

BIG BROTHER WATCH

**Big Brother Watch Briefing on
Health Protection (Coronavirus,
Restrictions) (No. 2) (England)
Regulations 2020 and Health
Protection (Coronavirus,
Restrictions) (No. 2) (England)
(Amendment) Regulations 2020
for the House of Lords**

July 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 technological 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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INTRODUCTION

We welcome the opportunity to provide this briefing to the House of Lords ahead of the debate on the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 and the The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) Regulations 2020, ahead of the debate on 24th July 2020.

RECOMMENDATIONS

- These Regulations should have been debated a month ago. 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
- The Regulations should specifically exempt political demonstrations from the restriction on gatherings to avoid the criminalisation of protesters.

Effect of the new Regulations

The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 came into force on Saturday 4th July, widely termed 'Super Saturday',¹ following announcements made by the Prime Minister on 23rd June² and subsequent guidance published by the Government on 24th June.³

The new Regulations lifted most restrictions on movement and gatherings that had characterised the 'lockdown', although a ban on gatherings of over thirty people indoors or outdoors remain, unless it occurs on land "operated by a business, a charitable, benevolent or philanthropic institution or a public body as a visitor attraction."⁴ There are also exceptions for gatherings organised by "a business, a charitable, benevolent or philanthropic institution, a public body, or a political body," where the organiser has carried out a risk assessment and takes all reasonable measures to limit the risk of coronavirus transmission, as well as gatherings the training or competition of elite athletes, for work, education or training purposes, for the purpose of childcare, to provide emergency assistance or to enable people to avoid injury or illness or to escape the risk of harm.⁵

New executive power

The Regulations include a new power for the Health Secretary to "restrict access to a specified public outdoor place, or to public outdoor places of a specified description."⁶ This includes public gardens, open country, access land and highways. The restriction must respond to a "serious and imminent threat to public health", be necessary to prevent the spread of coronavirus, and be proportionate to that aim.⁷ The Health Secretary must "consult with the Chief Medical Officer or one of the Deputy Chief

¹ Friends embrace 'Super Saturday' as pubs and bars reopen – BBC News, 5th July 2020: <https://www.bbc.co.uk/news/uk-53295513>

² HC Covid-19 Update (23rd June 2020) vol. 677, col. 1167: <https://hansard.parliament.uk/commons/2020-06-23/debates/7E464B41-46ED-4FA9-BAFD28EC7B3DA230/Covid-19Update>

³ Staying alert and safe (social distancing) after 4 July – Cabinet Office, 24th June 2020: <https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing-after-4-july>

⁴ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 5(2)

⁵ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 5(3)

⁶ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 6(1)

⁷ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 6(1)(a), (b)

Medical Officers of the Department of Health and Social Care” and review the restriction every seven days.⁸

Since this restriction can be made through a direction of the Health Secretary, without the need for new legislation, decisions cannot be scrutinised or rejected by Parliament. The power to shut down vast parts of the country are at the discretion of Health Secretary, with very few safeguards. While the right to appeal does exist within legislation, only “owners and occupiers” can appeal, meaning those who use public space have no way to challenge a closure.⁹

Undervaluing democratic scrutiny

Previous ‘lockdown’ Regulations

The last debate in the House of Lords relating to the Health Protection Regulations concerned the original ‘lockdown’ Regulations – the Health Protection (Coronavirus, Restrictions) (England) Regulations. This debate was on 15th June and specifically concerned Amendment No. 2 to those Regulations. However, by that time, Amendments No. 3 and No. 4 had already been made. These were never debated in the House of Lords.

Similarly, the House of Commons debated Amendment No. 3 of the original Regulations on 15th June but did not debate Amendment No. 4. In fact, the House of Commons has not debated the new Regulations at all.

New Regulations

On 4th July, the Health Protection (Coronavirus, Restrictions) (England) Regulations and subsequent amendments governing the lockdown in England were repealed. They were replaced by the Regulations currently under scrutiny – the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020. These Regulations lifted most of the restrictions on movement and gatherings that had characterised the ‘lockdown’, although restrictions on gatherings of over thirty people indoors or outdoors remain.

Also under scrutiny in this debate are The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) Regulations 2020, which came into force on 11th July 2020. These amendments allow for the re-opening of outdoor swimming pools, nail bars

⁸ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 6(4), (7)

⁹ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 6(13)

and salons, tanning booths and salons, spas, beauty salons, massage parlours, tattoo parlours, body and skin piercing services.¹⁰

However, the Government has continued its autocratic approach to legislating the lockdown, laying the new Regulations before parliament on the evening of 3rd July – the night before the Regulations came into force and ten days after the announcement was first made.

These Regulations represent a significant easing of the lockdown, perhaps the biggest change since measures were first put in place on 26th March 2020. While the public had a broad outline of the expected changes, gleaned from a mixture of press briefings and ministerial speeches, details were unknown until just before they were to come into force, meaning police were expected to enforce new rules that they barely knew the contents of.

As has been the case with the original Regulations and every subsequent amendment, Parliamentary scrutiny has been delayed and devalued. Despite repeated insistence from Government ministers that this will not become routine practice, the Regulations are being debated in the House of Lords twenty days after they were made, with no sign of any debate scheduled in the Commons.

As the lockdown restrictions ease in line with the Government's previously published roadmap, it becomes increasingly unjustifiable to bypass parliamentary scrutiny by claiming that the situation is too 'urgent' to be debated.

Prior debates on the role of parliament

Members across the House of Lords and Commons have rightly protested the Government's repeated and deliberate evasion of meaningful parliamentary scrutiny.

House of Commons

Shadow Health Minister Justin Madders said:

"It is important that this Chamber has a role because these are not minor or consequential changes that can be nodded through without debate. They affect millions of people's lives, and we know that if we get it wrong, the consequences will be devastating."

"Debating them weeks after the event, and in some cases when they have been superseded by the next set of Regulations, demeans parliamentary democracy.

¹⁰ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 2

(...) We are not merely a rubber-stamping exercise to create the veneer of a democratic process.”¹¹

Criticism also came from the Government’s own benches. Conservative MP Mark Harper said:

“I do not see what would have prevented a draft of those regulations being laid for debate on Thursday, so that the House could have taken a decision on them before they came into force. (...) That would have been better for our legislative process.”¹²

House of Lords

The House of Lords debate was similarly dominated by exasperation at the Government’s devaluing of parliamentary scrutiny.

Shadow Health Minister Baroness Thornton said:

“Debating [the Regulations] weeks after the event, when they have already been superseded, as we have heard, is frankly a bit of an insult to Parliament, and yet further evidence that the Government are not doing things in a timely fashion. There is no excuse for this.”¹³

Baroness Jenny Jones said of the delay:

“The Minister at the start used words such as ‘exceptional’ and said that it would not be an inappropriate precedent. That is complete nonsense, because it is already a precedent.

“The Regulations relate to the most extreme restrictions ever enforced in this country, yet Parliament appears to be an afterthought for this Government. Perhaps as a result, the Regulations are very poorly drafted.

¹¹ HC Deb (15th June 2020) vol. 677, col. 587-8:
<https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>

¹² HC Deb (15th June 2020) vol. 677, col. 584:
<https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>

¹³ HL Deb (15th June 2020) vol. 803, col. 2024: [https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection\(CoronavirusRestrictions\)\(England\)\(Amendment\)\(No2\)Regulations2020](https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection(CoronavirusRestrictions)(England)(Amendment)(No2)Regulations2020)

“Everyone will appreciate the fast pace of the situation. However, Parliament has been in session. It is hard to think of a higher priority business matter than these lockdown Regulations, yet they have evaded timely parliamentary scrutiny on every occasion (...) This makes a mockery of the term ‘democratic process.’”¹⁴

Liberal Democrat peers in particular pursued concerns about the process. Lord Scriven decried the lack of scrutiny:

“My Lords, this debate is nothing more than a charade—a mere illusion of scrutiny and accountability of government. (...)”

“It stretches matters too far to say that these changes have to be introduced as a matter of urgency. They were not issues that crept upon the Government within a few days. These executive orders, decided behind closed Whitehall doors, have serious implications for citizens’ movements and freedoms. This has to stop. It makes a mockery of Parliament and our civil liberties, and is a power grab by Ministers trying to avoid in-depth parliamentary scrutiny.”¹⁵

The gravity of these statements cannot be overlooked. Parliamentarians are warning that Ministers are treating Parliament as a “rubber-stamping exercise”, that parliamentary debates are a mere “veneer of a democratic process”, a “charade” and an “illusion of scrutiny”; that Ministers have “evaded”, “insulted” and “made a mockery” of parliament in a “power grab” with “no excuse”. Parliamentary democracy has been undermined, evaded and damaged by the executive during this crisis. This requires urgent attention and remedy.

Freedom of expression and assembly

A major human rights issue arising from the current Regulations and the ongoing restriction on gatherings is that the right to protest is de facto suspended.

While the new Regulations remove many of the restrictions on gatherings, there is still an upper limit of 30 people gathering indoors or outdoors. Whilst exceptions are made in the Regulations for gatherings organised by “a business, a charitable, benevolent or

¹⁴ HL Deb (15th June 2020) vol. 803, col. 2013-4: [https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection\(CoronavirusRestrictions\)\(England\)\(Amendment\)\(No2\)Regulations2020](https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection(CoronavirusRestrictions)(England)(Amendment)(No2)Regulations2020)

¹⁵ HL Deb (15th June 2020) vol. 803, col. 2015: [https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection\(CoronavirusRestrictions\)\(England\)\(Amendment\)\(No2\)Regulations2020](https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection(CoronavirusRestrictions)(England)(Amendment)(No2)Regulations2020)

philanthropic institution, a public body, or a political body,” where the organiser has carried out a risk assessment and takes all reasonable measures to limit the risk of coronavirus transmission, this does not constitute the restoration of the right to protest. Protests organised by campaigning organisations, community groups or spontaneous demonstrations (that would constitute more than 30 people) are not allowed.

We have documented over the past three months how the Regulations have been used to criminalise peaceful protestors and we have recommended that the right to protest is restored as a matter of urgency. This also supports our 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.¹⁶ 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. This has proved even more pressing in light of the wave of protests that have been held across the country, primarily the Black Lives Matter protests against police brutality following the death of George Floyd at the hands of police in the US.

Criminalisation of protests

On 16th May, as protests were organised across the UK against the lockdown measures, journalist James Delingpole was threatened with arrest for covering a protest. At the same protest, nineteen people were arrested and ten fines were issued.¹⁷

On 30th 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 Fixed Penalty Notices (FPNs). Affected individuals who made contact with Big Brother Watch confirmed that FPNs were issued under Regulation 7, the prohibition on gatherings.¹⁸

On 31st 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

¹⁶ Civil Contingencies Act 2004 s.23(3)(b):
<https://www.legislation.gov.uk/ukpga/2004/36/section/23>

¹⁷ 19 arrested as anti-lockdown protests take place across country – Faye Brown, Metro, 16th May 2020:
<https://metro.co.uk/2020/05/16/19-arrested-anti-lockdown-protests-take-place-across-country-12715038/>

¹⁸ Extinction Rebellion protestors are hauled away by police after hundreds stage silent socially-distanced climate change rallies across Britain – Jemma Carr, MailOnline, 30th May 2020: <https://www.dailymail.co.uk/news/article-8372119/Extinction-Rebellion-stage-silent-socially-distancedclimate-protests-Britain.html>

under Regulation 7 (the restriction on gatherings).¹⁹ All 23 individuals 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.

It would appear that in some cases, the restriction on gatherings has been used to prevent or punish ordinary democratic behaviour. On 24th June, a Twitter user reported that police tried to disperse a crowd watching and filming the arrest and restraint of a black teenage boy by six police officers by threatening to issue “tickets for violating COVID 19 regulation.”²⁰ Neighbours had gathered to observe and question police who had handcuffed the teenager, tied his legs and carried him into a police van. Threatening to use the restrictions on gatherings to prevent observation and intervention by members of the public during a forceful arrest is an attempt to utilise the Regulations to avoid essential public scrutiny of police actions. It demonstrates how these restrictions can easily creep into preventing any kind of unwanted acts of public democracy.

The right to protest is an essential part of democracy and cannot be restricted unless absolutely strictly necessary. During the House of Commons debate on the amendments to the Health Protection Regulations, Sir Charles Walker said:

“I find it rather wonderful that people in this country believe that the right to protest belongs to them and not Ministers.

“Whatever the rights and wrongs of protesting while there is a lockdown, looking ahead to the strength of the democratic right in this country, the fact that people believe the right to protest belongs to them and not Ministers should, in future, give us all hope for our democracy.”²¹

Poor guidance

The Government’s lack of distinction between what is law and what is guidance has been repeatedly criticised²² and has led to arbitrary police enforcement across the UK.

¹⁹ Metropolitan Police, Twitter, 31st May 2020: <https://twitter.com/metpoliceuk/status/1267211890612219904?s=20>

²⁰ Twitter, 24th June 2020: <https://twitter.com/saucealgxrienne/status/1275880741868429312?s=20>

²¹ HC Deb (15th June 2020) vol. 677 col. 600: <https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>

²² See all of our monthly Emergency Powers and Civil Liberties reports at <https://bigbrotherwatch.org.uk/campaigns/emergency-powers/#monthly-report>

There are no longer enforceable Regulations on socialising except for the restriction on large gatherings, as described. However, the Government's complex guidance risks blurring the line between what is permitted and what is guidance, in particular by repeating revoked Regulations. This is an extract from the Government's current 'Meeting people from outside your household' guidance:²³

You should only meet people you do not live with in 3 types of groups:

- you can continue to meet in any outdoor space in a group of up to 6 people from different households
- single adult households – in other words adults who live alone or with dependent children only – can continue to form an exclusive 'support bubble' with one other household
- you can also meet in a group of 2 households (anyone in your support bubble counts as one household), in any location – public or private, indoors or outdoors. This does not need to be the same household each time.

This 'guidance' echoes the legal restrictions that were formerly in place under the now revoked Regulations prior to 4th July. Whilst this may be advisable guidance to follow as a precaution, these are not legal requirements and go far beyond the law. Lawyers from Kingsley Napley said of the new guidance:

Since the inception of the coronavirus regulations coming into force at the end of March, police officers have cited the discrepancy between advice of senior politicians and the law itself as a source of confusion which has resulted in an inconsistency of enforcement throughout the country and numerous false charges. This will no doubt continue as the government fails to provide clarity between what is included in government guidance and what is legislated in law.²⁴

The ambiguity around what people "can" and "should" do corrodes the rule of law, making people unsure if their actions will lead to criminal sanction. As human rights barrister Adam Wagner commented, the Prime Minister "moved between these concepts carelessly, as has been the habit of this govt [sic] throughout."²⁵

²³ Meeting people from outside your household – Gov.uk, 23rd June (updated 17th July)
<https://www.gov.uk/guidance/meeting-people-from-outside-your-household-from-4-july>

²⁴ What am I allowed to do now? The legal extent of the 4 July coronavirus Regulations - Stephen Parkinson and Rosie Gibson, Lexology, 8th July 2020:
<https://www.lexology.com/library/detail.aspx?g=8cd89299-96c7-4702-9b22-973178751568>

²⁵ Adam Wagner, Twitter, 23rd June 2020:
<https://twitter.com/AdamWagner1/status/1275416812725944323?s=20>