

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

About Big Brother Watch

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

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

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Emergency Powers & Civil Liberties Report

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INTRODUCTION

This report is published on the 100th day of lockdown – an extraordinary period of time that has profoundly changed the nation and indeed the world.

The lockdown restrictions have been significantly eased, but in the characteristically autocratic manner in which they were imposed. Neither the public, nor parliament, has real transparency as to the basis on which restrictions have been made, amended or unmade. The lockdown measures, and ministerial rule by which they are governed, appear to be adopting a normative presence. The damage this approach has caused to the relationship between citizens and the state, parliamentary democracy and the rule of law cannot be underestimated.

This report examines the impact of the coronavirus response on civil liberties in the UK throughout the month of June, 2020. In this month, we have heard phrases in Parliament that are unlikely to have been heard for many years prior to this Government. Parliamentarians have warned that Ministers are treating the Houses of 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”, “abused” and “made a mockery” of parliament in a “power grab” with “no excuse”. These statements are all entirely justified and correct. The Government’s refusal to take them seriously and submit the lockdown Regulations to meaningful ex ante scrutiny has set a dangerous precedent.

This month will also be remembered for the social uprisings, particularly the Black Lives Matter movement, which has seen demonstrations all over the country, throughout the month. However, the lockdown Regulations have criminalised protests and made this political participation an offence. As Sir Charles Walker MP said in the House of Commons, “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.” But in practice, scores of people have been prosecuted and thousands have had to risk fines, arrests and criminal records simply for exercising their most foundational democratic right. We warned when the emergency laws were first published that this was an unnecessary, disproportionate and dangerous imposition on human rights and out of step even with the safeguards in the Civil Contingencies Act. Incredibly, the Prime Minister appeared not even to understand that the right to protest had been scrubbed by the Ministerial pen of Matt Hancock, telling the public we have the right to protest peacefully. But the following day, the Home Secretary told us that attending protests was illegal. When laws are being made by ministers, and even ministers do not know what those laws are, what hope do we have? With confusion at the highest levels of power in our country, citizens have had little hope of fair treatment from the ranks of police officers newly endowed with ambiguous, sweeping powers.

New statistics have proved beyond doubt that there have been systemic failures in policing in recent months. Yet again, this month's CPS review of emergency powers found 100% of prosecutions under the Coronavirus Act were unlawful and 10% of prosecutions under the lockdown Regulations too. The arbitrary wielding of these draconian powers could hardly have been more predictable. Nor could the people police targeted with them most. Almost all of the police forces that have published their data on lockdown fines have revealed that they issued a significantly disproportionate number of fines to black and Asian people, who have been 54% more likely to receive fines than white people. Half of the unlawful lockdown prosecutions in May were against homeless people, who have no home to go to. Despite accepting the law has been wrongly applied repeatedly, and despite evidence of a clear pattern of discrimination, police chiefs have failed to accept the need to review or remedy these actions. In tandem with the publication of this report, we have written to police chiefs again – this time, with 13 other rights groups, over 40 parliamentarians, and human rights lawyers to demand a review of every lockdown fine issued.

In this month, our warnings against the Government's centralised contact tracing app were vindicated. In a major win for privacy advocates, the app was finally ditched – not before costing the country £11.8million, months of precious time and a haemorrhage of public trust. Polls showed people simply did not trust the app and would not download it in the numbers required for it to make any meaningful impact. This was precisely the effect we warned of. The Government is gravely out of touch with the public's concern for privacy and is treating our data, even sensitive health information, as a resource to be exploited.

The digital coup is a scandal evolving in real time. Lucrative government contracts to big tech companies have been issued without transparency, a competitive process, and sometimes even without a clear purpose. We have sifted redacted contracts and ministers' statements in attempt to track the emerging data heist.

We hope the 100th day of lockdown can provide an opportunity for reflection and for the course to be reset. We urge parliamentarians on all sides to hold the Government to account on the important matters raised in this comprehensive review and to seek serious, remedial actions where they are needed. The recommendations that follow are important to protect civil liberties and democratic norms. If we do not push back against the authoritarian force of emergency government now, it may prove too difficult to fully reset the balance in future.

RECOMMENDATIONS

RECOMMENDATION 1: It remains that the lockdown restrictions in England have ever been in place with the full approval of Parliament. The Government must seek prior parliamentary approval of the “lockdown” restrictions, and all meaningful changes, 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 Regulations in England, Scotland and Northern Ireland should be amended so as to explicitly require a proportionality assessment as part of each review, as required by the Welsh Regulations.

RECOMMENDATION 5: Police chiefs should urgently instigate a national review of all fixed penalty notices issued under the lockdown Regulations.

RECOMMENDATION 6: The Government should introduce a means for individuals to challenge lockdown fixed penalty notices by way of administrative review or appeal, without having to risk magistrates’ court proceedings.

RECOMMENDATION 7: The NPPC and all police chiefs should provide all the ethnicity data they have relating to fixed penalty notices and provide thorough analysis, explanation and remedial action in relation to of any patterns of disproportionality.

RECOMMENDATION 8: Announcements of ‘local lockdowns’ must have clear legal authority. Restrictions on fundamental rights must be governed by the law and face Parliamentary scrutiny as soon as possible.

RECOMMENDATION 9: Schedule 21 of the Coronavirus Act poses an extraordinary risk to fundamental rights, has been abused to pursue 53 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 10: Schedule 22 of the Coronavirus Act has not been used at all, despite the country enduring a peak of the pandemic and the emergence of widespread protests and demonstrations. Unnecessary, draconian powers to restrict gatherings and

protests should not remain on the statute books. Schedule 22 should be urgently repealed.

RECOMMENDATION 11: The Government should introduce remote voting and hybrid proceedings for the House of Commons.

RECOMMENDATION 12: The Government must now be clear on plans for a new contact tracing app, the data management, and confirm that its use will be entirely voluntary.

RECOMMENDATION 13: Data collection for contact tracing by restaurants, pubs and bars must be voluntary both for the companies and the customers, and fully account for safety and privacy risks.

RECOMMENDATION 14: The Covid-19 Data Store collects and processes vast quantities of highly sensitive data, without full transparency about how this data is used. The most recent contracts must be published to ensure full scrutiny of these deals.

RECOMMENDATION 15: Robust safeguards are required given the highly sensitive nature of the data processed by the NHS Covid-19 Data Store. An accurate and complete Data Protection Impact Assessment for the datastore must be published. The NHS must be fully open and transparent about 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.

RECOMMENDATION 16: The Covid-19 Data Store should use only strictly necessary data and immediately stop processing personal data such as “political affiliations” that bear no relation to any public health purpose.

RECOMMENDATION 17: The NHS and the Department for Health and Social Care must engage with stakeholders, privacy groups and patient representatives on the NHS Covid-19 Data Store as a priority.

RECOMMENDATION 18: An Ethics Panel should be established to ensure full transparency and scrutiny of the NHS Covid-19 Data Store.

RECOMMENDATION 19: Patients should be informed and asked to provide consent for their scans and personal data to be sent to the National COVID-19 Chest Image Database.

RECOMMENDATION 20: The NHS should establish an independent ethics board to oversee the National COVID-19 Chest Image Database.

RECOMMENDATION 21: The Ministry of Housing, Communities and Local Government and its new contractor Faculty must disclose the precise purpose of its contract; provide

a data protection impact assessment; and explain how and why any decision making based on automation is used.

RECOMMENDATION 22: We urge all companies, authorities and institutions to immediately cease use of thermal surveillance, absent a strong evidence base and robust safeguards.

RECOMMENDATION 23: The Intelligence and Security Committee should be urgently convened. The ISC should report on activity related to the Covid-19 pandemic in six months and report to Parliament.

RECOMMENDATION 24: NHS whistleblowers, including contract tracers, 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 public health.

RECOMMENDATION 25: Any Fixed Penalty Notices or prosecutions under lockdown Regulations issued for attendance of a protest or demonstration should be revoked or set aside.

RECOMMENDATION 26: Any new restrictions on large gatherings must explicitly state that political gatherings and demonstrations are permitted. In the context of authoritarian measures, upholding the right to freedom of expression is essential to preserve our democracy.



The COVID-19 pandemic threatens more than the lives and the livelihoods of people throughout the world. It is also a political crisis that threatens the future of liberal democracy.

“Authoritarian regimes, not surprisingly, are using the crisis to silence critics and tighten their political grip. But even some democratically elected governments are fighting the pandemic by amassing emergency powers that restrict human rights and enhance state surveillance without regard to legal constraints, parliamentary oversight, or timeframes for the restoration of constitutional order. Parliaments are being sidelined, (...) as the economic lockdowns ravage the very fabric of societies everywhere. Repression will not help to control the pandemic. Silencing free speech, jailing peaceful dissenters, suppressing legislative oversight, and indefinitely cancelling elections all do nothing to protect public health.”

— A Call to Defend Democracy, signed by more than 500 democracy organisations, activists, Nobel laureates, and political and civil society leaders

EMERGENCY LAWS

Health Protection Regulations

The Health Protection Regulations, the rules governing the lockdowns across the four nations, have been further revised since our previous report, with further amendments due to come into force on 4th July.

The role of Parliament

In England, The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020¹ were made by Health Secretary Matt Hancock on 12th June, without Parliamentary approval, once again for reasons of 'urgency.' The Regulations eased restrictions on retailers and outdoor attractions, and permitted certain households to 'link' (physically meet).

On Sunday 14th June, Matt Hancock made a further statutory instrument, The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020,² making it a criminal offence not to wear a face covering on public transport. Both Regulations came into force on 15th June.

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. This began as a thin excuse and has only become thinner as weeks have progressed. It also led to the absurd situation where on 15th June, the same day as the two Regulations came into force, the House of Lords was debating Amendment No. 2 (made on 13th May), and the House of Commons was debating Amendment No. 3 (made on 31st May) – Regulations and thus versions of the lockdown that had since been superseded.

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

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.

¹ The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020: <http://www.legislation.gov.uk/uksi/2020/588/made>

² The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transports) (England) Regulations 2020: <http://www.legislation.gov.uk/uksi/2020/592/made>

“Debating them weeks after the event, and in some cases when they have been superseded by the next set of Regulations, demeans parliamentary democracy. (...) We are not merely a rubber-stamping exercise to create the veneer of a democratic process.”³

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.”⁴

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

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.”⁵

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.

“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

³ 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>

⁴ HC Deb (15th June 2020) vol. 677, col. 584: <https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>

⁵ 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)

lockdown Regulations, yet they have evaded timely parliamentary scrutiny on every occasion—in fact, debates are being held, as now, on old lockdown amendments, on the same day as new ones are enforced without prior parliamentary authorisation. This makes a mockery of the term ‘democratic process.

“It remains the extraordinary case that the lockdown regulations have never yet been put in place with parliamentary approval; only outdated versions have been approved, after an amendment has already been enforced.”

Further, she recommended that the Minister read our monthly reports to “understand the legal and social mess they have created.”⁶

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. We are discussing Regulations that have already been amended twice by a ministerial pen. We cannot change them or make recommendations to improve them. These are Henry VIII powers on steroids.

“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.”⁷

Lord Purvis agreed, saying, “Why the Government were not able to bring forward the measures which were made—and we were debating the original ones—is beyond me.”⁸

⁶ 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)

⁷ 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)

⁸ HL Deb (15th June 2020) vol. 803, col. 2019: [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)

Baroness Brinton described it as:

“(...) very frustrating to sit here today debating something that came into force half a month ago, with two updates since. (...) It rather feels as though this entire principle of debate is being abused, and, as other noble Lords have said, used solely for executive power.”⁹

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”, “abused” 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.

RECOMMENDATION 1: It remains that the lockdown restrictions in England have ever been in place with the full approval of Parliament. The Government must seek prior parliamentary approval of the “lockdown” restrictions, and all meaningful changes, 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.

Three-week reviews

The Regulations have required that their necessity is assessed by the Health Secretary every three weeks. The amended Regulations as of 31st May now require that they are reviewed every four weeks (28 days).¹⁰ As we have previously noted, there is no legal duty to publish the reviews and neither the public nor parliament has access to their contents. It remains the case that, during this reporting period (the month of June), no such reviews have been published.

We have repeatedly called on the Government to publish these reviews, a request echoed by Shadow Health Minister Justin Madders:

⁹ HL Deb (15th June 2020) vol. 803, col. 2023: [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)

¹⁰ The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020, Reg. 2 Para. 3: <https://www.legislation.gov.uk/ukxi/2020/558/introduction/made>

“The reviews, which are legally required to happen under the Regulations, took place on 16 April, 7 May and 28 May. I ask the Minister: where are they? (...)I find this absolutely incredible. Here we have the most far-reaching impositions into everyday life in this country, yet we have no idea what the Government’s own reviews of them say.”¹¹

On 4th June, Justin Madders MP posed a written question to the Health Secretary as to the whether he would publish the legally required three-weekly reviews.¹² On 9th June the Department of Health and Social Care (DHSC) said it would not be possible to answer the question within the usual time period. Days after Justin Madders MP reminded the House of this in the debate, Jo Churchill MP responded on behalf on DHSC, on 18th June. Her response referred to the Government’s “broad strategy” – the threadbare Covid-19 recovery strategy,¹³ which we analysed in our May report;¹⁴ SAGE (Scientific Advisory Group for Emergencies) meeting minutes; two short written statements Matt Hancock made to the House; and one oral statement the Prime Minister made to the House in May. None of these contains the legally required reviews.

On 18th and 17th June respectively, Justin Madders MP asked further written questions of the Health Secretary: whether he will provide written and oral statements to Parliament following each 28 day review of the lockdown Regulations,¹⁵ and what plans he has to include a full necessity and proportionality assessment in those reviews.¹⁶ At the time of writing, the questions have not been answered.

The Government’s Covid-19 recovery strategy, its five tests, and its short written statements are plainly inadequate to determine the necessity and proportionality of the extreme restrictions on fundamental rights, and thus plainly inadequate to determine compatibility of the lockdown Regulations with the Human Rights Act 1998. The reference to SAGE meeting minutes is equally unhelpful. SAGE is not responsible for the reviews of the lockdown restrictions, but the Health Secretary specifically is (Reg. 3,

¹¹ HC Deb (15th June 2020) vol. 677, col. 588: <https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>

¹² Coronavirus: Disease Control: Written question – 54930: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-06-04/54930/>

¹³ Our plan to rebuild: The UK Government’s COVID-19 recovery strategy - HM Government, 11th May 2020

¹⁴ Emergency Powers and Civil Liberties [May 2020] – Big Brother Watch, 2nd June 2020, pp.23-4: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/06/Emergency-Powers-and-Civil-Liberties-Report-May-2020-Final.pdf>

¹⁵ Health Protection (Coronavirus, Restrictions) Regulations (England) 2020:Written question – 61531: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-06-18/61531/>

¹⁶ Health Protection (Coronavirus, Restrictions) (England) Regulations 2020:Written question – 60781: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-06-17/60781/>

Para. 2). Furthermore, SAGE does not appear to have minutes representing discussions about this type of review. We are left to conclude that the reviews have not taken place.

In a report published on 25th June, the Secondary Legislation Scrutiny Committee specifically raised concerns about the Government's refusal to publish reviews:

"(...) it would assist the House and the Committee if the Explanatory Memorandum in such cases included specific information about how and where the outcome of any review is to be promulgated (...) We expect Government departments to ensure that in future this information is always provided."¹⁷
(emphasis in original)

The lack of transparency and parliamentary engagement is untenable. The lockdown has been dictated and, worse, the Government will not provide legally required reviews providing the basis of this Ministerial decision making. This threatens parliamentary sovereignty and reverses democratic norms.

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 Regulations in England, Scotland and Northern Ireland should be amended so as to explicitly require a proportionality assessment as part of each review, as required by the Welsh Regulations.

Guidance v law

The Government's lack of distinction between what is law and what is guidance has been repeatedly criticised, including in our monthly reports, and has led to arbitrary police enforcement across the UK.

This confusion is likely to increase as on 22nd June, the Prime Minister announced to parliament that further relaxation of restrictions would be introduced from 4th July. Boris Johnson announced that the two metre 'rule' would be relaxed (this was never a legal requirement), two households would be able to meet up indoors or outdoors, including

¹⁷ 19th Report - COVID-19 legislation: obstacles to Parliamentary scrutiny; Drawn to the special attention of the House: Draft Code of Practice for Online Services on Age Appropriate Design; includes information paragraphs on: 3 instruments relating to Covid-19 - The Secondary Legislation Scrutiny Committee, 25th June 2020:
<https://committees.parliament.uk/publications/1614/documents/15448/default/>

overnight stays, and that much of the hospitality industry would be able to re-open. However, Johnson also announced that these new measures would not be put into law. Instead, “from now on [the Government] will ask people to follow guidance on social contact instead of legislation.”¹⁸ It is unclear whether the Health Protection Regulations will be fully repealed, or further amended.

There have been suggestions of ‘localised lockdowns’ by the Health Secretary to manage subsequent outbreaks,¹⁹ but it is currently unclear what form these would take: the Prime Minister told Parliament that “Wherever outbreaks take place, we will use local cluster-busting techniques to stamp them out.”²⁰

Whilst it is understandable that the Government wishes to stress the importance of its guidance for public health reasons, it must be made explicit that many new measures around movement and activities as of 4th July will not be legally enforced. 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. The Prime Minister’s lack of distinction between legal requirements and public health guidance was characteristic. 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.”²¹

For example, in the same speech the Prime Minister announced, “(...) we can change the 2-metre social distancing rule from 4 July.” However, the 2-metre ‘rule’ has always been guidance in England, not a legal requirement. It is perhaps little surprise, then, that police – even at the most senior level – appear to understand 2-metre distancing as a legal requirement. As recently as 26th June, the National Police Chiefs’ Council (NPCC) issued a press statement which said, “From 1 June, it has been lawful for groups of up to six people to meet outdoors in England (as long as social distancing measures are maintained).”²² However, it has been lawful for groups of six people to meet outdoors regardless of whether social distancing is observed. It is alarming and damaging to the rule of law that the police’s understanding of their enforcement responsibilities is so untethered to the law.

¹⁸ HC Covid-19 Update (23rd June 2020) vol. 677, col. 1167:
<https://hansard.parliament.uk/commons/2020-06-23/debates/7E464B41-46ED-4FA9-BAFD-28EC7B3DA230/Covid-19Update>

¹⁹ Health Secretary, Daily Press Briefing, 27th May 2020:
<https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-27-may-2020>

²⁰ HC Covid-19 Update (23rd June 2020) vol. 677, col. 1180:
<https://hansard.parliament.uk/commons/2020-06-23/debates/7E464B41-46ED-4FA9-BAFD-28EC7B3DA230/Covid-19Update>

²¹ Adam Wagner, Twitter, 23rd June 2020:
<https://twitter.com/AdamWagner1/status/1275416812725944323?s=20>

²² Statistical update on number of lockdown fines given by police – NPCC, 26th June 2020:
<https://news.npcc.police.uk/releases/statistical-update-on-number-of-lockdown-fines-given-by-police-1>

Even parliamentarians do not understand the sweeping restrictions on freedom ministers have imposed. In our May report, we described how even Foreign Secretary and former lawyer Dominic Raab had misunderstood and wrongly communicated the (then) Regulations.²³ In the House of Commons ‘rubber-stamping’ debate on the (superseded) Regulations on 15th June, Conservative MP Mark Harper rightly said:

“I suspect that if we were to do a survey among Members of Parliament, even they probably would not get all the Regulations correct. They are quite difficult to follow (...) It is quite a challenge to work out what the current legal position is.”²⁴

In the House of Lords debate on the same day, Lord Anderson criticised the Government’s practice of “blurring the line between advice and instruction”, describing it as “as corrosive, in its own way, as the inaccurate presentation of statistics”.²⁵

Lord Purvis described confusion between law and guidance as a “major concern”:

“(…) there is the limited explanation of what the law is; then there is the greater element of what ministerial guidance is; and you now have a third category of ministerial requests to be made regarding the action of the people. But there is a great deal of confusion.”²⁶

Legal challenges

On 2nd June, the Good Law Project, a public interest litigation organisation, instructed solicitors to initiate correspondence with the Health Secretary/Government Legal Department to query the use of the emergency procedure and indicate that, if it were used again, they may seek a judicial review.²⁷

The letter expressed concern that “profound restrictions on people’s lives, the most profound since the Second World War” have been passed and amended “with almost no Parliamentary scrutiny”, pointing out that “this subverts the fundamental constitutional principle of Parliamentary accountability.”

²³ Emergency Powers and Civil Liberties [May 2020] – Big Brother Watch, 2nd June 2020, p.40: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/06/Emergency-Powers-and-Civil-Liberties-Report-May-2020-Final.pdf>

²⁴ HC Deb (15th June 2020) vol. 677, col. 597: <https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>

²⁵ HL Deb (15th June 2020) vol. 803, col. 2010: [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)

²⁶ HL Deb (15th June 2020) vol. 803, col. 2019:

²⁷ Rook Irwin Sweeny LLP Letter to the Health Secretary, 2nd June 2020: <https://drive.google.com/file/d/1hp07XzpNa8DyxZsWNgckexHeezN1PYR1/view>

The letter cited *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 at paragraph 249, in which Lord Carnwath said that the principle of Parliamentary accountability was no less fundamental to our constitution than the principle of Parliamentary sovereignty.

It also cited *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent)* [2019] 3 W.L.R. 589, in which Lady Hale termed Parliamentary accountability a “fundamental constitutional principle”, and at paragraph 46:

“Ministers are accountable (...) through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate (...) and citizens are protected from the arbitrary exercise of executive power.”

The Government’s response provided little by way of substantive explanation, except to reiterate, “the judgement as to the urgency and the necessity for acting in this way is one for the Secretary of State in the first instance.”²⁸ The reply also reminded the Good Law Project of the unlikely prospects for success, in the circumstances: “That judgement will, in this particular context, attract a significant measure of respect from the Court.”

Meanwhile, businessman Simon Dolan’s crowdfunded legal challenge to the lockdown Regulations, which argues they are ultra vires (see pp.56-8 of our April report) and breach rights protected under the European Convention on Human Rights, has a High Court permission hearing scheduled for 2nd July. At the time of writing, the CrowdJustice page has now raised £197,790 from 6,385 backers.

Enforcement

The latest statistics²⁹ released by NPCC show that 18,489 fixed penalty notices (FPNs) have been issued in England and Wales up to 22nd June for breaches of the Health Protections (Coronavirus, Restrictions) Regulations 2020 (the Regulations). 15,856 FPNs have been recorded in England - an increase from the 13,445 FPNs that were issued up to 11th May. In Wales, 2,583 FPNs have been recorded in the same timeframe, up from the 799 issued up to 11th May.

²⁸ Government Legal Department Letter to Rook Irwin Sweeny LLP/Good Law Project, 11th June 2020:
<https://www.dropbox.com/s/xnnfcd0i62cy35j/Letter%20to%20Good%20Law%20Project%2011%20June%202020A.pdf?dl=0>

²⁹ Statistical update on number of lockdown fines given by police – NPCC, 26th June 2020:
<https://news.npcc.police.uk/releases/statistical-update-on-number-of-lockdown-fines-given-by-police-1>

Unlawful lockdown prosecutions

The second of the CPS's monthly reviews of every charge, sentence and conviction under emergency powers in England and Wales found that 8 wrongful charges were brought under the Health Protection Regulations in May.³⁰ Despite touting this as an "improvement", it is proportionately worse than the previous month, with a 10% rate of unlawful charges, increasing from 6% (12 cases) in April. These failures included the charging of four homeless people, and two people in England who were charged under the Welsh Regulations. These are both errors that we have detailed in our previous Emergency Powers and Civil Liberties Reports; to see them repeated is extremely concerning and suggests that police and prosecutors still lack a basic understanding of what is law and what is not. As the Times' legal and crime correspondents noted: "When prosecutors start to boast that they are applying legislation correctly in 85 per cent of charging decisions, it is a fairly good indicator that something is wrong with the law."³¹

A Freedom of Information request revealed the reasons for incorrect convictions under the CPS's first review of charges. In one case an individual was charged under the wrong section of the Regulations. There were three cases of Welsh Regulations being applied in England and two cases of English Regulations being applied in Wales. Four cases were overturned as the individual charged was homeless, and in two cases individuals were charged under Regulations that had been repealed.

Unlawful lockdown fines

The CPS's review revealed a significant and unacceptable amount of unlawful charges and demonstrates serious systemic failings in policing during this period. However, FPNs issued under the same laws have not been reviewed.

FPNs do not have the safeguards of subsequent review by prosecutions lawyers and/or magistrates. We have been contacted by individuals who have been wrongly issued with FPNs. Some have proceeded to pay them due to a lack of resources to legally challenge them, a loss of trust in the system, and the fear of a criminal prosecution. If, as a conservative estimate, only 10% of the 18,489 FPNs recorded in England and Wales were unlawfully issued, this would account for over 1,800 unlawfully issued FPNs. This represents serious injustice during the pandemic that must be investigated and remedied.

³⁰ CPS review finds improvements in coronavirus charging compliance – Crown Prosecution Service, 15th June 2020:

³¹ Coronavirus laws expose 'downward spiral' of justice system – Jonathan Ames and Fariha Karim, The Times, 18th June 2020: <https://www.thetimes.co.uk/edition/law/coronavirus-laws-expose-downward-spiral-of-justice-system-rxm568pf0>

The lack of an accessible appeal mechanism for fines was raised by Shadow Health Minister Justin Madders, who submitted a written question to the Home Secretary on 18th June asking,

“what plans she has to provide a means for individuals to challenge Fixed Penalty Notices under the Health Protection (Coronavirus, Restrictions) Regulations (England) 2020 without having to pursue magistrates’ court proceedings.”

Policing Minister Kit Malthouse replied that “there is no appeals process for those issued under the Health Protection Regulations” and individuals could alternatively “await a decision from the police and then the CPS as to whether criminal proceedings are brought”³² – precisely the problem Mr Madders was seeking a solution to.

Big Brother Watch’s analysis shows at least 21 forces rescinded FPNs (i.e. issued them, but did not process/finalise them) between 27th May and 8th June as their overall FPNs recorded decreased, indicating a high number of FPNs that had been issued incorrectly. For example, Surrey Police rescinded at least 134 FPNs in this period: the force had recorded 632 FPNs up to 27th May but recorded FPNs dropped to 498 as of 8th June – a decrease of 21%. Staffordshire Police similarly appeared to have rescinded at least 17% of FPNs in this period and West Midlands 11%.

It is a serious lapse in responsibility by law enforcement to accept that the law repeatedly has been wrongly applied by the police but to ignore an obvious remedy; to review FPNs in the same way the CPS has reviewed charges.

RECOMMENDATION 5: Police chiefs should urgently instigate a national review of all fixed penalty notices issued under the lockdown Regulations.

RECOMMENDATION 6: The Government should introduce a means for individuals to challenge lockdown fixed penalty notices by way of administrative review or appeal, without having to risk magistrates’ court proceedings.

Postcode lottery

In the same two-week period (27th May to 8th June) as 21 forces rescinded fines, Dyfed Powys Police (the force that issued the highest number of FPNs proportionate to its population size) recorded a 693 or 85% increase of FPNs issued. The inconsistency in forces issuing and rescinding FPNs is remarkable and reveals a postcode lottery of policing.

³² Coronavirus: Disease Control: Written question – 60782: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-06-18/60782/>

Furthermore, as of 22nd June, our analysis shows Dyfed Powys Police had issued 86 times as many FPNs proportionate to population size as Staffordshire Police. North Yorkshire Police has issued at least 5 times as many FPNs proportionate to population size as neighbouring South Yorkshire Police (which issued 756 fewer FPNs).

Ethnicity and disproportionality

Evidence that black and minority ethnic (BAME) people are facing higher levels of enforcement of the lockdown Regulations than white people is mounting. In our previous report, we detailed how fines in England and Wales were being disproportionately handed out to black and Asian people and that stop and searches in London had rocketed.

The NPCC's latest FPN data pack dated 26th June³³ states that, of FPNs issued in England where the individual's self-identified ethnicity was recorded, 79% were to people who self-identified as white. Despite representing 7.8% of the population in England,³⁴ 12% of FPNs were issued to those identifying as Asian and despite representing 3.5% of the population in England,³⁵ 5% went to those identifying as black. Analysis by Liberty Investigates and the Guardian found that BAME people were 54% more likely to be fined than white people.³⁶

Ethnicity was not recorded for 23% of those receiving FPNs. Yvette Cooper MP, chair of the Home Affairs Select Committee, criticised police failures to properly record the ethnicity data of almost a quarter of fines handed out:

"You didn't have built-in data or systems you could easily draw upon to find whether or not these fines were being used disproportionately. Your initial analysis made some really basic insensitive errors that meant you claimed something was proportionate, when it clearly wasn't (...) doesn't this reveal something really serious about the police response to race and ethnicity?"³⁷

The NPCC and all police chiefs should provide all the ethnicity data they do have relating to FPNs across all forces so that this analysis can be conducted in an open and

³³ Statistical update on number of lockdown fines given by police – NPCC, 26th June 2020: <https://news.npcc.police.uk/releases/statistical-update-on-number-of-lockdown-fines-given-by-police-1>

³⁴ ONS Census 2011

³⁵ ONS Census 2011

³⁶ BAME people fined more than white population under coronavirus laws – Mattha Busby and Mirren Gidda, the Guardian, 26th May 2020: <https://www.theguardian.com/world/2020/may/26/bame-people-fined-more-than-white-population-under-coronavirus-laws>

³⁷ Oral evidence: The Macpherson Report: twenty-one years on, Home Affairs Select Committee, 24th June 2020

democratic way. We are aware that Tola Munro, President of the National Black Police Association, and Yvette Cooper have requested this data.

Force-specific ethnicity data for FPNs disclosed thus far demonstrates the need for a closer analysis.

On 3rd June, the Metropolitan Police disclosed that, up to 15th May, 26% of its FPNs issued were to black people, who make up 12% of London's population and 23% were to Asian people, who are 18% of London's population.³⁸ Black people were twice as likely, and Asian people 26% more likely, to receive fines than white people.³⁹ Black people were also significantly over-represented in arrests relating to the Regulations, while white people were under-represented. These shocking statistics are a clear indication of racism in lockdown policing in London. The Metropolitan Police has not given a satisfactory answer to explain these worrying statistics, only stating "crime is not proportionate"⁴⁰ in addressing these alarming figures.

This is not only a problem in London. Through Freedom of Information (FOI) requests, Liberty Investigates obtained the ethnicity breakdown of FPNs issued by 25 police forces, of which 18 evidenced statistically significant ethnic disproportionality between FPNs issued to BAME and white people.⁴¹ Liberty Investigates found that the most ethnically disproportionate issuing of fines was by Cumbria Police, where BAME people were 6.8 times more likely to be fined than white people. Other heavily disproportionate forces were Avon and Somerset, Lincolnshire and Suffolk where BAME people were at least 4 times more likely to be fined than white people. West Midlands police force was 1.6 times more likely to fine BAME people than white people. The force is currently under investigation by the Independent Office for Police Conduct for racial discrimination in its use of force against black men.⁴²

Whilst the Regulations do not confer stop and search powers to police, we have found evidence of steep increases. In our May report, we detailed how stop and search in London is at a seven year high, with black people 5 times more likely to be stopped than

³⁸ Final FPN arrest analysis report – Metropolitan Police, 3rd June 2020: <http://news.met.police.uk/documents/final-fpn-arrest-analysis-report-96756>

³⁹ Met Police data shows BAME people almost 50 per cent more likely to be arrested for breaching coronavirus laws – Jamie Johnson, The Telegraph, 3rd June 2020: <https://www.telegraph.co.uk/news/2020/06/03/met-police-data-shows-bame-people-almost-50-per-cent-likely/>

⁴⁰ Fixed Penalty Notices (FPNs) and Covid-19 Enforcement Report – Metropolitan Police, 3rd June 2020, p.2: <http://news.met.police.uk/documents/final-fpn-arrest-analysis-report-96756>

⁴¹ POLICE FORCES IN ENGLAND AND WALES UP TO SEVEN TIMES MORE LIKELY TO FINE BAME PEOPLE IN LOCKDOWN – Mirren Gidda, Liberty Investigates, 17th June 2020: <https://libertyinvestigates.org.uk/articles/police-forces-in-england-and-wales-up-to-seven-times-more-likely-to-fine-bame-people-in-lockdown/>

⁴² Police force faces inquiries over tasing of black men – Neil Johnston, The Times, 29th May 2020: <https://www.thetimes.co.uk/article/police-watchdog-investigates-claims-black-men-were-brutalised-in-birmingham-7qfzr3ffl>

white people. Analysis by The Yorkshire Post has since identified similar disproportionately in West Yorkshire, as stop and search numbers nearly doubled in April compared to 2019, with BAME people making up 42% of those stopped and searched - an increase from 37% in 2019,⁴³ and despite BAME people making up 18% of West Yorkshire's population.⁴⁴

In a letter responding to Big Brother Watch, the chair of the NPCC Martin Hewitt said that the matter is "complex" and that "a sizeable number of FPNs issued by local forces have been to non-residents who had travelled into their area in contravention of the Regulations."

We find this an unconvincing and unevidenced explanation that implies or assumes that it is disproportionately black and Asian people who contravened the Regulations.

Alarming statements have been made by other senior police figures. Defending statistics showing the Metropolitan Police was twice as likely to issue FPNs to black people than white people, chair of the Metropolitan Police Federation Ken Marsh reportedly said, "Anyone out in the first four weeks was a drug dealer."⁴⁵ These kinds of statements, relying on racist stereotypes to dismiss concerns about discriminatory policing, perpetuate harmful policing practices. They also bring policing into disrepute. Mr Marsh's comment was quoted in the House of Lords by Baroness Brinton who said,

"Let that sink in. Any black person out in the first four weeks was a drug dealer. Most of us fear catching the virus, but if you are black, you also have the conscious bias of police officers to fear.

"What advice will the Government offer to the law-abiding vast majority of black people in London when they go out? Will they undertake to talk to the Home Secretary and the Mayor of London, so that this shocking view can be challenged wherever it is found in the Metropolitan Police?"⁴⁶

RECOMMENDATION 7: The NPCC and all police chiefs should provide all the ethnicity data they have relating to fixed penalty notices and provide thorough analysis, explanation and remedial action in relation to of any patterns of disproportionality.

⁴³ Why stop and search of minorities by West Yorkshire Police increased during lockdown – Ismail Mulla, The Yorkshire Post, 15th June 2020: <https://www.yorkshirepost.co.uk/news/why-stop-and-search-minorities-west-yorkshire-police-increased-during-lockdown-2883689>

⁴⁴ ONS Census 2011

⁴⁵ <https://www.theguardian.com/uk-news/2020/jun/14/former-top-met-police-officers-say-racism-blighted-their-careers-black>

⁴⁶ HL Dec (15th June 2020) vol. 803, col. 2023: [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)

Case study: Kusai Rahal

On 15th June, a pre-action letter for judicial review was sent to the Metropolitan Police on behalf of Kusai Rahal. Mr Rahal is Head of Community Support at The 4Front Project, a youth support charity. He was arrested, forcibly handcuffed by four police officers, placed in a police van and then issued a FPN for allegedly breaching the Regulations. Mr Rahal, a key worker, was acting in his capacity as a youth support worker at the time, wearing his work t-shirt and displaying his work ID. He had been called to assist a young man who was being arrested after visiting a grave, which he clearly stated to police officers. The FPN was issued on the basis that he contravened Regulation 6, “the requirement as to restriction of movement during emergency period.”⁴⁷

The Regulations in force at the time stated that a person may leave the place where they are living if they have “a reasonable excuse,” including “to travel for the purposes of work, or to provide voluntary charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living.”⁴⁸ Mr Rahal was clearly acting in his capacity as a key worker, which he explained to police officers. Officers should not have issued an FPN to Mr Rahal.

Mr Rahal maintains that the issuing of the FPN was unlawful and irrational in that the FPN was issued without any legal basis for doing so; the decision purported to enforce government guidance rather than the relevant law; and the decision failed to follow police guidance as to appropriate strategies of enforcement, namely as a last resort.⁴⁹

Armed enforcement

In Cornwall, armed officers were allegedly sent to check that a holiday homeowner was not renting out his property in violation of the Regulations.⁵⁰ Shaun Pritchard said that the visit was “heavy handed” and “alarming”, especially considering the officers entered the property without a warrant or being invited. Mr Pritchard has already received two visits from the council and two visits from the police on other occasions, all for allegedly breaching the Regulations on holiday lets. On no occasion was a violation found to have occurred yet the armed officers reportedly said they would be returning to check on the home.

⁴⁷ Judicial Review Pre-Action Letter to Directorate of Legal Services – Hodge Jones and Allen Solicitors, 15th June 2020: https://15f5957d-0343-4107-b3ff-da50c1883854.filesusr.com/ugd/cb4798_21965acb68e74318a9b7704680e5e674.pdf

⁴⁸ The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Regulation 6(2)(f) (as enacted)

⁴⁹ Judicial Review Pre-Action Letter to Directorate of Legal Services – Hodge Jones and Allen Solicitors, 15th June 2020: https://15f5957d-0343-4107-b3ff-da50c1883854.filesusr.com/ugd/cb4798_21965acb68e74318a9b7704680e5e674.pdf

⁵⁰ ‘Armed officers’ sent to check Cornwall holiday let – Johanna Carr, BBC News, 25th June 2020: <https://www.bbc.com/news/uk-england-cornwall-53165376>

Mr Pritchard has now complained to the Independent Office for Police Conduct.

Spit hoods

Police in Northern Ireland have been using spit hoods since the beginning of the pandemic, after the Northern Ireland Policing Board approved their introduction in late March.⁵¹ The hoods have been used 29 times between the end of March and 23rd June. PSNI has admitted that the hood provides no protection from Covid-19. Amnesty International's Patrick Corrigan said: "The pandemic has been used as cover to roll out these controversial restraint devices in Northern Ireland in the face of the scientific evidence."

National divergence

Despite continued Government claims that it is "seeking to confront the virus as one United Kingdom," the fractious approach to easing the lockdown measures continues.⁵² The situation has been described in parliament as "woeful".⁵³

Wales

The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 5) Regulations 2020 were made on 29th May and came into force on 1st June.

This Amendment takes a difference approach to loosening restrictions than the previous English Amendments. While the English Amendments initially added more 'reasonable excuses' for being outside of one's home (to allow people to be outdoors for recreation), the Welsh Amendment does away with the requirement to remain in your home entirely, replacing it with a requirement to remain in your local area unless you have a reasonable excuse to leave it. An excuse to leave the local area is not considered reasonable if "it would be reasonably practicable for them to do that thing within the area."⁵⁴ While the Welsh Regulations had previously made it unlawful for an individual to exercise outside of their local area, this new Amendment broadens the requirement to stay local. As we have previously noted however, 'local' is not a clear term. Welsh Government guidance

⁵¹ Amnesty says police spit hoods offer 'no protection' – Julien O'Neill, BBC News, 24th June 2020: <https://www.bbc.com/news/uk-northern-ireland-53155638>

⁵² HL Oral questions (9th June 2020) vol. 803, col. 1646: <https://hansard.parliament.uk/lords/2020-06-09/debates/7E6E27B0-479F-429A-9F1C-CA157A7C7CD9/Covid-19UK-WideDiscussions>

⁵³ HL Oral questions (9th June 2020) vol. 803, col. 1645: <https://hansard.parliament.uk/lords/2020-06-09/debates/7E6E27B0-479F-429A-9F1C-CA157A7C7CD9/Covid-19UK-WideDiscussions>

⁵⁴ The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 5) Regulations 2020, para 2(3)

previously defined local as “not a significant distance from home” although admitted that “what is ‘local’ in Cardiff on the one hand, and in mid Wales on the other, could be quite different” and asked people to use “good judgement.”⁵⁵ This lack of clarity will inevitably lead to arbitrary policing, with people from different parts of Wales facing different limitations on their movements.

Restrictions on gatherings were also amended, allowing two household to meet outdoors. However, the Amendment created the offence of being indoors with anyone not from your household or who is your carer without a reasonable excuse. Similar to the previous English Amendments, this creates a new offence that encroaches into the private sphere.

The Welsh Amendment also creates the offence of leaving your house for the purpose of work or volunteering when it is “reasonably practical” to work from home.⁵⁶ It is unnecessary to legally mandate this – for many companies, working from home where practical has already been implemented. Where this is not the case, it is inappropriate to place the legal sanction on the employee, rather than employer. If a person has been instructed to work outside of their home by their employer, they should not be forced to either refuse to work, potentially risking their job, or face criminal sanctions. Any onus to ensure people are working from home where practical should fall on employers.

The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 6) Regulations 2020 came into force on 22nd June, allowing for elite athletes to train at certain premises, places of worship to open for private prayer and giving additional reasons why a person reasonably be outside of their local area, including voting, moving house or viewing an unoccupied property.⁵⁷

Scotland

The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 3) Regulations 2020 were made on 28th May and came into force on 29th May.

This Amendment allowed for groups from two households to meet for exercise or “outdoor recreation.”⁵⁸ There was no limit in the Regulations as to how far people could travel, or how many people this two-household gathering could consist of. However, when announcing the new measures, the Scottish First Minister Nicola Sturgeon said

⁵⁵ Coronavirus regulations: frequently asked questions – Welsh Government, 21st May 2020: <https://gov.wales/coronavirus-regulations-guidance-content>

⁵⁶ The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 5) Regulations 2020, para 4

⁵⁷ The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 6) Regulations 2020

⁵⁸ The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 3) Regulations 2020

travelling for exercise and recreation would be allowed “to a location near your local community (...) our strong advice is not to travel further than five miles.”⁵⁹ She also stated in the press briefing that groups meeting “should be a maximum of eight.” These restrictions were not written into law, despite it being widely reported as such. The Scottish Police Federation accused the Scottish Government of using “deliberately ambiguous” messaging over what is permitted, leading to confusion and frustration amongst the public.⁶⁰

This approach of announcing guidance as if it is law only increases the already serious confusion and discrepancies between guidance and law. The rule of law depends on clarity.

Even more concerningly, the new Amendments remove all reference to the “emergency period” limit on these powers. The Scottish Government must still review the powers conferred under the Regulations every 21 days, but by removing all references to an emergency period, the Scottish Government risks normalising these extreme curtailments on liberty. When challenged about this significant widening of the Regulations by Adam Tomkins MSP at Holyrood’s Covid-19 committee, Michael Russell MSP, in whose name the amendments were made, admitted that he was “unaware” of this change.⁶¹ It is unacceptable for a Minister to be unaware of the content of his own legislation, even more so when the legislation represents a serious widening of Government powers.

The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 4) Regulations 2020 were made on 18th June and came into force on 19th June.

This Amendment increases the number of households allowed to gather in a public place from two to three, and also created ‘extended households’, defined as “two households which have chosen to be treated as a single household, where one of those households is a qualifying household.”⁶² A qualifying household is a person who lives alone, or where there is only one person in the household over the age of 18.

The Amendment also includes the requirement to wear a face covering on public transport, subject to the same reasonable excuses as listed in the Regulations in

⁵⁹ First Scottish Minister Nicola Sturgeon, Daily press briefing, 28th May 2020: <https://www.bbc.com/news/uk-scotland-52819189>

⁶⁰ ‘Confused’ public losing patience with lockdown, police officers warn – Daniel Sanderson, The Telegraph, 8th June 2020: <https://www.telegraph.co.uk/news/2020/06/08/confused-public-losing-patience-lockdown-police-officers-warn/>

⁶¹ SNP minister ‘unaware’ of content of regulations made in his name – Tom Gordon, The Herald, 3rd June 2020: <https://www.heraldscotland.com/news/18492905.coronavirus-snp-minister-unaware-content-regulations-made-name/>

⁶² The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 4) Regulations 2020, Regulation 9(a)

England.⁶³ The Scottish Regulations require that any child over the age of 5 wear a face covering, while the English Regulations more reasonably require any child over the age of 11 to wear a face covering.

A further fifth Amendment came into force on 29th June.⁶⁴ This permits the opening of certain premises (e.g. outdoor markets, car showrooms) and provide that it is a reasonable excuse for a person to leave the place where they are living to move home and related activities.

Northern Ireland

The lockdown Regulations have been amended at a much quicker rate in Northern Ireland than the rest of the UK, with three sets of amendments published in June. Accompanying guidance explains that: “the expression “you must not” is used where the Regulations prohibit an activity, and “you may” where the Regulations permit an activity. The expressions “you should” and “you should not” are used to express advice including public health advice.” The guidance also divides restrictions into legal requirements and government guidance - a model that we recommend the UK government and devolved administrations follow.

⁶³ The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 4) Regulations 2020, Regulation 2(6)

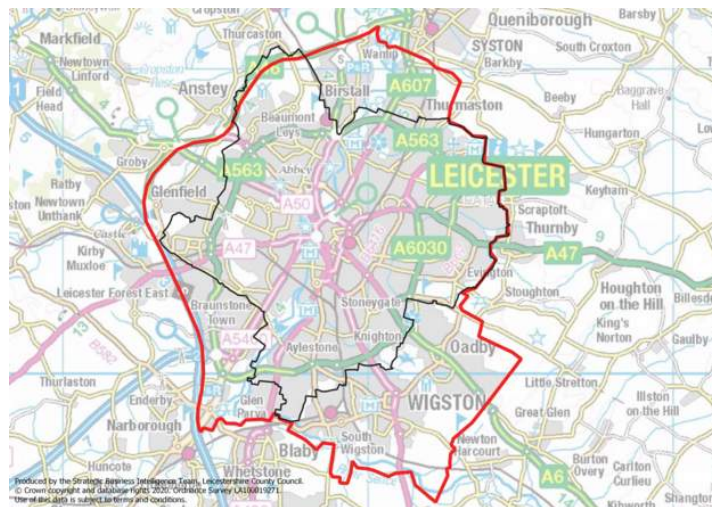
⁶⁴ The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 5) Regulations 2020: <http://www.legislation.gov.uk/ssi/2020/190/made>

Local Lockdowns

Leicester has been the first area to be placed under a 'local lockdown' after cases of Covid-19 began to rise in the city at a higher rate than the rest of England, with 866 cases recorded in the two weeks leading up to 23rd June.⁶⁵

On the evening of 29th June, the Home Secretary announced that non-essential shops were required to close from 30th June, schools from 2nd July and plans to open the hospitality industry in line with the rest of England on 4th July have been postponed.⁶⁶ However, there is no clear legal authority backing the statements as yet. There was no prior warning from local authorities, with one Headteacher telling BBC News that "she only found out about the localised lockdown from a BBC News alert."⁶⁷

It was initially unclear where the limits of the lockdown would be. Leicestershire County Hall was forced to apologise after the webpage showing the lockdown map became unavailable due to the high volume of people checking whether their homes, schools and businesses would be placed under the new restrictions.⁶⁸ The map itself does not provide much detail, although Leicestershire County Council said it is working on a postcode checker for those on the border.⁶⁹



⁶⁵ Leicester lockdown: Restrictions could be extended for two weeks – BBC News, 29th June 2020: <https://www.bbc.com/news/uk-england-leicestershire-53217095>

⁶⁶ HC Covid-19 Update (29th June 2020) vol. 678, col. 112: <https://hansard.parliament.uk/commons/2020-06-29/debates/0F09C0AB-4A72-4E67-832A-1F8FC07F2D2E/Covid-19Update>

⁶⁷ School head 'heard nothing' prior to lockdown announcement – David Pittam, BBC News, 30th June 2020: <https://www.bbc.co.uk/news/live/uk-england-derbyshire-53190455>

⁶⁸ Leicestershire County Hall, Twitter, 30th June 2020: <https://twitter.com/LeicsCountyHall/status/1277898315300995072?s=20>

⁶⁹ Council working on postcode checker for residents – Amy Woodfield, BBC News, 30th June 2020: <https://www.bbc.co.uk/news/live/uk-england-derbyshire-53190455>

At the time of publishing this report, no legal basis for this lockdown has been clearly explained by Ministers and we do not know exactly what restrictions will be placed on the movement of Leicester residents. On the morning after the Health Secretary's announcement, Leicester City Council tweeted:

"We haven't got all the information we need yet about the #LeicesterLockdown. But we do know that we all need to stay at home, keep 2 metres apart and wash our hands."⁷⁰

A post on its website stated that "The changes will require new legislation to be drafted before they can be implemented".

The uncertainty creates a serious risk of arbitrary policing in Leicester. As we witnessed with the onset of lockdown nationwide, police have shown a habit of enforcing guidance, and misinterpreted guidance, to the detriment of the public and the rule of law. Dave Stokes, Chairman of Leicestershire Police Federation, said:

"It's essential we get clarity from the Government as soon as possible on what the public can and can't do in this targeted lockdown. As we have seen over recent weeks and months, if the guidance and messaging from Government is confusing for the public then it will be almost impossible for our colleagues to police."⁷¹

Shadow Health Secretary Jonathan Ashworth urged the Government to hold a press conference to provide greater clarity about the measures and to answer "questions on how the government plans to implement tighter lockdown rules."⁷²

The Health Secretary, announcing these measures, told parliament,

"We recommend to people in Leicester, stay at home as much as you can and we recommend against all but essential travel to, from and within Leicester. We'll monitor closely adherence to social distancing rules and will take further steps if that's what is necessary."⁷³

⁷⁰ Leicester City Council, Twitter, 30th June 2020: https://twitter.com/Leicester_News/status/1277862474944073728?s=20

⁷¹ Leicestershire Police Federation, Facebook, 30th June 2020: <https://www.facebook.com/LeicesterPolFed/photos/rpp.395938127166218/3134053496687987/?type=3&theater>

⁷² Labour demands press conference on Leicester lockdown – Alex Smith, BBC News, 30th June 2020: <https://www.bbc.co.uk/news/live/uk-england-derbyshire-53190455>

⁷³ HC Covid-19 Update (29th June 2020) vol. 678, col. 112: <https://hansard.parliament.uk/Commons/2020-06-29/debates/OF09C0AB-4A72-4E67-832A-1F8FC07F2D2E/Covid-19Update>

Regarding travel restrictions, the Health Secretary told LBC that “We don't want to do that. Of course, we will if we have to. I've the legal powers in the Coronavirus Act to do that if we need to.”⁷⁴ On the BBC Radio 4 Today programme, he said “We recommend against all but essential travel and of course we're prepared to take further action if we need to.”⁷⁵

It appears that the requirement to stay at home is guidance only, but after months of Government ambiguity over what is legally enforceable and what is not, it is not clear what is required of the residents of and potential visitors, if even permitted, to Leicester.

The Health Secretary said the measures will be reviewed after two weeks to see if they are still necessary, although the terms of the review are not known.

For an entire area to be placed under renewed lockdown without the legal powers for this being made clear is unacceptable. Local lockdowns have been touted as a strategy for dealing with resurgences in Covid-19 infections since May⁷⁶ and the Prime Minister has made it clear that local outbreaks are expected.⁷⁷ For lockdowns to be governed by nothing but the words of the Health Secretary causes great confusion and considerable damage to the rule of law. Legislation that enables local lockdowns and makes explicit the restrictions people will be subject to should have been published in advance of, or at least simultaneously with, the Health Secretary's statement.

As local authorities are granted powers to enforce lockdowns, there is even greater risk of public confusion and arbitrary policing and so the need for Parliamentary approval is paramount. Any new legislation brought in to enable local authorities to preside over 'localised lockdowns' must be put before Parliament as soon as possible.

RECOMMENDATION 8: Announcements of 'local lockdowns' must have clear legal authority. Restrictions on fundamental rights must be governed by the law and face Parliamentary scrutiny as soon as possible.

⁷⁴ Theo Usherwood, Twitter, 30th June 2020:
<https://twitter.com/theousherwood/status/1277864369527951360?s=20>

⁷⁵ BBC Radio 4 Today Programme, 30th June 2020:
<https://www.bbc.co.uk/sounds/play/m000kgs8>; see also Pippa Crerar, Twitter, 30th June 2020:
<https://twitter.com/PippaCrerar/status/1277868813397221377?s=20>

⁷⁶ Health Secretary, Daily Press Briefing, 27th May 2020:
<https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-27-may-2020>

⁷⁷ HC Covid-19 Update (23rd June 2020) vol. 677, col. 1180:
<https://hansard.parliament.uk/commons/2020-06-23/debates/7E464B41-46ED-4FA9-BAFD-28EC7B3DA230/Covid-19Update>

Coronavirus Act

Schedule 21: detention powers

In the past month, the CPS has reported on its second monthly review of prosecutions under the Coronavirus Act. On 15th June, the CPS revealed that, once again, all charges under the Act had been unlawful.⁷⁸ As the previous review found, individuals (this time, nine) had been charged under Schedule 21 of the Act – a draconian Schedule that gives authorities far-reaching detention powers regarding “potentially infectious persons” – when there was no evidence of the nine individuals in question being infectious. Eight cases were withdrawn in court, with Regulations charges imposed instead for two offences. One conviction was set aside.

This maintains the unprecedented record of 100% unlawful prosecutions under the Coronavirus Act. While the latest review shows a reduction in the number of unlawful Coronavirus Act prosecutions (nine) compared to the previous CPS review (in which there were 44 unlawful prosecutions), it is plainly unacceptable that people have been charged, exclusively wrongly, under this extreme law for three months. There is no evidence that these powers are necessary, yet overwhelming evidence that they endanger rights and should be repealed.

In our May report, we detailed how the Department of Health’s two month review of the necessity of key provisions under the Act failed to identify the necessity of Schedule 21, did not even acknowledge the unlawful prosecutions, and refused to revoke the powers.

Following the publication of the CPS’s damning prosecution statistics, the Department of Health maintained the provisions “remain a key part of the UK’s response to Covid-19” and that Schedule 21 is “essential to controlling and containing the virus in the long term.”⁷⁹

Schedule 22: restrictions on gatherings

June has seen a wave of protests across the UK, following the killing of George Floyd at the hands of police in the US. Emergency laws have been used in attempt to chill and criminalise those demonstrating.

⁷⁸ CPS review finds improvements in coronavirus charging compliance – Crown Prosecution Service, 15th June 2020: <https://www.cps.gov.uk/cps/news/cps-review-finds-improvements-coronavirus-charging-compliance>

⁷⁹ Government refuses to abolish coronavirus law used unlawfully in every prosecution – Lizzie Dearden, the Independent, 28th June 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-law-government-cps-lockdown-unlawful-prosecutions-a9577371.html>

However, it remains the fact that Schedule 22 powers in the Act, to restrict gatherings of any type, have not been utilised or even invoked in England. There is absolutely no justification for these sweeping powers remaining on the statute books.

RECOMMENDATION 9: Schedule 21 of the Coronavirus Act poses an extraordinary risk to fundamental rights, has been abused to pursue 53 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 10: Schedule 22 of the Coronavirus Act has not been used at all, despite the country enduring a peak of the pandemic and the emergence of widespread protests and demonstrations. Unnecessary, draconian powers to restrict gatherings and protests should not remain on the statute books. Schedule 22 should be urgently repealed.

New Statutory Instruments

The Coronavirus Act 2020 and Public Health Act 1984 have both been used to pass a flurry of new statutory instruments.

Dr Ronan Cormacain, Senior Research Fellow at the Bingham Centre for the Rule of Law, warned the Public Administration and Constitutional Affairs Committee that “probably 200 pieces of secondary legislation” have been made which contain references to the Covid-19 pandemic “which aren’t necessarily picked up” (for scrutiny). At the time of writing, we can identify 195 pieces of Coronavirus secondary legislation. Dr Cormacain described the public health crisis as:

“(…) like an octopus with its tentacles spread out across the statute book. So many different rules and laws have been made as a result of coronavirus and they are spread out everywhere.”⁸⁰

He also expressed concern about the mixing of ordinary laws and emergency laws, particularly through the introduction of new legislation that is passed rapidly due to ‘urgency’. These laws blend long-term powers with provisions designed for the pandemic context:

“One of my concerns is that emergency law is normally seen as a separate, distinct body, which is separate and distinct from the ordinary laws and should not contaminate the ordinary laws. They are the kinds of things that we would not do in ordinary times.

“There is a serious risk at the moment with emergency laws and ordinary laws starting to mesh together. (...) There is that real danger that our ordinary constitutional process for making laws has been mixed together with the emergency process, and that is something that does concern me. Ordinary laws should be separate from emergency laws and they should be subject to proper parliamentary scrutiny and debate.”⁸¹

⁸⁰ Oral evidence: Responding to Covid-19 and the Coronavirus Act 2020, HC 377, Public Administration and Constitutional Affairs Committee, 16th June 2020, Q16: <https://committees.parliament.uk/oralevidence/519/default/>

⁸¹ Oral evidence: Responding to Covid-19 and the Coronavirus Act 2020, HC 377, Public Administration and Constitutional Affairs Committee, 16th June 2020, Q44: <https://committees.parliament.uk/oralevidence/519/default/>

International Travel Regulations

New statutory instruments were passed on 8th June across the four nations, enforcing a two-week isolation period on anyone entering the UK from abroad.⁸² The Health Protection (Coronavirus, International Travel) Regulations 2020, like the Regulations that impose lockdown, were made under the Public Health Act 1984, specifically s.45B which allows Ministers to make regulations "preventing danger to public health from vessels, aircraft, trains or other conveyances arriving at any place". However, this legislation regulates the behaviour and activities of individuals in England long after they have left any vessel they may have arrived on. It could be then, that these new Regulations are ultra vires of the Public Health Act.

This is argued by Wedlake Bell, on behalf on their client Simon Dolan, which has issued a letter to the Home Secretary challenging the legality of the new legislation (this is separate to their challenge to the Health Protection Regulations).⁸³ The letter also challenges the legislation on the grounds that the measures make "no sense in public health terms and [are] clearly irrational" due to a lack of scientific evidence. Lastly, the letter argues that the legislation is a disproportionate interference with the EU citizens' right to move freely between countries and our right to liberty under Article 5 of the European Convention on Human Rights.

The Secondary Legislation Scrutiny Committee noted that "concerns have been raised about the effectiveness of a system based on spot checks and the likelihood of visitors actually complying with requirements" and that "the travel industry is concerned that these measures will delay its economic recovery."⁸⁴ The Committee suggested that "the House may wish to press the Government on the financial cost to the travel industry and the effectiveness of this system in protecting public health."

The Regulations contain enforcement powers similar to the original enacted Health Protection Regulations. An authorised person may direct a person back to the place where they are self-isolating, use reasonable force to remove them, or remove them to "accommodation facilitated by the Secretary of State" (Reg. 5). An individual can be prosecuted for failing or refusing to carry out a requirement. They can also be issued with a fixed penalty notice (FPN) of £1,000 for failing to self-isolate in England, Wales

⁸² Health Protection (Coronavirus, International Travel) (England) Regulations 2020; The Health Protection (Coronavirus, International Travel) (Wales) Regulations 2020; The Health Protection (Coronavirus) (International Travel) (Scotland) Regulations 2020; The Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020

⁸³ Pre-action letter to the Rt Hon Priti Patel MP Secretary of State for the Home Department– Wedlake Bell LLP, 4th June 2020: <https://ukhumanrightsblog.com/wp-content/uploads/2020/06/8ed8af05b1ff2e0b2219cb126647f68cd7062b3a.pdf>

⁸⁴ 18th Report of Session 2019-21 – Secondary Legislation Scrutiny Committee, HL Paper 78, 18th June 2020: <https://committees.parliament.uk/publications/1512/documents/14018/default/>

and Northern Ireland.⁸⁵ In Scotland the FPN is £480.⁸⁶ A £100 FPN can be issued in England (£60 in Wales, Scotland and Northern Ireland) if an individual fails to record and inform public authorities of where they will be self-isolating.

Police forces in Northern Ireland⁸⁷ and Scotland⁸⁸ have expressed uncertainty about how they will enforce these new Regulations.

Public Health Information for Passengers Travelling to England or Wales Regulations

Those who operate international travel services that bring people to England and Wales now have a legal duty to provide certain public health information (effectively, the gov.uk travel advice) to travellers. In England, this information must be provided on three separate occasions and operators commit an offence, facing a Fixed Penalty Notice of £4,000, if they fail to do this.⁸⁹

The Regulations impose a duty to review the need for the requirement at least once every 21 days. There is no duty to publish this review.

Whilst it is clearly advisable that operators provide, and travellers seek, government advice, it is arguably excessive to make it a criminal offence not to provide travellers with advice from a widely accessible Government website.

⁸⁵ The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, Regulation 7(5); The Health Protection (Coronavirus, International Travel) (Wales) Regulations 2020, Regulation 16(6); The Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020, Regulation 7(5)

⁸⁶ The Health Protection (Coronavirus) (International Travel) (Scotland) Regulations 2020, Regulation 12(4)

⁸⁷ Quarantine rules branded ineffective as PSNI still to finalise how to police them – Gillian Halliday, Belfast Telegraph, 8th June 2020: <https://www.belfasttelegraph.co.uk/news/health/coronavirus/coronavirus-quarantine-rules-branded-ineffective-as-psni-still-to-finalise-how-to-police-them-39270494.html>

⁸⁸ Scottish police chief expresses 'reservations' about quarantine rules – Calum Ross, The Press and Journal, 9th June 2020: <https://www.pressandjournal.co.uk/fp/news/politics/scottish-politics/2247734/coronavirus-scottish-police-chief-expresses-reservations-about-quarantine-rules/>

⁸⁹ The Health Protection (Coronavirus, Public Health Information for Passengers Travelling to England) Regulations 2020, Regulation 7(1),(5); The Health Protection (Coronavirus, Public Health Information for Persons Travelling to Wales etc.) Regulations 2020, Regulation 7(5)

Wearing of Face Coverings on Public Transport Regulations

The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 came into force on 15th June and expire after twelve months. They must be reviewed in six months' time.⁹⁰

These Regulations mandate the wearing of 'face coverings' (very broadly defined as "a covering of any type which covers a person's mouth or nose") on any public transport except school transport services, taxis or cruise ships. Regulation 4 contains a non-exhaustive list of 'reasonable excuses' to not wear a mask, which include any physical or mental impairment or disability, if wearing a mask would cause 'severe distress', travelling with an individual who relies on lip reading, to avoid harm or injury, if it is reasonably necessary to eat or drink, to take medication, or if a relevant person requests that they removes their face covering.

The Regulations contain significant enforcement powers. Police, Transport for London (TfL) officers or designated employees of public transport operators can direct a person to wear a face covering, deny boarding and direct a person to disembark. Police may issue a £100 FPN to anyone not wearing a mask without a reasonable excuse, or an individual could be prosecuted and face a fine in court. Police may also use reasonable force to remove a person from a vehicle where it is necessary and proportionate. It is difficult to see when it might be 'necessary and proportionate' to forcibly remove a person from a vehicle under these circumstances.

Despite the exemptions, Disability Rights UK has said it has heard "horror stories" about those not wearing masks due to disabilities being reported to the police, as well as experiences of British Transport Police officers not allowing people to enter stations without a mask, even if they had a reasonable excuse not to wear one.⁹¹ One respondent of a survey organised by the charity said: "Having both fines for not wearing a mask, and an unprovable exemption alongside each other is an impossible situation."⁹²

Once again, this legislation has been introduced without Parliamentary scrutiny. It is clear that mandatory face coverings have been under consideration for a considerable

⁹⁰ The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020: <http://www.legislation.gov.uk/ukxi/2020/592/made>

⁹¹ Face mask exemptions: People with disabilities should never face intimidation on public transport over rules, says Government - Serina Sandhu, iNews, 19th June 2020: <https://inews.co.uk/news/uk/face-mask-exemptions-people-public-transport-rules-coverings-government-450550>

⁹² Ibid.

period- at least since April.⁹³ As such, there has been ample time to place these Regulations before Parliament. The Secondary Legislation Scrutiny Committee made a similar point in its analysis of the Regulations:

“(…) the announcement that face masks would become mandatory on public transport was made on 4 June, the Regulations were laid before Parliament on 15 June — the day that the provision came into effect — thus denying Parliament the opportunity to scrutinise the detail before its implementation. (...) such regulations should not, if at all possible, be laid at the last minute”.⁹⁴

This deliberate evasion of parliamentary scrutiny is unjustifiable and authoritarian.

⁹³ Ministers to consider whether public should wear face masks to help UK out of coronavirus lockdown – Laura Donnelly and Camilla Tominey, The Telegraph, 17th April 2020: <https://www.telegraph.co.uk/news/2020/04/17/ministers-consider-whether-public-should-wear-face-masks-help/>

⁹⁴ 19th Report – COVID-19 legislation: obstacles to Parliamentary scrutiny; Drawn to the special attention of the House: Draft Code of Practice for Online Services on Age Appropriate Design; includes information paragraphs on: 3 instruments relating to Covid-19 – The Secondary Legislation Scrutiny Committee, 25th June 2020: <https://committees.parliament.uk/publications/1614/documents/15448/default/>

Virtual Parliament

Temporary arrangements to enable both remote and physical ('hybrid') proceedings in the House of Commons were initially agreed on 22nd April 2020 and had effect until 20th May 2020.

On 2nd June, MPs voted to end virtual Parliament, forcing MPs to return to Westminster. This has been widely criticised for "disenfranchising" MPs from the democratic process who are shielding or have extra care responsibilities arising from the pandemic. Over 200 MPs, a third of the House of Commons, were not present for the vote⁹⁵ – which, due to physical distancing, incurred a one-kilometre queue lasting 90 minutes.⁹⁶ Sir Keir Starmer MP said "If any other employer acted like this it would be a clear and obvious case of indirect discrimination under the Equalities Act."⁹⁷

The Government refused to allow remote voting and initially even refused absent MPs to vote by proxy. This was condemned by MPs and the Equality and Human Rights Commission (EHRC), which said this would put at "significant disadvantage MPs who are shielding or self-isolating because of age, disability, health conditions or pregnancy" and called on the Government to "show leadership in championing equality and non-discrimination".⁹⁸ On 3rd June 2020, the Government u-turned on the voting policy and allowed shielding MPs to vote by proxy. Chair of the Procedure Committee, Karen Bradley MP, said that the voting by proxy scheme was "not suitable to be extended to several dozen members."⁹⁹

The new physically distanced voting system in the House of Commons has been roundly criticised as absurd, with MPs forming a long queues in a process that still takes around 40 minutes for each vote.¹⁰⁰ When questioned by the Chair of the Procedure Committee

⁹⁵ MPs vote to end the virtual Parliament – as shielding colleagues watch on from home – Georgina Bailey, Politics Home, 2nd June 2020: <https://www.politicshome.com/thehouse/article/mps-vote-to-end-the-virtual-parliament-as-shielding-colleagues-watch-on-from-home>

⁹⁶ MPs join 90-minute-long queue to vote to end virtual voting – Lisa O'Carroll, the Guardian, 2nd June 2020: <https://www.theguardian.com/politics/2020/jun/02/mps-join-90-minute-long-queue-to-vote-to-end-virtual-voting>

⁹⁷ MPs shielding from Covid-19 allowed proxy vote in Johnson U-turn – Rajeev Syal, the Guardian, 3rd June 2020: <https://www.theguardian.com/politics/2020/jun/03/mps-shielding-from-covid-19-allowed-proxy-vote-in-johnson-u-turn>

⁹⁸ Rees-Mogg's plan to end remote voting in parliament condemned by rights body – Peter Walker, the Guardian, 2nd June 2020: <https://www.theguardian.com/politics/2020/jun/02/rees-moggs-plan-to-end-remote-voting-in-parliament-condemned-by-rights-body>

⁹⁹ Johnson promises proxy votes for shielding MPs – BBC News, 3rd June 2020: <https://www.bbc.com/news/uk-politics-52903115>

¹⁰⁰ Government sees off revolt by shielding MPs and those who want to carry on voting from home during lockdown after farcical scenes with MILE-LONG 'socially distanced conga' into the chamber – James Tapsfield and William Cole, Mail Online, 2nd June 2020: <https://www.dailymail.co.uk/news/article-8379673/MPs-turn-Jacob-Rees-Mogg-forcing-return-Commons.html>

as to whether the Government will allow extra time for voting in account of the new system, Jacob Rees-Mogg MP, the Leader of the House appeared to evade the suggestion and instead imply the avoidance of debates and Divisions:

“(…) the call for Divisions is always subject to the desire to debate (…) Divisions where the results are known before the votes take place and simply eat into time are not always forced (…) how you adjust the time requires an element of good will on all sides.”¹⁰¹

The Leader of the House of Commons appeared to imply that debates and Divisions could be avoided in some cases in order to make time for the new prolonged voting system the Government has introduced. Such a devaluing of representative democracy and parliamentary scrutiny, especially in the context of emergency powers, growing Ministerial rule and an 80 seat majority, is alarming. Debates and Divisions provide opportunities for MPs to dissent even if, as is often the case in our system of fused powers, the Government’s objectives will be achieved. It should be noted that permitting remote voting would avoid any unusual compromise on the democratic functions of parliament.

The move from a virtual Parliament to a physically distanced Parliament has been widely criticised by MPs across the political spectrum, with Sir Keir Starmer MP calling the move “completely unnecessary and unacceptable.”¹⁰²

As it now stands, MPs who cannot physically attend parliament due to health reasons can take part virtually in scrutiny proceedings only: oral questions, urgent questions and ministerial statements.¹⁰³

The refusal to allow remote participation in Chamber debates has further limited the little parliamentary scrutiny that has been afforded to emergency powers. In the debate on the lockdown Regulations on 15th June, Sir Charles Walker MP noted that the Chamber was practically “empty”, questioning “Where are our colleagues getting upset about the removal of people’s civil liberties? Neither side here has a great story to tell.” Peter Kyle MP pointed out that MPs “want to be here engaging in the debate, but they are unable to be here because the virtual Parliament has been closed down for debates such as these,

¹⁰¹ Oral evidence: Procedure under coronavirus restrictions, HC 300, Procedure Committee, 8th June 2020, Q 84: <https://committees.parliament.uk/oralevidence/460/pdf/>

¹⁰² Johnson promises proxy votes for shielding MPs – BBC News, 3rd June 2020: <https://www.bbc.com/news/uk-politics-52903115>

¹⁰³ House of Commons Chamber proceedings during the COVID-19 pandemic – parliament.uk: <https://www.parliament.uk/about/how/covid-19-hybrid-proceedings-in-the-house-of-commons/>

and they have to shield. The Government are telling them not to be here.”¹⁰⁴ Justin Madders MP agreed, describing it as “an affront to democracy that those Members cannot take part in important debates such as these.”¹⁰⁵

Meanwhile, in the House of Lords, a new online voting hub was introduced on 15th June, allowing members from across the UK to vote safely and in line with respective national legislation on working from home.¹⁰⁶

RECOMMENDATION 11: The Government should introduce remote voting and expand hybrid proceedings for the House of Commons.

¹⁰⁴ HC Deb (15th June 2020) vol.677 col.588: <https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>

¹⁰⁵ HC Deb (15th June 2020) vol.677 col.588: <https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>

¹⁰⁶ Online voting to be introduced in House of Lords for the first time – Parliament.uk, 10th June 2020: <https://www.parliament.uk/business/news/2020/june/lords-online-voting/>



It's doubtful if a state of "normality" would even be possible through a surveillance network of tracing applications.

"Would we really be able to regain our freedom of movement if that movement is under constant surveillance, governed by digital applications?"

"As many security professionals currently seek to reimagine our future, will we let them treat us like herds in a pasture by coupling each person's biological identifiers with their digital identification?"

—Didier Bigo, professor of International Political Sociology at Sciences Po Paris-CERI and director of the Centre for study of Conflicts, Liberty and Security

CONTACT TRACING

NHSX App

On the 18th June, after months of technical issues, delays, and fateful dismissals of privacy concerns, the UK government finally announced it was dropping plans for a centralised contact tracing app.¹⁰⁷ This overdue decision followed months of warnings from us, technologists and other privacy groups, that the app would never be widely adopted and was not fit for purpose.

Technical issues were partly to blame for the app's failure. It was reported that the Isle of Wight trial of the NHSX app had failed to effectively use Bluetooth to estimate distances between people, an issue caused by the Government's insistence on using a centralised app that was not compatible with Google and Apple's software.¹⁰⁸ This was later confirmed by Gus Hosein, Executive Director of Privacy International and a member of the NHS COVID-19 App Data Ethics Advisory Board, who told the Telegraph that NHSX "sold ministers and others on how they were so brilliant at using Bluetooth, never sharing the data on how it was working out (...) phones were never designed to work this way."¹⁰⁹ Mr Hosein described the "frustrating" lack of communication, saying that the advisory board had "asked repeatedly for data on how the trials and tests went with Bluetooth data, and they have never shared those results."

The failure of the NHSX app is also owed to the Government being severely out of touch with public concerns about privacy. A poll conducted by Censuswide found that nearly half (48%) of Britons did not trust that the NHS app would have kept their personal data safe from hackers and around a third were concerned that the app would be used to track their whereabouts.¹¹⁰ The Health Foundation found significant divides between those who were willing and able to download the app; 71% of those with a degree said they were likely to download the app compared to only 50% of routine and manual workers, state pensioners and unemployed people and 38% of those with no formal

¹⁰⁷ UK abandons contact-tracing app for Apple and Google model – Dan Sabbagh and Alex Hern, the Guardian, 18th June 2020: <https://www.theguardian.com/world/2020/jun/18/uk-poised-to-abandon-coronavirus-app-in-favour-of-apple-and-google-models>

¹⁰⁸ Ministers consider NHS contact-tracing app rethink – Leo Kelion, BBC News, 11th June 2020: <https://www.bbc.com/news/technology-52995881>

¹⁰⁹ Bluetooth issues delay Covid app as government communication breaks down – Hasan Chowdhury and Hannah Boland, The Telegraph, 13th June 2020: <https://www.telegraph.co.uk/technology/2020/06/13/bluetooth-issues-delay-covid-app-government-communication-breaks/>

¹¹⁰ Britons uneasy about Covid-19 tracing app data usage – Jack Loughran, Engineering & Technology, 27th May 2020: <https://eandt.theiet.org/content/articles/2020/05/britons-uneasy-about-covid-19-tracing-app-data-usage-survey-finds/>

qualifications.¹¹¹ Adam Steventon, director of data analytics at the Health Foundation, warned that “There’s a significant risk that many will be left behind.”

With the contact tracing app beset with problems, Government officials began to row back on rhetoric that the app was a vital part of the contact tracing system. Initially, the app was touted as “an essential part” of protecting the NHS and ending the lockdown,¹¹² but on 5th June it was downgraded to the “cherry on the cake” of the contact tracing strategy.¹¹³ Its release date was repeatedly pushed back, initially due to be launched in mid-May, then revised to 1st June, then rumoured to be late July. Lord Bethell told the Science and Technology Committee on 17th June – the day before the app was dropped: “We’re seeking to get something going before the winter, but it isn’t the priority at the moment.” He did, at least, accept that “people’s concerns about the app are enormous.”

In fact, on the same day that the Government announced it was scrapping the app, Baroness Jones asked Minister Lord Bethell when Isle of Wight residents could ‘stand down’, to which he replied, “There is no question of them needing to stand down. Other measures for “test and trace” are working extremely well on the Isle of Wight, and both the pilot app and the manual “test and trace” have helped break the chain of transmission.”¹¹⁴ Several hours later, it was announced that residents should delete the app.¹¹⁵

The centralised app has incurred a colossal waste of public money and time when both are particularly critical resources for the country. In total, £11.8 million was spent on the abandoned app.¹¹⁶ Zuhlke Engineering was awarded more than £5 million, developer VMware and its subsidiary Pivotal were awarded more than £4.8 million, and contracts ranging from £67,000 to more than £162,000 were also awarded.¹¹⁷ Experts have

¹¹¹ UK’s Covid-19 contact-tracing app risks exacerbating ‘health inequalities’ – Jack Loughran, Engineering and Technology, 3rd June 2020: <https://eandt.theiet.org/content/articles/2020/06/uk-s-covid-19-contact-tracing-app-risks-exacerbating-health-inequalities/>

¹¹² UK contact-tracing app ‘ready in two to three weeks’ – Rory Cellan-Jones, BBC News, 28th April 2020: <https://www.bbc.com/news/technology-52458759>

¹¹³ Harding: Tracing app is just ‘the cherry on the cake’ – Jasmine Rapson, HSJ, 5th June 2020: <https://www.hsj.co.uk/technology-and-innovation/harding-tracing-app-is-just-the-cherry-on-the-cake/7027773.article>

¹¹⁴ HL Oral questions (18th June 2020) vol. 803, col. 2256: <https://hansard.parliament.uk/lords/2020-06-18/debates/8A3CF8B6-16A6-4672-A890-1B9726F8BC3F/Covid-19TrackAndTraceSystem>

¹¹⁵ Reaction to coronavirus app u-turn as Isle of Wight told to uninstall – Lucy Morgan, County Press, 18th June 2020: <https://www.countypress.co.uk/news/18526789.reaction-coronavirus-app-u-turn-isle-wight-told-uninstall/>

¹¹⁶ Tory peer reveals NHS contact-tracing app has cost £11.8m to date – Hannah Crouch, digitalhealth, 23rd June 2020: <https://www.digitalhealth.net/2020/06/nhs-contact-tracing-app-cost/>

¹¹⁷ Ministers pumped over £11million into failed NHS app: Huge contracts awarded to firms emerge after Matt Hancock admits contract tracing software doesn't work and is being ditched in favour of version produced by Apple and Google – James Tapsfield, Mail Online, 19th June 2020: <https://www.dailymail.co.uk/news/article-8439259/Apple-hits-Matt-Hancock-claims-tracing-app-detect-distances.html>

estimated that NHSX's refusal to listen to civil society concerns about the app sooner has put the UK's contact tracing system months behind other countries and "will cost lives."¹¹⁸

There are now plans to create a new app that works with Google and Apple's systems, although Ministers have not committed to when and how this app will be developed or what data it will seek to collect. Harriet Harman MP, Chair of the Joint Committee on Human Rights, wrote to the Health Secretary asking for information on the new app's data collection and whether it would be mandatory.¹¹⁹

The Health Secretary's claims that NHSX had "backed both horses" and has been developing both apps in tandem do not appear to be evidenced, with journalists describing the claims as "rewriting history".¹²⁰ The Health Secretary spoke of plans for a "hybrid" model, combining the failed NHSX plans with the Google-Apple model, and claimed the Government had "agreed to join forces with Google and Apple, to bring the best bits of both systems together."¹²¹ However, Apple (unusually) publicly responded and said: "We don't know what they mean by this hybrid model. They haven't spoken to us about it."¹²²

It is concerning that the Health Secretary and his Department appeared to have misled the press and the public as to their backup plans – or lack thereof. After announcing the centralised app had been ditched, the Department of Health again claimed "NHSX has been working with Google and Apple extensively" and that in preceding weeks "senior representatives from NHSX and Apple have had productive meetings".¹²³ Apple described the claims as "difficult to understand" and also said that it was unaware of the physically distancing issues the NHSX app had encountered with its software.¹²⁴

¹¹⁸ NHS contact tracing fiasco 'puts UK months behind Europe' and 'will cost lives' – Margi Murphy and Lawrence Dodds, The Telegraph, 19th June 2020: <https://www.telegraph.co.uk/technology/2020/06/19/nhs-contact-tracing-debacle-puts-uk-months-behind-europe-will/>

¹¹⁹ Letter to Rt Hon Matt Hancock MP, Secretary of State for Health and Social Care, regarding the digital contact tracing app, dated 24 June 2020: <https://committees.parliament.uk/publications/1596/documents/15206/default/>

¹²⁰ Tom Knowles, Twitter, 18th June 2020: <https://twitter.com/tkbeynon/status/1273656711002415106/>

¹²¹ Apple 'not told' about UK's latest app plans – Zoe Kleinman, BBC News, 19th June 2020: <https://www.bbc.co.uk/news/technology-53105642>

¹²² Ibid.

¹²³ Apple 'not told' about UK's latest app plans – Zoe Kleinman, BBC News, 19th June 2020: <https://www.bbc.co.uk/news/technology-53105642>

¹²⁴ Ibid.

The Isle of Wight trial

Cynical communications management also characterised the Isle of Wight trial of the app, where little to no information about its progress was given. Isle of Wight residents who trialled the app had expressed frustration over a lack of information on how it was working. Local outlet News OnTheWight put a series of questions to the island's MP Bob Seely and public health officials about the trial, asking how many cases the app had confirmed, how many tests were undertaken and how manual contact tracing was working with the app.¹²⁵ They reported that "despite prompting a number of times, they have still failed to answer the questions."¹²⁶

Further frustration was felt by Isle of Wight residents as Bob Seely MP, who had been heavily promoting the app, admitted to breaching the lockdown Regulations by attending a barbeque.¹²⁷

Frustration was voiced in Parliament too. During oral questions over the app's privacy policy, Lord Hain criticised the app's rollout in the Isle of Wight and the tracing system more broadly:

"(...) there have been numerous failings over the Isle of Wight contact tracing app meeting its promised deadlines, alongside other serious errors in the Government's track and trace system. Also, the NHS failed to carry out its legal data protection obligations prior to the launch."¹²⁸

As the app was finally ditched, Vix Lowithon, the Green Party's Isle of Wight representative said residents had been used as "lab rats":

"Islanders stood up to the mark and downloaded it in good faith to 'do their duty' and 'lead the way'. The reality was that the app had no NHS ethics approval, no privacy legislation and no declared success criteria. We were used as lab rats

¹²⁵ Why are questions about Isle of Wight Covid testing and Contact Tracing App not being answered? – Sally Perry, News OnTheWight, 28th May 2020: <https://onthewight.com/why-are-questions-about-isle-of-wight-covid-testing-and-contact-tracing-app-not-being-answered/>

¹²⁶ Simple questions about Isle of Wight Covid testing and Contact Tracing App still not be answered despite assurances at the highest level – Sally Perry, News OnTheWight, 6th June 2020: <https://onthewight.com/simple-questions-about-isle-of-wight-covid-testing-and-contact-tracing-app-still-not-be-answered-despite-assurances-at-the-highest-level/>

¹²⁷ Calls for MP Bob Seely to quit over 'barbecue' lockdown breach – BBC News, 8th June 2020: <https://www.bbc.com/news/uk-england-hampshire-52963313>

¹²⁸ HL Oral questions (11th June 2020) vol. 803, col. 1843: <https://hansard.parliament.uk/lords/2020-06-11/debates/C3BOCOA4-59ED-4B13-92F4-7F34293FA913/ContactTracingPersonalPrivacy>

for a costly experiment (...) Someone has got rich out of this, and it is not the Isle of Wight.”¹²⁹

Nick Stuart, chair of the Isle of Wight Liberal Democrats, said the government had “largely ignored ethical and privacy fears”:

“The Government took a flawed approach without listening to expertise, on the app, or on testing, tracking and tracing. They stubbornly insisted on building a bespoke application using a centralised approach, when many warned of its weaknesses. They largely ignored ethical and privacy fears (...) yet again, that they over-promised and under-delivered.”¹³⁰

In Scotland, after the app’s failure was announced, the First Minister tweeted that the Scottish Government had been “vindicated” in their “decision not to design and build our Test and Protect system around an untested app.”¹³¹ However, a spokesperson for the Scottish Government revealed that Scotland’s digital tracing program was also being put on hold and may never be used.¹³²

RECOMMENDATION 12: The Government must now be clear on plans for a new contact tracing app, the data management, and confirm that its use will be entirely voluntary.

¹²⁹ Ding Dong the (current Covid-19) App seems to be Dead! – Sally Perry, News OnTheWight, 18th June 2020: <https://onthewight.com/ding-dong-the-covid-19-app-seems-to-be-dead/>

¹³⁰ Ding Dong the (current Covid-19) App seems to be Dead! – Sally Perry, News OnTheWight, 18th June 2020: <https://onthewight.com/ding-dong-the-covid-19-app-seems-to-be-dead/>

¹³¹ Nicola Sturgeon, Twitter, 19th June 2020: <https://twitter.com/NicolaSturgeon/status/1273897742318870528?s=20>

¹³² Scottish Government ditches Covid-19 digital contact tracing system – Peter Swindon, The Sunday Post, 21st June 2020: <https://www.sundaypost.com/fp/scottish-government-ditches-covid-19-digital-contact-tracing-system/>

Test and Trace

In our previous report, we detailed data protection concerns about Public Health England's (PHE) newly launched 'Test and Trace' program. Since then, England's contact tracing system has struggled to live up to its 'world-beating' description. Only 67% of those contacted by Test and Trace gave information to contact tracers – many could not be reached, and significantly, many did not want to give over their details or the details of those they had been in contact with, according to Baroness Dido Harding, the head of the scheme.¹³³ In what could become a trend, South Ayrshire Council is using police officers to track down those meant to be shielding.¹³⁴ Where individuals have not responded by phone, email or letter to the council, police officers will locate individuals.

Further concerns were raised by industry experts at the scale of the 20 years data retention period. Darren Wray, founder of information security company Guardum, said that "20 years to keep Personal Information would seem excessive and unnecessary" and expressed concern over whether PHE "will truly audit" the data collected to ensure that it is still required for its original purpose, as set out by the GDPR, "having set an expectation for keeping it for 20 years."¹³⁵ Gus Hosein, Executive Director of Privacy International and a member of NHS COVID-19 App Data Ethics Advisory Board, described the retention period as a "ridiculously long period of time (...) even post 9/11 retention periods were never dreamt to be that long."¹³⁶

However, PHE has since rolled back, agreeing to an 8 year data retention period after the Open Rights Group instructed solicitor and data rights expert Ravi Naik to begin legal proceedings.¹³⁷ Naik, on behalf of the group, had sent letters to PHE challenging the amount of personal data collected, the retention period and the safeguards surrounding

¹³³ Britain's test and trace failure: Official data shows a THIRD of Covid-infected Brits refused to give details of contacts or couldn't be tracked down as head of flagship scheme Baroness Dido Harding admits it's 'not at the gold standard yet' – Sam Blanchard, Mail Online, 11th June 2020: <https://www.dailymail.co.uk/news/article-8409825/Does-Covid-19-app-work-Cases-tumbled-Isle-Wight-test-NHS-software.html>

¹³⁴ Police called in to help track down shielding people who have not responded to checks – Sarah Hilley, Daily Record, 9th June 2020: <https://www.dailyrecord.co.uk/ayrshire/police-called-help-track-down-22162598>

¹³⁵ Expert Reaction on NHS 'Test and Trace' Data Being Kept For 20 Years – Darren Wray, Information Security Buzz News, 29th May 2020: <https://www.informationsecuritybuzz.com/expert-comments/expert-reaction-on-nhs-test-and-trace-data-being-kept-for-20-years/>

¹³⁶ NHS under fire for plans to store track and trace data for 20 years – Matthew Field, The Telegraph, 28th May 2020: <https://www.telegraph.co.uk/technology/2020/05/28/nhs-fire-plans-store-track-trace-data-20-years/>

¹³⁷ Privacy group prepares legal challenge to NHS test-and-trace scheme – Dan Sabbagh and Alex Hern, The Guardian, 31st May 2020: <https://www.theguardian.com/world/2020/may/31/privacy-campaigners-prepare-legal-challenge-to-uks-test-and-trace-scheme>

the data – and later questioned why it took probing letters to achieve this change.¹³⁸ Given that retention periods are supposed to be set according to strict necessity and proportionality, it raises the question as to how the 20 year figure was arrived at in the first place. Furthermore, PHE has still not provided the legally required data protection impact assessment.

It has been reported that police officers have been told not to give their details to the NHS' contact tracing system, as it could constitute a security risk for those who are undercover or handling confidential sources.¹³⁹ Instead, police forces will be using their own tracing contact tracing system. Allyson Pollock, director of Newcastle University's Institute of Health and Society, said "contact tracing systems are based on trust. This tells you that the police don't trust the system and don't believe data will not be shared more widely, not just with the call handlers but the whole system."¹⁴⁰ If police forces do not trust this system, PHE should not expect the general public to either.

As we reported in May, Serco – one of the companies contracted by PHE to provide contact tracers – has already accidentally shared the email addresses of almost 300 contact tracers.¹⁴¹ Undeterred, Rupert Soames, CEO of Serco, expressed his hope that the contract "will go a long way in cementing the position of the private sector companies in the public sector supply chain" in a leaked email.¹⁴² However, the company has a questionable track record. In 2013, Serco was forced to withdraw from an NHS contract in Cornwall amid accusations of data falsification and understaffing.¹⁴³

Wales has its own system: Test, Trace, Protect. Business communications firm Solgari was awarded a £2.9 million contract with NHS Wales to provide this, without competition.¹⁴⁴

Scotland's system is called Test and Protect; whilst Northern Ireland's system is Test, Trace, and Protect.

¹³⁸ Ravi Naik, Twitter, 26th June 2020: <https://twitter.com/RaviNa1k/status/1276473497695502337?s=20>

¹³⁹ Police forces plan to use their own contact-tracing system – Rowland Manthorpe, Sky News, 5th June 2020: <https://news.sky.com/story/coronavirus-police-fear-govts-contact-tracing-scheme-could-endanger-officers-12000761>

¹⁴⁰ Ibid.

¹⁴¹ Serco apologises for sharing contact tracers' email addresses – Ross Hawkins, BBC News, 20th May 2020: <https://www.bbc.co.uk/news/uk-52732818>

¹⁴² NHS test-and-trace system 'not fully operational until September' – Sarah Marsh, Guardian, 4th June 2020: <https://www.theguardian.com/society/2020/jun/04/nhs-track-and-trace-system-not-expected-to-be-operating-fully-until-september-coronavirus>

¹⁴³ Serco pulls out of out-of-hours care in Cornwall – Jacqui Wise, British Medical Journal, 17th December 2013: https://www.bmj.com/content/347/bmj.f7549?ijkey=a8c29d3f81df5ee9ba54e1c39e9d7973b121e66d&keytype=tf_ipsecsha

¹⁴⁴ Contract Award Notice – NHS Wales Shared Services Partnership, Sell2Wales, 1st June 2020: https://www.sell2wales.gov.wales/search/show/search_view.aspx?ID=JUN335134

Businesses

On 23rd June, the Prime Minister announced that pubs, cafes, restaurants and other leisure venues could re-open from 4th July. Among measures to accompany this reopening, the Prime Minister told MPs that “we will ask businesses to help NHS Test and Trace respond to any local outbreaks by collecting contact details from customers” and that the Government “will work with the sector to make this manageable.”¹⁴⁵

This appears to be advisory and is not yet a legal requirement. Guidance for restaurants, pubs, bars and takeaway services released the following day said these businesses “should” assist NHS Test and Trace by “keeping a temporary record of your customers and visitors for 21 days, in a way that is manageable for your business, and assist NHS Test and Trace with requests for that data if needed.”¹⁴⁶ The guidance proposed that businesses that already have booking systems repurpose them and businesses that “do not already do this, (...) should do so to help fight the virus.” The Government should be much clearer as to whether businesses will be mandated to collect this information.

The move could see restaurants and bars asking all customers to present IDs and provide personal details. This is intrusive and plainly excessive – it appears designed to paper over the cracks of the wider failures in formal contact tracing. One pub industry source told iNews that pubs may have to check visitors’ IDs:

“We’ll have to check people are who they say they are. It’s not an easy thing to have to do, and if Test and Trace was up and running we would not have to do it.”¹⁴⁷

Asking pubs and restaurants to become data controllers overnight is unfair and risky for both companies, who are liable for data mismanagement, and customers. It devalues the importance of competent data protection and could lead to personal data being hoarded, lost or misused, whether for marketing or unwanted personal contact. A similar requirement was implemented in New Zealand in late March, which has recorded only 22 deaths related to Covid-19, and now requires customers to scan a QR code upon

¹⁴⁵ UK Prime Minister, Twitter, 23rd June 2020:
<https://twitter.com/10DowningStreet/status/1275391188334456836?s=20>

¹⁴⁶ Keeping workers and customers safe during COVID-19 in restaurants, pubs, bars and takeaway services (Version 3.0) – HM Government, 23rd June 2020:
<https://assets.publishing.service.gov.uk/media/5eb96e8e86650c278b077616/Keeping-workers-and-customers-safe-during-covid-19-restaurants-pubs-bars-takeaways-230620.pdf>

¹⁴⁷ Pubs to check IDs, take names and contact details of drinkers before they order as hospitality industry set to reopen on 4 July – Hugo Gye and Josh Barry, iNews, 22nd June 2020:
<https://inews.co.uk/news/politics/pubs-check-ids-drinkers-order-as-hospitality-industry-reopen-4-july>

entering a shop or restaurant to register their attendance.¹⁴⁸ One woman reported being harassed by a male staff member from Subway, after she was required to fill out a form with her name, home address, email address and phone number.¹⁴⁹ The woman received an email, a text and requests on Facebook and Instagram from the man who had served her. She said she felt "lucky" to have other people at home because the employee now knows her address. This kind of tracking and data collection is extreme and unjustifiable. Considerations must be made for the risks, particularly for venues that may reveal potentially sensitive personal information such as LGBT venues.

Scotland is planning a similar approach, with First Minister Nicola Sturgeon announcing that businesses would be "required" to keep customer details for four weeks from 6th July, when outdoor hospitality areas will be allowed to re-open.¹⁵⁰

RECOMMENDATION 13: Data collection for contact tracing by restaurants, pubs and bars must be voluntary both for the companies and the customers, and fully account for safety and privacy risks.

¹⁴⁸ Businesses face privacy minefield over contact-tracing rules, say campaigners – Alex Hern, the Guardian, 24th June 2020:
<https://www.theguardian.com/technology/2020/jun/24/businesses-face-privacy-minefield-contact-tracing-rules-england-campaigners>

¹⁴⁹ Covid 19 coronavirus: Subway worker 'harassed' woman customer after getting details for contact tracing – NZHerald, 15th May 2020:
https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12332073

¹⁵⁰ First Minister's Question Time (24th June 2020), Scottish Parliament:
<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12715>

NHS COVID-19 DATA STORE

In our previous monthly reviews we have reported on the Government's 'NHS Covid-19 Data Store', a vast database containing sensitive data from a range of sources, built to provide ministers with "real-time information about health services, showing where demand is rising and where critical equipment needs to be deployed."¹⁵¹ A range of companies including Palantir, Faculty, Microsoft, Amazon and Deloitte are involved in collecting and analysing this data, which is in turn fed into 'daily dashboards' informing the Government response to the pandemic.¹⁵²

We previously queried why a Google executive, Demis Hassabis, sat at a SAGE meeting despite having overseen the unlawful grab of 1.6 million NHS patients' data without their knowledge or consent as the head of DeepMind. It has now been revealed¹⁵³ that Mustafa Suleyman, Hassabis' co-founder of DeepMind and now Vice Principal of AI Policy at Google, was asked by NHSX to advise on the collection of patient data and whether Google's Cloud products were suitable for the data store project – a clear conflict of interest.¹⁵⁴ Suleyman was even given a NHS email address, which has since been deleted. It is a poor indicator of the significance being placed on data protection that the NHS is involving people involved in one of the biggest data scandals in the NHS's recent history.

Data sources

After public pressure, the UK government finally published the contracts governing its deals with Microsoft, Amazon, Google, Palantir and Faculty, just hours before campaign groups Foxglove and openDemocracy were due to issue proceedings in court.¹⁵⁵

¹⁵¹ 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/ukgovernment-using-confidential-patient-data-in-coronavirus-response>

¹⁵² NHS COVID-19 Data Store privacy notice – NHS England: <https://www.england.nhs.uk/contact-us/privacy-notice/how-we-use-your-information/covid-19-response/nhs-covid-19-data-store/>

¹⁵³ Google executive advised NHS on how to collect confidential patient data – Margi Murphy, The Telegraph, 1st June 2020: <https://www.telegraph.co.uk/technology/2020/06/01/google-executive-advised-nhs-collect-confidential-patient-data/>

¹⁵⁴ NHSX denies conflict of interest over DeepMind founder's advisory role – Andrea Downey, digitalhealth, 5th June 2020: <https://www.digitalhealth.net/2020/06/nhsx-denies-conflict-of-interest-over-deepmind-founders-advisory-role/>

¹⁵⁵ Under pressure, UK government releases NHS COVID data deals with big tech – Mary Fitzgerald and Cori Crider, openDemocracy, 5th June 2020: <https://www.opendemocracy.net/en/under-pressure-uk-government-releases-nhs-covid-data-deals-big-tech/>

Contracts with other companies involved (McKinsey, Deloitte and ANS Group¹⁵⁶) were not published.

Alarming, the contracts show that the companies were initially granted intellectual property rights over the data, meaning they could profit from it by using it to train their models. Government lawyers told openDemocracy that the contracts have been altered to prevent this, although these new contracts have not been published. Palantir's original contract with the NHS revealed that the firm was charging only £1 for its services, but this expired on 11th June.¹⁵⁷ We do not know how much Palantir is currently charging the NHS for its services, although it has been suggested that the contract could be worth "millions".¹⁵⁸ The updated contracts of all companies involved in the Data Store must be published to ensure full scrutiny. Without an up to date understanding of these deals, the public is denied full transparency.

The Data Store's Data Protection Impact Assessment (DPIA) states that NCC Group and Pivotal will have access to the Data Store. These two companies are not directly involved in the building of the Data Store, but were involved in the now scrapped NHS contact tracing app. The companies will be granted an "admin account" to access the database, which will then be replaced with an SQL account, allowing the companies to "read/write the database for certain task(s)."¹⁵⁹ After technology journalist Oscar Williams asked NHSX whether contact tracing app data will be used in the Data Store, he reported that it took a month to receive an answer and the response "evaded the question."¹⁶⁰ The inclusion of these companies in the Data Store project raises serious concerns that contact tracing data, given with the understanding that the information will be used to trace a person's contacts only, could be funnelled into a large database that has little transparency over how the data is used and for what purposes.

We previously detailed some of data sources for the Data Store in our April and May reports, which includes the contents of 111 calls. The contracts reveal that an even

¹⁵⁶ NHS COVID-19 Data Store privacy notice – NHS England:
[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)

¹⁵⁷ Provision of Palantir Foundry Services, Contract between Palantir and NHS Arden & GEM CSU: https://cdn-prod.opendemocracy.net/media/documents/Palantir_Agreements.pdf, p. 3

¹⁵⁸ Palantir could be in line for multi-million pound NHS deal, says analyst – Oscar Williams, NS Tech, 16th June 2020: <https://tech.newstatesman.com/coronavirus/palantir-nhs-deal>

¹⁵⁹ Data Protection Impact Assessment: NHS COVID-19 Data Store – NHS England:
<https://www.england.nhs.uk/wp-content/uploads/2020/06/202004-DPIA-NHS-COVID19-data-store-v1.4.pdf>, p. 8

¹⁶⁰ Oscar Williams, Twitter, 7th June 2020:
<https://twitter.com/oswilliams/status/1269659483371974656?s=20>

broader scope of personal data is being collected and processed in the Data Store. The contract with Palantir lists the following types of personal data that will be processed:

- *personal contact details (including name, personal email address, home address, home telephone numbers, emergency contact details),*
- *personal details (including gender, nationality and place of birth)*
- *work contact details (including work email address, work department, work telephone number, user IDs, work location details)*
- *employment details (including job title, job duties, manager/sponsor, working hours, employee number)*
- *any other personal data that might be useful for the nature and purposes of the Agreement*

Where it is legally required or permitted, or where the employee and/or contractor has consented, they will also process:

- *racial or ethnic data*
- *political affiliations, religious or similar beliefs*
- *criminal offences, proceedings and sentences*
- *physical or mental health conditions*¹⁶¹

There can be absolutely no justification for such wide-ranging, intrusive data gathering. This raises serious questions as to the intentions of the data collection.

The contract with Faculty states it will “process the data provided or made available to the Supplier in relation to the Agreement,” which is the data provided by Palantir and listed above.¹⁶² Both contracts note that the data is not anonymous but pseudonymous and uses aggregated data, which has the “risk of re-identification in the absence of proper controls.”¹⁶³ This vast data collection exercise means that the Data Store will hold

¹⁶¹ Provision of Palantir Foundry Services, Contract between Palantir and NHS Arden &GEM CSU: https://cdn-prod.opendemocracy.net/media/documents/Palantir_Agreements.pdf, p. 38

¹⁶² AI Lab Strategic Partner, Contract between Faculty and the Department for Health and Social Care: https://cdn-prod.opendemocracy.net/media/documents/Faculty_Agreement.pdf p. 47

¹⁶³ Ibid. p. 47

information on the most intimate areas of our lives. There is no public health justification for processing “political affiliations” and the like.

Professor Eerke Boiten, director of the Cyber Technology Institute at De Montfort University, has raised serious issues with the Data Store’s DPIA – most significantly that the risk assessment is missing. According to Professor Boiten, this “is a cheat (...) The heart of a DPIA, ‘What could possibly go wrong?’, including attacks, failing design assumptions, and function creep, is not being shared.”¹⁶⁴

There are many other concerning omissions in the DPIA. It states that the Data Store will not involve “the use of new technology i.e. (...) Artificial Intelligence.”¹⁶⁵ The Data Store contract with Faculty, however, explains that the company will “develop and deploy practical applications of artificial intelligence in the NHS (...) It will harness the power of data science and AI to turbo-charge our ability to make evidence-based decisions in health and social care.”¹⁶⁶ It is clearly inaccurate to claim that artificial intelligence is not being used as part of the Data Store project. In fact, the DPIA does not mention the role of Faculty at all.

The only data processors referenced in the DPIA are Palantir and the NHS, and the role of Palantir is critically underplayed. For example, the DPIA states that only “data concerning health” will be processed in the Data Store and denies data relating to political affiliation, religious beliefs, ethnicity etc. will be processed, despite their inclusion in the contract with Palantir listing the broad range of data that will potentially be processed.¹⁶⁷ Similarly, the DPIA does not refer to Palantir’s role in “data analytics” or “support tracking, surveillance, and reporting” that is referenced in the company’s contract with the NHS.¹⁶⁸ Professor Boiten has suggested that this DPIA is only “for data being combined and stored but not for how it is then being used for planning, including possibly through AI.”¹⁶⁹ He concludes that:

¹⁶⁴ Eerke Boiten, Twitter, 8th June 2020: <https://twitter.com/EerkeBoiten/status/1270035301860327425?s=20>

¹⁶⁵ Data Protection Impact Assessment: NHS COVID-19 Data Store – NHS England: <https://www.england.nhs.uk/wp-content/uploads/2020/06/202004-DPIA-NHS-COVID19-data-store-v1.4.pdf>, p. 7

¹⁶⁶ AI Lab Strategic Partner, Contract between Faculty and the Department for Health and Social Care: https://cdn-prod.opendemocracy.net/media/documents/Faculty_Agreement.pdf p. 12

¹⁶⁷ Data Protection Impact Assessment: NHS COVID-19 Data Store – NHS England: <https://www.england.nhs.uk/wp-content/uploads/2020/06/202004-DPIA-NHS-COVID19-data-store-v1.4.pdf>, p. 12

¹⁶⁸ Provision of Palantir Foundry Services, Contract between Palantir and NHS Arden & GEM CSU: https://cdn-prod.opendemocracy.net/media/documents/Palantir_Agreements.pdf, p. 37

¹⁶⁹ Why we need to know more about the UK government’s COVID-19 data project – and the companies working on it – Eerke Boiten, The Conversation, 24th June 2020: <https://theconversation.com/why-we-need-to-know-more-about-the-uk-governments-covid-19-data-project-and-the-companies-working-on-it-141078>

“Unfortunately, this DPIA only recognises low-level risks with their technical and organisational mitigations. Overall, that leaves us in a position where we do not know what Palantir, Faculty and others are doing with NHS medical data. We do not know whether the risks of abuse of the data have been properly recognised and mitigated.”¹⁷⁰

NHS England must publish a full DPIA for the Covid-19 Data Store and the dashboards that it is used to create.

RECOMMENDATION 14: The Covid-19 Data Store collects and processes vast quantities of highly sensitive data, without full transparency about how this data is used. The most recent contracts must be published to ensure full scrutiny of these deals.

RECOMMENDATION 15: Robust safeguards are required given the highly sensitive nature of the data processed by the NHS Covid-19 Data Store. An accurate and complete Data Protection Impact Assessment for the datastore must be published. The NHS must be fully open and transparent about 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.

RECOMMENDATION 16: The Covid-19 Data Store should use only strictly necessary data and immediately stop processing personal data such as “political affiliations” that bear no relation to any public health purpose.

¹⁷⁰ Ibid.

Safeguards

There is a lack of clarity as to how data is being collected, how it is being used and for what purpose. Contracts state that the purpose of the Data Store is to “track and predict the spread of Covid-19”, but also has the more ambiguous remit to “model interventions” and to “optimise health & community resources.”¹⁷¹ Independent oversight of how data is being collected and processed is urgently needed. The DPIA required the data controller to disclose if “independent experts” on privacy have been consulted – the NHS response was that “subject matter experts” (not independent) have been consulted to ensure the project is “safe, efficient and effective,” with no mention of privacy.¹⁷²

We have previously recommended that the NHS and the Department for Health and Social Care engage with and consult stakeholders, privacy groups and patient representatives as a priority. This has not happened. The DPIA for the Data Store states that it would not be appropriate “to seek the views of data subjects or their representatives on the proposed processing” due to the ‘urgency’ of the project.¹⁷³ The DPIA was signed by data protection officers in ‘April 2020’ – the specific date is conspicuously absent, especially considering concerns that the DPIA was rushed through after the contracts were already signed. The only signature with a specific date is that of the NHSE/I Medical Director (11th May) with the note that it was “reviewed retrospectively due to urgency to ensure the NHS could meet the requirements necessary to support the response to COVID-19.”¹⁷⁴ Once again, ‘urgency’ is being used to preclude any kind of meaningful review of measures that could have serious impact on our privacy.

The APPG on AI recommended that an oversight board be established, with a specific data protection remit “to guarantee the fair and ethical application of any data-driven public health measures.”¹⁷⁵ An oversight board or ethics panel (in a similar model to the ethics panel that oversaw the contact tracing app) should be established to provide scrutiny of how data is being collected and processed for the Data Store.

¹⁷¹ Provision of Palantir Foundry Services, Contract between Palantir and NHS Arden & GEM CSU: https://cdn-prod.opendemocracy.net/media/documents/Palantir_Agreements.pdf, p. 37; AI Lab Strategic Partner, Contract between Faculty and the Department for Health and Social Care: https://cdn-prod.opendemocracy.net/media/documents/Faculty_Agreement.pdf p. 47

¹⁷² Data Protection Impact Assessment: NHS COVID-19 Data Store – NHS England: <https://www.england.nhs.uk/wp-content/uploads/2020/06/202004-DPIA-NHS-COVID19-data-store-v1.4.pdf>, p. 14

¹⁷³ Ibid.

¹⁷⁴ Ibid., p. 22

¹⁷⁵ Parliamentary Brief: How can AI help in the fight against COVID-19? – APPG AI, 20th May 2020: https://www.appg-ai.org/wp-content/uploads/2020/05/parliamentary-brief-public-health-how-can-ai-help-in-the-fight-against-covid-19_.pdf

There are significant problems with using artificial intelligence to make public health decisions, including the quality of the data being used to build and train models and the lack of regard those building these systems have for human rights and data protection. We have long raised concern about bias, assumptions and the potential for negative or inaccurate conclusions being drawn, which could cause individuals harm with very little recourse to justice. It is essential that the NHS and Department for Health and Social Care engage with concerns surrounding automated decision making, and that there is full transparency and assessment of the harms it could occur.

RECOMMENDATION 17: The NHS and the Department for Health and Social Care must engage with stakeholders, privacy groups and patient representatives on the NHS Covid-19 Data Store as a priority.

RECOMMENDATION 18: An Ethics Panel should be established to ensure full transparency and scrutiny of the NHS Covid-19 Data Store.



If the UK bypasses ethical safeguards in a rush to deploy AI tools as aggressively as possible, we risk worse outcomes — not only from overconfidence in quick technical fixes, but by sparking distrust of public health authorities among the very communities we are trying to protect.

“This could well undermine the efficacy of all our public health efforts, not just those targeting COVID-19.”

— Shannon Vallor, Baillie Gifford Chair in the Ethics of Data and Artificial Intelligence at the Futures Institute at the University of Edinburgh

ARTIFICIAL INTELLIGENCE AND BIG DATA

National COVID-19 Chest Image Database

Alongside its NHS Covid-19 Data Store contract, AI company Faculty has been awarded a contract to build a National COVID-19 Chest Image Database. NHSX says the centralised, UK-wide database will contribute to the “development and validation of automated analysis technologies” that assist with Covid-19 assessment.¹⁷⁶

Hospitals with access to the database are asked to upload data on all patients who have been tested for Covid-19, without asking their consent and regardless of the outcome of the test.¹⁷⁷ For those who test negative, their NHS number, hospital number and outcome of their result is collected.¹⁷⁸ For those who test positive, the same information, plus their age, ethnicity, smoking statutes and comprehensive health data is collected.¹⁷⁹

Data will not be anonymous, but pseudonymous. The Data Protection Impact Assessment (DPIA) states that while “the project will involve the development of analysis tools and Artificial Intelligence tools (...) it is unlikely that individuals would consider this an intrusion of privacy, as patients’ privacy will be safeguarded.”

While AI may be a useful tool for researchers working on Covid-19 related research,¹⁸⁰ its use requires patient trust and public support. As such, there is no justification for not asking for patients’ consent to share their scan images and personal data, particularly those patients who have tested negative for Covid-19. Undoubtedly, there are significant data protection and privacy risks around the vast quantities of data sought for this project and patients should be afforded their right to make an informed choice. This has been recognised as vital for the long-term success of new research methodologies in health. Examining the use of AI in Covid-19 research, the APPG on AI concluded that:

¹⁷⁶ National COVID-19 Chest Image Database – NHSX: <https://nhsx.github.io/covid-chest-imaging-database/>

¹⁷⁷ Guidelines for Contributing Imaging and Data to the National COVID-19 Chest Imaging Database – National COVID-19 Chest Imaging Database - Guidance and Documentation for Collection Sites, NHS: https://medphys.royalsurrey.nhs.uk/nccid/guidance/NCCID_Guidelines_v1.5.pdf

¹⁷⁸ Covid-19 Status (Negative) Template v1.0 - National COVID-19 Chest Imaging Database - Guidance and Documentation for Collection Sites, NHS: https://medphys.royalsurrey.nhs.uk/nccid/guidance/COVID-19_NCCID_covid_status_negative_data_template_v1_0.xlsx

¹⁷⁹ Covid-19 Data (Positive) Template v1.5 - National COVID-19 Chest Imaging Database - Guidance And Documentation For Collection Sites, NHS: https://medphys.royalsurrey.nhs.uk/nccid/guidance/COVID-19_NCCID_covid_positive_data_template_v1_5.xlsx

¹⁸⁰ Note, AI research into Covid-19 has not been without problems and flaws. See, for example, p.11 of Parliamentary Brief: How can AI help in the fight against COVID-19? – APPG AI, 20th May 2020: https://www.appg-ai.org/wp-content/uploads/2020/05/parliamentary-brief-public-health-how-can-ai-help-in-the-fight-against-covid-19_.pdf

“Any data-driven method in the fight against Covid-19 relies on the strengthening and maintenance of public trust.”

Finally, the APPG found the “evidence provided suggests that an independent oversight body would be essential in the safeguarding of citizens’ data and the preservation of public trust.”¹⁸¹

RECOMMENDATION 19: Patients should be informed and asked to provide consent for their scans and personal data to be sent to the National COVID-19 Chest Image Database.

RECOMMENDATION 20: The NHS should establish an independent ethics board to oversee the National COVID-19 Chest Image Database.

MHCLG contract

Faculty has been awarded its third Covid-related contract - a £400,000 contract with the Ministry of Housing, Communities and Local Government (MHCLG)¹⁸² to “provide urgent additional capacity and data science capability (...) to support critical analytical work to inform the response of MHCLG to the COVID-19 crisis.”¹⁸³ Yet again, this was a non-competitive process. The description is vague and the specific areas of support are redacted, but the contract notes that the work will involve:

- *Identification, exploration and setup of alternative data sources (e.g. social media, utility providers and telecom bills, credit rating agencies, etc.)*
- *Application of data science and machine learning across data provided by MHCLG and alternative data sources*
- *Development of interactive dashboards which summarise the above activities*

The ‘alternative data sources’ will be those “valuable for monitoring and forecasting indicators of rental market stress” suggesting the contract is for rental market

¹⁸¹ Parliamentary Brief: How can AI help in the fight against COVID-19? – APPG AI, 20th May 2020: <https://www.appg-ai.org/wp-content/uploads/2020/05/parliamentary-brief-public-health-how-can-ai-help-in-the-fight-against-covid-19.pdf>

¹⁸² AI firm that worked with Vote Leave given new coronavirus contract – David Pegg and Rob Evans, the Guardian, 2nd June 2020: <https://www.theguardian.com/technology/2020/jun/02/ai-firm-that-worked-with-vote-leave-wins-new-coronavirus-contract>

¹⁸³ Data scientists for MHCLG Covid-19 response– Ministry of Housing, Communities & Local Government, 3rd June 2020: <https://www.contractsfinder.service.gov.uk/Notice/Attachment/244384>

forecasting. However, clarity of the contract purpose has proven difficult to achieve. A spokesperson for the MHCLG said “Faculty is helping MHCLG to analyse data in real-time allowing the department to monitor the impact of Covid-19 on local communities and respond to emerging issues at pace.”¹⁸⁴ Again, this is very general.

Experts told NS Tech:

“utilities and telecoms bills could provide insights into how many people in areas already segmented based on socioeconomic indicators are working from home following the introduction of lockdown measures. The bills may also identify areas where citizens are often falling behind on their utility payments.”

The government may also be “attempting to assess how many people may be unable to keep up with rent payments, and made homeless, as salaries fall and unemployment rises.”¹⁸⁵

This is all incredibly sensitive data, potentially being used to make automated decisions about people’s lives. Worse, the data protection sections of Faculty’s contract have not even been filled out. This is a worrying indicator of how seriously data rights and privacy are being taken.

We have long warned of the dangers of mass data collection and automation of public services. Earlier this year, Lord Clement-Jones, Chair of the APPG on AI, warned that “the impact of automated decision-making systems across an entire population can be immense in terms of potential discrimination, breach of privacy, access to justice and other rights.”¹⁸⁶

On the face of it, and certainly in absence of the MHCLG/Faculty’s willingness to describe its purpose, there appears to be little justification and no cost-benefit analysis for this lucrative, non-competitive, big data contract.

Finally, we note that this is Faculty’s ninth Government contract. Minister to the Cabinet Office and HM Treasury Lord Agnew, who has also recently taken ministerial responsibility for the Government Digital Service (GDS),¹⁸⁷ is a Faculty shareholder.¹⁸⁸

¹⁸⁴ UK Gov Contract Awarded to Vote Leave AI Firm, Faculty – David Paul, 2nd June 2020: <https://digit.fyi/uk-government-contract-awarded-to-vote-leave-ai-firm-faculty/>

¹⁸⁵ Faculty secures new deal to analyse impact of coronavirus across the UK – Oscar Williams, NS Tech, 1st June 2020: <https://tech.newstatesman.com/coronavirus/faculty-mhclg-deal-coronavirus-uk>

¹⁸⁶ The government’s approach to algorithmic decision-making is broken: here’s how to fix it – Lord Clemet-Jones, NS Tech, 18th February 2020: <https://tech.newstatesman.com/guest-opinion/algorithmic-decision-making>

¹⁸⁷ Interview: GDS head Alison Pritchard on ministerial change, the spending review and the benefits of comedy – Sam Trendall, Civil Service World, 25th March 2020:

RECOMMENDATION 21: The Ministry of Housing, Communities and Local Government and its new contractor Faculty must disclose the precise purpose of its contract; provide a data protection impact assessment; and explain how and why any decision making based on automation is used.

<https://www.civilserviceworld.com/in-depth/article/interview-gds-head-alison-pritchard-on-ministerial-change-the-spending-review-and-the-benefits-of-comedy>

¹⁸⁸ AI firm that worked with Vote Leave given new coronavirus contract – David Pegg and Rob Evans, the Guardian, 2nd June 2020:
<https://www.theguardian.com/technology/2020/jun/02/ai-firm-that-worked-with-vote-leave-wins-new-coronavirus-contract>

THERMAL SURVEILLANCE

In our May report, we revealed the spread of thermal surveillance across workplaces and airports. We also detailed how the scanners are highly experimental, unproven in a health context, and despite advertising claims, cannot accurately detect fevers.

Since then, Manchester Airport has also begun trialling the technology.¹⁸⁹ The airport has not provided any information about the consequences of thermal scans, consent or travellers' data rights. We are also aware of Apple stores using personalised thermal scans as a condition of entry.

Portsmouth International Port announced it was the first port in the UK to deploy thermal scanners to scan passengers and attempt to identify elevated temperatures. The scanner will test passengers before they board, and a 'high temperature' alert would trigger a medical team to decide whether to allow the passenger to travel. This is the clearest example yet that we have seen of thermal scanning influencing individuals' right to freedom of movement (and other consequential rights). Port director Mike Sellars said: "As we plan for recovery we felt that the scanner would bring confidence to passengers."¹⁹⁰

The desire to provide "confidence" via thermal scanners is a common theme, as explored in our last report. However, the WHO advice still cautions against temperature screening - thermal surveillance research provides no basis for such confidence.

Euro Parking Services, which manages parking for a range of organisations including NHS Trusts, McDonalds and National Express, has expanded its business into providing thermal scanners for businesses, starting in Birmingham.¹⁹¹ The cameras will be fitted into premises and used to scan people upon entry. Director James Tark said the cameras "can be used in homes, offices, construction sites, and schools, not to mention NHS locations or, like Heathrow, other key travel destinations."

HikVision

HikVision's thermal scanners have also emerged in the UK.

Hikvision is a Chinese state-owned security company supplying surveillance technology across the UK. It was blacklisted in 2019 by the United States for its role in building

¹⁸⁹ Coronavirus advice for travellers – Manchester Airport: <https://www.manchesterairport.co.uk/coronavirus/>

¹⁹⁰ Portsmouth port installs thermal camera – BBC News, 22nd May 2020: <https://www.bbc.co.uk/news/uk-england-hampshire-52767834>

¹⁹¹ Covid-19 thermal imaging cameras set to be trialled in Birmingham – Rachel Covill, The Business Desk, 1st June 2020: <https://www.thebusinessdesk.com/westmidlands/news/2041131-covid-19-thermal-imaging-cameras-set-to-be-trialled-in-birmingham>

surveillance systems that assisted with the Chinese government's detention of over 1 million Uighur Muslims in Xinjiang.¹⁹² HikVision has developed tools that "automatically identify and categorise individuals as ethnic minorities" and deployed them across China for this purpose,¹⁹³ and has also placed over 1,000 facial recognition cameras in mosques and re-education camps in the region.¹⁹⁴

Balhouses Care Group, which owns care homes across Scotland, has invested £182,000 in installing HikVision thermal scanners in all of its 25 care homes and its head office.¹⁹⁵ If a high temperature is detected, an alarm will sound. The individual will be asked to go to a designated "safe area" where a manual temperature test is undertaken. The installation guide for this device raises questions as to how practical usage might actually be in a care home; it warns that the "environment can easily influence the thermal camera's performance," backgrounds must not be "too crowded or bright," and a person should "wait more than five minutes" to be scanned "if there is a large gap between indoor and outdoor temperatures."¹⁹⁶ Mayflex, an IP solutions company in Birmingham, has also installed the same model of HikVision thermal cameras in its offices and warehouses.¹⁹⁷ The cameras also attempt to check if an individual is wearing a mask.

In Coleraine, Northern Ireland, Hikvision thermal cameras have been installed in the warehouses and administrative sites of Lynas Foodservice, where an "audible and visual alarm is produced along with an e-mail notification to alert the designated person onsite."¹⁹⁸ Facility Manager Maurice Devenny said, "the staff barely notice it is operating quietly in the background checking all temperatures as we walk past." The normalisation of workplace surveillance should not be lauded as a success.

¹⁹² These Chinese firms were blacklisted for Uighur oppression. Now they want to sell COVID-19 surveillance tools to the West – Business Insider, Isobel Asher Hamilton, 6th June 2020: <https://www.businessinsider.com/blacklisted-chinese-firms-uighur-oppression-covid-19-surveillance-tech-2020-6?r=US&IR=T>

¹⁹³ Hikvision's Minority Analytics – John Honovich, IPVM, 8th May 2018: <https://ipvm.com/reports/hikvision-minority>

¹⁹⁴ How China Uses High-Tech Surveillance to Subdue Minorities – Chris Buckley and Paul Mozur, New York Times, 22nd May 2019: <https://www.nytimes.com/2019/05/22/world/asia/china-surveillance-xinjiang.html>

¹⁹⁵ Tayside care home firm installs thermal imaging cameras to protect staff and residents – Jamie Buchan, 2nd June 2020: <https://www.thecourier.co.uk/fp/news/local/perth-kinross/1344275/coronavirus-tayside-care-home-firm-installs-thermal-imaging-cameras-to-protect-staff-and-residents/>

¹⁹⁶ Highly Accurate Thermographic Camera Installation and Configuration Guide – HikVision: https://us.hikvision.com/en/system/files_force/manual/ig_1217b_and_2617b_thermal_042120_na.pdf?download=1

¹⁹⁷ Mayflex installs Hikvision thermal elevated temperature screening for COVID-19 – Source Security: <https://www.sourcesecurity.com/news/hikvision-thermal-elevated-temperature-screening-solution-mayflex-uk-office-covid-19-co-1121-ga-co-3425-ga.1590392449.html>

¹⁹⁸ Lynas Foodservice utilises AI technology in assisting operations – Claire Cartmill, News Letter, 11th June 2020: <https://www.newsletter.co.uk/business/lynas-foodservice-utilises-ai-technology-assisting-operations-2878792 - gsc.tab=0>

These scanners are not only ineffective and threaten a spectrum of fundamental rights, but the use of Hikvision’s technology in the UK raises serious ethical and diplomatic questions. Darren Byler, a researcher into Uighur oppression at the University of Washington, said:

“behind the COVID-19 surveillance tools that [governments] buy from these companies are millions of Uighurs who provided the data on which aspects of these products were built.”¹⁹⁹

RECOMMENDATION 22: We urge all companies, authorities and institutions to immediately cease use of thermal surveillance, absent a strong evidence base and robust safeguards.

¹⁹⁹ These Chinese firms were blacklisted for Uighur oppression. Now they want to sell COVID-19 surveillance tools to the West – Isobel Asher Hamilton, Business Insider, 6th June 2020: <https://www.businessinsider.com/blacklisted-chinese-firms-uighur-oppression-covid-19-surveillance-tech-2020-6?r=US&IR=T>

INTELLIGENCE AND SECURITY COMMITTEE

The Intelligence and Security Committee (ISC) has a remit to oversee the government's intelligence agencies and departments. It is one of the most important parliamentary committees and a vital oversight mechanism - particularly now, considering the expansion of government surveillance, GCHQ's involvement in contact tracing, the Directive to allow GCHQ access to NHS systems,²⁰⁰ and relaxed surveillance safeguards during the pandemic²⁰¹ (these developments are detailed in our April and May reports). Yet, six months after the December general election, the ISC has still not been appointed - its longest break since it was established in 1994. Despite parties allegedly confirming their appointments for the Committee months ago, the Prime Minister is yet to approve them.²⁰²

Whilst we and other rights groups have called for greater transparency, oversight and accountability of the Government's use of surveillance material during the pandemic, this vital parliamentary Committee has been absent. The Liberal Democrats' Foreign Affairs spokesperson Alistair Carmichael MP said the Government "should be doing everything it possibly can to maintain public confidence" during the pandemic. The Scottish National Party's Ian Blackford MP, a former Committee member, said the failure to establish the ISC was "particularly worrying when the Committee's oversight has become all the more crucial given the crisis caused by the health pandemic."²⁰³

At least four written parliamentary questions have been asked by Members about the establishment of the ISC in recent weeks - including in the wake of the Reading terror attack.²⁰⁴ The last response was on 4th May, in which the Government claimed "The Committee is being formed in the normal way and as quickly as current circumstances allow."²⁰⁵ However, the six months that have elapsed show the process has been anything but normal. On 23rd June, Lord Strasburger again submitted a written question

²⁰⁰ The Consent to Activities Related to the Security of NHS and Public Health Services Digital Systems (Coronavirus) Directions 2020, 3rd 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

²⁰¹ The Consent to Activities Related to the Security of NHS and Public Health Services Digital Systems (Coronavirus) Directions 2020, 3rd 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

²⁰² Government criticised for delay in setting up security committee - Nick Eardley, BBC News, 19th June 2020: <https://www.bbc.com/news/uk-politics-53111507>

²⁰³ Ibid.

²⁰⁴ Intelligence and Security Committee:Written question - HL5988: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2020-06-22/HL5988/>

²⁰⁵ Subversion: Russia:Written question - HC40706: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-04-27/40706/>

asking when the members of the ISC will be nominated.²⁰⁶ He has not yet received a response.

RECOMMENDATION 23: The Intelligence and Security Committee should be urgently convened. The ISC should report on activity related to the Covid-19 pandemic in six months and report to Parliament.

²⁰⁶ Intelligence and Security Committee:Written question – HL6087:
<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2020-06-23/HL6087/>

FREEDOM OF EXPRESSION

Whistleblowers

In our previous report, we detailed the concerning rise in threats made to NHS staff over speaking to the media (or posting on social media) about healthcare issues within the NHS.

More gagging of NHS staff has been revealed. At the Royal Free Hospital, a senior doctor, Dr Daniel Martin OBE, emailed dozens of junior doctors and nurses to say that the hospital trust would “track any leaks to the media” and then “offer you the chance to post your P45 on Facebook for all to see.”²⁰⁷ Dr Martin, who is head of intensive care for serious infectious diseases, also referred to journalists from the Financial Times as “parasites” in the email that one staff member described as “bullying and intimidating.” A spokesman for the trust describes Dr Martin’s email as “badly worded.”²⁰⁸

In our May report, we recommended that whistleblowers are protected and that staff should be able to publicly raise any concerns they wish, in line with their right to freedom of expression and in the interests of public health.

On 17th June, Shadow Health Minister Justin Madders submitted a written parliamentary question:

To ask the Secretary of State for Health and Social Care, what recent assessment he has made of the adequacy of protections for NHS whistle-blowers and their ability to publicly raise concerns on (a) gaps in healthcare provisions and (b) other matters without adverse repercussions.

On 25th June, Health Minister Nadine Dorries responded citing the Employment Rights Act 1996, amended by the Public Interest Disclosure Act 1998, which gives legal protections to whistleblowers and said “NHS workers should be thanked for speaking up and never face detriment for doing so.”²⁰⁹ This is a very welcome response, but as

²⁰⁷ Doctors warn ‘culture of fear’ in NHS could prevent whistleblowing – Eleanor Rose and Juliette Garside, Guardian, 22nd June 2020: https://www.theguardian.com/society/2020/jun/22/doctors-warn-culture-of-fear-in-nhs-could-prevent-whistleblowing?CMP=Share_iOSApp_Other

²⁰⁸ Ibid.

²⁰⁹ NHS: Disclosure of Information:Written question – 60784: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-06-17/60784/>

whistleblowing charity Protect has said, it remains that “some NHS staff have told us they do not feel safe speaking up.”²¹⁰

NHS Contact Tracers

There has been considerable criticism of the NHS’ Test, Track and Trace Service, as detailed in this report. Perhaps in a bid to reduce negative media reports, contact tracers working for the NHS had been told they should not speak to the media, as reported in May.²¹¹

Yet continued bad press surrounding the system has led to more drastic measures – it appears that contract tracers have had their contracts altered to specify that they should not make any public comments about their role or the Test, Track and Trace service. Technology journalist Rowland Manthorpe reported on Twitter that a clause had been added to the contracts of tracers on 25th June, which states:

“You will be aware that public and media interest in Test, Track and Trace service on which you are working is high (...) you are reminded that you should not comment about the service or your role, without the prior written consent of NHS Professionals, in the media, social media or otherwise.”²¹²

As we have argued regarding NHS staff whistleblowing, raising issues in the media is a last resort that often leads to public scrutiny and much needed policy changes. Indeed, the Health Secretary recently celebrated the distribution of two billion pieces of PPE, a feat that may not have been possible without the public pressure that resulted from NHS staff speaking out.²¹³ Mr Manthorpe pointed out that his article on the lack of translation services available for non-English speakers contacted through Track and Trace – a story informed by anonymous contact tracers – likely led to the sudden subsequent appearance of translation services.²¹⁴ As Mr Manthorpe said, “[m]aking it harder for

²¹⁰ Protect comment on the DAUK survey about NHS staff being silenced over PPE – Protect, 15th May 2020: <https://www.pcaw.org.uk/protect-comment-on-the-dauk-survey-about-nhs-staff-being-silenced-over-ppe/>

²¹¹ Who are the contact tracers and what are they doing? – Joseph Lee, BBC News, 28th May 2020: <https://www.bbc.co.uk/news/uk-52838907>

²¹² Rowland Manthorpe, Twitter, 26th June 2020: <https://twitter.com/rowlmanthorpe/status/1276471952954327040?s=20>

²¹³ We’ve overcome huge supply challenges to deliver two billion items of PPE – Matt Hancock, the Times, 29th June 2020: <https://www.thetimes.co.uk/article/we-ve-overcome-huge-supply-challenges-to-deliver-two-billion-items-of-ppe-82tvngt8v>

²¹⁴ ‘English-only’ test and trace failing to contain virus – Rowland Manthorpe, Sky News, 25th June 2020: <https://news.sky.com/story/english-only-test-and-trace-failing-to-contain-virus-12014530>

contact tracers to speak to journalists isn't going to help solve any problems. It might actually make it more difficult.”²¹⁵

RECOMMENDATION 24: NHS whistleblowers, including contract tracers, 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 public health.

²¹⁵ Rowland Manthorpe, Twitter, 26th June 2020:
<https://twitter.com/rowlsmanthorpe/status/1276475372390014976?s=20>



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.”

— Sir Charles Walker MP, 15th June 2020

FREEDOM OF ASSEMBLY

In our previous report, we recommended that the right to protest is restored as a matter of urgency. 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.

It appears that many of the restrictions preventing gatherings will shortly be replaced with new, eased restrictions on gatherings of over thirty people.²¹⁶

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.”²¹⁷

On 17th June, Sir Charles submitted a written question to the Health Secretary to ask:

“whether he will amend the Health protection (Coronavirus Restrictions) Regulations (England) 2020 to clarify that peaceful demonstrations constitute a reasonable excuse for a gathering.”²¹⁸

The Department for Health said it would not be able to answer the question within the usual time period. Given the likelihood that the restriction on protests constitutes a disproportionate interference with rights to freedom of expression and assembly, it is possible that the response is being overseen by government lawyers.

²¹⁶ 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>

²¹⁷ HC Deb (15th June 2020) vol. 677 col. 600: <https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-Q382DD500705/PublicHealth>

²¹⁸ Coronavirus: Demonstrations: Written question – 60707: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-06-17/60707/>

Legal confusion

Under the Regulations (in England) gatherings of more than six people from different households outdoors are currently prohibited, and an individual commits an offence if they do not have a 'reasonable excuse' for a gathering.²¹⁹ A non-exhaustive list of reasonable excuses is provided in the Regulations, leading some to claim in legal proceedings that exercising the right to protest qualifies as reasonable excuse for gathering.²²⁰

However, there has been a great deal of political confusion on this. On 3rd June, the Prime Minister said in a daily press briefing, "'I would urge people to protest peacefully, and in accordance with the rules on social distancing'."²²¹ However, most readings of the Regulations interpret the right to protest as having been suspended, whilst there are no 'rules' (only guidance) on social distancing. It is important to remember that, during the time around the Prime Minister's statement, scores of people had been arrested at protests for breaching the Regulations on gatherings. The Prime Minister had not misspoken – on 7th June 2020, he tweeted "People have a right to protest peacefully & while observing social distancing".²²²

However, the next day on 8th June, Home Secretary Priti Patel told the House of Commons, "No matter how important the cause, protesting in large numbers at this exceptional time is illegal."²²³ If the Prime Minister's intention is that people should be able to protest peacefully – with which we wholly agree – the Government must create a clear exemption in the lockdown Regulations for protests and clarify its messaging.

On 12th June, the Prime Minister appeared to have changed his tune and tweeted, "The only responsible course of action is to stay away from these protests" – but did not say it was unlawful.²²⁴ Confusion between the most senior Government ministers and the Prime Minister over whether protests are permitted means it is impossible for individuals

²¹⁹ The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Regulation 9(1)(a) (as revised)

²²⁰ Jeremy Corbyn's brother Piers vows to fight coronavirus lockdown breach charges in court – Tristan Kirk, Evening Standard, 25th June 2020: <https://www.standard.co.uk/news/uk/piers-corbyn-brother-coronavirus-lockdown-breach-a4478776.html>

²²¹ 'Black Lives Matter, but we must fight this virus as well' Boris Johnson says protesters have the right to make their feeling known 'as long as social distancing rules are maintained' – James Tapsfield, Daily Mail, 3rd June 2020: <https://www.dailymail.co.uk/news/article-8383893/Boris-Johnson-condemns-inexcusable-death-George-Floyd.html>

²²² Boris Johnson, Twitter, 7th June: <https://twitter.com/BorisJohnson/status/1269724206440370178>

²²³ HC Statement by the Home Secretary (8th June 2020), vol. 677, col. 40: <https://hansard.parliament.uk/commons/2020-06-08/debates/212DD2A6-B810-4FDE-B3BD-1642F5BA1E86/PublicOrder>

²²⁴ Boris Johnson, Twitter, 12th June 2020: <https://twitter.com/BorisJohnson/status/1271388188544827394?s=20>

to know whether protesting constitutes a 'reasonable excuse' under the lockdown Regulations.

Enforcement

In our last report, we detailed police arrests and fines of those protesting for a range of reasons, including Black Lives Matter protestors. This has continued. Protestors from environmental campaign group Extinction Rebellion have also continued to face police interventions. Extinction Rebellion Cambridge reported that fifteen protestors (who were widely spread apart) had been arrested; they highlighted the irony that people could sunbathe next to them, but holding a placard resulted in criminal sanctions.²²⁵

Lawyers from Hodge Jones and Allen have asked the Metropolitan Police to assure the public that "attendance at a demonstration will not, in of itself, lead to either the issuing of Fixed Penalty Notices or arrests."²²⁶ Raj Chada, head of Hodge Jones & Allen's Crime Department said:

"It defies belief that even when protestors are peaceful and socially distanced, that the police have a power to arrest or issue a Fixed Penalty Notice. We urge the police not to use these regulations to interfere with the right to protest, particularly at a time where many feel so strongly about the Black Lives Matter movement and disproportionate policing."

However, protestors have been met with both fines and arrests – and an aggressive approach to prosecutions has emerged. Plans have been made to fast track prosecutions of protestors, modelled on the prosecutions of those involved in the 2011 London riots. Conservative MP Bob Blackman told the MailOnline that the Home Secretary "is reading the riot act, literally, to people up and down the country who are in charge (...) What we are considering now is the same rules that were operating in 2011 when we had riots and widespread looting."²²⁷ There have also been reports of

²²⁵ XR Cambridge, Twitter, 31st May 2020: https://twitter.com/xr_cambridge/status/1266981500433698819?s=20

²²⁶ Lawyers from HJA raise concerns that COVID regulations are being used to clamp down on peaceful protest – Hodge Allen & Jones, 3rd June 2020: <https://www.hja.net/press-releases/lawyers-from-hja-raise-concerns-that-covid-regulations-are-being-used-to-clamp-down-on-peaceful-protest/>

²²⁷ 'We cannot allow mob rule': Furious Priti Patel is 'reading the riot act' to police 'across the country' ordering them to tackle violent protesters – David Wilcock, James Tapsfield and Luke May, MailOnline, 12th June 2020: <https://www.dailymail.co.uk/news/article-8412725/Violent-protesters-face-jail-24-hours.html>

probation officers warning “several young black males” that they would be “recalled [to prison] due to their affiliations with the black lives matter movement.”²²⁸

Preventative action regarding protests has been taken too. On 25th June, police in Northumbria used a ‘Section 14 order’ (of the Public Order Act 1986) to prohibit any public assembly other than a planned Black Lives Matter vigil.²²⁹ David Mead, a professor specialising in protest and public order law at UEA Law School, questioned whether this was lawful, as this “could only have been imposed under s14A with H/Sec consent & applied to all.”²³⁰ It sets a worrying precedent if police begin to select which protests can and cannot take place, particularly if the powers used are of questionable legality.

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.”²³¹ 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.

Northern Ireland

In Northern Ireland, police used a range of tactics to prevent protests from occurring. Assistant Chief Constable Alan Todd told the BBC that police had “encouraged” organisers to cancel protests, leading to the cancellation of protests in Omagh, Portadown and Newry.²³²

²²⁸ Stop probation services trying to recall black men for protesting about BLACK LIVES MATTER – Diana Jacobs, Change.org, 15th June 2020: <https://www.change.org/p/sadiq-khan-stop-probation-services-trying-to-recall-black-men-for-protesting-about-black-lives-matter>

²²⁹ Northumbria Police, Twitter, 25th June 2020: <https://twitter.com/northumbriapol/status/1276149988981125123?s=20>

²³⁰ David Mead, Twitter, 28th June 2020: <https://twitter.com/SeethingMead/status/1277142051868610566?s=20>

²³¹ Twitter, 24th June 2020: <https://twitter.com/saucealgxrienne/status/1275880741868429312?s=20>

²³² Anti-racism rallies cancelled in NI – BBC News, 5th June 2020: <https://www.bbc.com/news/uk-northern-ireland-52934110>

Protests went ahead in Belfast and Londonderry. Photographer Brendan Harkin was observing the protest in Belfast and reported that police were handing out flyers, and had even placed a large screen in the area that displayed the warning that individuals were breaking the restrictions on gatherings.²³³ Worryingly, he reported that police took the details of protest stewards for “aiding and abetting a breach” and “to follow up if there is a breach taking place of Covid 19 gathering regulations.” Police Service Northern Ireland (PSNI) tweeted that some protestors, including the organisers, “will now be reported to the Public Prosecution Service with a view to prosecution.”²³⁴

Many were turned away before they could reach the protests, with Police East Belfast tweeting that they were “conducting checks on roads and transport hubs (...) ahead of planned protests.”²³⁵ PSNI reported that between 60 to 70 fines had been issued to protesters.²³⁶ Reginald Clarke, a speaker at the Belfast event, was given a fine whilst walking alone to the protest. He criticised the unfair nature of the fine asking, “Are you telling me I can't walk through that area because there might be a gathering? Either you give the ticket to everybody there or you don't give it to anyone.”

A petition to rescind fines issued to protesters has reached over 5,400 signatures.²³⁷ Patrick Corrigan, Amnesty International’s Northern Ireland Programme Director, said:

“A choice has been made to use quite significant policing resources to make penalties and threats of prosecution against people involved in a socially distant protest – but not used in other circumstance.”²³⁸

Brian Gormally, Director of the Committee for the Administration of Justice, similarly criticised PSNI’s response and noted the “Regulations here do not address the right to protest and instead the PSNI is relying on powers designed to restrict social gatherings that only became enforceable the night before the protest.”²³⁹

²³³ Brendan Harkin, Twitter, 6th June 2020: <https://twitter.com/brendanjharkin/status/1269241740868886529?s=20>

²³⁴ Police Service NI, Twitter, 6th June 2020: <https://twitter.com/PoliceServiceNI/status/1269307806815072256?s=20>

²³⁵ Police East Belfast, Twitter, 6th June 2020: <https://twitter.com/PSNIBelfastE/status/1269214973508628480?s=20>

²³⁶ 'Between 60 and 70' fines at anti-racism protests – BBC News, 8th June 2020: <https://www.bbc.com/news/uk-northern-ireland-52963039>

²³⁷ Remove fines for protesters following social distancing – Reece Lawson to PSNI, 6th June 2020: <https://www.change.org/p/psni-remove-fines-for-protesters-following-social-distancing>

²³⁸ Amnesty accuses Stormont of 'unacceptable' amendment to allow fines for Black Lives Matters protestors – Jessica Black, View Digital, 9th June 2020: <https://viewdigital.org/amnesty-accuses-stormont-of-unacceptable-amendment-to-allow-fines-for-black-lives-matters-protestors/>

²³⁹ Ibid.

PSNI also received criticism for their different approach to protesters gathered around statues at Belfast City Hall in order to 'protect' them. No fines were issued, nor were any arrests made. John Blair, a Policing Board member, told the BBC's Good Morning Ulster programme:

"The PSNI needs to apply a consistent approach to all sections of society and to all occasions and incidents at which they are present. Any deviance from that approach risks community confidence in policing and on this occasion particularly of ethnic minority members of our society."²⁴⁰

An investigation by the Police Ombudsman into how PSNI has policed protests has been launched in light of this uneven enforcement.²⁴¹

It is neither necessary nor proportionate for police to intimidate, fine and arrest those peacefully protesting. These excessive and unequal police measures risk further damaging trust in communities and individuals who are already protesting discriminatory policing. Everyone should be free to exercise their right to protest, regardless of the cause.

RECOMMENDATION 25: Any Fixed Penalty Notices or prosecutions under lockdown Regulations issued for attendance of a protest or demonstration should be revoked or set aside.

RECOMMENDATION 26: Any new restrictions on large gatherings must explicitly state that political gatherings and demonstrations are permitted. In the context of authoritarian measures, upholding the right to freedom of expression is essential to preserve our democracy.

²⁴⁰ Statues protest: PSNI needs to show 'consistent approach' – BBC News, 17th June 2020: <https://www.bbc.com/news/uk-northern-ireland-53049348>

²⁴¹ Ombudsman investigating police enforcement at gatherings – ITV News, 17th June 2020: <https://www.itv.com/news/utv/2020-06-17/ombudsman-investigating-police-enforcement-at-gatherings/>