>th</sup> May 2020: <https://committees.parliament.uk/writtenevidence/5454/pdf/>

39 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 444: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

40 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 462: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

*decisions or changes. I know that will have been heard by my right hon. Friend the Prime Minister in Downing Street.”<sup>41</sup>*

However, MPs do not appear to have been heard.

Peers raised this concern again in the House of Lords debate on the Regulations. Shadow Health Minister Baroness Thornton said:

*“We do not want these measures to be in place for a day longer than is absolutely necessary, which is why they must be accompanied by openness, accountability and scrutiny at a greater level than we would ordinarily see.(...)”*

*“Will a statement providing a helpful examination (...) follow the review, and will an Oral Statement follow each subsequent review?”<sup>42</sup>*

However, the Minister Lord Bethell did not respond to the question.

Despite pertaining to the greatest restrictions on freedoms in modern British history, parliament and the public have been completely denied transparency as to the periodic assessments of the lockdown Regulations. The lockdown has been effectively dictated by Ministerial rule with little scrutiny in a manner that contradicts the principle of parliamentary sovereignty at the heart of our constitutional democracy.

**RECOMMENDATION 3: The Secretary of State should issue written and oral statements in the House of Commons (or, during recess, online) following each review of the necessity of the Health Protection (Coronavirus, Restrictions) Regulations 2020 to foster transparency and to open subsequent measures to democratic scrutiny. The same process should take place by respective Ministers in devolved administrations.**

**RECOMMENDATION 4: The English Regulations should be amended so as to require a proportionality assessment as part of each review, as required by the Welsh Regulations.**

#### *Tests for lifting the lockdown*

On 16<sup>th</sup> April, the Government published ‘five tests’ that would be used to determine whether to ease the lockdown.

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41 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 468: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

42 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 616: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

However, the five tests are insufficient to judge the necessity, proportionality and any discriminatory impact of the Regulations, as required by the Human Rights Act 1998.<sup>43</sup> Indeed, the Public Health Act 1984 under which the Regulations are made also requires a proportionality assessment of the measures, but a proportionality assessment is missing from the five tests. This concern has been raised by the Joint Committee on Human Rights<sup>44</sup> and also forms part of businessman Simon Dolan's legal challenge to the lockdown.<sup>45</sup>

On 28<sup>th</sup> April, the wording of the fifth test was quietly changed without explanation, softening the test. It initially read that the Government must be "confident that any adjustments to the current measures will not risk a second peak of infections", but it was changed to read "confident that any adjustments to the current measures will not risk a second peak of infections that overwhelm the NHS."<sup>46</sup> This is a sensible change as a second peak is inevitable. However, it is concerning that such an important set of tests, apparently acting as the threshold for life and death policy decisions and the withholding of the nation's most fundamental rights, could have such a basic flaw and be changed without announcement or explanation. A Number 10 spokesman insisted there had been "no change" to the policy, and that the official wording had merely been changed to reflect what was always intended.<sup>47</sup>

Ministers cannot keep moving the goal posts surrounding lockdown, especially without making it clear what they have changed and why. It does not inspire faith that the basis on which decisions of such magnitude are being made lacks stability and is likely legally insufficient. The public needs clarity and consistency, not unexplained policy changes that greatly impact their lives.

#### *Four nations divergence*

The Government has not been able to achieve a UK-wide approach to lifting the lockdown. Devolved administrations have each developed their own tests for lifting restrictions.

#### *Wales*

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43 See also: Chair's Second Briefing Paper on the Lockdown Regulations – Harriet Harman MP, Joint Committee on Human Rights, 20<sup>th</sup> May 2020, p.8: <https://committees.parliament.uk/writtenevidence/5454/pdf/>

44 Chair's Second Briefing Paper on the Lockdown Regulations – Harriet Harman MP, Joint Committee on Human Rights, 20<sup>th</sup> May 2020: <https://committees.parliament.uk/writtenevidence/5454/pdf/>

45 Pre-action letter to the Rt Hon Matt Hancock MP Secretary of State for Health & Social Care – Wedlake Bell LLP, 5<sup>th</sup> May 2020: <https://wedlakebell.com/content/uploads/Letter-to-the-Rt-Hon-Matt-Hancock-MP-Secretary-of-State-for-Health-Social-Care-30-April-2020-redacted-ref-1.pdf>

46 Key rule in Government's five tests for lifting coronavirus lockdown is softened – Gordon Rayner, Harry Yorke, The Telegraph, 29<sup>th</sup> April 2020: <https://www.telegraph.co.uk/politics/2020/04/28/key-rule-governments-five-tests-lifting-lockdown-softened/>

47 Key rule in Government's five tests for lifting coronavirus lockdown is softened – Gordon Rayner, Harry Yorke, The Telegraph, 29<sup>th</sup> April 2020: <https://www.telegraph.co.uk/politics/2020/04/28/key-rule-governments-five-tests-lifting-lockdown-softened/>

There are discrepancies between the English and Welsh tests. The Welsh tests are more substantive than the English tests, with seven instead of five requirements for ending the lockdown. These include far broader and less precise questions including whether ending the lockdown would “have a positive economic benefit;” “a positive impact on people’s wellbeing;” and “a positive impact on equality?”<sup>48</sup> These may be useful tests for general policy making but it is unthinkable they could be used to withhold the right to freedom of movement. Mark Reckless AM, 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.”<sup>49</sup>

However, on 17<sup>th</sup> May, the Welsh Government published new guidance of how lockdown measures would be eased.<sup>50</sup> Instead of the seven tests, which were not mentioned, the Welsh Government said it would be using a ‘traffic light’ system to move out of lockdown, which would take into account the impact of any decision on the spread of the virus, public health and “social, economic or environmental impacts.”

### *Scotland*

Scotland has announced a four phase ‘route map’ on how it will end the restrictions placed on movement, gatherings and businesses.<sup>51</sup> The Scottish Government’s decisions about how to move through these phases will be based on:

- *“the scale of impact, in terms of the numbers of people and businesses likely to benefit;*
- *“whether the approaches will protect and support the groups and individuals in society most in need of support, their impact on protected characteristics, and the extent to which they would help to reduce inequalities in outcomes; and*
- *“evidence about the impacts of the current measures and any relevant wider evidence from other countries and scientific research.”*

### *Northern Ireland*

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48The seven questions the Welsh Government will ask before it lifts lockdown – Will Hayward, Wales Online, 24<sup>th</sup> April 2020: <https://www.walesonline.co.uk/news/politics/drakeford-coronavirus-lockdown-welsh-government-18142796>

49Plenary 29 April 2020 - Welsh Assembly, 29<sup>th</sup> April 2020, <http://www.senedd.assembly.wales/ieListDocuments.aspx?CId=401&Mid=6314>

50Unlocking our society and economy: continuing the conversation – Welsh Government, 17<sup>th</sup> May 2020: <https://gov.wales/sites/default/files/publications/2020-05/unlocking-our-society-and-economy-continuing-the-conversation.pdf>

51Coronavirus (COVID-19): framework for decision making – Scottish Government, 21<sup>st</sup> May 2020: <https://www.gov.scot/publications/coronavirus-covid-19-framework-decision-making-scotlands-route-map-through-out-crisis/pages/3/>

In Northern Ireland, a five-stage plan was announced for ending the emergency restrictions.<sup>52</sup> Decisions on easing the lockdown are specifically focused on transmission of the virus. The five tests, which closely mirror the World Health Organisation’s suggested tests, guide how the Executive will judge (every three weeks, as per the Regulations) whether the Regulations are still necessary and proportionate:

- Controlling transmission
- Protecting healthcare capacity
- Necessity to prevent or protect against spread of coronavirus
- Proportionality of the impact of health, society and economy
- Reliance on evidence

### *Relaxing the lockdown*

#### *Prime Minister’s address to the nation*

As discussed, there was no announcement on Thursday 7<sup>th</sup> May following the three-week review of the Regulations. Nevertheless, it appeared that newspapers had been briefed of forthcoming changes with front pages reporting “Lockdown freedom beckons” and “First steps to freedom on Monday”.<sup>53</sup> This was ahead of the bank holiday weekend (Friday 8<sup>th</sup> May).

On Sunday 10<sup>th</sup> May, the Prime Minister addressed the nation, confirming that the Regulations were soon to be eased.<sup>54</sup>

It was initially unclear whether he was signalling a change in Government guidance or in the Regulations, as the ‘new’ allowances included unlimited daily exercise, being able to drive for exercise and encouraging people to go to work if they could not work from home. None of these measures were prohibited under the original Regulations (in England – there was a once-a-day limit on exercise in Wales until 11<sup>th</sup> May<sup>55</sup>).

#### *‘Stay alert’ guidance*

The Government’s key message changed on 10<sup>th</sup> May from “Stay at home. Protect the NHS. Save lives” to “Stay alert. Control the virus. Save lives”. The new slogan is markedly more metaphorical – “stay alert” to the virus is not an actionable instruction,

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52 Coronavirus Executive Approach to Decision-Making – Northern Ireland Executive, 12<sup>th</sup> May 2020: <https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/executiveour-approach-to-decision-making.pdf>

53 Newspaper front pages, 7<sup>th</sup> May 2020 – thepaperboy.com: <https://www.thepaperboy.com/uk/2020/05/07/front-pages-archive.cfm>

54 [PM address to the nation on coronavirus: 10 May 2020 – 10 Downing Street](#)

55 [The Health Protection \(Coronavirus Restrictions\) \(Wales\) \(Amendment\) \(No. 3\) Regulations 2020](#)

nor is “control the virus”. As Baroness Hamwee said, it is difficult to stay alert to something you cannot see.<sup>56</sup>

The Police Federation for England and Wales said the uncertainty surrounding the new English guidance would make an “already challenging” job “impossible.”<sup>57</sup> This was exacerbated by Scottish, Welsh and Northern Irish governments’ announcements that they would not be changing their ‘stay home’ messaging.<sup>58</sup> Several days later, councils in Newcastle and Gateshead announced they would not be changing their ‘stay home’ slogans either.<sup>59</sup> This fragmented approach has worrying implications for the coherence and clarity of this public health guidance.

### *Covid-19 recovery strategy*

The following day, on 11<sup>th</sup> May, the Government published its Covid-19 recovery strategy.<sup>60</sup> It described a number of changes that would apply as of 13<sup>th</sup> May (“Step One”).

#### *Work*

The strategy stated that people should travel to work if they cannot work from home and their workplace is open. This has always been the case in both law and guidance.

#### *Public spaces*

The strategy forewarned that “as well as exercise, people can also now spend time outdoors”. However, the strategy said is subject to “not meeting up with any more than one person from outside your household” and continued physical distancing. This was a significant change in guidance, allowing further reasons for people to be outdoors and introducing an allowance to meet up with one person from outside the household.

#### *Exercise*

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56 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 605: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

57 ‘Loose’ lockdown rules ‘unfair’ on officers, police warn – BBC News, 11<sup>th</sup> May 2020: <https://www.bbc.co.uk/news/uk-52618005>

58 UK in lockdown chaos as Scotland, Wales and Northern Ireland reject new ‘stay alert’ slogan – Joe Roberts, Metro, 10<sup>th</sup> May 2020: <https://metro.co.uk/2020/05/10/uk-lockdown-rift-scotland-wales-northern-ireland-reject-new-stay-alert-slogan-12681561/>

59 Newcastle and Gateshead reject ‘stay alert’ message – BBC News, 14<sup>th</sup> May 2020: <https://www.bbc.com/news/uk-england-tyne-52667492>

60 Our Plan to Rebuild: The UK Government’s COVID-19 recovery strategy – HM Government, 11<sup>th</sup> May 2020: <https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy>



The strategy stated that “people may exercise outside as many times each day as they wish”. Despite guidance to the contrary, this had always been the case in law (except for in Wales, where exercise was limited to once a day until 11<sup>th</sup> May).

Furthermore, it stated that people may now “drive to outdoor open spaces irrespective of distance” so long as they respect physical distancing. This marked a change in the Government’s travel guidance which had initially been restricted to strict necessity (and enforced by many police forces as such), though it had been later clarified by CPS and NPCC guidance as permitting travelling for a “reasonable distance” to exercise. However, at no point have the Regulations set limits on travel distances – only the reasons for which a person is permitted to be outside of the home.

Despite the guidance on increased travel distances, the strategy expressly stated “do not travel to different parts of the UK” where doing so would be inconsistent with the guidance or Regulations of devolved administrations. This appeared to reveal a failure to uphold the “overarching principles” of the very same strategy, which vowed: “the UK Government will work in close cooperation with the devolved administrations in Scotland, Wales and Northern Ireland to make this a UK-wide response: coherent, coordinated and comprehensive.” In reality, there has been a divergent four-nations response.

### *Enforcement*

The strategy promised “more stringent enforcement measures for non-compliance”, despite many of the new rules being unenforceable and compliance with some of them arguably illogical. It also promised to “make clearer to the public what is and is not allowed.” However, the revised guidance, including the “stay alert” slogan, was widely derided precisely for its lack of clarity.

Of course, what is and is not allowed is even more unclear, contradictory and confused since the Cummings scandal.

### *Amended Regulations, 13<sup>th</sup> May*

Two days later, on 13<sup>th</sup> May 2020, The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020 came into force. This was six days after the three-week review.

The Amendment formally relaxed the lockdown Regulations, allowing further reasons for someone to leave or be outside of their home, including to collect ordered goods; to exercise or visit a public open space for physical or mental health or emotional

wellbeing, including with one member of another household; to move or view properties for rent/sale; and to use waste or recycling centres.<sup>61</sup>

The Amendment also significantly increased fixed penalties from £60 to £100 for a first offence (lowered to £50 if paid within 14 days), doubling with each repeat offence up to £3,200 for a sixth offence.

### *One person*

Whilst we welcomed the relaxation of the restrictions, the permission for only one person to meet only one other person from another household at a distance was arguably illogical. The amended Regulations and guidance combined mean that people could go to a park and be surrounded by hundreds or even thousands of people at a safe distance, so long as a. if they were with other people from their household, no one else in the park is a person they intended to meet, or b. if they were alone, only one other person in the park is someone they intended to meet.

This strange construction also meant that a person committed an offence by meeting two co-habiting parents in a park at a distance, though they can meet one at a time and the parents can swap places. Illogical laws such as these undermine the authority of the law and are likely to lead people to reject the rules in favour of common sense.

The one-person rule was also very limiting for some families. It meant that single parents with babies or young children would technically not be able to meet anyone at all outside of their household (except to facilitate child access to another parent)<sup>62</sup> as a person could only see people from outside their household if they were alone.<sup>63</sup> However, parents and children could still use public services including childcare and schools.<sup>64</sup> As such, the rule was practically impossible for some families to follow.

In addition to being “unenforceable”<sup>65</sup> this apparently arbitrary legal restriction on freedom of movement and family life did not appear to be justified by an evidenced public health purpose. This point was also made by Conservative peer Lord Wei who suggested that the law should be “more tailored and risk-based.”<sup>66</sup> Any arbitrary limit on fundamental rights is unsatisfactory law.

### *Travelling*

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61 [Health Protection \(Coronavirus, Restrictions\) \(England\) \(Amendment\) \(No. 2\) Regulations 2020](#)

62 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Regulation 6, para. 2(j)

63 [Health Protection \(Coronavirus, Restrictions\) \(England\) \(Amendment\) \(No. 2\) Regulations 2020](#), Reg. 2, para. 3(a)(ii) and (iii)

64 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Regulation 6, para. 2(i)

65 [We can't enforce relaxed lockdown, say police chiefs](#) - Fiona Hamilton and Kay Lay, The Times, 11<sup>th</sup> May 2020

66 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 602: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

The Amendment allowed people to leave their home for the purpose of exercise or recreation, either alone, with members of their household, or alone with one person from another household. Whilst there has been no specific travel prohibition in the Regulations, prior guidance suggested travel for exercise should be restricted to a “reasonable” distance. Now, the Government guidance states unrestricted travel is permitted. This is welcome, as many people living in built-up urban areas have little access to green spaces.

These amendments only applied to England, meaning that those taking advantage of the lifted restrictions on travel for exercise or recreation cannot travel to Wales, Scotland or Northern Ireland. This is particularly problematic for border towns or those with family members in another part of the UK to themselves as those driving a short distance across the border from England could face a fine. On the same weekend of 16<sup>th</sup> May, Dyfed-Powys Police issued twelve fines in just two hours to people who had travelled to Brecon Beacons, despite some individuals claiming they had not known they were not allowed to travel to Wales from England.<sup>67</sup> Police in North Wales appear to have set up officers at the English border to check reasons for travel.<sup>68</sup>

### *Two metres apart?*

The Amendment to the Regulations allowed individuals to exercise or visit public open spaces with one other person from another household. Whilst Government and public health guidance urges people to remain two metres apart, this is not a legal requirement in England. Accordingly, NPCC and College of Policing guidance expressly states that “police have no powers to enforce two-metre distancing in England.”<sup>69</sup>

Under Welsh Regulations, it remains that physical distancing is legally required. Permitted businesses must “take all reasonable measures to ensure that a distance of 2 meters is maintained between any persons on the premises”.<sup>70</sup> However, this is the responsibility of local authorities to enforce, not police.<sup>71</sup>

As restrictions on businesses, premises and freedom of movement are lifted, it is likely that future amendments may enforce physical distancing across the UK. Distancing measures are currently being discussed as a requirement for the reopening of schools,

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67 Fines for breaking coronavirus lockdown laws could rise – Hannah Thomas, ITV News, 18<sup>th</sup> May 2020: <https://twitter.com/ITVWales/status/1262433287609503744>

68 North Wales Police, Twitter, 15<sup>th</sup> May 2020: <https://twitter.com/NWPolice/status/1261325702680510464?s=20>

69 Policing the pandemic: How do the English and Welsh Health Protections (Coronavirus, Restrictions) Regulations Amendments 2020 vary? – NPCC and College of Policing, 13<sup>th</sup> May 2020: <https://www.college.police.uk/What-we-do/COVID-19/understanding-the-law/Documents/Health-Protection-Regulations-Amendments-England-changes-130520.pdf>

70 The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 2) Regulations 2020

71 Policing the pandemic: How do the English and Welsh Health Protections (Coronavirus, Restrictions) Regulations Amendments 2020 vary? – NPCC and College of Policing, 13<sup>th</sup> May 2020: <https://www.college.police.uk/What-we-do/COVID-19/understanding-the-law/Documents/Health-Protection-Regulations-Amendments-England-changes-130520.pdf>

planned for 1<sup>st</sup> to 15<sup>th</sup> June 2020. On the day that the new amendments were passed, Mark Camley, executive director of parks and venues at the London Legacy Development Corporation, stated that parks in London were willing to use private security, park employees or even police officers to enforce social distancing.<sup>72</sup> Already, many permitted businesses such as supermarkets that remain open in England, Scotland and Northern Ireland voluntarily operate policies to encourage physical distancing with stewards, signs, floor markings and limited capacities.

Enforcement of physical distancing is being considered at the European level too. On 13<sup>th</sup> May, the European Commission published guidance on the future of tourism and travel in Europe. It committed to support “innovative solutions”<sup>73</sup> including “Artificial intelligence (AI) and robotics [to] help monitoring physical distancing” and for “crowd management.”<sup>74</sup> Whilst physical distancing is important during the pandemic to stop the spread of the virus and in particular to protect those at high risk, enforcing such measures by oppressive surveillance technologies would be a disproportionate assault on individuals’ rights.

#### *Amended Regulations, 31<sup>st</sup> May*

Given the sudden publication of an Amendment on the last day of the month, this report contains only an initial examination of the amended lockdown Regulations.

A third amendment was made to the English Regulations on 31<sup>st</sup> May, to be laid before Parliament on 1<sup>st</sup> June and simultaneously coming into force.<sup>75</sup> Yet again, the lockdown Regulations have been significantly changed by ministerial fiat without democratic scrutiny despite MPs’ demanding appropriate oversight.

The Amendment extends the necessity review period for the Regulations from every three weeks to every four weeks (Reg. 2, para. 3).

It allows holiday accommodation to operate for people who are “isolating themselves from others as required by law” (Reg. 2, para. 5(a)), signalling the likely forthcoming increase in forced isolation under the Coronavirus Act.

#### *Restrictions on overnight stays*

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72 Security will ‘step in’ to enforce social distancing as restrictions eased, London park boss warns – Samuel Osborne, Independent, 13<sup>th</sup> May 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-social-distancing-security-park-rangers-london-a9511646.html>

73 Tourism and transport in 2020 and beyond – European Commission, 13<sup>th</sup> May 2020, p.6: [https://ec.europa.eu/info/sites/info/files/communication-commission-tourism-transport-2020-and-beyond\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication-commission-tourism-transport-2020-and-beyond_en.pdf)

74 Tourism and transport in 2020 and beyond – European Commission, 13<sup>th</sup> May 2020, p.5: [https://ec.europa.eu/info/sites/info/files/communication-commission-tourism-transport-2020-and-beyond\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication-commission-tourism-transport-2020-and-beyond_en.pdf)

75 The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020: <https://www.legislation.gov.uk/uksi/2020/558/introduction/made>

The Amendment removes the sweeping restriction on freedom of movement, and replaces Regulation 6 with a specific prohibition on staying overnight at a different home without reasonable excuse (Reg. 2, para. 6). Again, this rightly does not apply to homeless people. Another non-exhaustive list of reasonable excuses is provided mirroring many of those in the previous Regulation. However, the reasonable excuses cannot be so easily transposed from a generalised restriction on free movement to a specific prohibition on overnight stays.

The objective of this restriction is wholly unclear. Most social interactions are during the day. There is no clear extra risk associated with overnight rather than daytime social interactions.

An immediate concern that arose was the absence of a 'reasonable excuse' to stay out overnight with a partner, leading to many media reports that it is "illegal for couples living apart to have sex indoors".<sup>76</sup> However, the odd construction of the prohibition means a person can presumably stay at a different home during the day, seemingly invalidating the aim of the restriction. It is not clear at what point the "overnight" curfew starts.

The accompanying enforcement power has weakened. Police can no longer "remove" an individual suspected of an unlawful overnight stay, but only direct them to return to their home (Reg. 3, para. 8). In any event, the amended Regulation is completely unenforceable.

### *Restrictions on gatherings*

The Amendment also significantly changes the restriction on gatherings under Regulation 7, which provides an exhaustive list of the only types of 'reasonable excuses' that allow gatherings of people from different households "in a public or private place" (Reg. 2, para. 7). It is quite extraordinary for Regulations to restrict not only movements in public spaces but inside one's home and/or garden.

Under the amended Regulations, outdoor gatherings can take place of up to 6 people, and indoor gatherings of up to 2 people. Reasonable excuses apply, including many of the former reasons, and including schools and childcare facilities. Gatherings are permitted where it is "reasonably necessary" for work purposes, which could allow many workplaces to reopen.

Police can only direct private gatherings that breach the new Regulations to disperse, but retain the power to remove individuals from public gatherings (Reg. 8, para. 3).

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<sup>76</sup> Coronavirus: New lockdown laws in England make it illegal for couples living apart to have sex indoors – Lizzie Dearden, The Independent, 1<sup>st</sup> June 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-sex-lockdown-law-couples-indoors-england-a9542171.html>

Physical distancing is not legislated but remains central to Government guidance.

The new lockdown Regulations are illogical, poorly constructed, and unenforceable. They are bound to sow confusion. The Government is progressively losing public and parliamentary trust in making a farce of the lockdown restrictions.

**RECOMMENDATION 5: Illogical laws undermine the authority of the law and are likely to lead people to reject the rules in favour of common sense. Parliament should urgently debate the amended lockdown Regulations. Moreover, Government must stop introducing restrictions on fundamental rights by ministerial decree. Not only is it damaging to parliamentary democracy, it is damaging to the quality of law and public health efforts.**

### *Policing the lockdown*

#### *Confusing law and guidance*

In our April report, we catalogued an outbreak of excessive, inconsistent and sometimes unlawful policing. One of the major causes of this was the police's keen attempts to enforce Government guidance, much of which lacked legal authority and significantly differed from the emergency laws.

We also reported on how, despite the provision of clearer and more accurate explanations of what the Regulations do and do not allow, some senior police figures expressed a desire to continue enforcing the Government's guidance, absent any legal authority.

Concerns about the conflation of law and guidance were subsequently raised in Parliament.

On 5<sup>th</sup> May, Baroness Jones of Moulsecoomb asked an oral question to Home Office Minister Baroness Williams of Trafford:

*"To ask Her Majesty's Government what assessment they have made of (1) any inconsistencies between COVID-19-related guidance and legislation, and (2) the impact of any such inconsistencies on police interactions with members of the public."<sup>77</sup>*

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77 HL Oral questions (5<sup>th</sup> May 2020) vol. 803, col. 360: <https://hansard.parliament.uk/Lords/2020-05-05/debates/88FB4C14-C06C-4C5E-9110-FE2D8FDCE5BC/PolicingCovid-19GuidanceAndLegislation>

Baroness Jones called the guidance “extremely confusing” pointing out that it had “confused the public, the police and prosecutors.” Alluding to unlawful fines and prosecutions, the Baroness suggested there is a “mess” to “clear up”.

Similarly, Lord Beith warned:

*“(...) from Ministers to police constables, people exercising authority must distinguish clearly between what the law requires and what is simply guidance (...) Otherwise, habits that would be damaging to our freedom and liberty will persist beyond this dreadful epidemic.”<sup>78</sup>*

Baroness Williams admitted “there were definitely some initial inconsistencies among police forces” but reiterated that she is now “confident” in the policing. However, Lord Carlile pointed to the Director Public Prosecutions’ “very unusual” decision to initiate a review of every single prosecution under emergency laws, which “indicated clear overuse of the powers”.<sup>79</sup>

We have seen fewer examples of over-policing since the Regulations were amended on 13<sup>th</sup> May to ease the restrictions on movement, though some still occur. Since the new rules are widely seen as “unenforceable,” we believe the policing approach has significantly shifted.

In fact, confusion surrounding the easing of the lockdown on 13<sup>th</sup> May has even led to some mistakenly lenient policing. In Sheffield, police gave a hen party in a pub car park permission to go ahead, despite there being 15-20 people in attendance. A police officer had reportedly told the guests that as long as they maintained a two metre distance, the gathering was allowed. South Yorkshire Police admitted that the officer had given “incorrect advice” and stated that the gathering was “swiftly dispersed.”<sup>80</sup>

However, before the lockdown was eased, excessive policing persisted. As such, the case studies that follow are from the period between the publication of our April report (28<sup>th</sup> April) and the easing of the lockdown (13<sup>th</sup> May), except where otherwise noted.

### *Exercise*

In one of the most absurd examples of policing of exercise to date, a South Yorkshire Police Sergeant sent a (now deleted) community alert on 1<sup>st</sup> May titled ‘Coronly

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78 HL Oral questions (5<sup>th</sup> May 2020) vol. 803, col. 361: <https://hansard.parliament.uk/Lords/2020-05-05/debates/88FB4C14-C06C-4C5E-9110-FE2D8FDCE5BC/PolicingCovid-19GuidanceAndLegislation>

79 HL Oral questions (5<sup>th</sup> May 2020) vol. 803, col. 361: <https://hansard.parliament.uk/Lords/2020-05-05/debates/88FB4C14-C06C-4C5E-9110-FE2D8FDCE5BC/PolicingCovid-19GuidanceAndLegislation>

80 Hen party takes place in Sheffield after ‘incorrect advice’ from police – Steve Jones, The Star, 20<sup>th</sup> May 2020: <https://www.thestar.co.uk/news/people/hen-party-takes-place-sheffield-after-incorrect-advice-police-2859545>

Exersising' [sic] inferring that people going for a "saunter in jeans as exercise" did not have a reasonable excuse.<sup>81</sup> However, walking is clearly permitted and, for avoidance of doubt, the NPCC and College of Policing guidance on the reasonable excuses under the Regulations specifically acknowledges that walking is exercise.<sup>82</sup> The Sergeant also stated that he had issued "a lot of advice" to people going to "the shop for egg custards" or going to a cash machine. It is unclear why any of these activities were considered policing matters – there is no prohibition on jeans, egg custards or cash in the Regulations. A representative for the force later apologised.<sup>83</sup>



## Coronly Excersising

Tonight has seen us checking people's reasons for being on the streets. Between essential saunter in jeans as exercise, an essential visit to the shop for egg custards and essential trip to the cash machine for £20 to use in the morning, we've offered a lot of advice. That advice came along with reports to St Leger housing jeopardising tenancies, a full search of vehicle and occupant and an arrest for bail offences. Anyone out who'd already received a warning will receive a fine on top of any action tonight.

Stick to the restrictions. If you're out at the same time as us, we'll be checking. I sincerely hope that everyone stays safe and well in this tough time and my lot are doing their best to keep you that way

### **Message Sent By**

Michael Miles (South Yorkshire  
Police,Sergeant,Doncaster)

In a similarly absurd case, a couple and their three-year-old daughter were instructed by a PCSO in the market town of New Milton to stop feeding ducks whilst on a walk in the park as it is "not exercise".<sup>84</sup> A family member said the officer had been "heavy handed" in their enforcement and left the mother, who was heavily pregnant, "stressed out." Hampshire Police was forced to clarify that "Incorporating feeding the ducks into your

81 Netpol, Twitter, 1<sup>st</sup> May 2020: <https://twitter.com/netpol/status/1256005209337331712?s=20>

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

83 South Yorkshire Police apologises over 'wrong kind of jeans for exercise' message – Robert Cumber, Doncaster Free Press, 1<sup>st</sup> May 2020: <https://www.doncasterfreepress.co.uk/news/crime/south-yorkshire-police-apologises-over-wrong-kind-jeans-exercise-message-2659840>

84 Family told not to feed the ducks in New Milton during lockdown – Greg Luckhurst, Southern Daily Echo, 27<sup>th</sup> April 2020: <https://www.dailyecho.co.uk/news/18407558.family-told-not-feed-ducks-new-milton-lockdown/>



daily exercise is allowed, providing people are not remaining in the area for longer than is necessary.”<sup>85</sup>

Meanwhile, in Wales, Government guidance on exercise became more prescriptive. Cyclists were told not to ride further than 10 miles from their home.<sup>86</sup> This followed Welsh guidance stating that “cycling should be local, as a rule of thumb limited to travelling no further than a reasonable walking distance from home.”<sup>87</sup> The guidance imposed an arbitrary limit on exercise, with no basis in law. The guidance on local cycling has now been removed.

In Somerset on 6<sup>th</sup> May, a cyclist who was injured was shamed by a PCSO on Facebook. He questioned whether the 26 mile bike ride was “necessary” and wrote that the “incident took up valuable emergency service time and could have been prevented by the cyclists staying at home as per Government regulations.”<sup>88</sup> However, cycling is a permitted form of exercise and there is no limit on the distance one can cycle.

### *Home*

In our April report, we detailed examples of police attempting to enforce rules and guidance on people’s properties. Such attempts are unlawful. The Regulations require every person to stay at home unless they have a reasonable excuse to leave, and 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.”<sup>89</sup>

Unfortunately, policing of the lockdown in the confines of people’s properties has happened again in this reporting period, this time affecting two community schemes.

Police in London ordered a family string quartet to stop playing music in their front garden on 28<sup>th</sup> April as it encouraged neighbours to gather outside,<sup>90</sup> although photos appear to show people watching from their doorsteps and front gardens. The quartet had been playing a piece of music composed by Shostakovich whilst he feared arrest by Stalin’s secret police. There is nothing in the Regulations to prevent the family from playing music on their own property.

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85 Ibid.

86 Cyclists told not to travel further than 10 miles from home – Fraser Watson, Western Telegraph, 29<sup>th</sup> April: <https://www.westerntelegraph.co.uk/sport/18415009.exercise-regulations/>

87 Guidance on regulation 8 of the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020: <https://gov.wales/leaving-home-exercise-guidance#section-41067> [accessed 29<sup>th</sup> April 2020]

88 Photo shows emergency services treating cyclist who fell off bike on 26-mile ride in Somerset – Richard Mills, SomersetLive, 7<sup>th</sup> May 2020: <https://www.somersetlive.co.uk/news/somerset-news/photo-shows-emergency-services-treating-4113756>

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

90 Police close down family string quartet playing classical music for their neighbours claiming they are breaking coronavirus lockdown rules – Bhvishya Patel, Daily Mail, 30<sup>th</sup> April 2020: <https://www.dailymail.co.uk/news/article-8272681/Police-close-family-string-quartet-playing-classical-music-neighbours.html>

A woman in Luton was visited by Bedfordshire police twice, on 24<sup>th</sup> and 26<sup>th</sup> April, and asked to remove a 'book swap' she had left out for her neighbours in her front garden. She said she was threatened with arrest if she did not comply.<sup>91</sup> The police issued the instruction on the basis that "any shared items can pose a risk of spreading the virus."<sup>92</sup> However, this is not an enforceable police matter. Police are not tasked with policing the virus but policing the law.

### *Homelessness*

There have been several reports of homeless people being charged and convicted under the Regulations for leaving or being outside of the place where they are living, despite the fact they do not have such a place and accordingly there is a clear exception for homeless people in Regulation 6(4). It is unlawful, and plainly illogical, for a person without a home to be prosecuted for leaving or being outside of the place where they are living.

An ongoing investigation by court reporter Tristan Kirk has highlighted several wrongful charges against homeless people under the Regulations across London.<sup>93</sup> Many of these charges have not yet been overturned by the CPS review as they are still being processed by courts.

The following cases are examples of prosecutions under the Regulations against homeless individuals in London:

- After calling courts, we found that Mircea Borzos was convicted at Willesden Magistrates Court on 22<sup>nd</sup> April under Regulation 6 for being outside of his home, despite being listed with no fixed address.
- We also found that two days later at Croydon Magistrates Court, Keiley Dobson was convicted under Regulation 9 for refusing to comply with an order to return to her home, despite also being listed with no fixed address.
- The Independent reported that Sultan Monsour, of no fixed address, currently faces charges under the Regulations after being arrested at London's Liverpool

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91 Police order Luton woman to remove books stall from garden after 'coronavirus risk' complaint – Stewart Carr, Luton Today, 28<sup>th</sup> April 2020: <https://www.lutontoday.co.uk/health/coronavirus/police-order-luton-woman-remove-books-stall-garden-after-coronavirus-risk-complaint-2552738>

92 Ibid.

93 Coronavirus Lockdown Laws: Justice wasn't being seen, so was it being done? – Tristan Kirk, 4<sup>th</sup> May 2020: <https://kirkkorner.wordpress.com/2020/05/04/coronavirus-lockdown-laws-justice-wasnt-being-seen-so-was-it-being-done>

Street Station on 5<sup>th</sup> May for lacking a “reasonable excuse” for being outside.<sup>94</sup> He had initially told officers he was heading home but later admitted he does not have a home. At a bail hearing on 11<sup>th</sup> May, the judge questioned the CPS prosecutor as to why a homeless man was being prosecuted under the Regulations and whether CPS wished to proceed to a trial. The CPS maintained the need to prosecute as Monsour “had told police he had an address” and it “seems to satisfy the condition”. However, the judge said that an account given by the arresting officer said he was “arresting him for breaching coronavirus conditions because he had no address”.

On the publicly available facts, it is highly likely that these prosecutions are unlawful. Homeless people are among our society’s most vulnerable and are frequently easy targets for heavy-handed policing. These prosecutions under emergency laws further extend the criminalisation of homelessness. We hope that the CPS review of all prosecutions under the Regulations will prevent some further injustice, but with many of these people already having spent time in custody and subsequently being difficult to trace, it is likely that some of the harm caused is irrevocable.

### *Travel*

An area of over-policing that appears to persist, despite the eased lockdown, is travel.

Several rural and coastal police forces, in defiance of the guidance and contrary to the spirit of the Regulations, have urged people to avoid the countryside and coast.

After the new guidance was announced on 10<sup>th</sup> May, South Lakes Police asked people to “have a long hard look at [their] own conscience” before travelling to Cumbria and urged them to “continue to exercise close to [their] own home.”<sup>95</sup> On the same day, Cumbria Roads Police tweeted that they had “escorted from the county” someone who had driven to do their shopping in Barrow, rather than Morecambe (a nearby town across a bay from Barrow).<sup>96</sup> No limit is in the Regulations or guidance as to where a person may go to obtain basic necessities.<sup>97</sup> Tim Farron, MP for the Cumbrian constituency of Westmorland and Lonsdale, wrote a letter to the Prime Minister asking him to limit the

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94 ‘Homeless’ man charged for being outside ‘without reasonable excuse’ under lockdown law – Lizzie Dearden, Independent, 12<sup>th</sup> May 2020: <https://www.independent.co.uk/news/uk/crime/coronavirus-homeless-man-sultan-monsour-lockdown-law-charge-liverpool-street-a9510186.html>

95 South Lakes Police, Twitter, 10<sup>th</sup> May 2020: <https://twitter.com/SouthLakesPol/status/1259607891025281025?s=20>

96 Cumbria Roads Police, Twitter, 10<sup>th</sup> May 2020: <https://twitter.com/CumbriaRoadsPol/status/1259448578264698880?s=20>

97 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/Whatconstitutes-a-reasonable-excuse.pdf>

number of miles a person can travel “to help prevent the inevitable high influx of people travelling to the Lakes, the Dales and south Cumbria.”<sup>98</sup>

Police in Lincolnshire have similarly stated that they will be urging people to stay away from open spaces in their county.<sup>99</sup> This came as Policing and Crime Commissioners from rural forces warned of rising “vigilante attacks” on non-locals who may be exercising their legal right to travel across England for open air exercise.<sup>100</sup> Indeed, there have been reports of nail traps<sup>101</sup> and cycle path blockades<sup>102</sup> by residents hoping to prevent visitors from travelling to beauty spots.

On 16<sup>th</sup> May, the first weekend after the Regulations were eased, Sussex Police set up roadblocks on the A23 to “confirm and check why people are coming in” to Brighton and make sure drivers were abiding by “Government rules”.<sup>103</sup> Even before the Regulations were relaxed, police guidance had advised that “road checks on every vehicle is (...) disproportionate.”<sup>104</sup> Now that the scope for travel and exercise is much wider in England, it is plainly disproportionate for police to be questioning drivers in this way.

### *Excessive measures*

On 30<sup>th</sup> April, South Yorkshire Police announced it has set up a specialised ‘taskforce’ to enforce the provisions of the lockdown Regulations.<sup>105</sup> The taskforce consists of merged units from the Serious Violent Crime Taskforce and Tactical Support Group, whose responsibility it is to patrol streets and key locations ensuring that members of the public are not violating the Regulations. The announcement stated that many of the officers are specially trained in “Taser, firearms and tactical building entry as well as advanced driving and public order.” The taskforce promises “enhanced patrols” to

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98 Stay away from Lake District despite easing of lockdown, police say – Helen Pidd, Guardian, 11<sup>th</sup> May 2020: <https://www.theguardian.com/uk-news/2020/may/11/stay-away-from-lake-district-despite-easing-lockdown-police-say>

99 'I beg you to stay local' - Skegness residents worried about influx of visitors after lockdown rules change – Peter Hennessey, Lincolnshire Live, 12<sup>th</sup> May 2020: <https://www.lincolnshirelive.co.uk/news/local-news/coronavirus-skegness-beach-lockdown-coast-4123081>

100 Vigilante attacks in beauty spots feared after lockdown rules are relaxed – Martin Evans and Charles Hymas, The Telegraph, 13<sup>th</sup> May 2020: <https://www.telegraph.co.uk/news/2020/05/13/vigilante-attacks-beauty-spots-feared-lockdown-rules-relaxed/>

101 Lockdown fundamentalists may be behind 'horrific nail traps' planted at beauty spots, council leader says – Colin Drury, Independent, 15<sup>th</sup> May 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-lockdown-nail-traps-woods-cleveland-margrove-guisborough-a9515021.html>

102 Former parish councillor and retired teacher 'block woodland cycle path' with rocks and branches – Colin Drury, Independent, 15<sup>th</sup> May 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-lockdown-cycle-path-blocked-parish-councillor-teacher-a9513801.html>

103 Police perform stop checks on cars coming to Brighton – Laurie Churchman, The Argus, 16<sup>th</sup> May 2020: <https://www.theargus.co.uk/news/18454999.police-perform-stop-checks-cars-coming-brighton/>

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

105 Covid-19: Meet the teams keeping you safe – South Yorkshire Police, 30<sup>th</sup> April 2020: <https://www.southyorks.police.uk/find-out/news-and-appeals/2020/april-2020/covid19-meet-the-teams-keeping-you-safe/>

“encourage compliance with social distancing measures.” This is an excessive and somewhat chilling policing approach.

### *Stop and search*

The Regulations do not confer stop and search powers to police. However, there has been a steep increase in the police’s use of stop and search. There were over 30,000 stop and searches in April in London alone – a seven year high.<sup>106</sup> The Commissioner for the Metropolitan Police, Cressida Dick, said that due to a general drop in crime, officers had more time to “get into the right places and stop the right people”.<sup>107</sup> However, her unsubstantiated claim to stopping the “right people” is not supported by the Metropolitan Police’s own statistics. Only 10% of searches resulted in arrests, which is half the arrest rate of 2015 - despite there being three times as many searches in April 2020 as April 2015.<sup>108</sup> This evidences an unacceptable hike in suspicionless searches and police harassment of innocent people.

In particular this gives rise to concern about growing police racism, as black and minority ethnic groups are disproportionately targeted with stop and search powers. Black people are around 5 times more likely to be stopped and searched in London than white people.<sup>109</sup> The rise in stop and search and declining arrest rate demonstrates the ineffectiveness of this overused power. Especially given the systemically racist use of stop and search powers, this increase is yet more evidence of the harmful impact of the public order approach to policing during the lockdown.

**RECOMMENDATION 6: The steep rise in stop and searches, combined with declining arrest rates, are cause for serious concern – particularly as these powers are disproportionately used against black and minority ethnic groups. The Commissioner for the Metropolitan Police must be held to account and measures put in place to prevent the harassment of innocent people via stop and search.**

### *Rule of law*

It is fundamental to the rule of law that the law is clear, foreseeable and applies equally to all. These characteristics arguably do not apply to the emergency laws that have governed the pandemic thus far.

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106 Sharp increase in stop and search as arrest rate falls – Fiona Hamilton, The Times, 15<sup>th</sup> May 2020: <https://www.thetimes.co.uk/article/sharp-increase-in-stop-and-search-as-arrest-rate-falls-xj5r6jd0t>

107 Ibid.

108 Ibid.

109 Stop and search – Gov.UK, 19<sup>th</sup> March 2020: <https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest>

In this second month of emergency powers, the rule of law has further deteriorated. We have seen scores of unlawful prosecutions, unlawful fines, ongoing confusion between law and guidance, poorly constructed amendments to the Regulations exacerbating the lack of clarity and, most recently, the Dominic Cummings scandal.

The Cummings scandal encapsulates the damage to the rule of law inflicted during this emergency period: a lack of legal certainty, chasms between political, police and public understandings of the rules, competing interpretations of law and guidance, and Ministers – even the Attorney General – making political declarations as to the “rules”.

### *Inequality before the law*

In the context of over one hundred prosecutions and thousands of fines under the Regulations, what is so damaging about the Cummings scandal to the rule of law is that for many people it indicates a lack of equality before the law. Police are now reporting that they are met with “the Dominic Cummings defence” when they attempt to enforce the Regulations – i.e. if a powerful man in political favour can seemingly break the rules, why can’t I?<sup>110</sup> This impact demonstrates how vital it is to preserve the rule of law – not despite the public health crisis but because of it. The rule of law and public trust are mutually dependent, and a lack of trust in the rule of law at this time could ultimately endanger public health.

Inequality has manifested not only between the elites and the public, but through a postcode lottery of policing and racial disparities. Zealous application and broad interpretation of the lockdown Regulations by police have seen the expansion of the surveillance state, roadside checks and a wave of prosecutions and fines. But the evidence suggests that these prosecutions and fines have not been meted out evenly.

Our analysis of the latest NPCC statistics show remarkable disparity between the rates at which fixed penalty notices (FPNs) are issued across forces, with police in North Yorkshire issuing over 20 times more FPNs than in Staffordshire (adjusted for population size).<sup>111</sup> Rural forces appear to have enforced the Regulations most strongly. Clearly, fines are not being issued proportionately across the country.

The latest figures also show disproportionate punishment of Asian and Black people in England. Asian people represent 7.8%<sup>112</sup> of the population in England but received at

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110 Lockdown violators using Cummings as excuse, say police – Simon Murphy and Owen Bowcot, The Guardian, 27<sup>th</sup> May 2020: <https://www.theguardian.com/uk-news/2020/may/27/lockdown-violators-using-cummings-as-excuse-say-police>

111 For data analysis, see: <https://bigbrotherwatch.org.uk/campaigns/emergency-powers/#fines>

112 ONS Census 2011

least an alarming 13%<sup>113</sup> of FPNs. Whilst 3.5%<sup>114</sup> of the population in England is Black, over 5% of those issued fines in England were Black.<sup>115</sup> Ethnicity data was not recorded for all FPNs. However, analysis by the Guardian and Liberty Investigates has shown that black, Asian and ethnic minority people in England were 54% more likely to have been issued a FPN under the lockdown Regulations than white people.<sup>116</sup> This is deeply troubling and demonstrates the urgent need for measures to address racism in policing, and a review of all FPNs in the immediate term.

The strict, sometimes authoritarian and even unlawful application of the Regulations has been widely criticised in the public forum but the policing approach has been broadly defended by the Government. This context makes the Government's somewhat loose interpretation of the Regulations in relation to the Prime Minister's senior advisor indicative of inequality before the law.

Of course, it would be for a court to determine whether Cummings' actions constitute an offence or not and he should be treated as innocent unless proven guilty. That said, if the Regulations actually permitted long distance travel for a precautionary (not "essential") childcare purpose that was not ultimately required (adding further weight to the view that it was not "essential") - even when one is infected with coronavirus - this was certainly not well understood by the majority of the public.<sup>117</sup>

### *Public understanding*

Research has now evidenced that there is not only a lack of clarity of the new laws among police officers but among the general public too. In a survey by the University of York, carried out on YouGov online in late April, 99% of participants claimed that they "know, mostly or exactly, what activities are permitted under the lockdown restrictions."<sup>118</sup> However, the researchers found "fairly extensive disagreement on what is and is not allowed in relation to specific rules". For example, only 68% of respondents knew that it is permitted to move to another address because of a fear of violence at home. Clearly, the lack of clarity of the law could have a serious impact on people's safety.

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113 Fixed penalty notices issued under COVID-19 emergency health regulations by police forces in England and Wales- NPCC, 15<sup>th</sup> May 2020: <https://news.npcc.police.uk/resources/fixed-penalty-notices-issued-under-covid-15th-may>

114 ONS Census 2011

115 Fixed penalty notices issued under COVID-19 emergency health regulations by police forces in England and Wales- NPCC, 15<sup>th</sup> May 2020: <https://news.npcc.police.uk/resources/fixed-penalty-notices-issued-under-covid-15th-may>

116 BAME people fined more than white population under coronavirus laws - Mattha Busby and Mirren Gidda, The Guardian, 26<sup>th</sup> May 2020: <https://www.theguardian.com/world/2020/may/26/bame-people-fined-more-than-white-population-under-coronavirus-laws>

117 YouGov, 23 March 2020: <https://yougov.co.uk/topics/health/survey-results/daily/2020/05/23/56b74/1>

118 Law and Compliance during COVID-19: Interim Report 1 - Simon Halliday et al, Nuffield Foundation, 4<sup>th</sup> May 2020: <https://drive.google.com/file/d/1bIWWNbQvaAVA4ncJ7PrZehTyqqhmbCt/view>

On 10<sup>th</sup> May, Boris Johnson announced that changes would be made to Government guidance on the lockdown. As we have evidenced in this report, the construction and communication of forthcoming new rules, such as the 'one person' rule, were poor and led to widespread confusion. The Police Federation chair John Apter stated that "if the message of what is expected of the public is not clear then it will make the job of policing this legislation almost impossible."<sup>119</sup>

### *Legal uncertainty*

Confusion about what is and not allowed has been rife amongst the public, police and courts throughout the pandemic. Murray Hunt, Director of the Bingham Centre for the Rule of Law, recently wrote that "the government has failed from the start to appreciate the fundamental importance of legal certainty to maintaining the public's trust."<sup>120</sup>

The lack of clarity resulting from the Government's poor communications of the new laws and guidance was raised by several MPs in the Commons debate on the Regulations. Steve Baker MP catalogued the Ministerial pronouncements of "rules" that preceded the Regulations and lacked legal authority, listing damning examples of the "very severe, absurd problems arising because the police have sought to enforce rules that were not actually in law".<sup>121</sup> He rightly described the situation as "absurd and wrong and worrying for law abiding people". The Joint Committee on Human Rights said the uncertainty has:

*"(...) raised concerns about the rule of law as well as under Article 7 of the European Convention on Human Rights (no punishment without law), combining with concerns that enforcement efforts have gone beyond what is required by law thus infringing civil liberties unnecessarily and unlawfully."*<sup>122</sup>

As explained by Ronan Cormacain, Senior Research Fellow at the Bingham Centre for the Rule of Law, a key requirement of the rule of law is legal certainty.<sup>123</sup> This means that Regulations must be clear, precise and certain: the difference between guidance and law must not be blurred, and Ministers should not mischaracterise what the law says. To

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119 Simon Israel, Twitter, 10<sup>th</sup> May 2020:

<https://twitter.com/simonisrael/status/1259557724679004160?s=20>

120 Dominic Cummings and the rule of law – Murray Hunt, Prospect, 29<sup>th</sup> May 2020:

<https://www.prospectmagazine.co.uk/politics/dominic-cummings-and-the-rule-of-law-lockdown-durham-trip-bingham-centre>

121 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 452: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

122 Chair's Second Briefing Paper on the Lockdown Regulations – Harriet Harman MP, Joint Committee on Human Rights, 20<sup>th</sup> May 2020: <https://committees.parliament.uk/writtenevidence/5454/pdf/>

123 Can I go to the park please Dad? Everyday lessons in legal certainty in the English Coronavirus Regulations – Ronan Cormacain, UK Constitutional Law Association, 15<sup>th</sup> May 2020:

<https://ukconstitutionallaw.org/2020/05/15/ronan-cormacain-can-i-go-to-the-park-please-dad-everyday-lessons-in-legal-certainty-in-the-english-coronavirus-regulations/>



do so is to breach the rule of law. We do not live in a society where a Government declaration of a rule makes it so. The rule of law means that we are governed by the law, rather than governed by the wishes of those in power.

When the 'one person' rule was introduced, as described earlier in this report, Ministers struggled to explain how the rule would work in practice and precisely what it did and did not allow. Even the Foreign Secretary Dominic Raab, a former lawyer, appeared to misunderstand the new law, telling the BBC Radio 4 Today programme that an individual could meet both their parents at the same time as long as they are 2 metres apart. This was not the case, and was quickly retracted by the Government.<sup>124</sup>

The lack of clarity is, again, encapsulated by the Cummings scandal. Whilst the majority of the country view Cummings' actions to have breached the emergency law,<sup>125</sup> the Prime Minister and Cabinet members – even, highly inappropriately, the Attorney General<sup>126</sup> – have found it possible to argue that he acted legally. That it is possible to have such varying interpretations of the law, and to an extent that creates a national debate and political crisis, further evidences its fatal lack of clarity and eroding rule of law.

### *Ultra vires*

In our previous report, we argued that the Regulations could be ultra vires of the Public Health (Control of Diseases) Act 1984, the primary legislation under which they are made. We refer interested readers to a short briefing from Blackstone Chambers summarising the argument that the Regulations are ultra vires, hosted on our website.<sup>127</sup>

Since our April report, businessman Simon Dolan instructed legal firm Wedlake Bell LLP to send a pre-action letter to the Health Secretary stating his intention to issue

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124 Dominic Raab wrong to claim individuals can meet two people from another household at same time, government admits – Rob Merrick, the Independent, 11<sup>th</sup> May 2020: <https://www.independent.co.uk/news/uk/politics/uk-lockdown-boris-johnson-dominic-raab-downing-street-latest-a9507981.html>

125 YouGov, 23 March 2020: <https://yougov.co.uk/topics/health/survey-results/daily/2020/05/23/56b74/1>

126 Government digs in heels over Dominic Cummings as Tory MP revolt grows – Cat Neilan, The Telegraph, 26<sup>th</sup> May 2020: <https://www.telegraph.co.uk/politics/2020/05/26/dominic-cummings-latest-news-coronavirus-uk-lockdown-boris-johnson/>

127 Briefing: Coronavirus and Civil Liberties in the UK – Tom Hickman QC, Emma Dixon, Rachel Jones (Blackstone Chambers), 1<sup>st</sup> May 2020: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/05/Briefing-THEDRJ-Blackstone-Chambers-for-Big-Brother-Watch.pdf>

proceedings for a judicial review of the Regulations on similar same grounds.<sup>128</sup> To date, Dolan has crowdfunded over £148,000 to support the challenge.<sup>129</sup>

In their pre-action letter, Dolan’s legal team also point out that Regulation 3 sets a low necessity threshold for the Regulations, despite the serious interference with fundamental rights. Regulation 3(3) defines the necessity of the measures as any needed “to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus.” The test does not include the consideration of whether the measures “were the least restrictive means of doing so or proportionate to the harms done by the restrictions.”<sup>130</sup> This point has since also been made by the Joint Committee on Human Rights.<sup>131</sup> Dolan argues that the Regulations violate Articles 5, 8, 9, 11 and 14 of the European Convention on Human Rights.

### *The case for review*

#### *Prosecutions*

We welcomed the Crown Prosecution Service’s decision to investigate all prosecutions under both the lockdown Regulations and the Coronavirus Act. We had called for a review after we exposed the unlawful conviction of an Oxford teenager under the Coronavirus Act in our April report.<sup>132</sup> It is the first time the CPS has ever launched a review of every charge under a specific piece of legislation.<sup>133</sup> The CPS also committed to put in place an internal safeguard which means any charge under the emergency laws must be now reviewed by a supervising lawyer before being called on in court.<sup>134</sup>

The review found twelve cases (6%) where individuals had been incorrectly charged under the Regulations, including some cases where individuals in England were charged

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128 Pre-action letter to the Rt Hon Matt Hancock MP Secretary of State for Health & Social Care – Wedlake Bell LLP, 5<sup>th</sup> May 2020: <https://wedlakebell.com/content/uploads/Letter-to-the-Rt-Hon-Matt-Hancock-MP-Secretary-of-State-for-Health-Social-Care-30-April-2020-redacted-ref-1.pdf>

129 Join the Legal Challenge to the UK Govt Lockdown – Simon Dolan, Crowdjustice: <https://www.crowdjustice.com/case/lockdownlegalchallenge/> [accessed 29<sup>th</sup> May 2020]

130 Letter to the Rt Hon Matt Hancock MP Secretary of State for Health & Social Care – Wedlake Bell LLP, 5<sup>th</sup> May 2020: <https://wedlakebell.com/content/uploads/Letter-to-the-Rt-Hon-Matt-Hancock-MP-Secretary-of-State-for-Health-Social-Care-30-April-2020-redacted-ref-1.pdf>

131 Chair’s Second Briefing Paper on the Lockdown Regulations – Harriet Harman MP, Joint Committee on Human Rights, 20<sup>th</sup> May 2020, p.8: <https://committees.parliament.uk/writtenevidence/5454/pdf/>

132 Emergency Powers & Civil Liberties Report, April 2020 – Big Brother Watch, p.69: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>

133 CPS will review every charge under coronavirus law – Fariha Karim, the Times, 2<sup>nd</sup> May 2020: <https://www.thetimes.co.uk/article/cps-will-review-every-charge-under-coronavirus-law-0l37rsg8f>

134 CPS announces review findings for first 200 cases under coronavirus laws – CPS, 15<sup>th</sup> May 2020: <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

under Welsh Regulations.<sup>135</sup> (Similarly, we found that the Oxford teenager wrongly convicted under the Coronavirus Act had also been charged under the Welsh section).<sup>136</sup> This ongoing review covered cases up to 30<sup>th</sup> April.

Despite the CPS's pledge to ensure that a lawyer oversees all new charges, we are aware of multiple cases with incorrect charges still being processed by the courts. Court reporter Tristan Kirk noted that on 18<sup>th</sup> May, a 14-year-old boy was due in court in Paddington facing charges under both English and Welsh Regulations.<sup>137</sup> We keenly await publication of the next CPS review period.

### *Fixed Penalty Notices*

We are now calling on the National Police Chiefs' Council to instigate a national review of all FPNs issued under the Regulations, given the significant and serious failings. Our call is backed by Police Action Lawyers Group, Fair Trials, INQUEST, Liberty, Netpol and StopWatch. We sent a joint letter to the Chairman of the National Police Chiefs' Council Martin Hewitt on 20<sup>th</sup> May, urging for a review.<sup>138</sup>

On 22<sup>nd</sup> May, Chair of the Joint Committee on Human Rights Harriet Harman MP published a briefing on the Regulations and wrote it is "essential that an urgent review is undertaken of Fixed Penalty Notices issued under the lockdown regulations."<sup>139</sup> Explaining the case for a review further:

*"It is unacceptable that many thousands of people are being fined in circumstances where (a) the Regulations contain unclear and ambiguous language, (b) there is evidence that the police do not fully understand their powers, (c) a significant percentage of prosecutions have been shown to be wrongly charged, (d) there has been no systematic review of FPNs and (e) there is no appeal or review provided for under the Regulations. It is therefore essential that an urgent review of FPNs is undertaken and that, in any event, the Government introduce a*

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135 CPS announces review findings for first 200 cases under coronavirus laws – CPS, 15<sup>th</sup> May 2020: <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

136 Emergency Powers & Civil Liberties Report, April 2020 – Big Brother Watch, p.69: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>

137 Tristan Kirk, Twitter, 14<sup>th</sup> May 2020: <https://twitter.com/kirrkorner/status/1260833591220731906?s=20>

138 Letter to Martin Hewitt from Big Brother Watch & Others, 20<sup>th</sup> May 2020: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/05/Letter-to-Martin-Hewitt-from-Big-Brother-Watch-Ors.pdf>

139 Chair's Second Briefing Paper on the Lockdown Regulations – Harriet Harman MP, Joint Committee on Human Rights, 20<sup>th</sup> May 2020: <https://committees.parliament.uk/writtenevidence/5454/pdf/>

*means of challenging FPNs by way of administrative review or appeal in the next set of amendments.”<sup>140</sup>*

Over 14,000 fixed penalty notices have been issued under the Regulations,<sup>141</sup> of course without the checks and scrutiny involved in a prosecution. If FPNs were wrongly issued at the same rate as the wrongful prosecutions under the same Regulations (6%), it would account for almost 1,000 unjustified fines. The true figure is likely to be much higher.

In our reviews of the use of emergency powers, we have identified inconsistent, excessive and sometimes unlawful policing. We have found examples of senior police figures systematically rejecting legal advice in favour of the Government’s more restrictive guidelines.<sup>142</sup> Even the NPCC Chairman Martin Hewitt acknowledged in an opinion piece in the Times that there have been “well-publicised instances” of “overzealous” policing during early adjustment – but he assumed the public would read these instances as “well-meant attempts to encourage responsible behaviour.”<sup>143</sup> However, to protect the rule of law and policing by consent, these failures need to be remedied. The public will not be reassured simply by good intentions, but by actions taken to address the policing mistakes that have been made.

The only way a person can contest a FPN is to risk a prosecution, incurring legal and financial risks. It is likely that many people are paying FPNs, even if inappropriately issued, to avoid this risk.

Lancashire Police was forced to withdraw two £60 fines given to sisters who live in the same household for driving for exercise, after they sought to challenge the FPNs and instructed Bindmans LLP. Patrick Ormerod of Bindmans pointed out that this option is not available to everyone and “many people, even the innocent, will choose the easier, often cheaper, option of paying the penalty specified in the FPN (...) rather than risk magistrates’ court proceedings.”<sup>144</sup> This could be avoided if the Regulations gave individuals a statutory right to appeal a FPN without risking prosecution.

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140 Chair’s Second Briefing Paper on the Lockdown Regulations – Harriet Harman MP, Joint Committee on Human Rights, 20<sup>th</sup> May 2020, p.6: <https://committees.parliament.uk/writtenevidence/5454/pdf/>

141 Fixed penalty notices issued under COVID-19 emergency health regulations by police forces in England and Wales- NPCC, 15<sup>th</sup> May 2020: <https://news.npcc.police.uk/resources/fixed-penalty-notices-issued-under-covid-15th-may>

142 Emergency Powers & Civil Liberties Report, April 2020 – Big Brother Watch, pp. 28-9: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>

143 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>

144 Lancashire Police cancel coronavirus fines handed to Preston sisters who had driven to Docks for exercise – Matthew Calderbank, Lancashire Post, 5th May 2020: <https://www.lep.co.uk/news/crime/lancashire-police-cancel-coronavirus-fines-handed-preston-sisters-who-had-driven-docks-exercise-2842762>

Already, Wiltshire Police has withdrawn FPNs after a review conducted by its Scrutiny Panel found that some FPNs had been issued unlawfully,<sup>145</sup> but this is not a widespread practice.

In Northern Ireland, an observation scheme where police officers had to seek approval from a senior officer before issuing a fine under the Regulations was instigated as a "short-term quality assurance and reporting measure."<sup>146</sup> As a result, the number of fines dropped significantly, from 374 FPNs between 28<sup>th</sup> March 28 - 24<sup>th</sup> April to 30 FPNs between 1<sup>st</sup> May to 26<sup>th</sup> May. Politicians put the dramatic change down to the shift in policing rather than any observable difference in public behaviour.<sup>147</sup> This indicates that a number of fines may have been wrongly issued initially, and demonstrates the importance of police scrutiny.

Calls for a review of lockdown FPNs have been growing since the Cummings scandal. Many people felt that it demonstrated the lack of clarity of the Regulations and inequality before the law, thereby justifying a review. However, this has also made the question of a review highly political. During a press briefing on 26<sup>th</sup> May, a member of the public asked the Health Secretary if he would instigate a review of all fines issued to people travelling for the purpose of childcare (i.e. the purported purpose of Cummings' journey). He said he it was:

*"perfectly reasonable to take away that question (...) We'll look at it (...) We'll make sure that we write to you with a full answer and make an announcement from this podium. I think we can make that commitment."*<sup>148</sup>

However, without hours the Government quickly quashed the idea,<sup>149</sup> describing it as a police matter. Soon after, the NPCC spokesperson told press they have "no plans" to conduct a review of fines.<sup>150</sup> However, at the time of writing, we have not received a reply to our letter to the NPCC. The Health Secretary clearly saw the case for a review. It is now incumbent on police to conduct a full review of FPNs issued.

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145 Wiltshire Police withdraws two coronavirus fines – Tom Seaward, Swindon Advertiser, 1st May 2020: <https://www.swindonadvertiser.co.uk/news/18421349.wiltshire-police-withdraws-two-coronavirus-fines/>

146 Social distance fines in NI drop from almost 400 to 30 in a month – ITV News, 27th May 2020: <https://www.itv.com/news/utv/2020-05-27/social-distance-fines-in-ni-drop-from-almost-400-to-30-in-a-month/>

147 Social distance fines in NI drop from almost 400 to 30 in a month – ITV News, 27th May 2020: <https://www.itv.com/news/utv/2020-05-27/social-distance-fines-in-ni-drop-from-almost-400-to-30-in-a-month/>

148 Health Secretary, Daily Press Briefing, 26<sup>th</sup> May 2020: <https://twitter.com/BigBrotherWatch/status/1265325522315350016?s=20>

149 Brighton vicar 'disappointed' over lockdown fine review – BBC News, 27h May 2020: <https://www.bbc.co.uk/news/uk-england-sussex-52823073>

150 Police refuse to review coronavirus lockdown fines after Dominic Cummings case – Lizzie Dearden, the Independent, 28<sup>th</sup> May 2020: <https://www.independent.co.uk/news/uk/home-news/dominic-cummings-news-lockdown-uk-police-coronavirus-fines-latest-a9535241.html>

At a time when people are facing undue financial and psychological hardship, and when trust in policing is paramount, a national review of FPNs would ensure that they have been and will be used correctly and lawfully.

**RECOMMENDATION 7: The NPPC should instigate a national review of all FPNs issued under the lockdown Regulations.**

**RECOMMENDATION 8: The Government should introduce a means for individuals to challenge lockdown FPNs by way of administrative review or appeal, without having to risk magistrates' court proceedings.**

### *National divergence*

As the pandemic has unfolded, the Government has been increasingly unable to command a UK-wide response. Devolved powers have each adopted their own measures, managed lockdowns at their own pace, and developed their own tests for lifting restrictions. This makes it impossible for the Prime Minister, or indeed anyone in central Government, to speak to the country and communicate the rules as a whole.

This problem was raised in some of the short parliamentary debates on the Regulations. Baroness Wilcox reported that the Welsh First Minister, Mark Drakeford, experienced insufficient communication and had waited three weeks for Michael Gove to reply to him about improving communications between devolved administrations and central Government.<sup>151</sup>

One of the key principles in the Government's recovery strategy is to pursue "work in close cooperation with the devolved administrations in Scotland, Wales and Northern Ireland to make this a UK-wide response: coherent, coordinated and comprehensive."<sup>152</sup> In reality, there has been a divergent four-nations response.

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151 HL Deb (12<sup>th</sup> May 2020) vol. 803, col. 602: [https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection\(CoronavirusRestrictions\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020)

152 Our Plan to Rebuild: The UK Government's COVID-19 recovery strategy – HM Government, 11<sup>th</sup> May 2020: <https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy>

## *Travel*

### *Scotland*

In Scotland, there is no requirement in the Regulations that exercise is local.<sup>153</sup> Nevertheless, when revised guidance was released in England by the NPCC stating that it would be reasonable for people to travel for exercise,<sup>154</sup> a spokesperson for Police Scotland stated that they would not be sharing this guidance with their officers.<sup>155</sup>

At the time of writing, the Scottish Government's guidance says "our advice is that you should stay within your local area", which is described as being within five miles of a person's home although this is not a fixed limit.<sup>156</sup> Police Scotland states that "the Scottish Government advises that you should stay local" and warns that there will be an "increased police presence (...) to engage with those who are not complying with the current guidance."<sup>157</sup>

### *Wales*

On the other hand, the third Amendment to the Regulations in Wales on 11<sup>th</sup> May did include a requirement that exercise is "local".<sup>158</sup> It is under this amendment that police in Wales have fined those travelling from other UK nations into Wales. Of course, for those on the border towns of England, it could be reasonable to cross the border considering that Wales is 'local' to them. Statements from the Welsh Assembly and UK Government, however, have indicated that people should not be travelling from England into Wales.<sup>159</sup> The Regulations were amended again on 1<sup>st</sup> June, retaining the restriction on "local" travel with the five mile rule accompanying in guidance.<sup>160</sup>

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153 The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, Regulation 8(5)(b)

154 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/Whatconstitutes-a-reasonable-excuse.pdf>

155 This is where Scottish and English police differ on Covid-19 lockdown restrictions – James McKenzie, Edinburgh News, 17th April 2020: <https://www.edinburghnews.scotsman.com/health/coronavirus/where-scottish-and-english-police-differ-covid-19-lockdown-restrictions-2542340>

156 Coronavirus (COVID-19) Phase 1: staying at home and away from others (physical distancing) – Scottish Government, 28<sup>th</sup> May 2020: <https://www.gov.scot/publications/coronavirus-covid-19-staying-at-home-and-away-from-others/pages/meeting-others-outdoors/>

157 FAQs - Essential and Non-Essential Travel – Police Scotland, accessed 27<sup>th</sup> May 2020: <https://www.scotland.police.uk/about-us/covid-19-policescotlandresponse/faqs-essential-and-non-essential-travel>

158 The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 3) Regulations 2020, para 2(4)(b)

159 Warning over weekend travel from England to Wales – BBC News, 16<sup>th</sup> May 2020: <https://www.bbc.co.uk/news/uk-wales-52647847>

160 The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 5) Regulations 2020: <https://www.legislation.gov.uk/wsi/2020/557/regulation/2/made>

The restrictions have resulted in Welsh police spending vast amounts of time trying to prevent people from England crossing the border. Police in North Wales stopped over 2,500 vehicles in one weekend, fining and sending home a small number travelling from England and Scotland.<sup>161</sup> Police said the “vast majority” were local and travelling lawfully, whereas approximately 60 were not.<sup>162</sup> WalesOnline accompanied Gwent Police on a so-called ‘border patrol’ where police were checking vehicles near the border with England, to prevent “inessential journeys.”<sup>163</sup> They reported that passing cars were directed into a nearby carpark, where their reason for travel was established. In one hour, over sixty cars were stopped. While police are entitled to stop vehicles for any reason under the Road Traffic Act 1988 (s.163), it is disproportionate to stop every car. The police guidance on the emergency laws from the NPCC and College of Police is clear that “road checks on every vehicle is (...) disproportionate.”<sup>164</sup> At a rate of one car stop per minute, it is highly likely these vehicle stops were indiscriminate and arbitrary.

#### *Northern Ireland*

In Northern Ireland, the initial Regulations did not contain a limit on travelling for exercise. However, the first Amendment to the Regulations stated that leaving one’s house for exercise was only reasonable if “any associated travel that is not in itself exercise is reasonable.”<sup>165</sup>

**RECOMMENDATION 9: Setting up roadblocks to arbitrarily question people as to their movements is intimidating, disproportionate, and goes beyond the necessary measures for policing the pandemic. Police chiefs must ensure the guidance is being followed and stop conducting roadside checks in relation to the Regulations.**

#### *Exercise once per day?*

#### *England and Scotland*

In England and Scotland, there has never been a legal limit on the amount of times a person can exercise each day. Accordingly, guidance issued by the NPCC and College of

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161 Police stop over 2,500 drivers in one weekend in checks on lockdown rule breakers – Mari Jones, MSN News, 19<sup>th</sup> May 2020: <https://www.msn.com/en-gb/news/uknews/police-stop-over-2500-drivers-in-one-weekend-in-checks-on-lockdown-rule-breakers/ar-BB14jAZl>

162 Ibid.

163 Border patrol: The police officers tasked with stopping people coming from England into Wales – Marcus Hughes, WalesOnline, 23<sup>rd</sup> May 2020: <https://www.walesonline.co.uk/news/wales-news/border-patrol-police-officers-tasked-18297656>

164 COVID-19 – Policing brief in response to Coronavirus Government Legislation – NPCC and College of Policing, 31<sup>st</sup> May 2020

165 The Health Protection (Coronavirus, Restrictions) (Amendment) Regulations (Northern Ireland) 2020, para 2(4)(b)



Policing had stated that exercising more than once per day was “likely to be reasonable.”<sup>166</sup> However, Prime Minister Boris Johnson and First Minister of Scotland Nicola Sturgeon both announced on 10<sup>th</sup> May that those in England and Scotland respectively would now be allowed unlimited daily exercise. Guidance in Scotland now reads: “You can go outside to exercise as often as you wish.”<sup>167</sup> This marked a change in guidance rather than law. Previously, the UK Government guidance advised that people could leave their homes for “one form of exercise a day”; similarly, Nicola Sturgeon had stated that “exercising once a day” was permitted.<sup>168</sup> It is not clear why this limitation was not reflected in the Regulations themselves, like in Wales, if it was intended to be legally enforced.

### *Wales*

Wales was the only country with a legal limitation on the number of times a person could exercise per day.<sup>169</sup> This was later amended to allow those with a particular health condition or disability to exercise more than once per day if needed.<sup>170</sup> A further amendment scrapped the once per day limitation for all people.<sup>171</sup>

### *Northern Ireland*

In Northern Ireland, there has never been a limit in Regulations about the number of times a person can exercise per day.

### *Gatherings*

### *England*

In England, the second Amendment to the Regulations permitted people to meet with one person from another household on “public open space” for either exercise or recreation.<sup>172</sup> Regulations do not mandate a two-metre distance, but it has been stressed by the Government that this is advisable. Changes made to the Regulations on

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166 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/Whatconstitutes-a-reasonable-excuse.pdf>

167 Coronavirus (COVID-19): staying at home and away from others (physical distancing) – Scottish Government, 11<sup>th</sup> May 2020: <https://www.gov.scot/publications/coronavirus-covid-19-staying-at-home-and-away-from-others/pages/exercise/>

168 First Minister's speech 26 March 2020 – Scottish Government, 26<sup>th</sup> March 2020: <https://www.gov.scot/publications/first-minister-covid-19-update-3/>

169 The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 (as enacted), Regulation 8(2)(b)

170 The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 2) Regulations 2020, para 4(3)(b)

171 The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 3) Regulations 2020, para 2(4)(b)

172 The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020, para 2(3)(a)(iii)

1<sup>st</sup> June allow gatherings of up to six people outdoors and two people indoors in England.

### *Wales*

Similarly, Wales is amended its Regulations on 1<sup>st</sup> June, but to permit gatherings of any number of people from two households. However, this must be local. Physical distancing requirements for such gatherings are in Welsh guidance but not law.

### *Scotland*

On 29<sup>th</sup> May, the Regulations for Scotland were amended to allow people from two households to meet. The Scottish guidance seeks to limit such gatherings to 8 people, at a safe distance, and within five miles of a person's home<sup>173</sup> but these limitations are not in the Regulations.

### *Northern Ireland*

In Northern Ireland, the third Amendment to the Regulations which came into force on 19<sup>th</sup> May permits outdoor gatherings of up to six people from different households, with no legal requirement to maintain physical distance or stay local,<sup>174</sup> although the guidance is to stay local.<sup>175</sup> This means a person can lawfully travel any distance for a gathering (Amendment 3), but is legally restricted to "reasonable" travel for exercise (Amendment 1). The Amendment does not specify that the gathering must take place on public land, so a gathering can take place in private gardens.

The fact that these complex Regulations diverge across the nations of the UK makes it incredibly difficult, arguably impossible, for any citizen of the UK to understand and observe the differences. The stakes are very high – these Regulations must be accessible, foreseeable and practicable for the public at large if the purported benefits are to be achieved. Adherence to the lockdown Regulations requires major behavioural change on a scale never seen before – but this can only happen if the law is clear and coherent.

This BBC graphic simplifies, as far as possible, the new "rules" on gatherings as of 30<sup>th</sup> May. However, it does blur of laws and guidance. As demonstrated in this section, there

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173 Coronavirus (COVID-19) Phase 1: staying at home and away from others (physical distancing) – Scottish Government, 28<sup>th</sup> May 2020: <https://www.gov.scot/publications/coronavirus-covid-19-staying-at-home-and-away-from-others/pages/meeting-others-outdoors/>

174 The Health Protection (Coronavirus, Restrictions) (Amendment No. 3) Regulations (Northern Ireland) 2020, para 2(5)





175 Michelle O'Neill, Twitter video, 22<sup>nd</sup> May 2020: <https://twitter.com/moneillsf/status/1263874290526674945?s=20>

is no simple way to illustrate the unnavigable matrix of differences between laws and guidance across the four nations.

We repeat the recommendation of our April report.

**RECOMMENDATION 10: 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.**

### UK rules on meeting up

	England	Scotland	Wales	Northern Ireland
 <b>How many people?</b>	Up to 6	Up to 8 from two households	Any number from two households	Up to 6
 <b>At what distance?</b>	2m apart	2m apart	2m apart	2m apart
 <b>Where?</b>	Anywhere outdoors	Anywhere outdoors, ideally within 5 miles	Anywhere outdoors, ideally within 5 miles	Anywhere outdoors
 <b>From when?</b>	Monday 1 June	Now	Monday 1 June	Now

**BBC**

## Coronavirus Act

The Coronavirus Act is primary legislation containing the most draconian powers in British history.

We analysed these powers extensively in our briefing on the (then) Bill<sup>176</sup> and in our Emergency Powers and Civil Liberties Report, April 2020.<sup>177</sup>

We have consistently warned that these sweeping powers, deprived of meaningful parliamentary scrutiny, will be prone to abuse as they lack the most basic safeguards and endanger fundamental human rights in the UK.

Regretfully, this has proven to be the case.

### *Misuse of the Coronavirus Act*

In our April report, we exposed the unlawful conviction of an Oxford teenager under the Coronavirus Act<sup>178</sup> and, in light of mounting evidence that the Act was being repeatedly misinterpreted and abused, we called for a review of all fines and convictions under the Coronavirus Act. We welcomed the CPS' subsequent decision to review every charge, sentence and conviction under both the Coronavirus Act and the "lockdown" Regulations. It is the first time the CPS has ever launched a review of every charge under a specific piece of legislation.<sup>179</sup>

The initial findings were damning – every single one of the 44 Coronavirus Act prosecutions reviewed so far was unlawful.<sup>180</sup> The CPS said:

"All 44 cases under the Act were found to have been incorrectly charged because there was no evidence they covered potentially infectious people, which is what this law is intended for."<sup>181</sup>

Most of these unlawful cases reached courts: 31 of the incorrect charges were stopped at the first court hearing and 13 were returned to be re-listed and withdrawn. Some

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176 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>

177 Emergency Powers & Civil Liberties Report, April 2020 – Big Brother Watch, p.69:

<https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>

178 Ibid.

179 CPS will review every charge under coronavirus law – Fariha Karim, the Times, 2<sup>nd</sup> May 2020:

<https://www.thetimes.co.uk/article/cps-will-review-every-charge-under-coronavirus-law-0l37rsg8f>

180 CPS announces review findings for first 200 cases under coronavirus laws – CPS, 15<sup>th</sup> May 2020:

<https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

181 Ibid.

people, for example Marie Dinou,<sup>182</sup> had already spent time in custody on unlawful Coronavirus Act charges. This multi-layered incompetence is cause for serious concern.

It is widely thought that these unlawful charges arose from confusion between the Regulations and the Coronavirus Act. However, the evidence is unclear: only 11 of the unlawful Coronavirus Act charges were substituted with Regulations offences instead.<sup>183</sup>

The CPS also committed to put in place an internal safeguard which means any charge under the emergency laws must be now reviewed by a supervising lawyer before being called on in court.<sup>184</sup> Despite the CPS's pledge to ensure that a lawyer oversees all new charges, we believe cases with incorrect charges are still being processed by the courts. We keenly await publication of the next CPS review period.

The cases identified by the CPS relate to clearly unlawful charges. However, we remain concerned that the Act gives scope to unfair treatment within its legal confines.

#### *Schedule 21: detention powers*

##### *Removal of potentially any member of the public*

Under Schedule 21 of the Coronavirus Act, a person is "potentially infectious" if "the person is, or may be, infected or contaminated with coronavirus, and there is a risk that the person might infect or contaminate others with coronavirus" (paragraph 2(1)(a)). Given that the UK Government estimates up to 80% of the UK population could be infected with Coronavirus in the course of the pandemic, the entire population could classify as "potentially infectious" and vulnerable to detention.

A person is also "potentially infectious" if "the person has been in an infected area within the 14 days preceding that time" outside of the UK (paragraph 2(1)(b)). Under the latter power, officials may derive the power to detain people arriving to the UK.

A person can be forcibly removed and detained for screening and assessment by a public health official for up to 48 hours (paragraph 9), during which a failure to comply is an offence (paragraph 9(2)(c)). The person can be forced to provide a biological sample (paragraph 10(2)(a)), provide health, travel and social contact information (paragraph

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182 Wrongly convicted woman didn't speak for three days – Fariha Karim, 3<sup>rd</sup> April 2020: <https://www.thetimes.co.uk/article/woman-wrongly-convicted-under-new-coronavirus-law-did-not-speak-a-single-word-to-police-or-in-court-0kjq9zrhj>

183 CPS announces review findings for first 200 cases under coronavirus laws – CPS, 15<sup>th</sup> May 2020: <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

184 CPS announces review findings for first 200 cases under coronavirus laws – CPS, 15<sup>th</sup> May 2020: <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

10(2)(b)), personal contact details and any personal documentation to assist the assessment (paragraph 10(4)).

A person can also be forcibly removed and detained by an immigration officer (for up to 3 hours) or constable (for up to 24 hours, paragraph 13(3)) to await a public health officer to exercise the above functions. These waiting periods can be renewed for a further 9 hours for immigration officers and 24 hours by a constable if approved by officials at least as senior as a chief immigration officer or superintendent (paragraph 13(4)). An immigration officer or constable must consult a public health officer before exercising these powers, but only "to the extent that it is practicable to do so" (paragraph 13(8)) – a wholly insufficient safeguard.

#### *Draconian detention*

A "potentially infectious" person who has been screened or assessed by a public health officer (paragraph 14(1)) – even if the screening is "inconclusive" – can be detained or isolated for up to 14 days (paragraph 15(1)). Screening is defined as assessing the extent to which a person has been exposed to coronavirus, determining whether they are affected and assessing their state of health (paragraph 3(1)).

After the first 14 days of restrictions the individual must be assessed again within 48 hours (paragraph 15(2)(a)) and further restrictions can be imposed (paragraph 15(3)(b)), or the same restrictions re-imposed (paragraph 15(4)), or isolation extended for a further specified period (paragraph 15(5)) which can exceed 14 days without upper limit (paragraph 15(6)) as long as the restriction is reviewed daily (paragraph 15(7)).

If a person attempts to abscond from isolation, they can be forcibly returned to isolation or taken to another screening or isolation place by a constable or a public health officer and may even be taken into custody in this process (paragraph 16(c)).

In addition to detention, restrictions can be imposed on the person's movements, activities (including work activities) and even "contact with other persons or with other specified persons" (paragraph 14(4)).

There is now a very real possibility of these powers being used more widely as part of the "track and trace" scheme.

#### *Detention of children*

These powers of forcible removal, detention, isolation and testing can also be exercised in relation to children and should be exercised in the presence of an individual who has responsibility for the child, or failing that, an adult considered to be appropriate (paragraph 18(4)). There are no safeguards set out for the detention of children or the conditions in which they may be held. The absence of explicit, basic safeguards is extraordinarily dangerous.

### *Punishment*

If a person fails without reasonable excuse to comply with any direction, instruction, requirement or restriction conferred on them or their children; if a person attempts to abscond from isolation; if a person provides "misleading information"; or if a person obstructs an attempt to exercise any of the powers under the Schedule, they are guilty of an offence incurring a fine of up to £1,000 (paragraph 23(2)).

### *Inaccessible appeal*

Restrictions imposed under paragraph 14 can be appealed to a magistrates' court (paragraph 17) - although this could be impractical or impossible depending on the nature of the isolation restrictions imposed. The absence of strong, accessible legal rights alongside unprecedented detention powers is shocking and unacceptable.

### *Are these powers necessary?*

There are already significant and extensive powers for authorities to detain people or to enable the detention of people for public health protection, or to make regulations in this regard. The Health and Social Care Act 2008<sup>185</sup> gives magistrates the power to order people who are believed to be infected or contaminated to:

- submit to medical examination
- be removed to a hospital or other suitable establishment
- be kept in isolation or quarantine
- be disinfected or decontaminated (but not subjected to unconsented medical treatment such as vaccination)
- be subject to restrictions on where they go or who they have contact with

in order to reduce any significant risk to harm to human health.<sup>186</sup>

The Health and Social Care Act also gives police officers powers to return people to custody if they are subject to a requirement that they should be detained or kept in isolation or quarantine.<sup>187</sup>

The authorisation of a magistrate, present in the Health and Social Care Act but absent from the Coronavirus Act, is a vital safeguard.

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185 Which amended the Public Health (Control of Disease) Act 1984

186 Health and Social Care Act 2008, section 45G  
<http://www.legislation.gov.uk/ukpga/2008/14/section/129>

187 Health and Social Care Act 2008, section 45O  
<http://www.legislation.gov.uk/ukpga/2008/14/section/129>

Allowing the detention of people who “may be” infectious, without clear and objective justification could allow for an unprecedented infringement of the most basic human rights on any member of the public or their children.

The open-ended nature of the detention and isolation powers is a matter of grave concern.

#### *Schedule 22: restrictions on gatherings*

Schedule 22 powers to restrict gatherings and events have not been used in most of the UK as the lockdown Regulations have been used to restrict freedom of movement and gatherings. The Schedule 22 powers have only been invoked in Scotland, where a “public health response period” has been declared (this must be done before the powers can be used). This has not happened in England, Wales or Northern Ireland, and it is unclear whether the powers have actually been used in Scotland.

#### *Two month review*

Section 97 of the Act requires the Health Secretary to report to Parliament on key provisions in the Act every two months. The first report was published on 29<sup>th</sup> May.

Predictably, the report states that although some of the provisions have not been needed so far – during a peak of the pandemic - “it is too early to tell whether they can be completely dispensed with.”<sup>188</sup> For example, the modification of mental health legislation under s.10 and Schedule 8 of the Act has not been needed, yet Government is retaining the power.

#### *Schedule 21*

The report states that Schedule 21 has been used in “fewer than 10 cases across the whole of England”.<sup>189</sup> However, there is no further explanation or transparency as to why and how powers under the Schedule were used.

Furthermore, there is no mention of the 44 unlawful prosecutions under Schedule 21, which is an inexplicable oversight. Given that the CPS found that 100% of the prosecutions under the Act were unlawful, the risk of misuse of restrictions, directions

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188 Two monthly report on the status of the non-devolved provisions of the Coronavirus Act 2020 – Department of Health and Social Care, 29<sup>th</sup> May 2020, p.6: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/888602/coronavirus-act-2-month-report-may-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888602/coronavirus-act-2-month-report-may-2020.pdf)

189 Ibid.



and other powers is very serious. The confusion and misuse associated with Schedule 21 should surely play into any meaningful review. The review states that Schedule 21 “nonetheless remains a useful part of the full range of tools and powers available” without justification.

### *Schedule 22*

The review acknowledges that Schedule 22 powers have not been exercised by the UK Government. It makes no further assessment of their necessity and does not explain why they need to remain in place.<sup>190</sup>

As we have warned throughout the pandemic response, extraordinary powers afforded to the state will not always be necessary or essential, but ‘nice to have’ – and moreover, excessively difficult to repeal.

**RECOMMENDATION 11: Schedule 21 of the Coronavirus Act poses an extraordinary risk to fundamental rights, has been abused to pursue 44 unlawful prosecutions, and has proved of little use for public health despite the country enduring a peak of the pandemic. Schedule 21 should be urgently repealed.**

**RECOMMENDATION 12: Schedule 22 of the Coronavirus Act has not been used at all during the pandemic, yet contains draconian powers to restrict gatherings and protests that remain on the statute books. Schedule 22 should be urgently repealed.**

### *Failure to use Civil Contingencies Act*

Since the beginning of the pandemic, we have questioned why the Civil Contingencies Act, which would have involved greater parliamentary scrutiny and more regular reviews, was not used in the Government’s response.<sup>191</sup> In our April report, we detailed the ongoing questioning on this point in Parliament. However, it remains a question that has not been satisfactorily answered.

On 29<sup>th</sup> April, the Public Administration and Constitutional Affairs Committee asked Minister for the Cabinet Office Michael Gove why the Civil Contingencies Act (CCA) was not used. Gove’s explanation was that the CCA is “designed to be used for something

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190 Two monthly report on the status of the non-devolved provisions of the Coronavirus Act 2020 – Department of Health and Social Care, 29<sup>th</sup> May 2020, p.15: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/888602/coronavirus-act-2-month-report-may-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888602/coronavirus-act-2-month-report-may-2020.pdf)

191 Emergency Powers & Civil Liberties Report, April 2020 – Big Brother Watch, p.56-7: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>; see also 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>

that is unforeseen.”<sup>192</sup> In response, Ronnie Cowan MP pointed out the irony of Gove defending Government failings such as PPE shortages on the basis that the virus had moved so quickly, whilst simultaneously claiming that the Government was too prepared for the virus to use the CCA:

*“I am staggered to hear that this is not a bolt out of the blue. Given the speed with which this virus has ripped through the United Kingdom, and has killed over 20,000 people, are we saying we were not surprised? If we were not surprised by it, why were we not better prepared?”*<sup>193</sup>

Furthermore, the Committee Chair asked:

*“The Civil Contingencies Act exists for contingencies. If this is not an occasion on which that would be necessary, when would be?”*<sup>194</sup>

However, Gove maintained that the Government was too prepared for the pandemic to rely on the CCA. Indeed, as discussed in our April report, the Coronavirus Act was worked on for three months prior to being laid before Parliament for rushed three-day scrutiny. This only raises more questions about the timing of the Government’s response and the respect it has shown for our parliamentary democracy.

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192 Oral evidence: The work of the Cabinet Office, HC 118, Public Administration and Constitutional Affairs Committee, 29<sup>th</sup> April 2020, Q212: <https://committees.parliament.uk/oralevidence/326/default/>

193 Ibid, Q220

194 Ibid, Q215



*“If we are not careful, the epidemic might nevertheless mark an important watershed in the history of surveillance.”*

*“Not only because it might normalise the deployment of mass surveillance tools in countries that have so far rejected them, but even more so because it signifies a dramatic transition from ‘over the skin’ to ‘under the skin’ surveillance.”*

— Yuval Noah Harari, 20th March 2020

## CONTACT TRACING

Contact tracing helps prevent the spread of a virus by proactively finding people at higher risk of infection than others due to potential exposure. It is a method by which public health professionals aim to identify infected people and those exposed to a risk of infection through close contact with them, so they can be advised on appropriate action.

### NHSX App

It is possible that contact tracing apps could help to control the spread of the virus by alerting people who have been exposed to a risk of infection and advising them to self-isolate. Success relies on several factors, including mass uptake, reliability of alerts, usability of the app, and overall, trust. In our April report, we set out the key principles that any contact tracing app should follow.<sup>195</sup>

Regretfully, the UK has diverged from many other European countries and built a contact tracing app with a centralised database. On 27<sup>th</sup> April, NHSX announced that it would not follow the recommendations of civil society actors, technologists,<sup>196</sup> computer scientists<sup>197</sup> or technology companies and would continue to pursue a contact tracing app that uses a centralised database.<sup>198</sup> This came amid grave concerns surrounding a centralised approach and the risk of mission creep.

At the moment, use of the app is entirely voluntary. We believe it should stay this way and that possession of the app should never be used as a gateway to grant more work and travel rights than those who do not or cannot use the app.

To date, the app has only been trialled on the Isle of Wight. The results, and any plans for roll out across the UK, are unknown.

#### *How will the NHSX app work?*

The NHSX contact tracing app aims to let users know if they have been near to the phone of someone who may have coronavirus for long enough that they could be at risk of infection.

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195 Emergency Powers & Civil Liberties Report, April 2020 – Big Brother Watch, p.71-75: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>

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

197 Joint statement (177 signatories) - 29<sup>th</sup> April: <https://drive.google.com/file/d/1uB4LcQHMP-oLzIIHA9SjKj1uMd3erGu/view>

198 NHS rejects Apple-Google coronavirus app plan – Leo Kelion, BBC News, 27<sup>th</sup> April 2020: <https://www.bbc.com/news/technology-52441428>

As the NHS states, “Its goal is to reduce the transmission of the virus by alerting people who may have been exposed to the infection so they can take action to protect themselves.”<sup>199</sup>

The app works by Bluetooth “proximity tracing”, picking up on Bluetooth signals from phones running the app that come near the user, and recording how long and how far away they are from those phones. This is so that, should an app user develop coronavirus symptoms and report this via their app to the central system, other app users who may be at risk of infection can be alerted.

If a user receives such an alert, they will be advised on what to do (e.g. self-isolate). If a user has been alerted, they may also be provided with a 'token' to apply for a test if these are available.

### *Uptake*

The Government needs as many people to use the NHSX app as those who use WhatsApp for it to have an impact;<sup>200</sup> around 60% of the population, and at least 80% of smartphone users.<sup>201</sup> This is a truly huge number of people to recruit to an app in a short timeframe. Mass uptake will only happen if the public trusts the app and has evidence that it will work. The app has no chance of success if the public does not trust it.

CEO of NHSX Matthew Gould admitted to the Joint Committee on Human Rights that most countries have only seen around 20% uptake of their respective apps.<sup>202</sup>

### *Reliability*

Reliability is key for continued use of the app too. At the moment, alerts to self-isolate can be sent on the basis of someone’s self-diagnosis. If people are repeatedly told to self-isolate on the basis of false alarms – which will deny them freedom of movement, a family and social life, work and ability to earn, the ability to seek healthcare, and more – they may decide to stop using the app. If people are forced to self-isolate on the basis of such false alarms, it will constitute a significant and unjustified interference with people’s most basic rights.

### *Usability*

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199 NHS COVID-19 App – NHSX: <https://www.nhsx.nhs.uk/covid-19-response/nhs-covid-19-app/> [accessed 10<sup>th</sup> May 2020]

200 Effective configurations of a digital contact tracing app: A report to NHSX – Robert Hinch et. al., The Conversation, 16<sup>th</sup> April 2020: [https://cdn.theconversation.com/static\\_files/files/1009/Report\\_-\\_Effective\\_App\\_Configurations.pdf?1587531217](https://cdn.theconversation.com/static_files/files/1009/Report_-_Effective_App_Configurations.pdf?1587531217)

201 Why New Contact Tracing Apps Have A Critical WhatsApp-Sized Problem – Zack Doffman, Forbes, 5<sup>th</sup> May 2020: <https://www.forbes.com/sites/zakdoffman/2020/05/05/all-whatsapp-users-must-now-install-this-new-app-heres-why/>

202 The Government’s response to COVID-19: human rights implications – Joint Committee on Human Rights, 4<sup>th</sup> May 2020: <https://www.parliamentlive.tv/Event/Index/6f0f52cf-9fda-4785-bf63-af156d18b6c7>

Apple and Google have only supported de-centralised apps, which can now successfully run in the background of their devices. There are serious concerns over whether the NHSX app will even be functional, let alone secure. The operating systems of Apple and Google do not allow apps to broadcast data using Bluetooth unless they are in the foreground of the phone. This means if a user's phone is locked and they forget to reopen the app or use another app, the Bluetooth signal will not broadcast, making the app redundant.

*What is the difference between the centralised and decentralised contact tracing apps?*

All of the contact tracing app designs give app users an anonymous installation ID (a random number) upon registration and then regular pseudonymised IDs (a different number each day that connects back to the installation ID), so that encounters with other app users do not directly identify anyone personally. The NHSX app issues pseudonymised IDs daily to mitigate the risk of persistent tracking.

In the centralised model, it is effectively the state who issues and stores the installation IDs. It is also the state who issues the daily IDs, and they can (if they want to) connect them to the installation ID. In the decentralised model, the software issues installation IDs and daily IDs without a central authority, so no authority can connect the two.

Conservative backbencher Marcus Fysh MP gave his support to a decentralised app in the House of Commons:

*"The decentralised model is how the app should be implemented by design, so that it is not possible for a security breach to be as serious. It is an essential principle of our democracy and our freedom that we are not tracked by the state, and I think that the centralisation of the data is entirely wrong. I would dump the centralised design and I would dump it now, because I do not think people will take it up in the proportions required for it to be effective if it is a centralised design."<sup>203</sup>*

However, the centralised model has been pursued. Because the NHSX app uses a centralised model unlike many other countries – Germany, Italy, Austria, Estonia, Switzerland, Canada, Latvia and Ireland – it is unclear whether the apps will be 'interoperable' (i.e. be able to communicate with one another). For this reason, Northern Ireland has rejected the NHSX app so residents can use an app that is interoperable with the Republic of Ireland.<sup>204</sup> We do not yet know whether users of the NHSX app will be

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203 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 455: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

204 Coronavirus: Northern Ireland rejects UK's COVID-19 contact-tracing app – Rowland Manthorpe, Sky News, 21<sup>st</sup> May 2020: <https://news.sky.com/story/coronavirus-northern-ireland-rejects-uks-covid-19-contact-tracing-app-11992232>

able to benefit from using the app when they travel. This will also affect visitors who may be using other apps.

Meanwhile, in Australia, their centralised contact tracing app Coviidsafe has proven a failure. With not enough downloads and technical issues, only one case has been identified through the app.<sup>205</sup>

### *Can the NHSX app identify users?*

Whether app users can be re-identified relies largely on trust in the organisations - NHSX and the National Cyber Security Centre (NCSC) - who operate the system.

The data held by the centralised system is “personal data” under data protection law – not, in our view, “anonymous data” as the NHSX data protection impact assessment (DPIA) claims.

When a user registers with the app, their phone is assigned an 'installation ID' based in part on a 'master key' provided by NCSC. The installation ID does not change. This allows the NHS to make contact with the phone and to send an app alert if the data reported by others to the central system suggests the user is at risk of infection.

From this installation ID, the app will generate a 'daily ID' that changes each day – this is the ID that users exchange with other app users. Only NHSX and NCSC can see how daily IDs connect back to installation IDs.

Effectively, the app gives people an identification tag and this tag is pseudonymised (i.e. its visible number changes) every day. However, NHSX has the ability to see that each of these daily pseudonyms belong to the user's tag (installation ID).

At the moment, users are not asked for their phone number, name or information other than the first part of their postcode. However, ministers and senior NHSX officials have suggested that the app will change over time and updated versions will likely request, or take, more data.

### *What data will the NHSX app collect?*

At the moment, the data collected includes:

- the first half of the user's postcode

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<sup>205</sup>How did the Coviidsafe app go from being vital to almost irrelevant? – Josh Taylor, Guardian, 23<sup>rd</sup> May 2020: <https://www.theguardian.com/world/2020/may/24/how-did-the-coviidsafe-app-go-from-being-vital-to-almost-irrelevant>

- phone make and model
- installation ID and daily IDs (see 'Can the NHSX app identify me?'),
- IP addresses (only for cyber-security monitoring), and
- records of contact with other app users

which includes

- other apps' daily IDs
- the dates of the encounters
- the Bluetooth signal strength and power (used to estimate the distance between the phones)
- the length of time the phones were in contact

When a user registers their phone with the app, they are asked for the first half of their postcode. The NHSX app asks for this in order to “plan your local NHS response.”<sup>206</sup> This is likely to do with ensuring healthcare capacity to deal with the rate of infections, but this is unclear. What it means is the app is not only doing contact tracing, but some amount of tracking as well - as the Secretary of State confirmed in a press conference on 4<sup>th</sup> May. MPs have asked the Health Secretary for more clarity.<sup>207</sup>

Each time a user opens the app, they are asked if they have developed a new persistent cough or a temperature.

If a user reports these symptoms, the app will ask if they wish to send the last 28 days of their Bluetooth “contact events” - that is, data showing how close and for how long they have been to other app users – from the phone to a central store.

Privacy International’s analysis also shows there are two third-party trackers included in the app (Google Firebase Analytics and Microsoft Appcenter Analytics).<sup>208</sup> This could be for crash reporting, but it is not yet clear what the purpose of them is and what data, if any, they are collecting or sharing.

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206 NHS COVID-19: the new contact-tracing app from the NHS – NCSC, 4<sup>th</sup> May 2020:  
<https://www.ncsc.gov.uk/information/nhs-covid-19-app-explainer>

207 Letter to Health Secretary – Damian Collins MP, 5<sup>th</sup> May 2020:  
<https://twitter.com/DamianCollins/status/1257625267088101376?s=20>

208 UK government Covid tracking app: what we found – Privacy International, 7<sup>th</sup> May 2020:  
<https://privacyinternational.org/long-read/3752/coronavirus-tracking-uk-what-we-know-so-far>



On Android phones, the app asks users for their permission to use “location data” in order to use the Bluetooth. Privacy International has warned that, although the app isn’t believed to use location data at this time, this broad permission could allow the Android app to subsequently change the data collection to include location data (GPS).<sup>209</sup>

#### *Extending data collection*

We are concerned about the possibility of growing data collection with the proposed app. On 28<sup>th</sup> April, Matthew Gould, the CEO of NHSX, told the Science and Technology Committee that he was:

*“quite keen though that subsequent versions [of the app] should give people the opportunity to offer more data if they wish to do so. For example, it would be very useful, epidemiologically, if people were willing to offer us not just the anonymous proximity contact, but also the location of where those contacts took place ... If people were willing to do that, and I suspect a significant proportion of people would be willing to do that, then I think that would be very important data.”<sup>210</sup>*

On 4<sup>th</sup> May, Matthew Gould again affirmed that the app would move towards greater data collection, specifically location data. Gould also stated that this data could be used for “research in the public interest or by the NHS for planning and delivering services,” raising concerns again over mission-creep in the use of this highly sensitive data.<sup>211</sup> The ICO has stated that any use of data after the crisis ends “must be documented (...), assessed in the DPIA and discussed with the ICO.”<sup>212</sup>

#### *The need for data minimisation*

This desire to collect ever-increasing amounts of data is one that often characterises new technological developments.

Gould argues that more data could improve the NHS’s response to the pandemic, but it also increases the risk to individuals’ privacy. Numerous groups have urged the Government to confirm that any app used for contact tracing would collect the minimum amount of data required to function.

On 29<sup>th</sup> April, a group of over 170 scientists and researchers working in the UK in the fields of information security and privacy published an open letter calling on NHSX to

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209 Ibid.

210 UK Science, Research and Technology Capability and Influence in Global Disease Outbreaks (Oral evidence session) – Science and Technology Commons Select Committee, 28<sup>th</sup> April 2020, <https://committees.parliament.uk/event/837/formal-meeting-oral-evidence-session/>

211 The Government’s response to COVID-19: human rights implications – Joint Committee on Human Rights, 4<sup>th</sup> May 2020, <https://www.parliamentlive.tv/Event/Index/6f0f52cf-9fda-4785-bf63-af156d18b6c7>

212 COVID-19 Contact tracing: data protection expectations on app development – Information Commissioner’s Office, 4<sup>th</sup> May 2020, <https://ico.org.uk/media/for-organisations/documents/2617676/ico-contact-tracing-recommendations.pdf>

ensure that they adhere to data protection principles by justifying any data collection as essential for the functioning of the app, “rather than simply the easiest way, or a ‘nice to have.’” They argue that this is “vital... to build the necessary trust in the application.”<sup>213</sup>

The ICO has also stated that only the “minimum amount of personal data necessary” should be collected and “personal data beyond that necessary for contract tracing purposes must not be processed merely because it may become useful in the future.”<sup>214</sup>

### *Can the NHSX app track and/or identify users?*

The NHSX app monitors users’ contact with other app users, but not (at this point) phone location data.

However, the centralised model means there is the risk that the amount of monitoring could expand over time. With the government in control of the app, mission creep is a serious risk and the app’s functions could expand beyond the initial purpose.

### *Reidentification*

NHSX has stressed repeatedly that data stored on the centralised database will be anonymous.<sup>215</sup> This is not the case – it is pseudonymous data as it is technically capable of being re-identified.

The centralised data collection and use of a ‘master key’ to generate the installation IDs increases the risk that app users could be re-identified to the device or person. This could happen through expanding the data collection. Further updates and more data collection could be added to the app. NHSX has already expressed a clear interest in doing this. The data is not currently stored next to a name or phone number, but this would be much easier to do with the centralised system than the decentralised one.

Alternatively, if a Bluetooth sensor installed by the state was placed next to a point of identification, such as a passport booth or an Oyster card reader, those databases could also be easily combined to identify users and track them from there onwards.

### *Tracking*

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213 Joint statement from scientists and researchers working in the UK in the fields of information security and privacy – 29<sup>th</sup> April 2020, <https://drive.google.com/file/d/1uB4LcQHMPV-oLzIIHA9SjKj1uMd3erGu/view>

214 COVID-19 Contact tracing: data protection expectations on app development – Information Commissioner’s Office, 4<sup>th</sup> May 2020: <https://ico.org.uk/media/for-organisations/documents/2617676/ico-contact-tracing-recommendations.pdf>

215 NHS COVID-19 App – NHSX, 5<sup>th</sup> May 2020: <https://www.nhsx.nhs.uk/covid-19-response/nhs-covid-19-app/>

Even without re-identification, there is a considerable risk of privacy intrusion arising from the state management of installation IDs alone. The state could build lists of infectious IDs, recovered IDs, non-infected IDs, and IDs that have been instructed to isolate. Bluetooth sensors could pick up on where these IDs go and what they do. Many sensors already exist that could be repurposed. In this way, lockdown or isolation instructions could be closely policed.

If app updates ask for location data, users could be tracked without their permission too. NHSX has already indicated that in future it might invite people to send their location data about where they had contact with other individuals. A major privacy problem with this would be that while NHSX might have the consent of the person donating the data, it would not necessarily have the consent of everyone whose location data would be revealed.

*Who can access the data?*

In short, NHSX can access the data.

*From phone to central store*

The NHSX app data generated after installation – that is, data showing encounters with other app users – stays on the user’s phone unless they report symptoms, when they will be asked to send the last 28 days of that data to the central store.

Users’ data can also be sent to the central store without their consent. In the design of the NHSX app, users upload data about each other. As a result, even if a user never declares symptoms in the app, anybody who came into contact with them who has declared symptoms will have uploaded that person’s identifier to the central store.

Because of this, a social network involving users’ contacts can be assembled in the central server, even though many of those contacts may not have opted to upload any data.

*NHS*

NHSX can share data for health and research purposes, including with universities, pharmaceutical and tech companies for research. Data may be shared with NHS England and NHS Improvement.<sup>216</sup>

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216 Written answer: Nadine Dorries MP to Damian Collins MP, C-45143, 18<sup>th</sup> May 2020: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-questions-answers/?page=1&max=20&questiontype=AllQuestions&house=commons%2clords&member=1481&uin=45143>

## NCSC

When a user registers the app, their installation ID and phone make and model will be held in a central store. The central store belongs to NHSX and is secured by the National Cyber Security Centre (NCSC), an arm of the UK's signals intelligence agency GCHQ. Whilst this could technically allow them to access the data, it does not necessarily legally permit them to do so. Intelligence agencies can only obtain health data if there is a lawful purpose.

NCSC has been involved in the design of the NHSX app and provides cybersecurity expertise. The fact that there is a centralised data store at all creates a risk that it could be attacked, hacked or compromised.

A directive issued in early April gave GCHQ the power to access any and all NHS information systems.<sup>217</sup> This is reportedly in light of a growing threat of "state actors" hacking large stores of sensitive data about the pandemic in the UK, but would also be necessary for GCHQ to identify "bad actors" attempting to disrupt the system from within the UK.

## *Companies*

Other companies are involved in processing the data – namely, Amazon Web Services, VMWare Tanzu, Google and Microsoft.<sup>218</sup> it is not known precisely how or why.

## *Security risks*

A report by two security experts warned that the app had a number of serious security flaws which could make it vulnerable to hackers sending false alerts or tracking a person's location. The authors stated that they were "not convinced that the perceived benefits of centralised tracing outweigh its risks" and recommended legislation that would protect "from use by law enforcement, or any usage not directly related to COVID-19 prevention (...) The app should not be a backdoor for data collection for any purpose other than helping address the current crisis."<sup>219</sup>

The app's disclosure policy had previously stated that "You may not publicly disclose any details of the vulnerability [that you're reporting] without consent from NHSX," which

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217 The Consent to Activities Related to the Security of NHS and Public Health Services Digital Systems (Coronavirus) Directions 2020, 3<sup>rd</sup> April 2020:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/879049/Security\\_of\\_NHS\\_and\\_Public\\_Health\\_Services\\_Digital\\_Systems\\_\\_Coronavirus\\_\\_Directions\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879049/Security_of_NHS_and_Public_Health_Services_Digital_Systems__Coronavirus__Directions_2020.pdf)

218 Written answer: Nadine Dorries MP to Damian Collins MP, C-45143, 18<sup>th</sup> May 2020:  
<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-questions-answers/?page=1&max=20&questiontype=AllQuestions&house=commons%2clouds&member=1481&uin=45143>

219 Security analysis of the NHS COVID-19 App – Chris Culnane and Vanessa Teague, 19<sup>th</sup> May 2020:  
<https://www.stateofit.com/UKContactTracing/>

National Cyber Security Centre head Ian Levy admitted was “particularly daft” as “security researchers shouldn't be arbitrarily gagged.”<sup>220</sup> This has now been removed from the app’s policy.

*Is the NHSX app lawful?*

An expert legal opinion has already been issued which casts doubt on the lawfulness of the NHS app’s centralised model.<sup>221</sup> The legal opinion written by lawyers from Matrix and Blackstone chambers concluded that:

*“A de-centralised smartphone contact tracing system (...) would be likely to comply with both human rights and data protection laws. In contrast, a centralised smartphone system – which is the current UK Government proposal – is a greater interference with fundamental rights and would require significantly greater justification to be lawful. That justification has not yet been forthcoming.”<sup>222</sup>*

In order for the level of data collected by the app to be justified, it must be proven that such data collection is necessary for the app to be effective and that it provides real benefits to public health.

The app must comply with data protection laws, and clearly engages our right to privacy, protected by Article 8 ECHR, as well as our right not to be discriminated against, protected by Article 14.

The Joint Committee on Human Rights (JCHR) has warned:

*“It is not clear that the current legal and regulatory arrangements provide satisfactory, indeed the necessary, legal oversight required. State-controlled apps that enable the mass surveillance of personal data, and that could then enable the (proportionate or otherwise) violation of fundamental rights are novel.”<sup>223</sup>*

JCHR urged the Government to bring plans to Parliament so it can decide democratically whether to implement a centralised or decentralised app and provide oversight. The Committee said:

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220 NHS Covid-19 app security: two weeks on – Ian Levy, National Cyber Security Centre, 19<sup>th</sup> May 2020: <https://www.ncsc.gov.uk/blog-post/nhs-covid-19-app-security-two-weeks-on>

221 COVID-19 & Tech responses: Legal opinion - Matthew Ryder QC, Edward Craven, Gayatri Sarathy & Ravi Naik, 3<sup>rd</sup> May 2020: <https://www.matrixlaw.co.uk/wp-content/uploads/2020/05/Covid-19-tech-responses-opinion-30-April-2020.pdf>

222 COVID-19 & Tech responses: Legal opinion - Matthew Ryder et al, Matrix Law, 3<sup>rd</sup> May 2020: <https://www.matrixlaw.co.uk/news/legal-advice-on-smartphone-contact-tracing-published/>

223 Human Rights and the Government’s Response to Covid-19: Digital Contact Tracing – Joint Committee on Human Rights, 6<sup>th</sup> May 2020: <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/343/343.pdf>

*“The Government’s assurances about intended privacy protections do not carry any weight unless the Government is prepared to enshrine these protections in law.”*

We agree that the app's plans should be put to Parliament, and that primary legislation, in addition to the proper enforcement of existing legislation, is needed to ensure vital safeguards and protect our rights.

### *Legislation*

Many organisations and experts have called for the introduction of primary legislation to govern the app, including the Ada Lovelace Institute and the Joint Committee on Human Rights.<sup>224</sup> Harriet Harman MP, Chair of JCHR, said:

*“Assurances from Ministers about privacy are not enough. The Government has given assurances about protection of privacy so they should have no objection to those assurances being enshrined in law.”<sup>225</sup>*

The JCHR submitted draft legislation to the Health Secretary.<sup>226</sup> A team led by Professor Lillian Edwards (who now sits on the NHS COVID-19 App Data Ethics Advisory Board) also drafted a Bill.<sup>227</sup>

However, the Health Secretary has rejected calls for legislation that would govern the use of the app, saying that existing law and the Government’s “commitment to transparency (...) security and privacy” were sufficient safeguards against the myriad of issues we and others have raised.<sup>228</sup> As a group that closely monitors the Government’s “commitment to privacy”, the commitment lacks substance. The Joint Committee on

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224 Provisos for a Contact Tracing App – Ada Lovelace Institute, 4<sup>th</sup> May 2020:

<https://www.adalovelaceinstitute.org/our-work/covid-19/provisos-for-a-contact-tracing-app-4-may-2020/>

Human Rights and the Government’s Response to Covid-19: Digital Contact Tracing, Third Report of Session 2019-21 – Joint Committee on Human Rights, 6<sup>th</sup> May 2020:

<https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/343/343.pdf>

225 Report on the contact tracing app published – Joint Committee on Human Rights, 7<sup>th</sup> May 2020:

<https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/146351/report-on-the-contact-tracing-app-published/>

226 Draft Contact Tracing (Data Protection) Bill – Joint Committee on Human Rights, 7<sup>th</sup> May 2020:

<https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/correspondence/Letter-to-Rt-Hon-Matt-Hancock-MP-Secretary-of-State-for-HSC-Draft-Bill.pdf>

227 The Coronavirus (Safeguards) Bill 2020 – Prof. Lillian Edwards et al, 13<sup>th</sup> April:

<https://osf.io/preprints/lawarxiv/yc6xu/>

228 Letter from Rt Hon Matt Hancock MP, Secretary of State for Health and Social Care, regarding legislation for contact tracing for Covid-19 – 21<sup>st</sup> May 2020:

<https://committees.parliament.uk/publications/1223/documents/10345/default/>

Human Rights has asked for permission from the Leader of the House of Commons for Harriet Harman MP to table it as a private members bill.<sup>229</sup>

**RECOMMENDATION 13: Plans for a contact tracing app should be put to Parliament, and accompanied with primary legislation to ensure any app remains strictly voluntary, non-discriminatory and protects our rights.**

### *The Isle of Wight trial*

A trial of the app was launched on the Isle of Wight.

NHSX only produced a Data Protection Impact Assessment (DPIA) for the app after the trial launch. As the Information Commissioner's Office said, a DPIA "is required for contact tracing solutions prior to implementation."<sup>230</sup> The Information Commissioner, Elizabeth Denham, noted on 4<sup>th</sup> May that the ICO was still yet to receive this, despite the app being launched that same day in the Isle of Wight.

On 4<sup>th</sup> May, the Health Service Journal revealed via a senior NHS source that the app "had thus far failed all of the tests required for inclusion in the app library, including cyber security, performance and clinical safety."<sup>231</sup>

On 7<sup>th</sup> May, it was revealed that the app had passed an independent security audit, but barely.<sup>232</sup>

### *DPIA*

On 8<sup>th</sup> May, the DPIA for the Isle of Wight trial was released, four days after the app was launched. It is dated 6<sup>th</sup> May.<sup>233</sup> Key failures include:<sup>234</sup>

- The DPIA claims personal data is anonymous, which is incorrect – it primarily processes pseudonymous data, i.e. data that can be re-identified.

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229 Committee drafts Bill on COVID-19 (Coronavirus) Contact Tracing App – Joint Committee on Human Rights, 15<sup>th</sup> May 2020: <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2017/covid-contact-tracing-app-draft-bill-19-21/>

230 COVID-19 Contact tracing: data protection expectations on app development – Information Commissioner's Office, 4<sup>th</sup> May 2020, <https://ico.org.uk/media/for-organisations/documents/2617676/ico-contact-tracing-recommendations.pdf>

231 'Wobbly' tracing app 'failed' clinical safety and cyber security tests – Jasmine Rapson, HSJ, 4<sup>th</sup> May 2020: <https://www.hsj.co.uk/story.aspx?storyCode=7027564>

232 NHS contract tracing app only just scrapes a 'pass' in official review – Hannah Boland, The Telegraph, 7<sup>th</sup> May 2020: <https://www.telegraph.co.uk/technology/2020/05/07/nhsx-contract-tracing-app-scrapes-pass-official-review/>

233 Data Protection Impact Assessment NHS COVID-19 App PILOT LIVE RELEASE Isle of Wight – NHSX, 6<sup>th</sup> May 2020: <https://faq.covid19.nhs.uk/DPIA%20COVID-19%20App%20PILOT%20LIVE%20RELEASE%20Isle%20of%20Wight%20Version%201.0.pdf>

234 For a full analysis, see: Analysis of the NHSX Contact Tracing App 'Isle of Wight' Data Protection Impact Assessment – Michael Veale, LawArXiv Papers, 9<sup>th</sup> May 2020: <https://osf.io/preprints/lawarxiv/6fvgh/>

- It does not acknowledge that personal data can be uploaded about a user without their permission.
- It does not acknowledge that the NHSX app systematically monitors publicly accessible places.
- It does not explain the legal basis on which NHSX refuses the right of erasure for data that has been sent to the centralised database.
- It does not set out a valid legal basis on which significant automated decisions are made (though there likely could be one), and does not provide the logic of automated decisions as required under GDPR.
- The accompanying risk register scores all risks as low or medium, including the likely and serious risk of false reports leading healthy people to self-isolate. As data protection law expert Dr Michael Veale noted, "it's hard to imagine risks to rights or freedoms of higher impact than quarantine."<sup>235</sup>

These concerns about data protection are only amplified by an accidental Government leak of secret documents about the app's security – on an open Google Drive.<sup>236</sup> The documents revealed the potential for increased data collection (including an individual's full postal code and GP's surgery) and the introduction of a 'COVID-19 status.'

#### *Unknown results*

It is not clear what the parameters for success were in the trial, whether it was successful, or what has been learned.

Some residents' accounts are damning. Isle of Wight resident Megan Mackney told the BBC she received a notification that she had been in contact with someone who was displaying coronavirus symptoms. She was directed to the Government website that contained the "basic government guideline for everybody" and was not offered a test. She was not instructed to self-isolate and described the experience as "worrying."<sup>237</sup>

A very limited view on the success or otherwise of the trial was provided by Health Minister Lord Bethell, who told the House of Lords that the app was "not intrinsically

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235 Michael Veale, Twitter, 12<sup>th</sup> May 2020:

<https://twitter.com/mikarv/status/1260213584233201665?s=20>

236 The UK accidentally left secret plans for its COVID-19 contact-tracing app on an open Google Drive - Isobel Asher Hamilton, Business Insider, 13<sup>th</sup> May 2020: <https://www.businessinsider.com/uk-leaves-plans-contact-tracing-app-open-google-drive-2020-5?r=US&IR=T>

237 What's it like using the Covid-19 contact tracing app? – BBC News, 21<sup>st</sup> May 2020:

<https://www.bbc.co.uk/news/av/uk-52752274/what-s-it-like-using-the-covid-19-contact-tracing-app>



necessary” to the Government’s tracing program<sup>238</sup> and that releasing the app was premature:

*“One of the criteria of success is to learn from the pilot, which takes an early version of the app and hopes to develop learnings from it; we now have two or three. One of them, which I have mentioned, is that it is probably a mistake to launch an app before you have got the public used to the idea of tracing. As I mentioned in an earlier answer, that is something we have taken on board. When it comes to launching the test and tracing programme, we will begin with the tracing, not with the app.”<sup>239</sup>*

The Scottish Government has also de-emphasised the importance of an app. In a report on contact tracing, the Scottish Government called for more information about how the app would work: “we need to understand how data from this app will interface with the Scottish approach to contact tracing.” The report said an app “can be an important enhancement to contact tracing, but it is also important not to see it as a substitute for [other forms of] contact tracing.”

Focus across the UK has now moved to human contact tracing.

**RECOMMENDATION 14: NHSX must provide full disclosure of the contact tracing app trial, including any pre-defined parameters for success and subsequent results.**

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238 HL Questions (18<sup>th</sup> May 2020) vol. 803, col. 900: <https://hansard.parliament.uk/lords/2020-05-18/debates/1AEBA78C-1807-46CB-BDC9-73937A380A9A/Covid-19NHSContactTracingApp>

239 HL Questions (19<sup>th</sup> May 2020) vol. 803, col. 1096: <https://hansard.parliament.uk/lords/2020-05-19/debates/330874CF-A7FD-4EDA-B420-A0EA98A13AE2/Covid-19Response>

## Test and Trace

On 28<sup>th</sup> May, the UK Government's 'Test and Trace' program went live.<sup>240</sup>

Anyone who tests positive for coronavirus is contacted by NHS Test and Trace by "a text or email alert or call" with 24 hours with instructions on sharing details about anyone they may have been in contact with. They will be asked to provide "the name, telephone number and/or email address of anyone you have had close contact with in the 2 days prior to your symptoms starting."<sup>241</sup>

The information should be shared either on the NHS Test and Trace website, or on a phone call. Identified contacts will then be contacted by NHS Trace and Test and told to self-isolate for 14 days. They will only be offered a test if they develop symptoms.

### *Privacy notice*

NHS Test and Trace's privacy information states that "personally identifiable information" of someone with coronavirus or symptoms will be kept for 20 years.<sup>242</sup> This includes a person's full name, date of birth, sex, NHS number, home postcode and house number, telephone number, email address and details on their symptoms. The information kept on those identified as a contact of a person with coronavirus will be their full name, date of birth, contact details and details of any symptoms they may have had. This will be kept for 5 years.

The data retention periods are extraordinarily long and have not been justified. The privacy notice vaguely states that it is "because COVID-19 is a new disease and it may be necessary to know who has been infected, or been in close contact with someone with symptoms, to help control any future outbreaks or to provide any new treatments."<sup>243</sup>

The privacy information also states that, under Section 251 of the National Health Service Act 2006, NHS Test and Trace has permission from the Secretary of State for Health and Social Care "to use personally identifiable information without people's consent where this is in the public interest." The privacy information states that a person can request that their data is not used or request that their data is deleted but notes that this is "not an absolute right."

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240 Government launches NHS Test and Trace service – Department of Health and Social Care press release, 27<sup>th</sup> May 2020: <https://www.gov.uk/government/news/government-launches-nhs-test-and-trace-service>

241 NHS test and trace: how it works – Department of Health and Social Care, 27<sup>th</sup> May 2020: <https://www.gov.uk/guidance/nhs-test-and-trace-how-it-works>

242 NHS Test and Trace Privacy notice – Public Health England, accessed 29<sup>th</sup> May 2020: <https://contact-tracing.phe.gov.uk/help/privacy-notice>

243 Ibid.

Initially, the privacy notice read that any 'personal identifiable information' collected will be accessible to "those who have a specific and legitimate role in the response." This open statement was concerning, particularly considering the number of private companies currently working with the NHS as part of the Covid-19 response. Following concerns, the privacy information was altered to specify that data would be processed by the NHS Business Services Authority, NHS Professionals, Serco UK, SITEL Group and Amazon Web Services and can only be used to help with the contact tracing. Personal data can only be seen by Public Health England contact tracers, Local Authority public health teams, NHS Professionals, Serco UK and SITEL Group staff. Amazon Web Services staff will not be able to see the information.

However, in another contact tracing security blunder, private company Serco accidentally shared the email addresses of almost 300 contact tracers.<sup>244</sup>

Incidentally, 'personally identifiable information' is usually an American term. Under GDPR and the Data Protection Act, this kind of data is referred to as 'personal data.' It is unclear why the Test and Trace privacy policy uses a different term.

### *Missing DPIA*

Public Health England has confirmed that it is yet to complete the mandatory Data Protection Impact Assessment.<sup>245</sup> As we have noted before, the ICO has vowed that it will not penalise organisations for missed deadlines, so there will be few repercussions for this lapse. Ravi Naik, solicitor and head of digital rights organisation AWO, said that this lack of scrutiny "may further undermine efforts to get people to take part in the system (...) Confidence and trust is key. Missteps like this will only lose public trust."<sup>246</sup>

### *Voluntary or forced detention?*

Matt Hancock said that an instruction given by a contact tracer to self-isolate "will be voluntary at first because we trust everyone to do the right thing."<sup>247</sup> However, he warned that the Government "can quickly make it mandatory if that's what it takes."<sup>248</sup>

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244 Serco apologises for sharing contact tracers' email addresses – Ross Hawkins, BBC News, 20<sup>th</sup> May 2020: <https://www.bbc.co.uk/news/uk-52732818>

245 UK 'test and trace' service did not complete mandatory privacy checks – Mark Scott, Politico, 28<sup>th</sup> May 2020: <https://www.politico.eu/article/uk-test-trace-privacy-data-impact-assessment/>

246 UK 'test and trace' service did not complete mandatory privacy checks – Mark Scott, Politico, 28<sup>th</sup> May 2020: <https://www.politico.eu/article/uk-test-trace-privacy-data-impact-assessment/>

247 Hancock: it is public's 'civic duty' to follow test-and-trace instructions in England – Sarah Boseley and Heather Stewart, The Guardian, 27<sup>th</sup> May 2020: <https://www.theguardian.com/world/2020/may/27/government-unveils-covid-19-test-and-trace-strategy-for-england>

248 Ibid.

The Prime Minister told the Liaison Committee on 27<sup>th</sup> May that the government "will consider bringing in financial sanctions" for those who do not self-isolate.<sup>249</sup>

These comments suggest that Ministers may use Schedule 21 of the Coronavirus Act 2020 to legally enforce self-isolation instructions. As we discussed earlier in this report, Schedule 21 makes it an offence for any "potentially infectious" person to breach certain requirements given by a public health officer, including the requirement to "remain at a specified place in isolation from others for a specified period."<sup>250</sup> It also makes it an offence to breach any requirement given on restricting movement, travel, activities (including work) and contact with others.<sup>251</sup> Under Schedule 21, a person who attempts to abscond from quarantine is guilty of an offence incurring a fine of up to £1,000.

**RECOMMENDATION 15: The Track and Trace scheme is a privacy nightmare that undermines trust in a vital public health function. The NHS must revise and justify the data retention periods and complete a DPIA urgently.**

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249 Coronavirus: the science, the impact, and the way ahead – Liaison Committee, 27<sup>th</sup> May 2020: <https://committees.parliament.uk/event/1119/formal-meeting-oral-evidence-session/>

250 Coronavirus Act 2020, Schedule 21, para 14(3)(e)

251 Coronavirus Act 2020, Schedule 21, para 14(4)

## NHS COVID-19 DATASTORE

In our April review, we reported that 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.”<sup>252</sup> Microsoft, Palantir, Amazon, Google and Faculty are collecting and analysing data to create the Covid-19 datastore as well as turning data into ‘dashboards.’<sup>253</sup>

Legal analysis by lawyers from Matrix Chambers and AWO concluded that the datastore “does not comply, thus far, with data protection principles.”<sup>254</sup>

### Secret data

There remain many unknowns about the scope of this datastore.

As detailed in our April report, documents seen by the Guardian revealed that large volumes of confidential UK patient data are being used for the project.<sup>255</sup> On 25<sup>th</sup> May, privacy campaigner and co-ordinator of medConfidential Phil Booth noted on Twitter that the Department of Health and Social Care’s blog on the datastore had been edited, removing the assertion that any data held was anonymous and could not be traced back to an individual.<sup>256</sup> Now it only reads that data is held according to data protection legislation.

It is possible that the dashboards even handle surveillance data. Michael Gove referred to a “dashboard” in an oral evidence session with the Public Administration and Constitutional Affairs Committee – likely the Covid-19 datastore dashboard. He spoke in relatively vague terms and explained that some of the contents of the dashboard are “sensitive” as “some of the intelligence that the Government have about the potential challenges, threats and risks we may face is necessarily confidential.”<sup>257</sup> He revealed that information on the dashboard includes information on “compliance with social

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252 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>

253 The power of data in a pandemic - Matthew Gould, Indra Joshi and Ming Tang, Technology in the NHS blog, 28<sup>th</sup> March 2020: <https://healthtech.blog.gov.uk/2020/03/28/the-power-of-data-in-a-pandemic/>

254 COVID-19 & Tech responses: Legal opinion - Matthew Ryder et al, Matrix Law, 3<sup>rd</sup> May 2020, p.24-6: <https://www.matrixlaw.co.uk/news/legal-advice-on-smartphone-contact-tracing-published/>

255 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>

256 Phil Booth, Twitter, 25<sup>th</sup> May 2020: <https://twitter.com/EinsteinsAttic/status/1265054172879171586?s=20>

257 The work of the Cabinet Office (Oral evidence session) – Public Administration and Constitutional Affairs Committee, 29<sup>th</sup> April 2020, Q178: <https://committees.parliament.uk/event/864/formal-meeting-oral-evidence-session/>

distancing measures,” but how this data is gathered cannot be shared as “the means by which [the Government] gather[s] that information involves some quite sensitive relationships.”<sup>258</sup>

There is no clear justification for the use of secret surveillance to gather “intelligence” on social distancing measures. The engagement of big data firms in such projects only exacerbates privacy concerns. These companies have poor records of protecting privacy and are notorious for their aggressive personal data collection.

### **Secret contracts**

In our April report, we recommended that any data sharing agreements between the NHS and private companies are made public. On 29<sup>th</sup> April Big Brother Watch, alongside Privacy International, medConfidential, Foxglove and Open Rights Group, sent Palantir ten questions about its work with the NHS covering what data is being stored, how it is being used, and what happens to this data once their contract expires.<sup>259</sup> Their response failed to clarify the extent of the project or privacy protection, and did not rule out the possibility for Palantir to gain access to sensitive patient data.<sup>260</sup>

On 18<sup>th</sup> May Big Brother Watch, along with 26 other organisations and advocates, addressed a letter to Matt Hancock asking for more information about why and how the NHS datastore is being built and the relationship between the NHS and the private sector.<sup>261</sup> We have not received a response.

To date, over 10,000 people have signed a petition by Foxglove and openDemocracy calling on the Government to publish the contracts with the technology firms.<sup>262</sup>

### **“Beyond privatisation”**

NHSX has pledged to eventually close the datastore:

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258 The work of the Cabinet Office (Oral evidence session) – Public Administration and Constitutional Affairs Committee, 29<sup>th</sup> April 2020: <https://committees.parliament.uk/event/864/formal-meeting-oral-evidence-session/>

259 Press release: 10 questions to Palantir from privacy organisations – Privacy international, 29<sup>th</sup> April 2020, <https://privacyinternational.org/press-release/3732/press-release-10-questions-palantir-privacy-organisations>

260 Response to Privacy International Open Letter dated 29 April 2020 – Palantir UK, 6<sup>th</sup> May 2020: <http://privacyinternational.org/sites/default/files/2020-05/Response%20to%20Privacy%20International%20Open%20Letter%20dated%2029%20April%202020.pdf>

261 Open letter to Matt Hancock – Anouk Ruhaak et al, Medium, 18<sup>th</sup> May 2020: <https://medium.com/@anoukruhaak/open-letter-b7cb79832064>

262 Stop the secrecy: Publish the NHS COVID data deals – openDemocracy, accessed 22<sup>nd</sup> May 2020: <https://www.opendemocracy.net/en/stop-secrecy-publish-nhs-covid-data-deals/>

*“Once the public health emergency situation has ended, data will either be destroyed or returned in line with the law and the strict contractual agreements that are in place between the NHS and partners.”<sup>263</sup>*

However, since NHSX has thus far refused to make those contracts public we cannot know exactly what this means. Furthermore, NHSX has stated that even after the data store has been dismantled:

*“we hope to be able to use what we have learned from our technology partners to get better within the Government at data collection, aggregation and analysis in a way that protects the privacy of our citizens.”<sup>264</sup>*

Indeed, it has been suggested by an NHS source that Palantir will be “well placed to continue providing the service after the coronavirus outbreak comes to an end.”<sup>265</sup> This is clearly the case. Managing NHS IT infrastructure gives companies a huge market advantage, eliminating competition and clearing a path to monopolisation. This amount of power and control over some of the country’s most sensitive data gives rise to concerns about the protection of citizens’ privacy.

Lina Dencik, co-director of Cardiff University’s Data Justice Lab, said NHSX’s deal with Palantir “goes beyond privatisation”:

*“What this will do (...) is to increase dependency on [Palantir’s] technological infrastructure over time. The implementation of these technologies are restructuring organisational practices in such a way that risks displacing public infrastructure and the way policy is made. This gives [Palantir] enormous power in a different way to typical outsourcing.”<sup>266</sup>*

We repeat our April recommendation.

**RECOMMENDATION 16: 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.**

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263 The power of data in a pandemic - Matthew Gould, Indra Joshi and Ming Tang, Technology in the NHS blog, 28<sup>th</sup> March 2020: <https://healthtech.blog.gov.uk/2020/03/28/the-power-of-data-in-a-pandemic/>

264 The power of data in a pandemic - Matthew Gould, Indra Joshi and Ming Tang, Technology in the NHS blog, 28<sup>th</sup> March 2020: <https://healthtech.blog.gov.uk/2020/03/28/the-power-of-data-in-a-pandemic/>

265 Palantir’s NHS data project “may outlive coronavirus crisis” – Oscar Williams, NS Tech, 30<sup>th</sup> April 2020: <https://tech.newstatesman.com/coronavirus/palantir-covid19-datastore-coronavirus>

266 Secret data and the future of public health: why the NHS has turned to Palantir – Oscar Williams, New Statesman, 21<sup>st</sup> May 2020: <https://www.newstatesman.com/politics/health/2020/05/secret-data-and-future-public-health-why-nhs-has-turned-palantir>

## **SAGE**

There has been serious concern over the relationship between SAGE, the independent scientific body which advises the Government on their COVID-19 response, and private contractors. Faculty's chief executive, Marc Warner, attended a SAGE meeting. His brother, a data scientist, also attended SAGE meetings alongside Dominic Cummings, a move which has been highly criticised.

Google also revealed that its DeepMind executive Demis Hassabis sat in on the SAGE meeting where lockdown measures were debated on 18<sup>th</sup> March. This is despite Hassabis having overseen an unlawful NHS data grab, where DeepMind unlawfully received the sensitive, identifiable patient data of over 1.6 million people without their knowledge or consent.<sup>267</sup>

These attendances require explanation.

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267 Anger as Google artificial intelligence expert is invited to secretive 'Sage' meeting five years after his firm's involvement in data breach over the unlawful use of 1.6 million patient records from the NHS – David Wilcock, Jack Maidment and Ross Ibbetson, Daily Mail, 30<sup>th</sup> April 2020: <https://www.dailymail.co.uk/news/article-8275395/Anger-Google-artificial-intelligence-expert-invited-secretive-Sage-meeting.html>



## IMMUNITY CERTIFICATES

In our April review, we reported on the Health Secretary's "strong interest" in immunity certificates and the WHO's evidence brief against them.<sup>268</sup>

The Government has not announced any further plans to use so-called 'immunity passports'. Matthew Gould told the Science and Technology Committee that NHSX were at the "very early stages" of looking at proposals. As John Redwood MP warned:

*"The right to work cannot become a macabre lottery whereby people have to prove that they have had a certain illness before they have the right to return to their job."*<sup>269</sup>

We urge NHSX and Ministers to follow the guidance of the WHO and immunology experts and be mindful of the complex human rights risks associated with such a scheme.

Amid reports that some countries are using facial recognition technology to track infected people,<sup>270</sup> and with biometric surveillance companies marketing their services to governments across the world, there are concerns that a similar approach might be taken in the UK.<sup>271</sup> Darren Jones MP asked Matthew Gould to confirm that NHSX was not considering the use of facial recognition technology for immunity tracking purposes. While Gould said he was not currently considering this, he refused to rule it out, despite being pressed again by the Committee's Chair, Greg Clark.

We have long raised serious concerns over the accuracy of facial recognition technology and its implications for human rights.<sup>272</sup> NHSX should confirm that this invasive technology will not be used in any compulsory way all as part of public health measures.

### 'Health certificates'

The Government has now suggested, instead of an 'immunity passports', that some form of "system of certification" (also referred to as 'health certificates') could be issued to

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268 Emergency Powers & Civil Liberties Report, April 2020 – Big Brother Watch, p.80: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>

269 HC Deb (4<sup>th</sup> May 2020) vol. 675, col. 457: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

270 Russia uses facial recognition to tackle Covid-19 – Sarah Rainsford, BBC News, 4<sup>th</sup> March 2020: [https://www.bbc.com/news/video\\_and\\_audio/headlines/52157131/coronavirus-russia-uses-facial-recognition-to-tackle-covid-19](https://www.bbc.com/news/video_and_audio/headlines/52157131/coronavirus-russia-uses-facial-recognition-to-tackle-covid-19)

271 Controversial tech company pitches facial recognition to track COVID-19 – Jacob Ward, NBC News, 28<sup>th</sup> April 2020: <https://www.nbcnews.com/now/video/controversial-tech-company-pitches-facial-recognition-to-track-covid-19-82638917537>

272 For example, see Face Off – Big Brother Watch, May 2018: <https://bigbrotherwatch.org.uk/campaigns/stop-facial-recognition/report/>

those who have previously had the coronavirus.<sup>273</sup> While health certificates may not promise immunity, many of the privacy and discrimination concerns are the same. This could easily be a roadmap to digital health IDs and growing health surveillance. In the House of Lords, the Earl of Clancarty warned that health certificates could be “socially divisive and foster prejudice if they were valued by employers.”<sup>274</sup>

**RECOMMENDATION 17: We urge Ministers to release any plans for so-called health certificates and to make it clear what the scientific basis is for any such certificates.**

## Health data

Health data is classified as ‘special category data’ under the GDPR and Data Protection Act and so requires additional protection.

The ICO has stated that employers may collect and store data about their employees’ COVID-19 status as it meets the ‘legitimate interest’ test but that they should carry out a DPIA to ensure that risks are accounted for and that the collection is necessary and proportionate.

The ICO’s advice recommends ‘safeguards’ that are wholly insufficient on any reading. Professor Lilian Edwards, Chair of Law, Innovation and Society at Newcastle University, noted that “what it makes clear is that [data protection law] presents [very] few barriers to workplace surveillance.”<sup>275</sup> We share her concerns and believe the introduction of stronger safeguards against any workplace surveillance, particularly regarding health, would be urgently needed.

## Immunity research

Professor Danny Altmann, Professor of Immunology at Imperial College London and Spokesperson for the British Society for Immunology, reiterated the advice of the WHO to the Science and Technology Committee, explaining that an antibody test “offers you no conclusion whatsoever about whether you’d be immune” to coronavirus.<sup>276</sup> The antibody tests should not be mistaken for conclusive evidence that an individual is safe

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273 Immunity forms planned for coronavirus survivors – Chris Smyth and Tom Whipple, The Times, 22<sup>nd</sup> May 2020: <https://www.thetimes.co.uk/article/immunity-forms-planned-for-coronavirus-survivors-6gz0szlhw>

274 HL Questions (18<sup>th</sup> May 2020) vol. 803, col. 899: <https://hansard.parliament.uk/lords/2020-05-18/debates/1AEBA78C-1807-46CB-BDC9-73937A380A9A/Covid-19NHSCocontactTracingApp>

275 Lilian Edwards, Twitter, 21<sup>st</sup> May 2020: <https://twitter.com/lilianedwards/status/1263399479136452608?s=20>

276 UK Science, Research and Technology Capability and Influence in Global Disease Outbreaks (Oral evidence session) – Science and Technology Commons Select Committee, 28<sup>th</sup> April 2020: <https://committees.parliament.uk/event/837/formal-meeting-oral-evidence-session/>

from being re-infected with coronavirus. The risk of giving individuals a false sense of immunity could be a great threat to public health.

**RECOMMENDATION 18: 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.**

## PROJECT OASIS

Around 19<sup>th</sup> May, NHSX revealed Project OASIS – a project to gather data from third-party apps that track coronavirus symptoms.<sup>277</sup> This is in partnership with jHub, the UK military’s technology innovation body that specialises in AI and data analytics, whose role is to “receive and review” the data from the apps before passing it on NHSX.<sup>278</sup> As well as symptom data, jHub and NHSX will also receive demographic data.

There are seven third-party apps which collect and share data on coronavirus symptoms with the NHS: Agitate Ink C-19, Connected Cognition, Corona-Help.UK, Evergreen Life, Let’s Beat COVID-19, TrackTogether, and Your.MD. It is unclear whether users of all of these apps are aware that their data is being shared with both jHub and NHSX.

- Agitate Ink C-19 is specifically for tracking Covid-19 and explicitly states on its website that it shares data with NHS
- Connected Cognition is an app developer that tracks symptoms and states that it is a data supplier to the NHS
- Corona-Help.UK is specifically for tracking Covid-19 and explicitly states on its website that it shares data with NHS
- Evergreen Life is a wellness app that produces a ‘heatmap’ of Covid-19
- Let’s Beat COVID-19 is developed by Leeds University Institute of Data Analytics and states that it works with the NHS
- TrackTogether is a symptom tracker developed by several American universities to track symptoms of Covid-19, and states that it shares data with NHS
- Your.MD is a general health app and does not make it clear to users that health data is being shared with NHS

While an NHSX spokesperson stated that data collected and analysed by Palantir and Faculty (the COVID-19 datastore) is being held and processed on different sites, they “didn’t expressly rule out that the data could be fed into this model.”<sup>279</sup>

**RECOMMENDATION 19: Users of health tracking apps should be fully informed if their data is shared with jHub or NHSX under Project OASIS. NHSX should provide clearer explanation as to the use of data collected under Project OASIS.**

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277 Project OASIS – NHSX: <https://www.nhsx.nhs.uk/covid-19-response/data-and-information-governance/project-oasis/> [accessed 21<sup>st</sup> May]

278 jHub support NHSX to securely share COVID-19 symptom data – Ministry of Defence, 19<sup>th</sup> May 2020: <https://www.gov.uk/government/news/jhub-support-nhsx-to-securely-share-covid-19-symptom-data>

279 NHS collecting third party app data to map Covid-19 threat – Laurie Clarke, NS Tech, 18<sup>th</sup> May 2020: <https://tech.newstatesman.com/coronavirus/nhs-third-party-app-data-covid-19-threat>

## GCHQ

GCHQ has been granted new powers to access data from the NHS's IT systems, via a Directive as of 4<sup>th</sup> April 2020.

The NHS must consent to the disclosure of "any information relating to the security of any network and information system held by or on behalf of the NHS or a public health body" to GCHQ, until the end of the year."<sup>280</sup> A "network or information system" includes all electronic communications networks, data processing devices and "digital data stored, processed, retrieved or transmitted" on either of these. This represents virtually all data held by the NHS - a massive store of our most sensitive and personal information.

While the Directions frame this as a way "to ensure those systems continue to function to support the provision of services intended to address coronavirus and COVID-19," the scope of the directions are very broad. A spokesperson for the National Cyber Security Centre stated: "We have no desire to receive any patient data."<sup>281</sup> Assurances that GCHQ does not want to collect patient data are not enough, especially when there is a long history of secretive data collection from intelligence agencies that has violated the law.

**RECOMMENDATION 20: The Intelligence and Security Committee should be urgently convened. The ISC should report on activity conducted under the GCHQ Directive in six months and report to Parliament.**

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280 The Consent to Activities Related to the Security of NHS and Public Health Services Digital Systems (Coronavirus) Directions 2020:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/879049/Security\\_of\\_NHS\\_and\\_Public\\_Health\\_Services\\_Digital\\_Systems\\_Coronavirus\\_Directions\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879049/Security_of_NHS_and_Public_Health_Services_Digital_Systems_Coronavirus_Directions_2020.pdf)

281 Hancock grants GCHQ powers over NHS IT systems – Nick Carding, HSJ, 29<sup>th</sup> April 2020,  
<https://www.hsj.co.uk/technology-and-innovation/hancock-grants-gchq-powers-over-nhs-it-systems/7027528.article>

## INVESTIGATORY POWERS

A Regulation to expand the number of Government agencies that can obtain communications data under the Investigatory Powers Act has been laid before Parliament.<sup>282</sup>

This would increase the number of Government agencies that can access sensitive communications data to over fifty, with the Civil Nuclear Constabulary, the Environment Agency, the Insolvency Service, the UK National Authority for Counter Eavesdropping and the Pensions Regulator all receiving access to communications data. The reasoning provided for this is that agencies “are increasingly unable to rely on local police forces to investigate crimes on their behalf” according to the accompanying memorandum.<sup>283</sup> What was once supposed to be an extraordinary power has been expanded to become a commonplace surveillance tool for the most minor government agencies.

In an open letter to the Prime Minister, Big Brother Watch and ten other civil liberties and digital rights organisations queried why the Government has decided that now is the time to widen already extreme surveillance powers, warning “the proposal uses the pandemic to set course for mission creep with minimal scrutiny.”<sup>284</sup>

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282 The Investigatory Powers (Communications Data) (Relevant Public Authorities and Designated Senior Officers) Regulations 2020

283 Memorandum explaining purpose and effect of the Investigatory Powers (Communications Data) (Relevant Public Authorities and Designated Senior Officers) Regulations 2020: [http://www.legislation.gov.uk/ukdsi/2020/9780111195499/pdfs/ukdsiod\\_9780111195499\\_en.pdf](http://www.legislation.gov.uk/ukdsi/2020/9780111195499/pdfs/ukdsiod_9780111195499_en.pdf)

284 Letter to the UK Prime Minister, Rt Hon Boris Johnson, Prime Minister – Big Brother Watch et al, 20<sup>th</sup> May 2020: <https://www.article19.org/wp-content/uploads/2020/05/Open-letter-UK-final.pdf>

## **THERMAL SURVEILLANCE**

Thermal surveillance is currently being trialled at the immigration hall in Heathrow Airport Terminal 2 and Bournemouth Airport. It is also being used at workplaces including Amazon UK's fulfilment centres. It is being trialled on a voluntary basis at the BBC's New Broadcasting House in London.

We have written letters to Heathrow Airport, Bournemouth Airport and Amazon UK to raise concerns and request further information.<sup>285</sup> Thermal surveillance poses a major threat to fundamental rights, is likely to breach data protection law and presents few proven benefits (as well as risks) to public health.

Thermal imaging cameras represent a worrying surveillance creep in the UK and provide little more than security theatre at a serious cost to rights. In particular:

- the impact on individuals' privacy rights is profound, yet appears not to have been assessed,
- the impact on individuals' data protection rights is serious, yet impact assessments are not publicly available,
- there is no available information as to the accuracy, necessity and proportionality of these companies' use of thermal surveillance,
- the ability of the surveillance measure to meet the purported aim, and therefore its utility, is not supported by scientific evidence and could even be counter-productive,
- the consequential impact on fundamental rights and freedoms, including freedom of movement and employment rights, is serious yet unaccounted for, and
- there are no clear safeguards to prevent the normalisation and endurance of this extended surveillance apparatus.

### **Privacy and data protection**

Thermal imaging is a particularly intrusive form of surveillance that incurs a novel and serious loss of personal and collective privacy. The use of these cameras engages individuals' right to privacy, protected by Article 8 of the European Convention on Human Rights (ECHR). They reveal individuals' bodies, and generate sensitive data

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<sup>285</sup> The letters will be made available on the 'Emergency Powers' page of our website.

about them, in a manner that is not ordinarily publicly visible. They could expose features that individuals may seek to conceal (e.g. prosthetic limbs). Thermal cameras are a lurch towards pervasive monitoring of sensitive health data and represent a major extension of public surveillance apparatus.

Thermal surveillance engages individuals' rights under the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA).

### *Personal data*

Heathrow Airport's press release of 21<sup>st</sup> May 2020 stated "No personal data will be stored or shared through these trials".<sup>286</sup> This gives the impression that personal data is not involved. Whilst it may not presently be stored or shared, personal data is in fact generated, collected and analysed by their use of the cameras. In fact, thermal imaging involves the generation, collection and analysis of personal data that pertains to our bodily state and health. Cameras are directed at individuals with the aim of evaluating their physiological state.

According to a press release by Bournemouth Airport's technology provider, SCC – which is the only primary source of information about their use of the technology – thermal cameras are currently "mounted on a tripod in the staff entrance".<sup>287</sup> Furthermore, the press release continues, "the next deployment phase will see the introduction of a multi-camera system, positioned at each entry point across the airport's terminal building, in departures and arrivals."

This is in an environment where passengers and staff are all identified, and facial biometrics are also in use. Since it is possible in this environment to identify, even subsequently, data subjects – and indeed the aim appears to be to connect thermal data to identified individuals – the data generated by thermal cameras is personal data as defined by Article 4(1) GDPR and s.3(2) DPA. Where infrared data is processed as health data, it is special category personal data as defined by Article 9 GDPR, which requires special safeguards. We have asked for details of any safeguards in place.

### *Profiling*

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286 Temperature screening trial launch – Heathrow Airport, 21 May 2020: <https://www.heathrow.com/latest-news/temperature-screening-trial-launched-at-heathrow>

287 SCC helping businesses bounce back from COVID-19 crisis with Thermal Fever Detection technology – SCC, 30 April 2020: <https://www.scc.com/insights/news/scc-news/scc-helping-businesses-bounce-back-from-covid-19-crisis-with-thermal-fever-detection-technology/>



Furthermore, Heathrow Airport's use of thermal surveillance is profiling passengers. On their website's FAQ on thermal screening, they reveal:

*"We will also log the following information: gender, age groups (child, teenager, adult, elderly), if the passenger was moving at pace or not, if the passenger was wearing a face mask or headwear as well as well as other generic information which may cause a person to have an elevated temperature such as 'passenger was carrying a cup of tea'".<sup>288</sup>*

We have asked Heathrow to clarify what other "generic information" they are collecting and to provide an exhaustive list of the data they are collecting about individuals via this screening.

The combination of this detailed data further increases the ability of a data controller to identify the individual – the data is plainly personal data as defined by Article 4(1) GDPR and s.3(2) DPA. In particular, the software Heathrow Airport is using is profiling individuals, as defined by Article 4(4) GDPR, which is "any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person" to analyse or predict aspects concerning that person's "health, personal preferences" or "behaviour, location or movements". It is deeply concerning that this profiling is opaque and non-consensual – there appears to be no public signage or explicit consent process at Heathrow Airport around this intrusive surveillance.

### *Right of access*

Heathrow Airport's insistence that no personal data is collected appears to have resulted in yet another denial of passengers' data protection rights – right of access to data, protected by Article 15 GDPR. In their website's FAQ on thermal screening, it states "you will not be able to access images or your personal temperature information" because "we are not collecting any information that would identify an individual as part of this trial."<sup>289</sup> However, they are collecting moving images of people, skin temperature readings, gender, age, clothing, movement information and more, which in combination is clearly personal data. Data subjects have a legal right to access this information. Just as individuals have a right to access CCTV data about them, they also have the legal right to access data collected via this thermal surveillance. That right cannot be denied.

We have asked Heathrow Airport if they will rectify this.

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<sup>288</sup> Coronavirus update, Temperature screening trials FAQ – Heathrow: <https://www.heathrow.com/customer-support/faq/coronavirus-covid-19> (accessed 23 May 2020)

<sup>289</sup> Coronavirus update, Temperature screening trials FAQ – Heathrow: <https://www.heathrow.com/customer-support/faq/coronavirus-covid-19> (accessed 23 May 2020)

### *Automated decisions*

The thermal data may, in future, be used to make decisions, which could be automated or based on this profiling and significantly affect the individual. Automated decisions by corporations that incur significant effects for individuals are ordinarily prohibited by s.14 DPA and Article 22 GDPR and at the very least would require extra safeguards.

Heathrow Airport's website FAQ states that "a subsequent phase" of their use of thermal surveillance may involve "escalations to healthcare professionals".<sup>290</sup> Similarly, SCC's press release about Bournemouth Airport's use of their technology states that next "deployment phase" is aimed at "enabling border staff to intercept any passengers showing signs of a high temperature."<sup>291</sup>

We have asked both Heathrow and Bournemouth Airports to provide full plans of these subsequent "phases" including the legal\_bases, a full decision tree of what the consequences may be if an individual is flagged as having an elevated temperature, and to explain how and by whom those decisions may be made.

### *DPIA*

At a minimum, a data protection impact assessment (DPIA) would need to be completed for any lawful use of thermal surveillance, as required by Article 35 GDPR. This is because the data processing is likely to result in a high risk to the rights and freedoms of data subjects; the processing involves a systematic evaluation of personal data and may qualify as profiling; the data may result in decisions that significantly affect individuals; the surveillance involves large-scale processing of sensitive (special category) data pertaining to individuals' health; and the surveillance constitutes systematic monitoring of a publicly accessible area on a large scale.

A DPIA should describe the processing in detail, including the purpose, and an assessment of the necessity, proportionality, why less intrusive means are insufficient, risks to individuals' rights and freedoms, and the measures taken to address the risks and ensure individuals' legal rights are protected.

We have been unable to find DPIAs for any of the companies' use of thermal surveillance – neither Bournemouth Airport nor Amazon UK even have information about it on their websites at all – and we have requested copies in writing.

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290 Coronavirus update, Temperature screening trials FAQ – Heathrow: <https://www.heathrow.com/customer-support/faq/coronavirus-covid-19> (accessed 23 May 2020)

291 Ibid.

### *Facial recognition thermal surveillance*

We are particularly concerned to learn that Heathrow Airport is considering the rollout of “facial recognition thermal screening technology”.<sup>292</sup>

Facial recognition surveillance is an intrusive form of monitoring that is subject to legal challenge in the UK. Any non-consensual use of thermal surveillance in the UK is also likely to be subject to a legal challenge. The cumulative effect of these invasive monitoring technologies combined is particularly serious for individuals’ fundamental rights and could pave the way for pervasive, identifiable health monitoring of citizens, yet there is no scientific evidence to suggest this benefits public health.

The non-consensual gathering of sensitive biometric, physiological and “health” data by corporations is unacceptable and highly likely to be unlawful. We have urged Heathrow Airport to seek legal advice, as well as scientific and ethical guidance, before considering such dangerous plans any further.

### *Limited accuracy and utility*

One important consideration as to the lawfulness of any use of thermal surveillance cameras is the accuracy of the data generated and collected. Data collected must be accurate (Article 5(1)(d) GDPR) but the accuracy of thermal imaging, particularly in the present application, is unclear.

This technology is being applied as a novel surveillance method that is unproven in a public health context. During a seasonal flu epidemic, a New Zealand study found airport thermal scanners were “not much better than chance” at identifying infected travellers.<sup>293</sup> During the SARS epidemic, 763,082 passengers were screened by thermal scanners in Toronto and Vancouver airports, but failed to identify a single case.<sup>294</sup>

Since the onset of the present pandemic, some commercial vendors have professed that their thermal cameras screen for signs of fever – a known symptom of the novel coronavirus. Unscrupulous surveillance and security companies are selling thermal imaging devices in the UK with marketing slogans such as “fever detection”. As a result,

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292 Heathrow COVID-19 detection trials – Heathrow Airport, 6 May 2020: <https://www.heathrow.com/latest-news/heathrow-covid19-detection-trials>

293 Priest PC, Duncan AR, Jennings LC, Baker MG (2011) Thermal Image Scanning for Influenza Border Screening: Results of an Airport Screening Study. PLoS ONE 6(1): e14490. <https://doi.org/10.1371/journal.pone.0014490>

294 St John, R. K., King, A., de Jong, D., Bodie-Collins, M., Squires, S. G., & Tam, T. W. (2005). Border screening for SARS. *Emerging infectious diseases*, 11(1), 6–10. <https://doi.org/10.3201/eid1101.040835>

the independent camera review site IPVM describes a “booming multi-million coronavirus fever camera market.”<sup>295</sup> **However, thermal cameras cannot detect fevers.**

### *How thermal imaging works*

Thermal cameras detect radiated infrared energy from the surface of a solid object (in this case, skin surface of either the face or the entire body) and the software converts this to an estimated temperature reading. The temperature reading of each pixel is associated with a colour to provide a visual representation of this estimation. The accuracy of the reading depends on many environmental and detector factors, including whether the camera and subject are still or not, whether the face or entire body is scanned, positioning, the pixel resolution of the camera, spatial resolution, emissivity, temperature drift, and detector and system noise. One major thermography vendor, MoviTHERM, advises that thermal images of crowds do not provide accurate readings of elevated body temperatures.<sup>296</sup> The camera review site IPVM described it as a “core issue” that there are “no independent tests of thermal camera performance/accuracy and no independent standards to measure against”, and in its own independent reviews found that companies’ claims to accuracy were “overinflated”.<sup>297</sup> MoviTHERM considers that thermal cameras have a +/- 2 degrees Celsius error margin.<sup>298</sup> Whilst this may be negligible in many commercial applications of the technology, it seriously undermines efficacy when applied to attempt to detect the small temperature discrepancies that indicate an elevated core body temperature or fever. Thermal imaging cameras detect infrared energy from skin surface, which is not an accurate indicator of core body temperature.<sup>299</sup> Core body temperature must be measured (e.g. with an oral thermometer) to accurately detect a fever.

We have asked Heathrow Airport and Amazon UK what software they use. We have asked both airports and Amazon UK to describe their software’s claimed accuracy in detecting core body temperature, the threshold at which they set thermal imaging cameras to flag an individual, and how this threshold was arrived at.

### *Other reasons for a temperature*

A number of factors, other than the potential of infection with Covid-19, affect skin temperature. Skin temperature fluctuates with the diurnal cycle and is affected by acclimatisation, stress, anxiety, alcohol and various other conditions. Skin temperature

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295 The Booming Multi-Billion Coronavirus Fever Camera Market - John Honovich and Charles Rollet, IPVM, 21 April 2020: <https://ipvm.com/reports/corona-cam-market>

296 Elevated Body Temperature Screening – MoviTHERM, YouTube, 16 April 2020: <https://www.youtube.com/watch?v=kBrBlohq9gg>

297 Detecting coronavirus fevers with thermal cameras – IPVM, 15 March 2020: <https://ipvm.com/reports/thermal-wuhan>

298 Elevated Body Temperature Screening – MoviTHERM, YouTube, 16 April 2020: <https://www.youtube.com/watch?v=kBrBlohq9gg>

299 Ng EY. Is thermal scanner losing its bite in mass screening of fever due to SARS?. *Med Phys*. 2005;32(1):93-97. doi:10.1118/1.1819532

also fluctuates with the menstrual cycle and can be affected by menopause, raising the possibility of particular impact of unskilled thermal screening on women. A raised skin temperature can also result simply from physical exertion, or a fever caused by any number of infections unrelated to Covid-19.

#### *Limited benefits of temperature screening for Covid-19*

Even accurate temperature screening has limited efficacy in screening for Covid-19. This is due to the incubation period and proportion of asymptomatic infections. A substantial proportion of Covid-19 infections are thought to be asymptomatic.<sup>300</sup> The World Health Organisation (WHO) recently advised that:

*“temperature screening alone may not be very effective as it may miss travellers incubating the disease or travellers concealing fever during travel, or it may yield false positive [sic]”.*<sup>301</sup>

Similarly, epidemiologists from the Centre for the Mathematical Modelling of Infectious Diseases (CMMID) nCoV working group concluded:

*“Due to the duration of the incubation period of 2019-nCoV infection, we find that exit or entry screening at airports for initial symptoms, via thermal scanners or similar, is unlikely to prevent passage of infected travellers into new countries or regions.”*<sup>302</sup>

#### *Economic benefits and health risks of false confidence*

The European Centre for Disease Prevention and Control (ECDC) has also cautioned against thermal screening in airports, warning that the measure is not supported by scientific evidence.<sup>303</sup> On the contrary, the use of thermal cameras may give people a false sense of security which could lead to more risky behaviours and worsen public health.

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300 Quilty Billy J, Clifford Sam, CMMID nCoV working group2, Flasche Stefan, Eggo Rosalind M. Effectiveness of airport screening at detecting travellers infected with novel coronavirus (2019-nCoV). Euro Surveill. 2020;25(5):pii=2000080. <https://doi.org/10.2807/1560-7917.ES.2020.25.5.2000080>

301 Key considerations for repatriation and quarantine of travellers in relation to the outbreak of novel coronavirus 2019-nCoV – WHO, 11 February 2020: <https://www.who.int/news-room/articles-detail/key-considerations-for-repatriation-and-quarantine-of-travellers-in-relation-to-the-outbreak-of-novel-coronavirus-2019-ncov>

302 Quilty Billy J, Clifford Sam, CMMID nCoV working group2, Flasche Stefan, Eggo Rosalind M. Effectiveness of airport screening at detecting travellers infected with novel coronavirus (2019-nCoV). Euro Surveill. 2020;25(5):pii=2000080. <https://doi.org/10.2807/1560-7917.ES.2020.25.5.2000080>

303 Coronavirus screening at airports: the problem with thermal detection – Abi Millar, Airport Technology, 14 April 2020: <https://www.airport-technology.com/features/coronavirus-screening-at-airports/>

Indeed, Heathrow Airport’s online FAQ on thermal screening states, “[we] believe these initial measures will provide added passenger confidence”.<sup>304</sup>

Meanwhile, SCC quotes Bournemouth Airport’s Managing Director as saying that thermal surveillance is being used with a view to “instilling confidence across the sector” so they can “begin planning to reopen for business safely”.<sup>305</sup> SCC’s Chief Executive is quoted as saying that the company’s “Thermal Fever Detection solution” is aimed at “helping companies regain consumer confidence and begin to recover from the most unprecedented economic event of modern times”.<sup>306</sup>

However, in a pandemic, misplaced confidence deriving from surveillance marketing rather than scientific evidence endangers public health.

The financial incentives are clear. SCC’s press release about the surveillance expansion at Bournemouth Airport is titled “SCC helping businesses bounce back” and focuses on the need to “demonstrate that proactive measures are in place” in order to “reopen for business”.<sup>307</sup> SCC even claims a further benefit of thermal screening is that it could “remov[e] the requirement to undersell occupancy to enable social distancing on flights”.<sup>308</sup> Everyone wants the economy and travel sector to “bounce back” but this will not be possible on the back of unevidenced surveillance solutionism that gives corporations the confidence to cut corners and endanger public health.

### *Legitimate purpose*

In light of the evidence, it is questionable whether there is a legitimate purpose for these companies’ use of thermal surveillance cameras and whether it could be considered necessary or proportionate.

As acknowledged in Heathrow Airport’s press release, “Current expert advice suggests that temperature checks at UK airports are not required”<sup>309</sup> - but Heathrow and Bournemouth Airports have opted to “trial” thermal surveillance nonetheless. An experimental trial, which usually requires fully informed participants who provide explicit

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304 Coronavirus update, Temperature screening trials FAQ – Heathrow: <https://www.heathrow.com/customer-support/faq/coronavirus-covid-19> (accessed 23 May 2020)

305 Protect your employees and customers – SCC: <https://www.scc.com/stronger-together/thermal-screening/> (accessed 23 May 2020)

306 SCC helping businesses bounce back from COVID-19 crisis with Thermal Fever Detection technology – SCC, 30 April 2020: <https://www.scc.com/insights/news/scc-news/scc-helping-businesses-bounce-back-from-covid-19-crisis-with-thermal-fever-detection-technology/>

307 Ibid.

308 Ibid.

309 Temperature screening trial launch – Heathrow Airport, 21 May 2020: <https://www.heathrow.com/latest-news/temperature-screening-trial-launched-at-heathrow>

consent and can opt out with all data deleted, is unlikely to satisfy the legal test of a legitimate, necessary and proportionate purpose for intrusive surveillance.

We have asked the companies to detail their necessity and proportionality assessments, and explain the evidence basis for their use of thermal surveillance.

### *Serious rights impact*

There are serious consequential effects of thermal surveillance cameras on fundamental rights beyond privacy that significantly impact employment, freedom of movement and other rights. This is particularly the case if individuals do not have an opportunity to opt in or opt out of thermal screening without prejudice. The potential impact of the use of this technology on individuals' rights, freedoms and economic security, as well as the purported public health benefits, must be assessed and shown not to be harmful before its use is pursued.

### *Consent*

It is important that any operator of thermal screening is clear as to whether it is mandatory or based on consent. To that end, we refer to the Surveillance Camera Commissioner's advice on 21<sup>st</sup> April 2020: "it might be proportionate to use [thermal imaging] technology in the unique times we are in (...) where individuals have given consent" but "mass use without individuals' knowledge seems disproportionate and would require much stronger justification."<sup>310</sup>

Heathrow Airport's online FAQ on thermal screening states, "During the trial you can opt to take a different route that does not pass the cameras if you wish – please speak to our colleagues who will happily support you in this."<sup>311</sup> However, from photos we have seen, it is not clear that this information is made readily available to passengers in the immigration hall. In any event, this would suggest that consent is not fully informed, freely given or explicit, and that opting out incurs inconvenience.

We have asked the companies if their use of thermal imaging is based on consent, and if so for them to demonstrate that consent is fully informed, explicit and freely given, and that there are no adverse consequences for those who decline.

Given the extraordinary circumstances, we should be open to a diversity of measures that make even a small impact on protecting public health. However, measures that

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310 Surveillance and COVID-19: Lessons to be learnt – Tony Porter, Surveillance Camera Commissioner, 21 April 2020: <https://videosurveillance.blog.gov.uk/2020/04/21/surveillance-and-covid-19-lessons-to-be-learnt/>

311 Coronavirus update, Temperature screening trials FAQ – Heathrow: <https://www.heathrow.com/customer-support/faq/coronavirus-covid-19> (accessed 23 May 2020)

engage fundamental rights must be proportionate and moreover, measures must not be counter-productive, waste resources, diminish public trust, create a false sense of security or have an adverse impact on individuals. All of these risks apply to thermal imaging cameras.

**RECOMMENDATION 21: We urge all companies, authorities and institutions to immediately cease use of thermal surveillance, absent a strong evidence base and robust safeguards.**



## FREEDOM OF EXPRESSION

### Free speech online

In our April report, we analysed the UK's new 'Rapid Response Unit' which aims to "tackle harmful narratives" online, and the new content policies adopted by social media companies to further limit the confines of free expression on their platforms. We also reported that we had written to the Government and the social media companies to raise serious concerns. We have now received replies and will make them public on our 'Emergency Powers' webpage soon. Unfortunately, the responses do not engage substantively with our concerns at all.

### DCMS

Oliver Dowden, the Secretary of State for the Department of Culture, Media and Sports (DCMS) stated on 27<sup>th</sup> April that the newly formed "cross-Whitehall Counter Disinformation Unit is providing a comprehensive picture of disinformation and misinformation on Coronavirus." In our previous report, we called for increased scrutiny around the workings of this unit. Despite their response to our letter, there is still little information on who is part of it, how they are collecting information and what they are doing with it.

Demonstrating ministerial pressure put on private companies to censor lawful information, the Culture Secretary said:

*"I have engaged personally with social media platforms, which have made technical and policy changes to stem the spread of misinformation. For example, YouTube now removes content that denies the existence of covid-19 or contradicts NHS information, and WhatsApp has reduced the number of contacts to whom a message can be forwarded."*<sup>312</sup>

Dowden described how he is pressing social media platforms to increase measures aimed at removing disinformation:

*"Most platforms have taken positive steps to curtail the spread of harmful and misleading narratives related to covid-19. However, when I spoke to the platforms earlier this month I made it clear that they need to explore how they can further limit the spread of misinformation. (...) Since then, Facebook has announced that it will show in its newsfeed the messages to anyone who has interacted with a post that*

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312 HC Oral Answers to Questions, vol. 675, col. 97, 27<sup>th</sup> April 2020:  
<https://hansard.parliament.uk/Commons/2020-04-27/debates/9428647E-F5FC-40A2-83D4-5AF76D056036/OralAnswersToQuestions>

*has since been removed. That sort of work needs to continue at pace across all platforms.*<sup>313</sup>

As we have previously stressed, however well-intended, censoring lawful speech is dangerous and it is particularly dangerous when resulting from the wishes of ministers.

Without a legal definition or proper scrutiny of what constitutes disinformation, there is a dangerous and very real possibility that content which contradicts Government advice could be subject to limitation or censorship.

### *Social media companies*

A Facebook group called “UK Freedom Movement” organised a series of protests across the country against the UK’s lockdown measures. The group claimed they had organised protests in over 60 locations for 16<sup>th</sup> May.<sup>314</sup> Damian Collins MP appears to have written to Facebook to urge the company to remove the posts on or around 13<sup>th</sup> May.

On 15<sup>th</sup> May, he tweeted that he had received a reply from Facebook explaining that the Facebook group had now been removed and the protest posters “banked” so they can be automatically detected and removed if posted anywhere on Facebook or Instagram.

Damian

Thank you again for flagging this to us. We have actioned all the violating comments and removed the group ‘UK Freedom Movement’.

We have also banked the images of these posters to help our automated systems detect and remove them immediate if they are shared elsewhere on either Facebook or Instagram.

Rebecca

Rebecca Stimson | Head, Public Policy  
10 Brock St, London, NW1 3FG  
mobile: [REDACTED]  
email: [REDACTED]

FACEBOOK

The implications of this are quite chilling. We urge parliamentarians to exercise great caution before pressuring companies to obstruct individuals’ rights to express dissent.

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313 Ibid, col.98.

314 See photo attached to Damian Collins MP’s tweet, 13<sup>th</sup> May:  
<https://twitter.com/DamianCollins/status/1260577898362212359?s=20>

In this case, it is fair to say that such a gathering would have breached lockdown Regulations. However, freedom of expression is one of the democratic methods by which the rule of law, human rights and equality is protected in a liberal society – even if it constitutes peacefully breaching laws or regulations. When the Metropolitan Police attempted to exercise a ‘Section 14’ protest ban across London to prevent Extinction Rebellion’s “Autumn Uprising”, many politicians rallied in favour of the group – some even joined the protest.<sup>315</sup> In this case, the Section 14 ban was later found to be unlawful. It is important to remember in the current circumstances that there are strong arguments, including from some of the country’s leading legal scholars, that the lockdown Regulations are ultra vires. It is a very real possibility that citizens’ most fundamental rights have been suspended in a manner that is unlawful. Concerned citizens should be able to express dissent and object to the lockdown, particularly online. The duty of politicians is to engage with citizens, listen to their concerns and provide reassurance – not to simply shut them down through extra-judicial pressure levied on private companies.

On 22<sup>nd</sup> April, over 75 technology and civil liberties organisations and academics signed an open letter to social media companies, asking them to ensure that all information on content removal during the COVID-19 pandemic is preserved and published, including information on which takedowns did not receive human review.<sup>316</sup>

**RECOMMENDATION 22: 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.**

**RECOMMENDATION 23: Social media companies should not censor content beyond the limitations on free speech set by domestic law. Platforms should carefully consider the impact of their new content restrictions not only on their PR but on the health of the right to freedom of expression online.**

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315 After 1,600 arrests, Extinction Rebellion fights for right to protest in UK – Natalie Sauer, Climate Home News, 16<sup>th</sup> October 2019: <https://www.climatechangenews.com/2019/10/16/1600-arrests-extinction-rebellion-fights-right-protest-uk/>

316 Coronavirus: 75 organisations call on social media platforms to preserve, publish content moderation data – Article 19, 22<sup>nd</sup> April 2020, <https://www.article19.org/resources/coronavirus-75-organisations-call-on-social-media-platforms-to-preserve-publish-content-moderation-data/>

## Freedom of expression and assembly

Peaceful protestors have faced criminalisation under the lockdown Regulations, as protesting is not listed as a 'reasonable excuse' to be outside of one's home. However, police have shown mixed approaches to protests across the country, with some being allowed, some being dispersed, and some leading to arrests and fines for the participants.

On 4<sup>th</sup> May, a small demonstration outside Westminster Magistrates' Court against the extradition of Julian Assange was dispersed by police officers. As the hearing finished, the demonstrators (who were "many metres apart" from one another) and journalists (who are designated key workers) were all "aggressively shooed away" according to one reporter.<sup>317</sup> On the same day, protesters against HS2 in Euston were confronted by police and told they would be arrested "for breaching the COVID conditions" if they did not disperse.<sup>318</sup> Protestors at both of these sites were following social distancing, whilst many wore masks.

On 9<sup>th</sup> May, a group protesting the lockdown measures was dispersed in London, with some arrests made and fines issued.<sup>319</sup> In a video taken of the protests, a police officer referred to Schedule 21 of the Coronavirus Act as the power by which he was ordering people to disperse.<sup>320</sup> As we have emphasised in our reports, Schedule 21 only refers to "potentially infectious" persons and should not ordinarily be used without the authority of a public health official, as explained in police guidance.<sup>321</sup> Whilst protestors may have been violating the lockdown Regulations, they were not violating the Coronavirus Act. Passers-by who stopped to observe the protest were also ordered by police officers to return to their homes.<sup>322</sup>

Also on 9<sup>th</sup> May, an anti-racism demonstration against excessive police force was allowed to go ahead at a Manchester petrol station, after a black man was Tasered twice in front of his young child for speeding.<sup>323</sup> The small group was well spaced and wearing masks.

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317 Mohammed Elmaazi, Twitter, 4th May 2020:

<https://twitter.com/MElmaazi/status/1257272974635393025?s=20>

318 HS2 is Funding a Massive Police Operation amid COVID Crackdown on Right to Protest – Real Media, 6<sup>th</sup> May 2020: <https://realmedia.press/covid-hs2/>

319 Anti-lockdown protest broken up by police in London – Richard Williams, Sky News, 9<sup>th</sup> May 2020:

<https://news.sky.com/story/coronavirus-anti-lockdown-protest-broken-up-by-police-in-london-11985737>

320 14 arrested by police at London anti-lockdown protest – YouTube, 9<sup>th</sup> May 2020 (4:17):

<https://www.youtube.com/watch?v=jsh2p9H0z-w>

321 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>

322 Ibid.

323 Stretford Taser arrest: Campaigners protest at petrol station – BBC News, 10<sup>th</sup> May 2020:

<https://www.bbc.co.uk/news/uk-england-manchester-52598702>

On 16<sup>th</sup> May, as protests were organised across the UK against the lockdown measures, journalist James Delingpole was threatened with arrest for covering a protest. A police officer, after seeing Delingpole's press pass, asked him why he was not displaying it and then told him he would issue the journalist a fine if he did not heed his "advice".<sup>324</sup> At the same protest, nineteen people were arrested and ten fines were issued.<sup>325</sup>

On 30<sup>th</sup> May, Extinction Rebellion activists staged silent, physically-distanced demonstrations across the country. The Metropolitan Police confirmed that a number of the demonstrators were arrested or issued with FPNs. Affected individuals who made contact with Big Brother Watch confirmed that FPNs were issued under Regulation 7, the prohibition on gatherings.<sup>326</sup> It is interesting that Regulation 7 was used rather than 6 (restrictions on freedom of movement) as the demonstrations were socially distanced and thus not incurring many of the risks associated with gatherings during the pandemic. Arguably, this shows that the lockdown Regulations were being used for a public order purpose – that is, to police the protest – which is not the intended purpose of the Regulations.

On 31<sup>st</sup> May, there were solidarity rallies across London, Cardiff and Manchester following the death of George Floyd at the hands of police in the US. Although the demonstrations were peaceful, police made 23 arrests in London including a number under Regulation 7.<sup>327</sup> All 23 were taken into custody. The use of coronavirus restrictions to pick off demonstrators in attempt to chill others is deeply wrong and a waste of police time.

The use of coronavirus Regulations to police peaceful demonstrations concerns us and supports the argument that the Civil Contingencies Act should have been used to govern this period. The Civil Contingencies Act has more robust protections of freedom of assembly, prohibiting restrictions on strikes and industrial action.<sup>328</sup> In the context of authoritarian measures, we believe the right to freedom of expression is one of the most important rights to defend and better protections should be in the emergency laws.

**RECOMMENDATION 24: As lockdown measures begin to ease, we urge the Government to add an exemption on the prohibition of gatherings for those of a political nature and restore the right to peaceful protest as a matter of urgency. In the context of**

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324 Twitter, 16<sup>th</sup> May 2020: <https://twitter.com/SteveRightNLeft/status/1261654384959725568?s=20>

325 19 arrested as anti-lockdown protests take place across country – Faye Brown, Metro, 16<sup>th</sup> May 2020: <https://metro.co.uk/2020/05/16/19-arrested-anti-lockdown-protests-take-place-across-country-12715038/>

326 Extinction Rebellion protestors are hauled away by police after hundreds stage silent socially-distanced climate change rallies across Britain – Jemma Carr, MailOnline, 30<sup>th</sup> May 2020: <https://www.dailymail.co.uk/news/article-8372119/Extinction-Rebellion-stage-silent-socially-distanced-climate-protests-Britain.html>

327 Metropolitan Police, Twitter, 31<sup>st</sup> May 2020: <https://twitter.com/metpoliceuk/status/1267211890612219904?s=20>

328 Civil Contingencies Act 2004 s.23(3)(b): <https://www.legislation.gov.uk/ukpga/2004/36/section/23>

**authoritarian measures, upholding the right to freedom of expression is essential to preserve our democracy.**

### **NHS whistleblowers**

NHS staff have been told by NHS bodies that they should not be speaking publicly about shortages of personal protective equipment (PPE). A memo sent on 26<sup>th</sup> March to A&E staff at Southend Hospital read:

*“The posting of inappropriate social media commentary or the posting of photographs of staff in uniform who are not complying with IPC [infection prevention and control] standards and social distancing requirements is unacceptable. Such behaviour will be considered under the disciplinary policy.”<sup>329</sup>*

The Doctor’s Association UK (DAUK) reports that staff are being told they cannot give interviews to news services and to avoid posting critically on social media. Some staff have faced disciplinary action for raising concerns over PPE, while another was warned in an email from their hospital that their social media accounts were being monitored. DAUK President, Dr Samantha Batt-Rawden, said that “Doctors have a moral duty to make their concerns regarding COVID-19 public if these cannot be resolved locally.”<sup>330</sup>

Whistleblowers UK told the BBC that over 100 NHS staff members have contacted them over PPE concerns.<sup>331</sup> One doctor who had spoken out about PPE shortages said he was brought in front of a senior management panel and told “what felt like government type of lines, saying ‘this hospital has never had PPE shortages’ - which I know to be factually untrue. And that essentially I should stop causing a fuss.” He called the incident “very, very intimidating.” Another doctor told the BBC that they were warned by their manager that they might “find it hard to get a job at that trust or others in the region”<sup>332</sup> if they continued to raise concerns about PPE shortages. However, as the chair of the All-Parliamentary Group on Whistleblowers, Mary Robinson said: “If we don’t listen to the concerns of people on the front line, we don’t have the right tools to deal with issues like PPE shortages.”<sup>333</sup> Denying staff the opportunity to flag serious gaps in healthcare provisions is not only a violation of their freedom of expression, but also a threat to their lives and broader public health. It is thanks to the NHS staff who have continued to raise

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329 NHS staff ‘gagged’ over coronavirus shortages – Denis Campbell, The Guardian, 31<sup>st</sup> March 2020: <https://www.theguardian.com/society/2020/mar/31/nhs-staff-gagged-over-coronavirus-protective-equipment-shortages>

330 Ibid.

331 Doctors ‘told not to discuss PPE shortages’ – Charlie Haynes and James Clayton, BBC News, 15<sup>th</sup> May 2020: <https://www.bbc.co.uk/news/uk-52671814>

332 Ibid.

333 Ibid.

concerns, despite the threats, that the shortage of PPE has become a priority issue for the Government.

Compelling legal analysis from George Letsas and Virginia Mantouvalou suggests that this suppression of free speech may violate both human rights law and labour law.<sup>334</sup> Article 10 of the European Convention on Human Rights protects our right to freedom of expression, and section 6 of the Human Rights Act 1998 makes it unlawful for public authorities (including the NHS) to limit any Convention right. While Article 10 may be restricted in the interest of public health, it is hard to argue that reporting on lack of PPE will endanger public health. In fact, drawing attention to these issues drives policy that better protects public health. The Public Interest Disclosure Act 1998 protects whistleblowers and amends the Employment Rights Act 1996, allowing disclosures that show that "the health or safety of any individual has been, is being or is likely to be endangered."<sup>335</sup>

Nadia Whittome, MP for Nottingham East, returned as a "casual worker" to a care home after the onset of the pandemic but was dismissed after publicly raising concerns about PPE shortages.<sup>336</sup> Whittome said she "condemn[s] care companies who try to gag staff for speaking out and raising concerns" and is collecting examples from other carers of similar incidents.

It is well known that Chinese authorities silenced a Wuhan doctor who attempted to warn colleagues of a novel coronavirus in late 2019.<sup>337</sup> Silencing him is thought to have delayed the country's acceptance of the virus and thus its response, endangering public health. The risks of silencing health staff during a pandemic are extremely significant and must not be tolerated.

**RECOMMENDATION 25: NHS whistleblowers should be protected and staff should be able to publicly raise any concerns they wish. Denying staff the opportunity to flag serious gaps in healthcare provisions is not only a violation of their freedom of expression, but also a threat to their lives and broader public health.**

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334 Is Gagging NHS Workers Lawful? Coronavirus and Freedom of Speech - George Letsas and Virginia Mantouvalou, UK Labour Law, 14<sup>th</sup> April 2020: <https://uklabourlawblog.com/2020/04/14/is-gagging-nhs-workers-lawful-coronavirus-and-freedom-of-speech-by-george-letsas-and-virginia-mantouvalou/>

335 Public Interest Disclosure Act 1998, section 43B(1)(d)

336 Labour MP Nadia Whittome sacked as carer for speaking out about PPE shortages – Nicola Bartlett, Mirror, 6<sup>th</sup> May 2020: <https://www.mirror.co.uk/news/politics/labour-mp-nadia-whittome-sacked-21985519>

337 The Chinese doctor who tried to warn others about coronavirus – Stephanie Hegarty, BBC News, 6<sup>th</sup> February 2020: <https://www.bbc.co.uk/news/world-asia-china-51364382>

## FREEDOM OF INFORMATION

The Information Commissioner's Office (ICO) appears to be delaying the issuing of decision notices on freedom of information challenges in some cases and instead issuing informal decisions, to put off any potential challenges to a decision. This is intended to prevent "undue burden on public authorities and the Tribunal during the Covid-19 pandemic".<sup>338</sup>

On 28<sup>th</sup> April, the Campaign for Freedom of Information reported that the ICO had informally closed a complaint without issuing a decision notice so as to delay any possible challenge. This case related to an FOI request for the Intelligence and Security Committee's (ISC) 2019 report on possible Russian interference in the 2016 Brexit referendum.

The ICO said it would not respond to any request to challenge this at the First-Tier Tribunal "until such time [the Information Commissioner] considers appropriate."<sup>339</sup> It is unclear whether this was an exceptional decision for this case, or whether this is a blanket statement that has been issued to many cases. The Tribunal has already granted the Information Commissioner's request to stay all existing cases for two months in light of new time pressures and it is also able to delay specific cases if necessary. Any further delay should be issued by the Tribunal, not the Information Commission.

In a letter to a lawyer filing a data protection complaint, the ICO seemed to suggest that it would not be taking up new complaints, stating that it had "decided not to take forward any complaints that require organisations to take action or respond to enquiries from us until the situation improves."<sup>340</sup>

Transparency is an essential tenet of any democracy, especially during times of crisis. The ICO cannot hand authorities a blank cheque to use the pandemic as chance to avoid scrutiny.

**RECOMMENDATION 26: It is wrong for the ICO to delay decision notices as a precautionary measure on behalf of other public authorities. The ICO should be performing its full regulatory role, particularly at a time when freedom of information and data protection are vitally needed legal rights.**

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338 Deferring decision notices – Campaign for Freedom of Information, 28<sup>th</sup> April 2020: <https://www.cfoi.org.uk/2020/04/deferring-decision-notice/>

339 Ibid.

340 It looks like the UK's data regulator has given up, blaming coronavirus – Nicole Kobie, Wired, 19<sup>th</sup> May 2020: <https://www.wired.co.uk/article/ico-data-protection-coronavirus>



## COUNCILS

The decisions of local authorities have very tangible effects on our daily lives. Decisions made without proper scrutiny can have serious consequences. However, due to restrictions on gatherings, councillors across the country are pushing through changes to the running of councils that centralise power and limit their democratic accountability. We identify a small selection of examples below.

On 22<sup>nd</sup> April, Lambeth councillors voted in favour of constitutional changes that grant the Chief Executive additional powers. Now, “any function may be exercised” by the Chief Executive regardless of its delegation to an elected representative, where “in the opinion of the [Chief Executive], it is necessary and expedient in the circumstances to do so.”<sup>341</sup> This grants the Chief Executive vast powers, with no justification given or time-limit. Leader of the opposition and Co-Leader of the Green Party, Jonathan Bartley, wrote that “such a move is bad for democracy (...) More than ever [the council] needs scrutiny and to be harnessing as much expertise as it can.”<sup>342</sup> Bartley also questioned whether this power-grab is lawful, as the Monitoring Officer did not comment on the significant changes.<sup>343</sup>

Norwich Council held an online council meeting to decide that it would not hold online council meetings. It stated that “the convening of council meetings will now be considered on a case by case basis” for the next three months.<sup>344</sup> Going forward, decisions will be made by the Committee Chairman. Liberal Democrat councillor Judith Lubbock said “we are not happy at this being left to a few individuals. It is not good for democracy.” Nigel Utton, an independent councillor, called this decision “a dangerous departure from democratic norms.”<sup>345</sup> Since this decision was taken, controversial building plans have been put forward but without a planning committee. The decision will now rest solely with the council Chairman.<sup>346</sup>

Lancashire County Council suspended all council meetings from mid-March, with its first virtual Cabinet meeting being held only on 14<sup>th</sup> May. This nine-week week gap in accountability meant that “a lot of the decision-making has been delegated to the

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341 Constitution of the London Borough of Lambeth – Lambeth Council, 22<sup>nd</sup> April 2020, <https://modern.gov.lambeth.gov.uk/ieListDocuments.aspx?CId=738&MId=13804&Ver=4&Info=1>

342 Councils are using this emergency to shut out democracy – Jonathan Bartley, The Times, 29<sup>th</sup> April 2020, <https://www.thetimes.co.uk/edition/comment/councils-are-using-this-emergency-to-shut-out-democracy-vdr07rwzx>

343 Twitter, Jonathan Bartley, 22<sup>nd</sup> April 2020: [https://twitter.com/jon\\_bartley/status/1253064499894108162?s=20](https://twitter.com/jon_bartley/status/1253064499894108162?s=20)

344 Meetings - Norwich City Council: <https://cmis.norwich.gov.uk/live/Meetingscalendar.aspx>

345 Virtual council meeting held to decide not to hold virtual council meetings – Dan Grimmer, Eastern Daily Press, 23<sup>rd</sup> April 2020, <https://www.edp24.co.uk/news/politics/virtual-council-meeting-decides-not-to-hold-virtual-council-planning-meetings-1-6620486>

346 Scores of objections over bid to build more than 50 new homes – Dan Grimmer, Eastern Daily Press, 2<sup>nd</sup> May 2020, <https://www.edp24.co.uk/news/politics/objections-over-eaton-bartram-mowers-homes-bid-1-6631341>

officers so that they can respond immediately.”<sup>347</sup> Labour Councillor John Fillis said the lone Cabinet meeting was “a step in the right direction, but we’ve got a long way to go before we can call this democracy.”<sup>348</sup> Currently, all future meetings until June are listed as cancelled.<sup>349</sup>

**RECOMMENDATION 27: Councils must not use this emergency to shut out democracy, but instead seek the input of councillors, residents and experts alike for current critical decision making. Councils should use technology to reopen democratic processes like most other organisations and conduct business as usual, as far as possible.**

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347 Lancashire County Council prepares for virtual meetings to keep democracy going during coronavirus restrictions – Paul Faulkner, The Gazette, 5<sup>th</sup> May 2020, <https://www.blackpoolgazette.co.uk/news/politics/lancashire-county-council-preapres-virtual-meetings-keep-democracy-going-during-coronavirus-restrictions-2843409>

348 Lancashire County Council prepares for virtual meetings to keep democracy going during coronavirus restrictions – Paul Faulkner, The Gazette, 5<sup>th</sup> May 2020, <https://www.blackpoolgazette.co.uk/news/politics/lancashire-county-council-preapres-virtual-meetings-keep-democracy-going-during-coronavirus-restrictions-2843409>

349 Lancashire County Council website, accurate as of 6<sup>th</sup> May 2020: <https://council.lancashire.gov.uk/mgCalendarMonthView.aspx?M=6&CID=0&OT=&C=-1&MR=0&DL=0&D=1&ACT=Earlier&DD=2020>