

**BIG
BROTHER
WATCH**

JULY 2020

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

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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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CONTENTS

INTRODUCTION	4
RECOMMENDATIONS	6
EMERGENCY LAWS	9
HEALTH PROTECTION REGULATIONS	9
The role of Parliament	10
Four-week reviews	14
Guidance v law.....	16
Enforcement	17
Unlawful lockdown prosecutions.....	18
Unlawful lockdown fines	18
Postcode lottery.....	19
Ethnicity and disproportionality.....	20
Stop and Search	21
National divergence	22
Wales	23
Scotland.....	24
Northern Ireland.....	25
Funerals	25
CORONAVIRUS ACT	27
Schedule 21: detention powers	27
Schedule 22: restrictions on gatherings.....	28
Local elections	29
Scotland.....	30
NEW STATUTORY INSTRUMENTS	31
Wearing of Face Coverings Regulations.....	31
England.....	31
Retail spaces	31
Public transport.....	34
Wales	35
Scotland.....	36
Northern Ireland	37
International Travel Regulations	37
England.....	37
Scotland.....	38
Northern Ireland.....	38

<u>VIRTUAL PARLIAMENT</u>	39
<u>BIG DATA AND HEALTH CARE</u>	42
NHS COVID-19 Data Store.....	43
National COVID-19 Chest Image Database.....	45
<u>CONTACT TRACING</u>	46
Test and Trace	46
Private venues	47
Data misuse	49
NHSX app.....	51
<u>BIOSURVEILLANCE</u>	55
Thermal scanners.....	57
<u>LOCAL LOCKDOWNS</u>	60
Unavailable data.....	63
Law v. guidance.....	65
Enforcement.....	69
Leicester lockdown debate.....	71
Ending local lockdowns.....	73
Wales.....	74
Scotland.....	74
Northern Ireland.....	75
<u>FREEDOM OF EXPRESSION</u>	76
Counter Disinformation Unit.....	76
Freedom of assembly.....	76
Powers for local authorities.....	77
Northern Ireland	78

INTRODUCTION

This is our fourth monthly report on the impact of emergency measures on civil liberties in the UK. Recovering from the initial shock of the pandemic, and with restrictions in many areas eased, we are now beginning to glean a sense of exactly what the tirelessly discussed “new normal” looks like.

Local lockdowns have been autocratically imposed with the ferocity of shock and awe campaigns. In a now worryingly familiar Kafkaesque manner, restrictions have been imposed without preceding legal authority, a published evidence base, engagement with local officials or effective public communications. This includes sweeping restrictions that carry criminal sanctions. Few would criticise proportionate efforts to protect public health, but without vital transparency it is impossible for the public or parliamentarians to make the kind of assessments needed to have trust in these Government diktats – quite aside from the risk such Government diktats pose to our democracy. As we publish this report, the Health Secretary has imposed a new lockdown on vast parts of the north of England including Greater Manchester, east Lancashire and West Yorkshire. He did so via a tweet, less than 3 hours before the as-yet-unpublished legal restrictions were to be enforced – coinciding with Eid.

Meanwhile, as pubs and workplaces open, a new environment of biosurveillance is unfolding. QR codes, thermal scans, automated physical distancing controls and demands for personal data now characterise our social worlds. Community is increasingly superseded by control. This surveillance theatre aims to give people a sense of, perhaps unwarranted, certainty and safety, but without an evidence base, what it is most successful at achieving is a toxic combination of arbitrary compliance and fear.

As we gain these micro-controls in our everyday lives, it is becoming easy to forget what we have in fact lost. This reshaping of public life with unevidenced and experimental surveillance technologies is only possible in a society where the bedrock of civil liberties has become a sinkhole. Our long-held values of freedom, the rule of law and parliamentary democracy are at risk of collapsing in on themselves under the weight of this Ministerially-governed public health situation. The impact on the public psyche is diminishingly acknowledged in the calculus of proportionate public health measures. It is hard to see how we could ever return to a sense of normality after this wave of increasingly oppressive measures, if there ever is an “after” – there is no obvious off switch to these measures.

It is clear that our work is more important now than ever.

Following our campaign for a shorter duration of the Coronavirus Act, Parliament will have the opportunity to repeal the Act after it resumes in September. This is one of the decisive moments the UK has to start a course correction and repeal the Act. In its place, authorities can rely on the Public Health Act 1984 and multiple other statutes for comparable powers,

which contain superior safeguards, rather than the draconian Act that was introduced at the last moment, passed without parliamentary scrutiny and ushered in the most extreme and arbitrary powers that have already led to 89 unlawful prosecutions – encapsulating the disastrously authoritarian manner in which the Government has met the pandemic.

This crisis, and the technological revolution in which it has occurred, both prompt the question of what kind of society and what kind of country we want the UK to be. This is not a time to accede to an oppressive mode of management but a time to reimagine a better world and fight for a freer future.

Silkie Carlo

RECOMMENDATIONS

RECOMMENDATION 1: The Government must end the use of ‘urgency’ as an excuse for bypassing Parliamentary scrutiny and approval of Regulations. When Parliament is recalled in September, debating lockdown Regulations must be priority.

RECOMMENDATION 2: 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 3: 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 4: Police chiefs should urgently instigate a national review of all fixed penalty notices issued under the lockdown Regulations.

RECOMMENDATION 5: 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 6: Schedule 21 of the Coronavirus Act poses an extraordinary risk to fundamental rights, has been abused to pursue 89 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 7: 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 8: With restrictions lifted and people resuming ordinary life, the normal democratic process should also be resumed. Section 60 of the Coronavirus Act should be repealed.

RECOMMENDATION 9: The UK Government and devolved Parliaments must launch public awareness campaigns explaining exemptions to Regulations which require the wearing of face coverings.

RECOMMENDATION 10: Hybrid proceedings and remote voting should be introduced to the House of Commons when Parliament returns in September.

RECOMMENDATION 11: The Department of Health and Social Care must make an assessment of its use of data analytics in the NHS Covid-19 Data Store, ideally in Data Protection Impact Assessment.

RECOMMENDATION 12: 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 13: Vast amounts of data collected for automated processing must be subject to more stringent safeguards than ordinary data collection. Patient consent should be required for data entered into the National COVID-19 Chest Imaging Database, particularly from patients who test negative for Covid-19.

RECOMMENDATION 14: The Department of Health and Social Care must urgently produce the legally required Data Protection Impact Assessment for its Test and Trace program.

RECOMMENDATION 15: Collecting contact tracing information from places of worship puts highly sensitive personal data at risk. The ICO should publish specific guidance for places of worship to ensure that data which reveals religious beliefs is kept secure.

RECOMMENDATION 16: There is a high risk of personal data collected in the hospitality and leisure sector for NHS Test and Trace being misused. The ICO must investigate incidents where personal data has been misused and take decisive action to prevent more abuses of Test and Trace data occurring.

RECOMMENDATION 17: NHSX should commit to privacy by design and minimised data collection in any contact tracing app.

RECOMMENDATION 18: NHSX must reinstate the NHS COVID-19 App Data Ethics Advisory Board in order to ensure ethical oversight of any contact tracing app in development.

RECOMMENDATION 19: The UK Government and devolved administrations must take steps to ensure that the use any contact tracing app is not a requirement or barrier to access workplaces, schools, services or venues.

RECOMMENDATION 20: We urge all companies, authorities and institutions to immediately cease use of thermal surveillance, absent a strong evidence base and robust safeguards.

RECOMMENDATION 21: Timely reviews and the evidence bases of local lockdowns should be published to allow for public scrutiny.

RECOMMENDATION 22: With gatherings of over 30 now permitted for a range of organisations, there is no longer a credible public health excuse for the restriction on the right to protest. Ministers must amend the Health Protection Regulations to restore the right to protest.

EMERGENCY LAWS

The volume of emergency legislation now in place is vast and growing. Ronan Cormacain, Senior Research Fellow at the Bingham Centre for the Rule of Law, warned that as “the process of rushing legislation through becomes normalised (...) the risk is that we become so used to emergency laws that they become part and parcel of ordinary procedure.”¹

Indeed, since the first Coronavirus-related statutory instrument was laid on 28th January 2020, there has been a total of 163 laid before parliament at the time of writing, averaging at 7 new coronavirus-related statutory instruments a week.² Including in devolved administrations, there are now well over 200 statutory instruments with the word ‘coronavirus’ in them. Just 4.5% of these statutory instruments have been subject to the ‘draft affirmative’ procedure, which requires them to be approved by parliament before they are passed into law. The statutory instruments have been laid using powers from 88 different Acts of Parliament, 3 Orders and one EU Regulation. 10 statutory instruments have been laid using powers in the Coronavirus Act 2020.

We examine the main emergency laws and their impact on civil liberties, parliamentary democracy and the rule of law below.

HEALTH PROTECTION REGULATIONS

The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 came into force on Saturday 4th July, widely termed ‘Super Saturday’,³ following announcements made by the Prime Minister on 23rd June⁴ that pubs (and other premises) could reopen and subsequent guidance published by the Government on 24th June.⁵ These new Regulations have been amended twice, on 11th July and 25th July respectively, which allowed for the majority of businesses to re-open, although nightclubs, indoor play areas, indoor skating rinks, bowling alleys and conference halls must remain closed. A third set of amendments are expected to be introduced on 1st August which will allow for the re-

¹ Global Legislative Responses to Coronavirus - Bingham Centre for the Rule of Law webinar, 15th July 2020: <https://binghamcentre.biicl.org/events/1359/part-2-global-legislative-responses-to-coronavirus>

² Coronavirus Statutory Instruments Dashboard – Hansard Society (updated 24th July 2020): <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>

³ Friends embrace ‘Super Saturday’ as pubs and bars reopen – BBC News, 5th July 2020: <https://www.bbc.co.uk/news/uk-53295513>

⁴ 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>

⁵ Staying alert and safe (social distancing) after 4 July – Cabinet Office, 24th June 2020: <https://www.gov.uk/government/publications/staying-alert-and-safe-socialdistancing/staying-alert-and-safe-social-distancing-after-4-july>

opening of remaining venues except nightclubs and indoor play areas, as per the Prime minister's announcement on 17th July.⁶

The new Regulations and the subsequent amendments lifted most restrictions on movement and gatherings that had characterised the 'lockdown', although a ban on gatherings of over thirty people indoors or outdoors remains, unless it occurs on land "operated by a business, a charitable, benevolent or philanthropic institution or a public body as a visitor attraction."⁷ There are also exceptions for gatherings organised by "a business, a charitable, benevolent or philanthropic institution, a public body, or a political body," where the organiser has carried out a risk assessment and takes all reasonable measures to limit the risk of coronavirus transmission. There are exemptions too for gatherings for the training or competition of elite athletes, work, education or training, for childcare, to provide emergency assistance, to enable people to avoid injury or illness or to escape the risk of harm.⁸

The Regulations include a new power for the Health Secretary to "restrict access to a specified public outdoor place, or to public outdoor places of a specified description."⁹ This includes public gardens, open country, access land and highways. The restriction must respond to a "serious and imminent threat to public health", be necessary to prevent the spread of coronavirus, and be proportionate to that aim.¹⁰ The Health Secretary must "consult with the Chief Medical Officer or one of the Deputy Chief Medical Officers of the Department of Health and Social Care" and review the restriction every seven days.¹¹

Since this restriction can be made through a direction of the Health Secretary, without the need for new legislation, decisions cannot be scrutinised or rejected by Parliament. The power to shut down vast parts of the country are at the discretion of Health Secretary, with very few safeguards. While the right to appeal does exist within legislation, only "owners and occupiers" can appeal, meaning those who use public space have no way to challenge a closure.¹²

The role of Parliament

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

⁶ Prime Minister's statement on coronavirus (COVID-19), 17th July 2020: <https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-17-july-2020>

⁷ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 5(2)

⁸ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 5(3)

⁹ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 6(1)

¹⁰ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 6(1)(a), (b)

¹¹ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 6(4), (7)

¹² Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 6(13)

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

In its judgment on whether the lockdown Regulations could be challenged in court, the High Court (regarding the claim that freedom of religion had been unlawfully interfered with) noted that even the Court was denied full information regarding forthcoming changes:

“At the hearing on 2 July 2020, [the Government’s defence lawyer] indicated that the Regulations may be amended in the near future to permit communal worship. No regulations, or even draft regulations, amending Regulation 5 were produced at the hearing.”¹³

It is concerning that, just two days before they were published, no draft of the Regulations could be produced. The Government has consistently denied every opportunity for much-needed prior scrutiny of the Regulations.

As has been the case with the original Regulations and every subsequent amendment, Parliamentary scrutiny has been delayed and devalued. Despite repeated insistence from Government ministers that this will not become routine practice, the new Regulations and the first amendment were debated in the House of Lords twenty days after they were made, on 24th July, with no sign of any debate scheduled in the Commons. The second amendment is yet to be debated in either House. As noted, a third amendment is expected on 1st August. Since Parliament is on recess, this will not receive any scrutiny for at least a month.

The House of Lords debate was dominated by exasperation at the Government’s devaluing of Parliamentary scrutiny. As well as the considerable delay in holding the debate, Peers were granted just one minute to speak.

Labour peer Lord Liddle, who has consistently criticised the authoritarian approach taken by the Government, said:

“My Lords, here we go again: statutory instruments being debated after they have come into effect. This is not parliamentary scrutiny; it is government diktat.

¹³ R (Dolan) v Secretary of State for Health and Social Care [2020] EWHC 1786 (Admin), para 86: <https://www.bailii.org/ew/cases/EWHC/Admin/2020/1786.html>

The Minister will argue that this is necessary in an emergency, and of course I accept an element of that, but it is part of a more general trend.”

It is a testament to Lord Liddle’s frustration that he even suggested that the House refuse to approve the legislation:

“We can force change. If we refuse consent to these SIs, the Government will have to agree to a more effective system of pre-implementation scrutiny with the power of amendment.”¹⁴

Green Party peer Baroness Jones has also been a fierce critic of the lack of Parliamentary scrutiny afforded to new legislation:

“My Lords, like many other Peers, I am furious about the way the Government seem to be ruling by diktat; it is not democratic. To describe what we have today— a minute per Peer—as debate is absolutely ludicrous. Can the Government please get back on some sort of democratic footing?”¹⁵

Criticism came too from Conservative Peers. Lord Cormack said:

“A series of one-minute statements is not parliamentary scrutiny, and we have to hammer that home through [the Health Minister] (...) He must tell his political masters that this is not acceptable. Retrospective endorsement of government fiat is inimical to parliamentary democracy, and of course it adds to the muddle, to which many of your Lordships have referred during this debate.”¹⁶

Baroness Thornton, the Shadow Spokesperson for Health said:

“(...) this is not a debate because, with one minute per Member, the Minister can choose whether he answers the questions in a meaningful way without any further challenge. He can read his prepared script and there is nothing that we in this House can do. The noble Lord, Lord Cormack, is quite correct: this is a travesty of parliamentary scrutiny.

¹⁴ HL Deb (24th July 2020) vol. 804, col. 2481: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

¹⁵ HL Deb (24th July 2020) vol. 804, col. 2481: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

¹⁶ HL Deb (24th July 2020) vol. 804, col. 2489: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

“It is deeply concerning and unsatisfactory to make regulations in this way, and is indicative of this Government’s cavalier attitude to parliamentary scrutiny.”¹⁷

Baroness Thornton also pointed out the very real impact that publishing Regulations at the last minute has on businesses whose re-opening was dependent on them:

“Many of them, along with community groups and charities, have been very critical of the Government’s communication on lockdown relaxation measures. They say that the lack of preparation time has made a short summer season unviable. Other businesses began preparations to open, following headlines on government announcements, only to find subsequently that they are unable to offer certain services.

“I hope that the Minister will apologise to these operators, their staff and the communities they serve for the Government’s shambolic failure to communicate with industry and provide clarity and guidance in a timely fashion.”¹⁸

Almost every Peer engaged in the debate expressed anger that Parliament had again been overlooked when making significant legislation. Conservative peer Lord Balfe said the process of debating legislation was “deteriorating into farce”¹⁹, crossbencher Lord Alton argued that the House was “simply going through the motions” by approving Regulations retrospectively²⁰, and Liberal Democrat peers Baroness Tyler²¹ and Baroness Sheehan²² were joined by Conservative Baroness Altmann²³ in branding the debate a “mockery” of parliamentary scrutiny. The cross-party condemnation of the Government’s approach to legislating restrictions is damning.

The new Regulations have not been debated in the House of Commons. In fact, the last debate and approval of the lockdown Regulations in the Chamber was on 15th June.

¹⁷ HL Deb (24th July 2020) vol. 804, col. 2494: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

¹⁸ HL Deb (24th July 2020) vol. 804, col. 2495: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

¹⁹ HL Deb (24th July 2020) vol. 804, col. 2490: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

²⁰ HL Deb (24th July 2020) vol. 804, col. 2490: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

²¹ HL Deb (24th July 2020) vol. 804, col. 2483: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

²² HL Deb (24th July 2020) vol. 804, col. 2485: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

²³ HL Deb (24th July 2020) vol. 804, col. 2488: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

Shadow Health Minister Justin Madders expressed his frustration at the Committee hearing over continued delays:

“We are here today to debate amendments to those regulations, which were laid on 10 July and came into force on 11 and 13 July. This will be the fifth occasion on which I am forced to highlight the unsatisfactory approach to parliamentary scrutiny of the regulations, which was at least acknowledged by the Minister last week and again today. It is still the case, however, that we continue to debate regulations after they come into effect.

“Members on both sides, and in the other place, have expressed concern about time not being provided to ensure future changes are debated before they are made. For me, it is evident that the Government are running out of excuses as to why they have failed to ensure that that happens.

“As I said last Thursday, parliamentary scrutiny is not something that can be ditched because the timing is inconvenient, especially for regulations such as these, which have huge ramifications. These issues are too important not to be debated and given timely and full parliamentary scrutiny.”²⁴

The Government cannot continue to ignore these words. Parliament has now gone into summer recess, with many significant pieces of legislation yet to face scrutiny or approval. The Government must commit to restoring full democratic approval of any legislation passed in response to the pandemic, and stop using the excuse of ‘urgency’ to evade scrutiny.

RECOMMENDATION 1: The Government must end the use of ‘urgency’ as an excuse for bypassing Parliamentary scrutiny and approval of Regulations. When Parliament is recalled in September, debating lockdown Regulations must be priority.

Four-week reviews

Any measures enacted under the new Health Protection Regulations must be reviewed every 28 days to ensure their necessity. The first review of The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 was due on 28th July 2020. No such review has been published and no announcement was made. In fact, not a single review of any of the Regulations has been published.

²⁴ Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) Regulations 2020 - Second Delegated Legislation Committee (20th July 2020): [https://hansard.parliament.uk/commons/2020-07-20/debates/0577c396-d652-4210-b9c8-747f62aa5c26/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)\(Amendment\)Regulations2020](https://hansard.parliament.uk/commons/2020-07-20/debates/0577c396-d652-4210-b9c8-747f62aa5c26/HealthProtection(CoronavirusRestrictions)(No2)(England)(Amendment)Regulations2020)

We have repeatedly made the case for the publication of these reviews in our previous monthly reports. In light of the Government's disregard for parliamentary scrutiny in passing these Regulations, information as to why Government is maintaining them is essential.

We have been working with parliamentarians to ensure the recommendations on these (and other) matters in our monthly reports are pursued.

On 18th and 17th June respectively, Justin Madders MP asked 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,²⁵ and what plans he has to include a full necessity and proportionality assessment in those reviews.²⁶ The Government responded on 2nd July, explaining that its "social distancing measures" are "under continual review", pointing to a series of Written Ministerial Statements and oral statements that do not directly correspond or relate to the contents of any of the legally required reviews; and that proportionality has been "considered" at "each of these review points".

Shadow Health Minister Justin Madders MP has continued to call on the Government to publish these reviews. In the Second Delegated Legislation Committee on 20th July, he raised the issue again:

"I have previously asked the Minister why the legally required reviews of 16 April, 7 and 28 May and 25 June have not been published. I have not as yet had a satisfactory answer, so I ask that question again today. The Secondary Legislation Scrutiny Committee has also called on the Government to ensure that that information is provided. Without those reviews, we are not in a position to judge the impact of previous regulations; and when it comes to the current regulations, all that has been published alongside them is an explanatory note telling us that no consultation has been carried out and no regulatory impact assessment has been undertaken."²⁷

It is unacceptable that reviews of these Regulations, which have made a serious and sustained impact on every area of our lives, have not been published.

²⁵ 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/>

²⁶ 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/>

²⁷ Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) Regulations 2020 - Second Delegated Legislation Committee (20th July 2020): [https://hansard.parliament.uk/commons/2020-07-20/debates/0577c396-d652-4210-b9c8-747f62aa5c26/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)\(Amendment\)Regulations2020](https://hansard.parliament.uk/commons/2020-07-20/debates/0577c396-d652-4210-b9c8-747f62aa5c26/HealthProtection(CoronavirusRestrictions)(No2)(England)(Amendment)Regulations2020)

RECOMMENDATION 2: 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) (No. 2) 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 3: 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 criticised²⁸ and has led to arbitrary police enforcement across the UK.

There are no longer enforceable Regulations on socialising except for the restriction on large gatherings, as described. However, the Government's complex guidance risks blurring the line between what people must and should do, in particular since the guidance repeats revoked Regulations. This is an extract from the Government's current 'Meeting people from outside your household' guidance²⁹:

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

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

This 'guidance' echoes the legal restrictions that were formerly in place under the now revoked Regulations prior to 4th July. Whilst this may be advisable guidance to follow as a

²⁸ See our previous Emergency Powers and Civil Liberties Reports: <https://bigbrotherwatch.org.uk/campaigns/emergency-powers/#monthly-report>

²⁹ Meeting people from outside your household – Gov.uk, 23rd June (updated 17th July): <https://www.gov.uk/guidance/meeting-people-from-outside-your-household-from-4-july>

precaution, these are not legal requirements and go far beyond the law. Lawyers from Kingsley Napley said of the new guidance:

“Since the inception of the coronavirus regulations coming into force at the end of March, police officers have cited the discrepancy between advice of senior politicians and the law itself as a source of confusion which has resulted in an inconsistency of enforcement throughout the country and numerous false charges. This will no doubt continue as the government fails to provide clarity between what is included in government guidance and what is legislated in law.”³⁰

The ambiguity was also criticised in the Public Administration and Constitutional Affairs Committee. Conservative MP John Stevenson criticised the Government’s constant framing of guidance as law:

“We could argue that, actually, Ministers have misled the public, because they have basically said one thing when the law of the land, which we all have to follow, has said something completely different. Therefore, people have adjusted their behaviour when they did not need to.”³¹

The ambiguity around what people “must” and “should” do corrodes the rule of law, making people unsure if their actions will lead to criminal sanction. It can also lead to serious public health repercussions. A mosque in Blackburn is under police investigation after a funeral with over 250 mourners was held; the chairman of the mosque said “they thought there were no restrictions on numbers if hygiene and distancing measures were in place.”³² In this case, the confusion not only brought the risk of criminal sanctions but of a coronavirus outbreak, after the imam conducting the funeral tested positive for coronavirus, potentially infecting hundreds of people.³³

Enforcement

The latest statistics released by the National Police Chief’s Council (NPCC) reveal that a total of 18,669 fixed penalty notices (FPNs) have been issued from 27th March 2020 to 20th

³⁰ What am I allowed to do now? The legal extent of the 4 July coronavirus Regulations - Stephen Parkinson and Rosie Gibson, Lexology, 8th July 2020: <https://www.lexology.com/library/detail.aspx?g=8cd89299-96c7-4702-9b22-973178751568>

³¹ Oral evidence: Responding to Covid-19 and the Coronavirus Act 2020, HC 377 - Public Administration and Constitutional Affairs Committee, 14th July 2020: <https://committees.parliament.uk/oralevidence/689/default/>

³² Blackburn mosque 'faces police investigation' over 250 at funeral – BBC News, 19th July 2020: <https://www.bbc.co.uk/news/uk-england-lancashire-53464840>

³³ Blackburn mosque closed as imam tests positive for coronavirus – Sophie-May Clarke, Lancashire Telegraph, 19th July 2020: <https://www.lancashiretelegraph.co.uk/news/18592920.blackburn-mosque-closed-imam-tests-positive-coronavirus/>

July 2020 in England and Wales.³⁴ This represents an increase of 180 FPNs from the 18,489 issued as of 22nd June.³⁵

Unlawful lockdown prosecutions

On 16th July, the CPS published its third review into prosecutions under the new emergency laws. Out of 105 cases, six were withdrawn in court. Of these, four were withdrawn because Welsh regulations had been used in England (or vice versa) and two were withdrawn on evidential grounds.³⁶ This represents 6% off all charges under the Regulations. As reported in our June review, the CPS found 10% of lockdown prosecutions were unlawful in May.

In total, twenty-six charges under the Health Protection Regulations out of 376 have been found to be unlawful, approximately 7% off all charges.

Unlawful lockdown fines

The CPS reviews have revealed an 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.

Big Brother Watch sent a second letter to Martin Hewitt, Chair of the NPCC, urging the NPCC to instigate or support a national review of all FPNs issued under emergency laws in England. This call was backed by 13 rights groups, including Amnesty International, Liberty and the Institute of Race Relations, over 40 parliamentarians, human rights lawyers and Reverend Martin Poole – the Brighton Vicar who questioned the Health Secretary Matt Hancock during the Government’s daily press briefing in the wake of the Dominic Cummings affair. Revd. Poole said his question had aimed to “highlight potential inequality in the way lockdown regulations were being implemented” and that this “appears to be borne out in the statistics”.³⁷

On 27th July, we received a reply from Martin Hewitt stating “I do not believe that a national review of all FPNs is appropriate” for four reasons: because the policing has, apparently, been “proportionate”; some police forces have independently rescinded wrongly issued FPNs; those issued with a FPN can refuse to pay and face magistrates proceedings; and

³⁴ Coronavirus fines issued by forces continue to fall – National Police Chief’s Council, 27th July 2020: <https://news.npcc.police.uk/releases/coronavirus-fines-issued-by-forces-continue-to-fall>

³⁵ Note, the true figure is unclear, as many police forces have withdrawn fines as well as issuing them, as well as making counting errors.

³⁶ Latest findings for CPS coronavirus review – Crown Prosecution Service, 16th July 2020: <https://www.cps.gov.uk/cps/news/latest-findings-cps-coronavirus-review>

³⁷ Campaigners demand review of all lockdown fines – Big Brother Watch, 1st July 2020: <https://bigbrotherwatch.org.uk/2020/07/campaigners-demand-review-of-all-lockdown-fines/>

chief constables are held to account by Police and Crime Commissioners. Regrettably, we conclude that the police are determined to avoid accountability on this topic.

Our Freedom of Information request to ACRO, the Criminal Record Office, found that 33 police forces have withdrawn FPNs across England. 306 FPNs were cancelled by 31 police forces across England, while 115 FPNs were withdrawn in court across 18 police forces. Our Freedom of information requests to individual police forces have also revealed a number of cancelled FPNs. Our analysis indicates that a minimum of 550 FPNs have been cancelled. However, internal review procedures are wholly inconsistent and while some police forces have withdrawn fines, many have not. This is yet further evidence supporting the need for a full and thorough review of all FPNs.

FPNs do not have the safeguards of subsequent review by prosecutions lawyers and/or magistrates. Big Brother Watch, and many of the groups and lawyers we work with, 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 18,669 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.

RECOMMENDATION 4: Police chiefs should urgently instigate a national review of all fixed penalty notices issued under the lockdown Regulations.

RECOMMENDATION 5: 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

Big Brother Watch's analysis has found significant variance in FPNs issued across the country. Since the lockdown Regulations were introduced, Cumbria Police has proportionately issued the most FPNs, at 730 FPNs³⁸ or 146 FPNs per 100,000 people. North Yorkshire Police is a close second, issuing 1,152 FPNs³⁹ or 140 FPNs per 100,000. Dorset Police has issued 110 FPNs per 100,000 people (845) and Devon and Cornwall have issued 58 FPNs per 100,000 people (1,013).⁴⁰ This stands in stark contrast to other police forces across the country: Warwickshire and Greater Manchester Police have issued 11

³⁸ Coronavirus fines issues by forces continue to fall – NPCC, 27th July 2020: <https://news.npcc.police.uk/releases/coronavirus-fines-issued-by-forces-continue-to-fall>

³⁹ Ibid.

⁴⁰ Ibid.

FPNs per 100,000 people (63 and 315 respectively), Kent Police has issued 7 FPNs per 100,000 people (127) and Staffordshire Police has issued just 4 FPNs per 100,000 people (41).⁴¹

Many police forces with high fine rates had explained this as enforcement against people visiting beauty spots in their area, in breach of the restrictions on movement. However, those restrictions on movement have now been lifted and yet this disparity between forces is continuing. Indeed, inconsistency is reflected in the comparatively high number of FPNs issued by the same forces over the past month. Cumbria Police continues to fine people at a higher rate than any other in England. Our analysis shows that from 25th June to 20th July, 42 out of 180 new fines recorded in England were issued by Cumbria Police Force, almost a quarter (23%) of the total. Devon and Cornwall Police issued 35 FPNs (19%), Dorset Police issued 21 FPNs (12%) and North Yorkshire 17 FPNs (9%). The Metropolitan Police, the largest force in England, issued just 14 FPNs (8%). Other forces, such as Avon and Somerset and Cheshire, issued no FPNs during this period.

In Wales, between 22nd June and 20th July Dyfed-Powys issued 59 FPNs, while Gwent issued just 1.⁴² North Wales and South Wales police forces withdrew 6 FPNs between them. Despite Dyfed Powys policing an area that represents approximately 17% of the Welsh population, it is responsible for 98% of all FPNs issued during this period.

The NPCC noted that "caution should be taken to make comparisons between forces as variation in is likely to reflect a range of factors including how the force has decided to police non-compliance."⁴³ It is concerning that the NPCC would suggest that it is acceptable for some police forces to take more aggressive enforcement action than others.

Ethnicity and disparity

In our previous report, we detailed the alarming disproportionality of FPNs issued to black and minority ethnic (BAME) groups, with black and Asian people facing higher levels of fines across a number of police forces. We recommended that the NPCC and all police chiefs should provide all the ethnicity data they have relating to FPNs. On 27th July, the

⁴¹ Ibid.

⁴² Statistical update on number of lockdown fines given by police - National Police Chief's Council, 26th June 2020: <https://news.npcc.police.uk/releases/statistical-update-on-number-of-lockdown-fines-given-by-police-1>

⁴³Fixed penalty notices issued under COVID-19 emergency health regulations by police forces in England and Wales – National Police Chief's Council, 27th July 2020: <https://cdn.prgloo.com/media/download/6664211dc192446b86f6ceebcaaa1690>

NPCC published this information. The report paints a worrying picture of unequal enforcement of lockdown Regulations across the country.

BAME people are 1.6 times more likely to be issued a FPN than white people, as a national average.⁴⁴ The disparity increases even more for young men, with BAME 18-34 year olds twice as likely to be fined than young white men. The figures are even more worrying in some areas of England. Last month we reported disparities in Cumbria, Avon and Somerset, Lincolnshire and Suffolk, but a more detailed breakdown has revealed the extent to which black and Asian people in particular are facing higher rates of police enforcement.⁴⁵

In Cumbria, Asian people were 5.6 times more likely to be fined than white people, and black people were 3.8 times more likely.⁴⁶ In Gloucester, black people were 9.8 times more likely to be fined, with BAME people overall 3.7 times more likely to be fined than white people. In North Yorkshire, Asian people were 9.1 times more likely to be fined and BAME people were 5.6 times more likely to be fined overall. In Derbyshire, black people were 8.3 times more likely to be fined, while Asian people were 5.6 times more likely to be fined. Only one police force, Cheshire, was found to have fined BAME people at the same rate as white people overall – however this is due to Asian and people of mixed ethnicity being fined at a lower rate than white people, while black people were still 5.7 times more likely to be fined than white people.

In Wales, the disparity was similarly stark. Dyfed-Powys was 4.7 times more likely to fine BAME people, and 7.3 times more likely to fine black people.⁴⁷ Gwent was 3.4 times more likely to fine BAME people, and 5.7 times more likely to fine people of mixed ethnicity. North Wales was 4.1 times more likely to fine BAME people, with black and Asian people both 5.4 times more likely to receive fines. In South Wales, BAME people were 2.1 times more likely to be fined than white people, with black people 3.1 times more likely. These findings indicate serious discrimination problems within police enforcement.

Stop and search

In our previous monthly reports, we have raised concerns over the increased use of stop and search powers during the lockdown, with BAME people being disproportionately targeted. New evidence has demonstrated that this is particular issue in London. The Metropolitan Police carried out 21,950 stop and searches on young black men between

⁴⁴ Policing the Pandemic: Detailed analysis on police enforcement of the Public Health Regulations and an assessment on disproportionality across ethnic groups – National Police Chief’s Council, 27th July 2020: <https://cdn.prgloo.com/media/download/608327f7e62a4432a59ce05c5c1554bc>

⁴⁵ Appendix Tables for Policing the Pandemic Report – National Police Chief’s Council, 27th July 2020: <https://cdn.prgloo.com/media/download/9e6084e976684f9babfa53e671c81d63>

⁴⁶ Ibid, Table 15

⁴⁷ Ibid.

March and May.⁴⁸ Cressida Dick, the Metropolitan Police Commissioner, defended this high number by stating that black people were eight times more likely to be perpetrators of violent crime - yet over 80% of stop and searches resulted in no further action.

Yvette Cooper MP was scathing of these figures:

“That suggests in one month alone, more than one in 10 of young black men in London were stopped and searched and found to be carrying nothing and found not to be doing anything that required further action. That’s just in one month also at a time when actually most people would have been at home during lockdown.”⁴⁹

It has also been revealed that Section 60 of the Criminal Justice and Public Order Act, which allows police to stop and search people without grounds for suspicion, was used by the Metropolitan Police more than 65 times in London during May 2020, an increase on previous years despite a fall in crime during the lockdown.⁵⁰ The number of stop and searches undertaken under Section 60 more than doubled in London in May of this year compared with May 2019, with 1,418 people stopped.

There is clear evidence that the lockdown has led to an environment of over-policing that have been felt unevenly across ethnic groups.

National divergence

Across the devolved nations, approaches to easing lockdowns have been increasingly fragmented.

Speaking in the Petitions Committee during a session committed to petitions on the coronavirus response, Chris Evans MP argued that national divergence has created confusion across the UK:

“The devolved nature of decision making for lockdown measures has over-complicated the confusion for members of the public and businesses as to what is allowed and what is not. What the public need from the Government is consistency in response. (...) The Prime Minister’s apparent lack of communication with the

⁴⁸ Met carried out 22,000 searches on young black men during lockdown - Jamie Grierson, the Guardian, 8th July 2020: <https://www.theguardian.com/law/2020/jul/08/one-in-10-of-londons-young-black-males-stopped-by-police-in-may>

⁴⁹ Ibid.

⁵⁰ Met police increased use of section 60 stop and search during lockdown – Sarah Marsh, the Guardian, 27th July 2020: <https://www.theguardian.com/uk-news/2020/jul/27/met-police-increased-use-of-section-60-stop-and-search-during-lockdown>

devolved Governments of Wales, Scotland and Northern Ireland has also led to confusion about the correct guidance regarding lockdown restrictions.”⁵¹

Jeremy Miles MS, Counsel General and Minister for European Transition in the Welsh Government told the Public Administration and Constitutional Affairs Committee that:

“There were definitely opportunities that were missed, I would say, on the part of the UK Government to clarify that messages were intended for an England-only audience. I took the unusual step of writing, in my capacity as a Law Officer, to the Attorney General to ask for that to be rectified. In the interests of the rule of law, we should all want our citizens in the different parts of the UK to understand which laws apply to them (...) it is incumbent on Governments to be very clear about the territorial limits of the regulations they are introducing. That has not always happened.”⁵²

Restrictions have been lifted at various rates across the four nations, with amendments to restrictions often announced weeks before the Regulations are published, meaning continued uncertainty for those enforcing and living under the Regulations.

Wales

The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020 were laid on 10th July and came into force on 11th July. They have subsequently been amended twice.

Cafés, restaurants and pubs remain closed in Wales.

Local authorities retain the power to close any public outdoor land if they believe it “to be liable to large numbers of people congregating or being in close proximity to each other” or if “the use of which otherwise poses a high risk to the incidence or spread of infection with coronavirus in its area.”⁵³ There is no obligation for local authorities to seek advice on such closures, nor to review them.

Gatherings remain highly restricted. People in Wales may not meet anyone from another household indoors and may only gather with one other household outdoors.⁵⁴ Gatherings are permitted with a reasonable excuse, which includes to obtain or provide medical assistance or care, to donate blood, for work purposes, to avoid injury or illness or escape

⁵¹ Oral evidence: e-petition session: The easing of Covid-19 lockdown restrictions, HC 623, Petitions Committee, 15th July 2020, Q1: <https://committees.parliament.uk/oralevidence/699/pdf/>

⁵² Oral evidence: Responding to Covid-19 and the Coronavirus Act 2020, HC 377, Public Administration and Constitutional Affairs Committee, 23rd June 2020, Q80: <https://committees.parliament.uk/oralevidence/559/default/>

⁵³ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020, Regulation 11(2)

⁵⁴ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020, Regulation 14 (1)

a risk of harm, to attend and marriage, funeral⁵⁵ or place of worship,⁵⁶ to access childcare⁵⁷ or for the purpose of buying or moving house.⁵⁸ Gatherings that have been organised by a business, charity, political group or a sporting organisation are permitted, provided they consist of no more than 30 people, have carried out a risk assessment and follow social distancing requirements.⁵⁹ Again, there are no exemptions permitting the right to protest.

Scotland

The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 8) Regulations 2020 were laid on 14th July and came into force on 15th July.

These amendments allow for the re-opening of indoor cafés, restaurants and pubs.⁶⁰

Gatherings of five households are permitted outdoors, and gatherings of three households are permitted indoors.⁶¹ Unlike the English regulations, there are no limits on the number of people permitted at such gatherings. There is no limit on the number of households permitted to gather for funerals, marriage ceremonies or civil partnership registrations.⁶² There are also no limitations if the gathering is for the purpose of work, childcare, education or training, providing care or assistance to a vulnerable person, providing emergency or medical assistance, avoiding injury, illness or escaping a risk of harm, facilitating a house move, participation in legal proceedings or fulfilling a legal obligation, donating blood, accessing public services, or to attend a place of worship.⁶³

There are no exceptions on gatherings for protests.

Analysis by the NPCC of the issuing of FPNs has found that Police Scotland were twice as likely to issue FPNs to those breaching lockdown Regulations than police forces in

⁵⁵ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020, Regulation 14 (2)

⁵⁶ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) Regulations 2020, Regulation 1,2(2)

⁵⁷ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 2) Regulations 2020 Regulation 1(3), 2(5)(b)

⁵⁸ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 2) Regulations 2020, Regulation 1(4), 3(9)(a)

⁵⁹ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020, Regulation 15

⁶⁰ The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 8) Regulations 2020, Regulation 2(2), (5)(a)

⁶¹ The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No.7) Regulations 2020 Regulation 1(2)(3), 2(6)

⁶² The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 8) Regulations 2020 Regulations 1(2), 2(4)(a)(i)

⁶³ The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 8) Regulations 2020 Regulation 1(2), 2(4)(a)(iii)

England.⁶⁴ Three fines have been issued for every 10,000 residents in England, while six were issued per 10,000 people in Scotland.

Northern Ireland

The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020 were made on 23rd July 2020 and came into force the same day.

The majority of venues are permitted to open except theatres, nightclubs, conference halls, concert halls and soft play areas. Pubs may only open if alcohol is served outdoors and at a table, or indoors, at a table and with with food, which must be a “main table meal” (defined as a main course eaten at a table or counter).⁶⁵

Gatherings indoors or outdoors must be limited to 30 people.⁶⁶ However, gatherings face no limitation on numbers provided they are “organised or operated for cultural, entertainment, recreational, outdoor sports, social, community, educational, work, legal, religious or political purposes” and have carried out risk assessments and take reasonable measures to limit the spread of coronavirus.⁶⁷ Given that there is no restriction on who can organise a gathering, these restrictions are the closest to allowing for protests of any of the four nations.

Funerals

While the restrictions on gatherings have since been amended, there was controversy in Northern Ireland over a senior politician’s potentially illegal funeral attendance on 30th June.

There was anger over deputy First Minister Michelle O’Neill’s attendance of the funeral of a senior republican who was neither a member of her household nor close family, despite family members also being in attendance – this was against the Regulations in place at the time. First Minister Arlene Foster said, “it is vital that the police send out a clear signal in all their actions that no one is above the law. There can be no special status as far as the law is concerned. We are all equal under the law and equally subject to it.”⁶⁸ As has been amply demonstrated by the public outcry over the Prime Minister’s Senior Advisor

⁶⁴ Coronavirus in Scotland: Scots twice as likely to be fined by police for lockdown breaches – Kieran Andrews, the Times, 28th July 2020: <https://www.thetimes.co.uk/article/coronavirus-in-scotland-scots-twice-as-likely-to-be-fined-by-police-for-lockdown-breaches-zb70sl8g3>

⁶⁵ The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020, Regulation 4(1)

⁶⁶ The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020, Regulation 5(1)

⁶⁷ The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020, Regulation 5(3)

⁶⁸ Police must show no-one is above the law, Arlene Foster says – Rebecca Black, Belfast Telegraph, 8th July 2020: <https://www.belfasttelegraph.co.uk/news/northern-ireland/police-must-show-no-one-is-above-the-law-arlene-foster-says-39350741.html>

Dominic Cummings travelling to Durham with coronavirus during the lockdown, those in authority cannot flout rules without discrediting public health efforts and the rule of law.

The 2nd July amendment to the Regulations replaced regulation 5(2)(g) – which limited those who could attend funerals to the deceased’s household members and close family. News Letter noted that these latest amendments were not announced or publicised:

“the highly technical legislation was simply placed on the Department of Health’s website, with no explanatory press release from the Executive or statement from an Executive minister. Even in the Assembly (...) no minister highlighted that the law had been changed in this way.”⁶⁹

The Northern Irish Executive should not allow political controversy to prevent it from publishing full and clear guidance around new legislation.

⁶⁹ Stormont quietly changed funeral law just 48 hours after Michelle O’Neill breach – Sam McBride, News Letter, 7th July 2020: <https://www.newsletter.co.uk/news/politics/stormont-quietly-changed-funeral-law-just-48-hours-after-michelle-oneill-breach-2905778>

CORONAVIRUS ACT

Schedule 21: detention powers

On 16th July, the CPS published its third monthly review of prosecutions under the Coronavirus Act. The CPS revealed that, once again, every single charge under the Act had been unlawful.⁷⁰ As the previous review found, individuals had been charged under Schedule 21 of the Act – a draconian Schedule that gives authorities far-reaching detention powers regarding “potentially infectious persons” – although there was no evidence of those charged having coronavirus. There was a sharp increase in cases from the previous month – from nine to thirty-six. Thirty-five cases were withdrawn in court, with Regulation charges imposed for nine offences. One conviction was relisted and set aside.

This continues the unprecedented record of 100% unlawful prosecutions under the Coronavirus Act, a total of eighty-nine. There are no signs that police are learning to apply this law correctly. 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.

On 29th June, Steve Baker MP asked the Health Secretary a written parliamentary question on this topic:

“To ask (...) with reference to the CPS's findings that 53 unlawful and no lawful prosecutions have been pursued in England and Wales under the powers provided by Schedule 21 of the Coronavirus Act 2020, what plans he has to revise his assessment of the necessity of Schedule 21 in his two month report on that Act.”⁷¹

On 16th July, the Government responded only to point to towards the next two-monthly report, which “is due to be published at the end of July”.⁷² At the time of writing, it has not been published.

⁷⁰ Latest findings for CPS coronavirus review – Crown Prosecution Service, 16th July 2020: <https://www.cps.gov.uk/cps/news/latest-findings-cps-coronavirus-review>

⁷¹ Coronavirus: Prosecutions: Written question – 66042, 29th June 2020: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-06-29/66042/>

⁷² Ibid.

On 8th July, the UK government published guidance for public health officials on how to apply Schedule 21 of the Coronavirus Act.⁷³ Schedule 21 gives vast powers to the police, immigration officers and public health officials to remove and detain members of the public, including children, potentially indefinitely. It also allows for public health officials to require a person to be screened and assessed, including forcibly taking a biological sample. We have warned since the Coronavirus Bill was first published that the powers contained in Schedule 21 are draconian and excessive. The publication of this new guidance suggests that, as the NHS Test and Trace program begins to become more effective, Schedule 21 may start being used increasingly by public health officials to detain “potentially infectious” people. This is alarming and at an extremely high risk of misuse. Health detention powers with superior safeguards are available in the Public Health Act and should be used, rather than Schedule 21, if necessary.

Schedule 22: restrictions on gatherings

Schedule 22 gives Ministers the power to restrict gatherings of any kind. We have argued that these powers represent a serious potential infringement on the right to protest.

It remains that Schedule 22 powers in the Act have not been utilised or even invoked in England. All restrictions on gatherings have been made through a series of Health Protection Regulations. There is absolutely no justification for these sweeping powers remaining on the statute books.

On 29th June, Steve Baker MP asked the Health Secretary a written parliamentary question on this topic:

“To ask (...) with reference to the powers provided under Schedule 22 of the Coronavirus Act 2020 having not been used despite the outbreak having peaked in the UK and a public health response period having not been invoked, what plans he has to revise his assessment of the necessity of Schedule 22 in his two month report on that Act.”⁷⁴

Again, the Government responded on 16th July, only to point to towards the next two-monthly report, which now due but not yet published.⁷⁵

⁷³ Guidance for public health officers: Potentially infectious persons – Department of Health and Social Care and Public Health England, 8th July 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899237/Guidance_for_public_health_officers_-_potentially_infectious_persons.pdf

⁷⁴ Coronavirus Act 2020: Written question – 66043, 29th June 2020: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-06-29/66043/>

⁷⁵ Ibid.

RECOMMENDATION 6: Schedule 21 of the Coronavirus Act poses an extraordinary risk to fundamental rights, has been abused to pursue 89 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 7: 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.

Local elections

Extraordinary powers under the Coronavirus Act have been used to postpone all local elections in England, and all Police and Crime Commissioner elections in England and Wales, for a year.⁷⁶ This includes elections in 118 metropolitan, district and unitary authority council areas; the London mayoral election and seats on the Greater London Authority; Police and Crime Commissioner elections in 40 police force areas in England and Wales; mayoral elections in Greater Manchester, Liverpool City Region, Tees Valley, West Midlands, Bristol, Liverpool, and Salford; and parish council elections in some areas.⁷⁷ This delay goes considerably further than a recommendation by the Electoral Commission that elections be postponed until autumn.⁷⁸

In Shropshire, residents of the Haygate ward will go without council representation until May 2021, due to this provision.⁷⁹ After the death of ward councillor Frank Burns in April, Haygate residents were left without representation. Conservative councillors refused to allow a non-elected councillor to be co-opted to represent Haygate. Councillor Mike Hoskins said: "I believe it's democratic that people have the right, whether they have to wait or not, for an election to put somebody – who has been duly elected by everybody in that particular ward – as councillor." Similarly, the Salisbury St Francis and Stratford ward is currently without council representation following the death of its councillor Charles

⁷⁶ Coronavirus Act, Section 60

⁷⁷ Coronavirus Act: Elections, HC Briefing Paper 08856, 6th May 2020: <http://researchbriefings.files.parliament.uk/documents/CBP-8856/CBP-8856.pdf>

⁷⁸ Twitter, Electoral Commission, 12th March 2020: <https://twitter.com/ElectoralCommUK/status/1238141167319031808?s=20>

⁷⁹ Residents to go without full representation until May 2021 after council clash – Rory Smith, Shropshire Star, 3rd July 2020: <https://www.shropshirestar.com/news/local-hubs/telford/wellington/2020/07/03/hundreds-of-wellington-residents-to-go-without-full-representation-until-may-2021-after-council-clash/>

Rodgers.⁸⁰ In Lichfield, a local councillor resigned after not being able attend virtual meetings, also leaving residents without representation until May 2021.⁸¹

As lockdown measures are further eased, the removal of the democratic right to representation can no longer be justified. If it is safe to return to work, to school, to shops and to leisure activities, it follows that it must to possible to vote safely.

RECOMMENDATION 8: With restrictions lifted and people resuming ordinary life, the normal democratic process should also be resumed. Section 60 of the Coronavirus Act should be repealed.

Scotland

In Scotland, Holyrood's Equalities and Human Rights Committee has called for the repeal of "unnecessary and arbitrary" powers contained the Coronavirus (Scotland) Act. Writing to the Older People and Equalities minister, Ruth Maguire MSP said the Committee had concerns around the lack of detail as to when certain provisions, such as detention and compulsory treatment order, would be triggered. She wrote:

“As a human rights defender, the Committee considers this approach is the very reason why legislation, a blunt instrument, should be repealed. Having the power as a ‘backstop’ while not having a clear threshold, and awaiting an arbitrary six-month review is an unacceptable position when people’s rights are being removed.”⁸²

⁸⁰ Vacancy on Salisbury Council following death of Cllr Rogers – Gemma Gibson, Salisbury Journal, 17th July 2020: <https://www.salisburyjournal.co.uk/news/18589947.vacancy-salisbury-council-following-death-cllr-rogers/>

⁸¹ Lichfield District Councillor resigns after negative comments online – Jordan Reynolds, Express & Star, 16th July 2020: <https://www.expressandstar.com/news/health/coronavirus-covid19/2020/07/16/lichfield-district-councillor-resigns-after-negative-comments-online/>

⁸² Letter to Christina McKelvie MSP, Minister for Older People and Equalities - Equalities and Human Rights Committee, 7th July 2020: https://www.parliament.scot/S5_Equal_Opps/General%20Documents/20200707_ConvtoMinOPE_Evidenc e25June.pdf

NEW STATUTORY INSTRUMENTS

Face coverings

The introduction of the requirement to wear face coverings on public transport and in retail spaces has been poorly handled, leading to confusion across the UK and concerns that those who are exempt from wearing them will be publicly shamed or harassed. As with much of the emergency legislation passed over recent months, there has been only retrospective Parliamentary approval.

England

Retail spaces

On 24th July, the Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 came into force, requiring individuals to wear face coverings in shops, shopping centres, banks and post offices.⁸³

Similar exemptions to The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 apply: to children under the age of 11, employees of the relevant place, those providing services in the relevant place, an employee of an operator of a public transport service, or an emergency responder.⁸⁴

There are also similar reasonable excuses for not wearing a face covering: if an individual cannot wear a mask due to any physical or mental illness, impairment, or disability; if it would cause "severe distress"; if an individual is accompanying, or providing assistance to, another person who relies on lip reading; to avoid injury or escape the risk of harm; or if it is reasonably necessary to eat, drink or to take medication.⁸⁵ There are additional reasonable excuses: if it is required by an employee in order to verify a person's identity or to provide healthcare in a pharmacy.⁸⁶

The Regulations can only be enforced by a 'relevant person' - a police officer, Transport for London officer, or person designated by the Health Secretary.⁸⁷

As has been the case with virtually all emergency legislation in England, the Regulations were laid the day before they were due to come into force, without receiving any form of Parliamentary scrutiny, for reasons of "urgency". This is despite the move being trialled in

⁸³ The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020, Schedule, Part 1

⁸⁴ Regulation 3(2)

⁸⁵ Regulation 4(1)(a)-(f), (i)

⁸⁶ Regulation 4(1)(g),(h)

⁸⁷ Regulation 11

the press and announced to Parliament on 14th July.⁸⁸ As we have repeatedly argued, relying on urgency as an excuse for bypassing scrutiny becomes meaningless when Ministers announce their intentions to pass new laws days or even weeks in advance. Due to Parliamentary recess, these Regulations will not be debated in either House until September at the earliest.

It was announced that the Regulations would be introduced following several days of contradictory statements from Cabinet figures. On 12th July, Michael Gove told the BBC that face coverings in shops should not be mandatory,⁸⁹ which was followed the next day by the Prime Minister's announcement that the Government was "looking into" it and Justice Secretary Robert Buckland's comment that face coverings in retail spaces could "perhaps" be made mandatory.⁹⁰

Even the day before the Regulations were due to come into force there was confusion, after senior Ministers again contradicted each other over whether face masks would be required when ordering food or drink to take away. After it was clarified that individuals would be required to wear coverings if collecting food and leaving, Kate Nicholls, chief executive of UK Hospitality, said this contradicted previous Government advice to the industry and that it was "very late in the day" for alterations.⁹¹ Liberal Democrat health spokesperson Munira Wilson said:

"Clear communication is critical in a public health crisis. Instead, this confusion on guidance shows ministers simply could not organise a bun fight in a bakery.

"All this stinks of ministers making it up as they go along instead of listening to the experts."⁹²

On 17th July, Sir Graham Brady MP asked a written question to the Health Secretary:

⁸⁸ Face coverings to be mandatory in shops and supermarkets from 24 July, oral statement to Parliament – Department of Health and Social Care, 14th July 2020: <https://www.gov.uk/government/speeches/face-coverings-to-be-mandatory-in-shops-and-supermarkets-from-24-july>

⁸⁹ Twitter, BBC Politics, 12th July 2020: <https://twitter.com/BBCPolitics/status/1282249763698638848?s=20>

⁹⁰ The masked balls-up: Boris Johnson finally says people SHOULD wear face masks in shops and is poised to make them compulsory 'within days' after weeks of dithering and mixed messages from ministers – James Tapsfield, Daily Mail, 13th July 2020: <https://www.dailymail.co.uk/news/article-8516741/Boris-Johnson-Michael-Gove-clash-face-masks-shops.html>

⁹¹ Ministers urged to end face coverings 'confusion' - BBC News, 23rd June 2020: <https://www.bbc.co.uk/news/uk-53510631>

⁹² Hospitality, retail industries and opposition MPs claim mixed messages on face covering rules – Alexander Bridge-Wilkinson, The Parliamentary Review, 24th June 2020: <https://www.theparliamentaryreview.co.uk/news/hospitality-retail-industries-and-opposition-mps-call-for-clarity-on-face-covering-rules>

“if he will publish the criteria according to which the legal requirement to wear face masks in retail settings will be ended; and how frequently a review of that policy will take place.”⁹³

He is yet to receive a reply. It is worrying that the Government has introduced Regulations without a clear strategy or benchmark for when they will no longer be required. This illustrates the essential function of Parliamentary scrutiny: Regulations should not be introduced and then scrapped on a ministerial whim.

Senior police officers expressed surprise and dismay over the announcement of new Regulations. Martin Hewitt, chair of the National Police Chiefs’ Council, said he was “unaware” that new laws surrounding the wearing of face coverings were due to be announced.⁹⁴ John Apter, chair of the Police Federation of England and Wales, said police “simply don’t have the resources, and this would fundamentally undermine the model of policing, which is to police by consent.”⁹⁵ Ken Marsh, leader of the Police Federation’s London branch said the law would be “nigh on impossible for enforcement (...) We’ll be driving around and around London looking for people who weren’t wearing masks, it’s absolutely absurd.”⁹⁶

Some police forces have already stated they will not enforce the new Regulations. The leader of the Greater Manchester branch of the Police Federation said that expecting officers to enforce the Regulations was a “forlorn hope”.⁹⁷ In Devon and Cornwall, the Police and Crime Commissioner said police were “not going to come to every phone call that someone is not wearing a mask.”⁹⁸ Bedfordshire Police tweeted: “We are asking people to not call us to report people not wearing face coverings in shops, but instead to raise concerns to store staff or security personnel.”⁹⁹

Worryingly, Metropolitan Police Commissioner Cressida Dick said she hoped that people would be “shamed” by other members of the public into wearing masks in retail spaces or into leaving the venue, making police interventions unnecessary.¹⁰⁰ Other police forces

⁹³ Protective Clothing: Shops: Written question – HC75987: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-07-17/75987/>

⁹⁴ Police ‘unaware’ of government’s face mask law announcement, leaders reveal – Lizzie Dearden, Independent, 14th July 2020: <https://www.independent.co.uk/news/uk/home-news/face-mask-law-england-police-coronavirus-boris-johnson-a9619001.html>

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Police in Manchester say they are ‘too busy’ to enforce the new law on wearing masks in shops – John Scheerhout, Manchester Evening News, 14th July 2020: <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/police-manchester-say-too-busy-18595672>

⁹⁸ How police will tackle face mask dodging as doctors fear impact of ‘illogical’ messaging – Joe Gammie, Richard Whitehouse and Jeremy Culley, Mirror, 20th July 2020: <https://www.mirror.co.uk/news/uk-news/how-police-tackle-face-mask-22382183>

⁹⁹ Twitter, Bedfordshire Police, 24th July 2020: <https://twitter.com/bedspolice/status/1286651309840576512?s=20>

¹⁰⁰ Twitter, LBC, 22nd July 2020: <https://twitter.com/LBC/status/1285846783302799361?s=20>

have asked members of the public to report venues where face coverings are not being worn.¹⁰¹ To suggest public shaming as a method by which the Regulations should be enforced undermines the community spirit required in tackling the pandemic and puts those who are exempt from wearing face coverings at risk of discrimination.

Public Transport

Whilst enforcement on transport has been generally low, the Government appears eager to increase it. The Transport Secretary, Grant Shapps, told Parliament that: “We did say that in the early days we would ensure compliance was enforced gently, but I inform the House that TfL, Network Rail and British Transport police will be tightening up on that.”¹⁰² This was echoed by Baroness Vere, a Transport Minister, who told the Lords that the Government “expect to see a gradual ramping up of enforcement.”¹⁰³ These statements seem at odds with comments from police forces who are reluctant to enforce Regulations on face coverings. As of 19th July, 32 fines have been issued in England to people not wearing a face covering on public transport.¹⁰⁴

However, some police forces appear to be enforcing the Regulations more enthusiastically. Within 11 days of the legislation being passed, West Midlands Police had directed 533 passengers off public transport, issued 3 fines and arrested an individual for not wearing a face covering on public transport.¹⁰⁵ It has also been reported that they are using “[i]ntelligence from transport operators and CCTV controls rooms” to aid with enforcement of the Regulations of face coverings.¹⁰⁶

As we argued in our previous report, it is unacceptable that these controversial Regulations were made without any Parliamentary scrutiny – a sentiment echoed by many peers when the Regulations were debated in the House of Lords on 8th July. Labour peer Lord Liddle pointed out the long delay in securing approval and scrutiny of the Regulations:

“The Government announced this policy on 4 June and it came into effect on 15 June, yet we are debating it on 8 July. We kid ourselves if we think this is effective

¹⁰¹ Tell us online about people breaking mask rules, urge Lancashire police – David Nowell, Lancaster Guardian, 25th June 2020: <https://www.lancasterguardian.co.uk/health/coronavirus/tell-us-online-about-people-breaking-mask-rules-urge-lancashire-police-2924057>

¹⁰² HC Oral Answers to Questions: Transport (2nd July 2020), vol. 678, col. 502: <https://hansard.parliament.uk/commons/2020-07-02/debates/4A352622-9B63-4773-A02A-B66EB140A967/OralAnswersToQuestions>

¹⁰³ HL Deb (8th July 2020) vol. 804, col. 1152: [https://hansard.parliament.uk/lords/2020-07-08/debates/3C3CD48A-AB3F-4770-9A69-E48031E70423/HealthProtection\(CoronavirusWearingOfFaceCoveringsOnPublicTransport\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-08/debates/3C3CD48A-AB3F-4770-9A69-E48031E70423/HealthProtection(CoronavirusWearingOfFaceCoveringsOnPublicTransport)(England)Regulations2020)

¹⁰⁴ Coronavirus fines issued by forces continue to fall – National Police Chief’s Council, 27th July 2020: <https://news.npcc.police.uk/releases/coronavirus-fines-issued-by-forces-continue-to-fall>

¹⁰⁵ Passenger arrested after refusing to wear face covering as police crackdown on commuters – Charlotte Paxton, Birmingham Live, 9th July 2020: <https://www.birminghammail.co.uk/news/midlands-news/passenger-arrested-after-refusing-wear-18570394>

¹⁰⁶ Ibid.

parliamentary scrutiny; it is in fact executive diktat. It would matter a lot less if we had a Government who had competently handled this crisis, but the controversy over face masks is a classic example of the Government squandering public good will by offering confusing and contradictory advice over the past few months.”¹⁰⁷

Liberal Democrat Baroness Randerson agreed, stating that this approach

“is government by decree, and we must not get used to it, because it is a long way from acceptable democratic process (...) Even this debate is being held at the very last minute.”¹⁰⁸

Health Minister Baroness Vere replied that the made affirmative procedure, which allows the Government to bypass scrutiny in this manner, is “not used lightly by the Government.”¹⁰⁹ Yet use of this procedure has come to characterise the Government’s approach to legislating during the emergency period, with vast amounts of emergency legislation being passed with very little democratic oversight. The Government is swerving much needed scrutiny of these novel powers. As a result, everyone suffers with Regulations that, according Baroness Primarolo, are “weak, confused and inconsistent.”¹¹⁰

Wales

In Wales, regulations requiring face coverings to be worn on public transport were introduced on 24th July, coming into force on 27th July.¹¹¹ Unlike the English and Northern Irish Regulations, it is not considered a reasonable excuse to not wear a face covering if it causes “extreme distress.” While it is a reasonable excuse not to wear a face covering due to a “physical or mental illness or impairment, or a disability”,¹¹² this less expansive exemption does not account for personal difficulties in wearing a mask, for example for those who have experienced trauma such as sexual or domestic violence.¹¹³

¹⁰⁷ HL Deb (8th July 2020) vol. 804, col. 1160: [https://hansard.parliament.uk/lords/2020-07-08/debates/3C3CD48A-AB3F-4770-9A69-E48031E70423/HealthProtection\(CoronavirusWearingOfFaceCoveringsOnPublicTransport\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-08/debates/3C3CD48A-AB3F-4770-9A69-E48031E70423/HealthProtection(CoronavirusWearingOfFaceCoveringsOnPublicTransport)(England)Regulations2020)

¹⁰⁸ HL Deb (8th July 2020) vol. 804, col. 1163: [https://hansard.parliament.uk/lords/2020-07-08/debates/3C3CD48A-AB3F-4770-9A69-E48031E70423/HealthProtection\(CoronavirusWearingOfFaceCoveringsOnPublicTransport\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-08/debates/3C3CD48A-AB3F-4770-9A69-E48031E70423/HealthProtection(CoronavirusWearingOfFaceCoveringsOnPublicTransport)(England)Regulations2020)

¹⁰⁹ HL Deb (8th July 2020) vol. 804, col. 1160: [https://hansard.parliament.uk/lords/2020-07-08/debates/3C3CD48A-AB3F-4770-9A69-E48031E70423/HealthProtection\(CoronavirusWearingOfFaceCoveringsOnPublicTransport\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-08/debates/3C3CD48A-AB3F-4770-9A69-E48031E70423/HealthProtection(CoronavirusWearingOfFaceCoveringsOnPublicTransport)(England)Regulations2020)

¹¹⁰ HL Deb (8th July 2020) vol. 804, col. 1157: [https://hansard.parliament.uk/lords/2020-07-08/debates/3C3CD48A-AB3F-4770-9A69-E48031E70423/HealthProtection\(CoronavirusWearingOfFaceCoveringsOnPublicTransport\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-08/debates/3C3CD48A-AB3F-4770-9A69-E48031E70423/HealthProtection(CoronavirusWearingOfFaceCoveringsOnPublicTransport)(England)Regulations2020)

¹¹¹ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 2) Regulations 2020

¹¹² The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 2) Regulations 2020, Regulation 3(7)

¹¹³ Covid-19: Are you concerned about wearing a mask? - The Survivors’ Trust: <https://www.thesurvivorstrust.org/covid-19-are-you-concerned-about-wearing-a-mask>

There is also a requirement for transport operators to “provide information to passengers about the requirement to wear face coverings on their vehicles” - ideally this will include clear information on the reasons a person can be exempted from wearing one.

First Minister Mark Drakeford announced that “it will become mandatory for people to wear a three-layer face covering while travelling”¹¹⁴ and the Welsh Government Twitter page announced: “From 27 July, you’ll need to wear a three-layer face covering when travelling on public transport.”¹¹⁵ The Regulations do not specify that a face covering should be three layers and implying that they do continues to blur the line between law and guidance.

Scotland

In Scotland, the Health Protection Regulations were amended to require individuals to wear face coverings in all shops from 10th July. The Regulations were passed the day before, allowing little time for preparation. Unlike in England, employees of a shop are also obliged to wear a mask unless there is a partition between an employee and customer, or the employee can maintain a two metre distance from customers.¹¹⁶ Those not wearing a mask could receive a £60 Fixed Penalty Notice.

Daniel Donaldson, a disability rights lawyer with hidden respiratory disabilities that prevent him from wearing a face covering, has reported being “regularly harassed and abused” by strangers, as well as being refused entry to shops for not wearing a face mask.¹¹⁷ Mr Donaldson blamed the Scottish Government for “rushing through” the legislation:

“The problem is, the Scottish Government published this law three hours before it was introduced. There was no consultation with disability groups, no taking into account how it would affect them.”

"The guidance is confusing, and doesn't make it clear that we don't need medical evidence to prove we are exempt."

¹¹⁴ Face masks: How is Wales' advice different to England? - BBC News, 23rd July 2020: <https://www.bbc.co.uk/news/uk-wales-52631835>

¹¹⁵ Twitter, Welsh Government, 13th July 2020: <https://twitter.com/WelshGovernment/status/1282654061788045317?s=20>

¹¹⁶ The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 7) Regulations 2020, Regulation 2(9)

¹¹⁷ Disabled Scots lawyer 'disgusted' after being harassed and refused entry to shops without face mask – Magdalene Dalziel, Daily Record, 20th July 2020: <https://www.dailyrecord.co.uk/news/scottish-news/disabled-scots-lawyer-disgusted-after-22380425>

Mr Donaldson, who is also head of the Disability Law Centre, said he was aware of multiple incidents of discriminatory treatment of those unable to wear face coverings: “all we can do for now is raise awareness because the system right now is not working.”

Northern Ireland

Regulations requiring individuals to wear face coverings on public transport were passed in Northern Ireland on 10th July, as part of an amendment to the Health Protection Regulations. After these Regulations were revoked and replaced by The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020, the Executive passed The Health Protection (Coronavirus, Wearing of Face Coverings) Regulations (Northern Ireland) 2020. Those not wearing a face covering can be removed from a vehicle using “reasonable force” by a police officer¹¹⁸, receive a £60 Fixed Penalty Notice,¹¹⁹ or be arrested and fined in court.¹²⁰

RECOMMENDATION 9: The UK Government, devolved administrations, transport providers and retailers must be proactive in explaining the exemptions to Regulations which require the wearing of face coverings.

International Travel Regulations

England

The National Police Chief’s Council said that there had not been a single fine issued to a person violating the two week isolation period required by the Regulations.¹²¹ This indicates that the Regulations, a violation of which can result in a £100 fine, are perhaps either unnecessary or unenforceable.

Heathrow Airport is considering piloting a scheme that allows those travelling from ‘red list’ countries to pay for a Covid-19 test and therefore bypass the required two-week isolation period if they test negative.¹²² A change in law would be required in order to facilitate the scheme, as currently there is no allowance for those who test negative for Covid-19 to waive the isolation period, although the Transport Secretary has signalled his report for this scheme. The test would cost £140, meaning that wealthier travellers, be they tourists or Britons returning from abroad, would be able to bypass requirements.

¹¹⁸ Regulation 6(4)

¹¹⁹ Regulation 8(1)

¹²⁰ Regulation 7(4)

¹²¹ <https://news.npcc.police.uk/releases/statistical-update-on-number-of-lockdown-fines-given-by-police-2>

¹²² ‘Red list’ passengers arriving at Heathrow could avoid quarantine by paying for Covid test – Charles Hymas and Dominic Penna, the Telegraph, 6th July 2020:

<https://www.telegraph.co.uk/news/2020/07/06/passengers-arriving-heathrow-red-list-could-pay-avoid-quarantine/>

Scotland

Nicola Sturgeon criticised the "shambolic" approach the UK Government had taken towards the restrictions, saying that the "shifting sands of the UK government's position" had left the Scottish Government unsure which countries would be included in 'air bridge' proposals up until the day they were announced.¹²³

Northern Ireland

There was confusion in Northern Ireland as Ministers contradicted each other over whether individuals travelling from other parts of Britain should self-isolate. First Minister Arlene Foster has said that those arriving from other parts of Britain should not self-isolate, while Deputy First Minister Michelle O'Neill called for alignment with the Republic of Ireland, warning that "community transmission there is so much higher. Probably the biggest risk to us is travel from Britain."¹²⁴

Health Minister Robin Swann admitted to Good Morning Ulster that the language around restrictions was not "simple or clear" and said the guidance needs to be updated and "tidied up."¹²⁵

¹²³ First Scottish Minister Nicola Sturgeon, Daily press briefing, 3rd July 2020: <https://news.gov.scot/speeches-and-briefings/coronavirus-covid-19-update-first-ministers-speech-3-july-2020>

¹²⁴ NI 'should act on coronavirus risk of GB travellers' – ITV News, 20th July 2020: <https://www.itv.com/news/utv/2020-07-20/ni-should-act-on-covid-19-risk-of-gb-travellers>

¹²⁵ Travel advice needs to be tidied up – Swann – BBC News, 23rd July 2020: <https://www.bbc.co.uk/news/live/uk-northern-ireland-53510118>

VIRTUAL PARLIAMENT

There has been continued criticism of the Leader of the House's decision to remove online voting and virtual participation in the House of Commons.

Many Members of Parliament across the political spectrum have spoken out against the new procedure, which has resulted in 250 MPs being unable to contribute to debates. This is at a time when, as we have explored in each of our monthly reports, the role of parliament has already been greatly diminished. The Procedure Committee noted that an "unprecedented number of Members have made their views known to the Committee" about the end of the hybrid procedures and that it had caused "considerable concern among Members and the general public."¹²⁶

MPs have gone so far as to seek legal assistance, with a cross-party group engaging solicitors at Leigh Day to write to the Leader of the House, "requesting that he reinstate the motion allowing access to debates for the 250 shielded MPs."¹²⁷ On 9th July, Labour's Geraint Davies MP, who is leading the group calling for the motion, said the Leader of the House would receive a letter setting out why

"it was illegal to pass a rule that said that 250 MPs should be excluded from parliamentary debate, that Parliament is in fact not empowered to remove the source of its own legitimacy, and that the vote itself was illegal because it excluded those 250 MPs."¹²⁸

The Procedure Committee has been hearing evidence on the decision to end virtual Parliament. Experts in constitutional law were deeply critical of both the move to proxy voting and the removal of hybrid proceedings. Professor Meg Russell, Director of the University College London Constitution Unit, called it "deeply regrettable" that "Members are excluded from the substantive proceedings, and the proxy arrangements for voting are far inferior to the previous remote voting system."¹²⁹ The Director of Hansard Society, Dr Ruth Fox, said the new system was "detrimental"¹³⁰ to the Commons and that the proxy voting system "is an utterly inadequate solution."¹³¹ Chris Elmore MP noted that some

¹²⁶ Procedure under coronavirus restrictions: The Government's proposal to discontinue remote participation - House of Commons Procedure Committee, Third Report of Session 2019-21,

¹²⁷ MPs challenge abolition of online Parliament as unlawful - Leigh Day, 10th July 2020: <https://www.leighday.co.uk/News/Press-releases-2020/July-2020/MPs-challenge-abolition-of-online-Parliament-as-un>

¹²⁸ HC Business of the House (9th July 2020), vol. 678, col. 1137: <https://hansard.parliament.uk/Commons/2020-07-09/debates/20070911000001/BusinessOfTheHouse>

¹²⁹ Oral evidence: Procedure under coronavirus restrictions, HC 300, Procedure Committee, 8th July 2020, Q225: <https://committees.parliament.uk/oralevidence/657/pdf/>

¹³⁰ Ibid.

¹³¹ Q239

votes using the proxy system had not been counted: in one case, 30 SNP votes were not counted by the Teller.¹³²

RECOMMENDATION 10: Hybrid proceedings and remote voting should be introduced to the House of Commons when Parliament returns in September.

¹³² Q239



We're at an impasse now – we're meeting this crisis at a time when we don't have all the pieces in place that would allow us to trust such technology applications and their complete dedication to public health objectives, because they remain in the unregulated, lawless space of private surveillance capital”

— Shoshanna Zuboff ¹³³

¹³³ Surveillance capitalism in the age of Covid-19 - Sebastian Klovig Skelton, Computer Weekly 13th May 2020: <https://www.computerweekly.com/feature/Surveillance-capitalism-in-the-age-of-Covid-19>

BIG DATA AND HEALTH CARE

Despite a string of high profile failings and controversies surrounding Big Tech firms and the NHS over the course of the pandemic, the Health Secretary told the All-Party Parliamentary Group on NHS Data that the pandemic has been “a very big moment” for the private sector’s role in “entrenching data in decision-making” in the NHS.¹³⁴ The continuation of this, he said, is “mission-critical.” Alexander de Carvalho, co-founder of PUBLIC, a venture firm set up to help technology start-ups gain government contracts, also told the APPG that “there’s been a loosening, or an improvement, of data sharing agreements (...) a lot of it has been in the context of the Covid-19 response, but as much as we can keep some of this positive momentum in place post this response, the better.”¹³⁵

We know from experience that emergency measures can easily become the new normal. It is concerning to see weaker data protection, enabled by the pandemic, being touted as an improvement and a model for the future.

In an independent report commissioned by the Department for Digital, Culture, Media and Sport, the Centre for Data Ethics and Innovation was critical of the Government’s approach to public sector data use. It noted that “there are significant portions of the population who lack trust in either the competency or intentions of overall public sector data-use” and yet, “there has been relatively limited effort by the government and wider public sector to address public trust explicitly.”¹³⁶ It criticised Government transparency around data sharing with private companies, noting that “public awareness of it is generally low.”¹³⁷ This is demonstrated by an Imperial College London survey, which found that 95% of UK respondents were not willing to share their health data with private companies - a sharp increase of 50% of respondents in a similar poll from 2016.¹³⁸ ¹³⁹ It highlights the real need for Governments to reconsider their involvement of Big Tech companies in public health.

¹³⁴ Matt Hancock encourages private sector involvement in post-pandemic NHS technology - Sebastian Klovig Skelton, Computer Weekly, 9th July 2020: <https://www.computerweekly.com/news/252485870/Matt-Hancock-encourages-private-sector-involvement-in-post-pandemic-NHS-technology>

¹³⁵ Matt Hancock encourages private sector involvement in post-pandemic NHS technology - Sebastian Klovig Skelton, Computer Weekly, 9th July 2020: <https://www.computerweekly.com/news/252485870/Matt-Hancock-encourages-private-sector-involvement-in-post-pandemic-NHS-technology>

¹³⁶ Addressing trust in public sector data use – Centre for Data Ethics and Innovation, 20th July 2020: <https://www.gov.uk/government/publications/cdei-publishes-its-first-report-on-public-sector-data-sharing/addressing-trust-in-public-sector-data-use#tenuous-trust--data-sharing>

¹³⁷ Addressing trust in public sector data use – Centre for Data Ethics and Innovation, 20th July 2020: <https://www.gov.uk/government/publications/cdei-publishes-its-first-report-on-public-sector-data-sharing/addressing-trust-in-public-sector-data-use#tenuous-trust--data-sharing>

¹³⁸ Public trust in health data sharing has sharply declined, survey reveals – Justine Alford, Imperial College London, 27th July 2020: <https://www.imperial.ac.uk/news/200436/public-trust-health-data-sharing-sharply/>

¹³⁹ The One-Way Mirror: Public attitudes to commercial access to health data – the Wellcome Trust, March 2016: <https://wellcome.ac.uk/sites/default/files/public-attitudes-to-commercial-access-to-health-data-wellcome-mar16.pdf>

NHS Covid-19 Data Store

In our previous monthly reports we have called for increased transparency around 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."¹⁴⁰ A range of powerful technology companies including Palantir, Faculty, Microsoft, and Amazon are involved in collecting and analysing this data, which is in turn fed into 'daily dashboards' informing the Government response to the pandemic.¹⁴¹ We know that highly sensitive personal data, including that relating to "political affiliations", can be processed, but there is still little knowledge of exactly what data is being collected, how it is being used, and to what end.¹⁴²

In our June report, we called for further transparency from the Government and NHS, recommending the publication of the latest contracts between the NHS and the companies who have built and operate the Data Store, and the publication of a Data Protection Impact Assessment (DPIA) which assesses the full capability of the Data Store. However, despite questions from Parliamentarians,¹⁴³ the Government has been unwilling to provide adequate transparency around the project.

We recommended the publication of a DPIA that evaluates the risk of automated processing of data provided by Faculty, as the current DPIA makes no mention of it. It has since been announced that Faculty, as part of its Data Store contract, will be providing predictive technology for hospitals surrounding Covid-19 admissions:

"...the new Joint Biosecurity Centre is being asked to give the NHS locally advance warning of any uptick in coronavirus admissions. This is being complimented by a machine learning-powered tool for the NHS based on Bayesian hierarchical modelling to warn hospitals so they can divert staff, beds and other equipment such as oxygen or ventilators needed to tackle COVID-19 cases."¹⁴⁴

When Lord Freyberg submitted a written question asking the Government why "the Data Protection Impact Assessment of Palantir's role in combining NHS data had no analysis of data analytics (...) and whether they intend to publish an additional report to cover this,"

¹⁴⁰ 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>

¹⁴¹ 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/>

¹⁴² 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

¹⁴³ For example, Lord Strasburger asked several questions in early July which, to date, are unanswered: HL6733, HL6734, HL6735

¹⁴⁴ NHS Harnesses Coronavirus Forecasting Tech to Help Save Lives - NHSX, 15th July 2020: <https://www.nhsx.nhs.uk/news/nhs-harnesses-coronavirus-forecasting-tech-help-save-lives/>

Health Minister Lord Bethell responded that the government had “made no specific assessment” of the role of data analytics in the Data Store.¹⁴⁵ This is a considerable oversight. The automated processing of highly sensitive data in the context of a pandemic could potentially lead to life or death decisions. It must be fully interrogated.

We have also called for the publication of the new contracts between the NHS and the companies who are building the Data Store.

On 15th June, NHSX confirmed that its contract with Palantir had been extended by four months, and that Palantir’s fee had increased from £1 to £1million.¹⁴⁶ The updated contract is yet to be published. As part of the extended contract, an NHS England spokesperson said that Palantir had been asked to “package up the work they’ve been doing so the service can go out to tender in an open procurement process.”¹⁴⁷ So far contracts have been awarded in the absence of competition; it is welcome that NHS England appears to be preparing to open up the procurement process but it seems unlikely that, given their head start, Palantir will not continue to provide this service.

We have previously raised concerns that two Google executives, the co-founders of DeepMind, were providing advice to the NHS on data collection as they notoriously received 1.6 million named patient records without consent and in breach of the law. It has since emerged that Google has been dropped from the NHS Data Store after an “after an evaluation of their tools.”¹⁴⁸ It is not clear which, if any, company will replace Google.

RECOMMENDATION 11: 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.

RECOMMENDATION 12: 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.

¹⁴⁵ Palantir: Data Protection:Written question – HL6154:
<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2020-06-25/HL6154/>

¹⁴⁶ Palantir secures £1m contract extension for NHS data store work– Oscar Williams, NS Tech, 15th July 2020:
<https://tech.newstatesman.com/coronavirus/palantir-nhs-datastore-contract-extension>

¹⁴⁷ Ibid.

¹⁴⁸ Google dropped from NHS Covid-19 'Data Store'- Margi Murphy, Telegraph, 15th July 2020:
<https://www.telegraph.co.uk/technology/2020/07/15/google-dropped-nhs-covid-19-data-store/>

National COVID-19 Chest Imaging Database

In our previous report, we raised concerns about the National COVID-19 Chest Imaging Database built by AI firm Faculty, which is centralised, UK-wide and contributes to the “development and validation of automated analysis technologies” that assist with Covid-19 assessment.¹⁴⁹ Patient data of all those testing for coronavirus is input to the database without consent.

We recommended that patients should be informed and asked for consent before their data is added to the database, and that an independent ethics board should oversee its work. When asked in a written question by Lord Strasburger if patients’ consent will be required before their data is collected for the database, Health Minister Lord Bethell replied:

“The data collected for the National COVID-19 Chest Imaging Database is done so under the Control of Patient Information notices issued by the Secretary of State for Health. Consequently, no patient consent is required to collect the data from National Health Service trusts.”¹⁵⁰

We believe that this database represents a significantly novel form of patient data use and so should be subject to additional safeguards, specifically, patient consent. Lord Bethell also stated twice that data in the database would be “anonymous.” This is not the case, as evidenced by the database’s own guidelines.¹⁵¹ Data is instead pseudonymous.

RECOMMENDATION 13: Vast amounts of data collected for automated processing must be subject to more stringent safeguards than ordinary data collection. Patient consent should be required for data entered into the National COVID-19 Chest Imaging Database, particularly from patients who test negative for Covid-19.

¹⁴⁹ National COVID-19 Chest Image Database – NHSX: <https://nhsx.github.io/covid-chest-imaging-database/>

¹⁵⁰ Coronavirus: X-rays:Written question – HL6807: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2020-07-13/HL6807/>

¹⁵¹ 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

CONTACT TRACING

Test and Trace

The Government's failure to produce a Data Protection Impact Assessment (DPIA) for its Test and Trace program led to the threat of a legal challenge. Open Rights Group rightly asserted that the Department of Health and Social Care had violated its obligations under the GDPR and the Data Protection Act by not producing a DPIA. Eventually, the Department of Health and Social Care admitted that it had not written a DPIA, violating data protection law.¹⁵²

It is concerning that a Public Health England spokesperson said on 28th May that a DPIA was being prepared for the "Test and Trace system" and would be published shortly¹⁵³ as, it appears from Government correspondence with Open Rights Group's legal team, a DPIA was carried out only for the website used for the Test and Trace program, not the program as a whole.¹⁵⁴

A DPIA is an essential part of guarding against the misuse of data – without it, the government and public are blind to potential risks. Director of Open Rights Group Jim Killock said:

"A crucial element in the fight against the pandemic is mutual trust between the public and the government, which is undermined by their operating the programme without basic privacy safeguards."¹⁵⁵

As demonstrated by the resounding failure of the NHSX app, trust is essential for the successful deployment of new technology. As NHS Test and Trace continues to face operational issues, including failing to reach almost a quarter of contacts¹⁵⁶ and failing to rapidly to return test results,¹⁵⁷ public trust is even more essential.

A lack of assessment of data protection issues may well have contributed to the misuse of personal data by contact tracers.

¹⁵² England's test and trace programme 'breaks GDPR data law' – Rory Cellan-Jones, BBC News, 20th July 2020: <https://www.bbc.co.uk/news/technology-53466471>

¹⁵³ UK 'test and trace' service did not complete mandatory privacy checks – Mark Scott, Politico, 28th May 2020: <https://www.politico.eu/article/uk-test-trace-privacy-data-impact-assessment/>

¹⁵⁴ Track and Trace – AWO, 20th July 2020: <https://www.awo.agency/latest/track-and-trace/>

¹⁵⁵ England's test and trace programme 'breaks GDPR data law' – Rory Cellan-Jones, BBC News, 20th July 2020: <https://www.bbc.co.uk/news/technology-53466471>

¹⁵⁶ Coronavirus test and trace fails to reach a quarter of close contacts, say official figures – Henry Bodkin, Telegraph, 2nd July 2020: <https://www.telegraph.co.uk/news/2020/07/02/coronavirus-test-trace-fails-reach-quarter-close-contacts-say/>

¹⁵⁷ NHS Test and Trace system 'simply not good enough to maintain safety' – Paul Gallagher, 2nd July 2020: <https://inews.co.uk/news/analysis/nhs-test-and-trace-system-safety-public-462561>

It was revealed that contact tracers employed by NHS Test and Trace have been sharing confidential patient data over Facebook and WhatsApp groups.¹⁵⁸ Screenshots that include names, NHS numbers, contact details and case IDs of people who have tested positive for coronavirus have been shared in groups set up by contact tracers as “informal support networks.” An anonymous contact tracer told the Times that the groups had been set up as “the training is shambolic and the system is a disgrace,” and that he knew of “dozens” of similar incidents.

RECOMMENDATION 14: The Department of Health and Social Care must urgently produce the legally required Data Protection Impact Assessment for its Test and Trace program.

Private venues

As we detailed in our previous report, the announcement for the hospitality sector reopening was accompanied by the recommendation that businesses should collect and retain records of those who have visited the premises for 21 days.

The original guidance published on 23rd June was scant, and promised that further guidance would be published to allow the hospitality sector to adequately prepare for these measures.¹⁵⁹ This guidance was released on 2nd July, just two days before pubs, cafés and restaurants reopened.¹⁶⁰ As Jim Jones, trade director of Palmers Brewery pubs said:

“It was clear from reading the guidelines that pubs across the country would collectively be scratching their heads and trying to come up with a solution that was easy to implement, quick to use and able to cope with the tricky data protection requirements that we have in the UK.”¹⁶¹

The long wait for government advice meant that many businesses started to take matters into their own hands, implementing tracking systems powered by smartphones and tablets – for example, Palmers Brewery pubs introduced a QR code system, asking customers to scan their mobile devices on entrance. It is clear that many companies are

¹⁵⁸ Coronavirus contact tracers sharing patients’ data on WhatsApp and Facebook – Shanti Das, the Times, 12th July 2020: <https://www.thetimes.co.uk/article/coronavirus-contact-tracers-sharing-patients-data-on-whatsapp-and-facebook-rq3zqn5l6>

¹⁵⁹ Working safely during coronavirus (COVID-19): Restaurants, pubs, bars and takeaway services (23rd June update) – Department for Business, Energy & Industrial Strategy and Department for Digital, Culture, Media & Sport, 23rd June 2020: <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/restaurants-offering-takeaway-or-delivery>

¹⁶⁰ Maintaining records of staff, customers and visitors to support NHS Test and Trace – Department of Health and Social Care, 2nd July 2020: <https://www.gov.uk/guidance/maintaining-records-of-staff-customers-and-visitors-to-support-nhs-test-and-trace>

¹⁶¹ Palmers customers can ‘check in’ to help NHS Test and Trace system – Lyme Online, 2nd July 2020: <https://lyme-online.co.uk/news/lyme-regis/palmers-customers-can-check-in-to-help-nhs-test-and-trace-system/>

using this as an opportunity to sell intrusive surveillance tools to the hospitality sector, which not only come with worrying levels of data collection, but also exclude those without smart devices.¹⁶² Head of Individuals' Rights and Ethics at data protection consultancy Protecture, Rowenna Fielding, warned that "a lot of people will over-interpret and collect too much because they're scared of not doing enough."¹⁶³

It should not be forgotten that this is guidance only and the guidance itself states that customers "can choose to opt out." However, many venues are requiring that visitors provide this information. GDPR experts Act Now wrote:

"There is no contract between the parties at the stage of entering the premises. There's no statutory requirement in law to demand it or any official authority for businesses to require it. No-one is going to die immediately if the data is not handed over so vital interests cannot be used. Unless emergency legislation is passed in the next week it appears businesses will have to rely on the "legitimate interests" condition under Article 6 to collect and process the personal data of customers."

They point out that businesses cannot rely on consent as their condition for processing data: "The customer is not freely giving their data as they have no real choice if they want to use the premises."¹⁶⁴

It is worrying that the breadth of venues included in the guidance has increased since it was first introduced. Originally, guidance that asked venues to collect contact details of their visitors referred only to the hospitality sector. The full list now includes:

- *hospitality, including pubs, bars, restaurants and cafés*
- *tourism and leisure, including hotels, museums, cinemas, zoos and theme parks*
- *close contact services, including hairdressers, barbershops and tailors*
- *facilities provided by local authorities, including town halls and civic centres for events, community centres, libraries and children's centres*

¹⁶² Seven options to help pubs collect track and trace data – Ed Bedington, 3rd July 2020: <https://www.morningadvertiser.co.uk/Article/2020/07/03/What-technology-is-available-to-help-pubs-collect-track-and-trace-data>

¹⁶³ It's Super Saturday, the pubs are open and it's a privacy nightmare – Matt Burgess, Wired, 4th July 2020: <https://www.wired.co.uk/article/pubs-opening-rules-contact-tracing>

¹⁶⁴ Customer Contact Details for Track and Trace: GDPR Considerations – Act Now Training, 25th June 2020: <https://actnowtraining.wordpress.com/2020/06/25/3339/>

- *places of worship, including use for events and other community activities.*¹⁶⁵

This covers virtually every location a person may visit, except retail spaces or private homes. It is particularly concerning that places of worship are being asked to log any visitors. Personal data that reveals religious or philosophical beliefs is classed as special category data under the Data Protection Act 2018 and the GDPR and requires additional protection. With just two days' notice, it is likely that many places of worship have been able to consider what safeguards will be necessary when collecting contact tracing details.

RECOMMENDATION 15: Collecting contact tracing information from places of worship puts highly sensitive personal data at risk. The ICO should publish specific guidance for places of worship to ensure that data which reveals religious beliefs is kept secure.

Data misuse

Steps must be taken to ensure that data is kept securely, as required by Article 32 of GDPR. There is a real risk this personal data could be abused for marketing, by staff members to harass customers, or by hackers to exploit people.

In our last report, we warned that collecting customer data could lead to staff members using this information to harass women, as seen already abroad.¹⁶⁶ Sadly, it did not take long for this to occur here. One woman in Oxford reported that she had received unsolicited Facebook messages from a bartender after he required her contact details for tracing purposes, saying that she was “not super keen on handing over my name, email and phone number for contact tracing if men are going to use it for this.”¹⁶⁷

We wrote to a pub and the ICO after a woman, who had provided personal details for contact tracing, later received unsolicited messages. We requested that they investigate any potential breaches of the Data Protection Act 2018 that may have occurred in the course of their collection of customer information for the purposes of contact tracing; review their policies for the collection, retention and deletion of customer information, and provide these to us; and improve staff training on the collection and protection of customer information. We are yet to receive a reply from either party.

¹⁶⁵ Maintaining records of staff, customers and visitors to support NHS Test and Trace – Department of Health and Social Care, 2nd July 2020: <https://www.gov.uk/guidance/maintaining-records-of-staff-customers-and-visitors-to-support-nhs-test-and-trace>

¹⁶⁶ Auckland woman 'creeped out' after restaurant worker uses her contact tracing details to hit on her – Mike McRoberts, Newshub, 11th May 2020: <https://www.newshub.co.nz/home/new-zealand/2020/05/auckland-woman-creeped-out-after-restaurant-worker-uses-her-contact-tracing-details-to-hit-on-her.html>

¹⁶⁷ Twitter, Rose Lyddon, 11th July 2020: <https://twitter.com/roselyddon/status/1281885086347075588?s=20>

It is possible, if not likely, that many similar breaches have occurred that have not been reported.

Financial advisor Martin Lewis reported that contact details he had given his barber for NHS Test and Trace were quickly used to send him marketing material, which he rightly said is “not acceptable (or legal)”.¹⁶⁸ Some establishments are even taking personal data in the name of contact tracing, yet note that data will also be used for marketing purposes unless the individual opts out.¹⁶⁹ This, too, is unlawful.

RECOMMENDATION 16: There is a high risk of personal data collected in the hospitality and leisure sector for NHS Test and Trace being misused. The ICO must investigate incidents where personal data has been misused and take decisive action to prevent more abuses of Test and Trace data occurring.

¹⁶⁸ Twitter, Martin Lewis, 15th July 2020:
<https://twitter.com/MartinSLewis/status/1283431328336289792?s=20>

¹⁶⁹ Twitter, Privacy Matters, 20th July 2020:
<https://twitter.com/PrivacyMatters/status/1285238995434209281?s=20>

NHSX App

There is still little official information on the new contact tracing app which is said to be in development, with the Health Secretary even admitting that an app was “not necessary”¹⁷⁰ for a fully functioning contact tracing system and refusing to commit to a date when an app might be rolled out.¹⁷¹ However, Tom Riordan who headed the manual contact tracing programme told BBC Radio 4's Today programme on 28th July, “I would expect that [app] to start to be rolled out in the next few weeks.”¹⁷²

The Government still has not published its findings from the Isle of Wight trial, despite constant questions from local media¹⁷³ and Shadow Health Minister Justin Madders.¹⁷⁴ NHSX has also disbanded the app's Ethics Board, deleting information about the Board from its website and had its final meeting in early July.¹⁷⁵ With a new app under development, it is worrying that NHSX no longer acknowledges the need to commit to an ethical oversight body.

However, Sky News reported that NHSX's new design could include “FitBit style” notifications “which would remind people that the app is working and nudge them into safer behaviours,” the option to “check-in” to venues with QR codes, and “personal benefits” to downloading the app, in order to motivate uptake.¹⁷⁶

These are concerning suggestions. It is unclear what ‘personal benefits’ would be offered, but this approach could represent compulsion by the back door. If use of the app allows people to access certain locations or services (which could be a real possibility, given the suggestion of coupling the app with QR codes at entrances), it would undermine the notion of meaningful consent, let alone disadvantage the millions of people who do not have a smart phone. “Incentivisation” was warned against as far back as April by Professor Lillian Edwards, a member of the NHSX app's Ethics Board, who told the Science and

¹⁷⁰ Oral evidence: UK science, research and technology capability and influence in global disease outbreaks - Science and Technology Committee, 21st July 2020, HC 136, Q1189: <https://committees.parliament.uk/oralevidence/761/pdf/>

¹⁷¹ Oral evidence: UK science, research and technology capability and influence in global disease outbreaks - Science and Technology Committee, 21st July 2020, HC 136, Q1190: <https://committees.parliament.uk/oralevidence/761/pdf/>

¹⁷² NHS contact tracing app ready for rollout 'in a few weeks', says outgoing test and trace head – Mike Wright, The Telegraph, 28th July 2020: <https://www.telegraph.co.uk/news/2020/07/28/nhss-contact-tracing-app-ready-rollout-weeks-says-outgoing-test/>

¹⁷³ What is it about the Government hiding the results of the Isle of Wight Contact Tracing App trial? - Simon Perry, News OnTheWight, 10th July 2020: <https://onthewight.com/what-is-it-about-the-government-hiding-the-results-of-the-iw-contact-tracing-app-trial/>

¹⁷⁴ Contact Tracing: Computer Software: Written Question – HC69590: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-07-06/69590/>

¹⁷⁵ NHS contact-tracing app Ethics Board scrapped – Matthew Field, the Telegraph, 23rd July 2020: <https://www.telegraph.co.uk/technology/2020/07/23/nhs-contact-tracing-app-ethics-board-scrapped/>

¹⁷⁶ New NHS England contact-tracing app may bring 'personal benefits' – Rowland Manthorpe, Sky News, 22nd July 2020: <https://news.sky.com/story/coronavirus-new-nhs-england-contact-tracing-app-will-use-fitbit-style-contact-counts-12033994>

Technology Committee that “huge issues about the societal discrimination (...) may be created, about social stigma and, perhaps, about autonomy.”¹⁷⁷

The inclusion of proxy-location data collection in the app by way of scanning QR codes at the entrance to venues is also a concerning suggestion. There are countless venues that could reveal sensitive information about an individual, such as a therapist’s office, an LGBT venue or a sexual health clinic. We do not yet know how and where the new app will store data or if this data will be used as part of the NHS’ Data Store. It is worth remembering that NHSX’s previous effort at producing an app was not trusted by the general public, partly due to a belief that their data would not be safe and that they could be tracked.¹⁷⁸ Excessive data collection, such as the collection of location data, would seriously damage public trust in the app.

Elsewhere in the UK, Northern Ireland has developed its own decentralised app in collaboration with the Republic of Ireland, which is due to be launched in the coming weeks. The app is voluntary, but there are no safeguards in place to prevent employers from mandating employees to download the app. Worryingly, a Health Department official said they “intend to follow up with specific guidance to employers” after the app has been launched.¹⁷⁹ The Northern Irish Executive must make it clear that downloading the app is not mandatory and cannot be a gateway to accessing workplaces or services.

Welsh Health Minister Vaughan Gething has said that officials are in talks with Northern Irish health officials over the use of the app in Wales.¹⁸⁰ Wales had initially committed to bringing in the NHSX app alongside England, but with little information on when it will be available Mr Gething said Wales would “want to be part of” any “viable UK wide app that works, and provides information into our system.” It is proving easier and faster, let alone more proportionate, to roll out an app which does not collect vast amounts of data and that works on a technical level. NHS England’s approach is increasingly becoming the outlier.

RECOMMENDATION 17: NHSX should commit to privacy by design and minimised data collection in any contact tracing app.

¹⁷⁷ Oral evidence: UK Science, Research and Technology Capability and Influence in Global Disease Outbreaks – Science and Technology Committee, 28th April 2020, HC 136, Q377: <https://committees.parliament.uk/oralevidence/316/pdf/>

¹⁷⁸ 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/>

¹⁷⁹ NI Covid-19 contact-tracing phone app to be launched next week – Express&Star, 23rd July 2020: <https://www.expressandstar.com/news/uk-news/2020/07/23/ni-covid-19-contact-tracing-phone-app-to-be-launched-next-week/>

¹⁸⁰ Health officials in Wales turn to Irish after UK contact-tracing app no-show – Nation Cymru, 22nd July 2020: <https://nation.cymru/news/health-officials-in-wales-turn-to-irish-after-uk-contact-tracing-app-no-show/>

RECOMMENDATION 18: NHSX must reinstate the NHS COVID-19 App Data Ethics Advisory Board in order to ensure ethical oversight of any contact tracing app in development.

RECOMMENDATION 19: The UK Government and devolved administrations must take steps to ensure that the use any contact tracing app is not a requirement or barrier to access workplaces, schools, services or venues.



When we see emergency measures passed, particularly today, they tend to be sticky. The emergency tends to be expanded. Then the authorities become comfortable with some new power. They start to like it.”

— Edward Snowden ¹⁸¹

¹⁸¹ Edward Snowden Live / CPH:DOX online – CPH:DOX*, 23rd March 2020:
https://www.youtube.com/watch?time_continue=1762&v=9we6t2nObbw&feature=emb_logo

BIOSURVEILLANCE

With more people returning to work, education and leisure spaces, companies are turning to biosurveillance tools that monitor health in attempt to assuage fears of infection. Organisations may mean well, but much of this technology is highly intrusive and often ineffective.

There is also a real risk of function creep, whereby tools designed to protect against the spread of coronavirus are kept on for other purposes or additional features are later added, such as more general health tracking or assessing the productivity of employees and students. Once companies have installed surveillance devices, they may be unwilling to turn them off.

Software company Cadline has developed a contact tracing app that allows employers to track the movements of their employees.¹⁸² The app connects to a Bluetooth device worn by the staff member and registers the distance to other nearby devices. Not only can the system be used to alert those who may potentially need to self-isolate, but, according to Cadline's business development director, "most importantly" it can be used to "report on those people who repeatedly breach the two metre distance so HR can implement additional training for those individuals."¹⁸³ The company reports that "major global construction and engineering groups" based in the UK have already expressed their intention to purchase the software for their staff.¹⁸⁴ Installing digital surveillance to enable micro-controls on people's movements is excessive and will create oppressive work environments.

Soter Analytics, a company that markets wearable Bluetooth devices that track employees' movements, has introduced an audio and vibration alert system for employees breaching social distancing guidance. The data from the devices is available in a 'console' for "managing the entire workforce, check[ing] performance and get[ting] insights on ergonomic data."¹⁸⁵ The surveillance wearables are already used by British companies Travis Perkins, British Airways and Balfour Beatty, with plans to supply "now-growing industries – logistics, supermarkets, healthcare."¹⁸⁶ This monitoring and vibration alert system is akin to a pervasive electric fence and will likely feel overbearing.

Amazon has developed augmented reality software which applies AI to CCTV cameras to display live readings of staff who are following social distancing (surrounded by a green

¹⁸² ITWosafe – Cadline: <https://cadline.co.uk/itwosafe/>

¹⁸³ Companies are enforcing their own contact tracing to track employees – Matt Burgess, Wired, 22nd June 2020: <https://www.wired.co.uk/article/contact-tracing-offices-coronavirus>

¹⁸⁴ Safe Distancing Technology for the Workplace Launches in the UK – David Soffer, Tech Round, 20th May 2020: <https://techround.co.uk/news/safe-distancing-technology-workplace-uk/>

¹⁸⁵ Clip&Go – Soter Analytics: <https://soteranalytics.com/solutions/clipgo/>

¹⁸⁶ How to rebuild a business after the coronavirus lockdown – Laura Miller, Wired, 22nd June 2020: <https://www.wired.co.uk/article/reanimate-business-coronavirus-lockdown>

ring) and those who are not (surrounded by a red ring).¹⁸⁷ The company has begun to roll out its Digital Assistant technology across its sites - there are over twenty Amazon sites across the UK. On 23rd June, Amazon announced that it would be making that software open source, meaning anyone "with just a computer and camera" can run the technology.



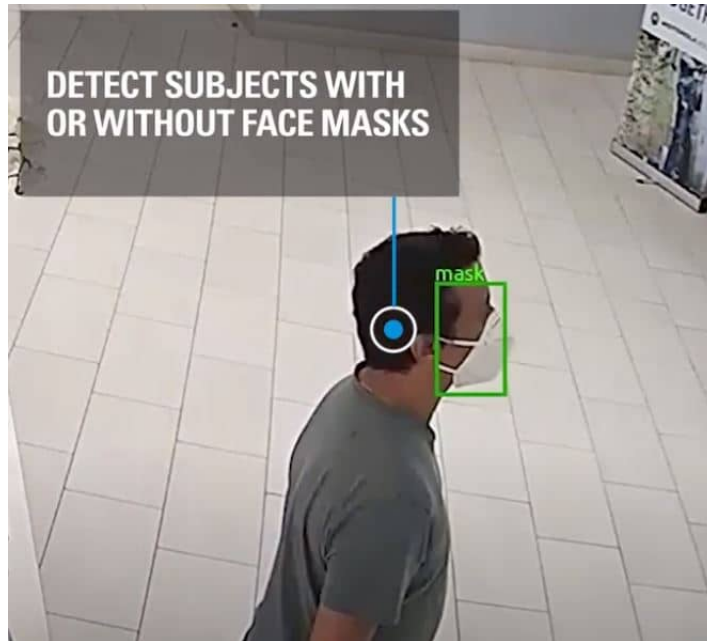
Credit: Amazon

Security company Ecl-ips is marketing various surveillance tools to venues, including contact tracing CCTV and cameras which identify "breaches of social distancing guidance" or those not wearing face masks, sending alerts and giving audible warnings.¹⁸⁸ It is particularly concerning that these tools are also being specifically marketed at schools.¹⁸⁹

¹⁸⁷ Amazon introduces 'Distance Assistant' – Brad Porter, Amazon blog, 23rd June 2020: <https://blog.aboutamazon.com/operations/amazon-introduces-distance-assistant>

¹⁸⁸ Covid-19: Monitoring solutions to keep everyone safe – Karen Uppal, Ecl-ips, 25th May 2020: <https://ecl-ips.com/blog/covid-19-monitoring-solutions-to-keep-everyone-safe/>

¹⁸⁹ Schools: Getting Back Safely in September - Karen Uppal, Ecl-ips, 6th July 2020: <https://ecl-ips.com/blog/schools-getting-back-safely-september/>



Credit: Ecl-ips

Thermal Scanners

We documented in our previous reports the introduction of thermal scanning across a range of venues as a means of attempting to detect elevated body temperatures and the serious limitations of this measure. More experts have since warned against this technology. Mara Aspinall, an Arizona State University professor of biomedical diagnostics, said that any form of temperature check was “almost useless” in diagnosing Covid-19, while Eric Topol, executive vice president of biomedical science institute Scripps Research said:

“There’s never been any data to show that it’s prevented any transmissions [of COVID-19] (...) The temperature check is of no value. It should be abandoned.”¹⁹⁰

However, we are seeing increasing numbers of venues adopting this ineffective and intrusive technology.

On 23rd July, the London Palladium opened for a ‘test event’, trialling measures intended to allow theatres to reopen. These measures included all visitors receiving thermal scans on entrance using a thermal imaging camera. The London Palladium’s website states: “[o]ne person will be screened and assessed at any one time and if your temperature is

¹⁹⁰ COVID-19 temperature checks might do more harm than good – Kat Eschner, 21st July 2020: <https://www.popsci.com/story/health/temperature-check-fever-covid-pandemic/>

38°C or higher, you and those who are part of your group might not be allowed to enter the venue (at our sole discretion).”¹⁹¹

An arts venue and outdoor bar in Glasgow, SWG3, has installed thermal scanners that questionably claim to “detect fevers” at its entry point. Any person who is in the temperature range of a fever is not permitted to enter the venue.¹⁹² Various shops such as Apple¹⁹³ and Furniture Village¹⁹⁴ have also introduced thermal scanning as a requirement for access. Apple is already facing an investigation as to whether this violates EU data protection laws from a regional German data protection office.¹⁹⁵ As we have previously explored, non-contact thermal scanners cannot confidently detect “fevers” or core body temperature.

We have received communication from teachers concerned at the use of thermal imaging cameras in their schools. Staff and pupils are being routinely scanned on entrance, and presumably if found to have a high temperature, individuals may not be permitted to attend school. Denying children entrance to school on the basis of unproven surveillance technology has serious implications for access to education.

It is significant that the Home Office has decided to combine the roles of Biometrics Commissioner and Surveillance Camera Commissioner during the pandemic.¹⁹⁶ This move by Home Office signals that biometric surveillance is being increasingly normalised and previously passive surveillance cameras are increasing offering more active, complex and intrusive data processing functions. The current Surveillance Camera Commissioner has asked to see the consultation that led to this decision, calling it “a dilution of roles / responsibilities.”¹⁹⁷

Much has been made of the apparent choice between protecting privacy and saving lives, characterised by one publication as the choice between “panopticons or pandemics.”¹⁹⁸ We believe this is a false, dangerous distinction to draw. Invasive technology is not, and must not be framed as, the only alternative to lockdown and a public health crisis. In fact,

¹⁹¹ Beverley Knight: Thu 23 July 2020, FAQs - London Palladium website: <https://www.popsci.com/story/health/temperature-check-fever-covid-pandemic/>
<https://lwtheatres.co.uk/whats-on/beverley-knight/#faqs>

¹⁹² Good health ... SWG3 reveals how it plans to keep guests safe at new outdoor venue – Ian Marland, Glasgow WE, 3rd July 2020: <http://glasgowwestend.today/2020/07/03/venue/>

¹⁹³ Store opening letter – Apple, 17th May 2020: <https://www.apple.com/uk/store-opening-letter/>

¹⁹⁴ Three in 10 feel unsafe at the shops as face mask usage increases: Ian Aikman, Which?, 28th May 2020: <https://www.which.co.uk/news/2020/05/three-in-10-feel-unsafe-at-the-shops-as-face-mask-usage-increases/>

¹⁹⁵ Apple Faces Regional German Probe Over Store Temperature Checks – Daniel R. Stoller, Bloomberg Law, 12th May 2020: <https://news.bloomberglaw.com/privacy-and-data-security/apple-faces-regional-german-probe-over-store-temperature-checks>

¹⁹⁶ HM Government Public Appointments: Biometrics and Surveillance Camera Commissioner – Gov.uk, 9th July 2020: <https://publicappointments.cabinetoffice.gov.uk/appointment/biometrics-and-surveillance-camera-commissioner/>

¹⁹⁷ Twitter, Tony Porter, 26th July 2020: <https://twitter.com/surcamcom/status/1287296102908203008?s=20>

¹⁹⁸ The rise of the bio-surveillance state – Jeremy Cliffe, New Statesman, 25th March 2020: <https://www.newstatesman.com/science-tech/2020/03/rise-bio-surveillance-state>

privacy goes hand in hand with public health. Medical confidentiality, data protection and trust are the bedrock of functioning health systems.

In order for an interference with the right to privacy to be necessary, it must work. As evidenced by the failed NHSX app and our analysis of thermal scanners, surveillance measures often promise much more than they can deliver. Companies who have suffered losses through the pandemic may feel the pressure to appear to be taking steps to build consumer and employee trust, in particular to get business moving again and to avoid potential liabilities. Technology that promises 'safer' venues are consequently rushed out, with little consideration of whether they actually work or not. Much of this technology has been deployed too quickly for proper assessment of its effectiveness and accuracy. It is experimental at best. Access to education, employment, culture, travel and recreation, engaging fundamental rights, must not be predicated on experiment surveillance technologies.

RECOMMENDATION 20: We urge all companies, authorities and institutions to immediately cease use of thermal surveillance, absent a strong evidence base and robust safeguards.

LOCAL LOCKDOWNS

The Government has reiterated its commitment to taking a local approach to any future lockdowns, with the Prime Minister likening another national lockdown to a “nuclear deterrent.”¹⁹⁹

It is widely expected that England will continue to experience more local lockdowns as cases spike in different areas across the country. Professor Peter Horby, a member of SAGE, was asked on 1st July whether we should prepare for more local outbreaks. “Unfortunately I think we should,” he said. “We saw that London unfortunately led the way in the UK and now Leicester is unfortunately leading the way and we can expect more of that, so I think there will have to be local responses to local outbreaks.”²⁰⁰

In response, the Government has published The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations which give local authorities the power to close premises,²⁰¹ prohibit the holding of events,²⁰² and restrict access to public outdoor land.²⁰³ The Regulations also give the Health Secretary the power to direct local authorities to order said restrictions.²⁰⁴ This is alongside the power granted by The Health Protection (Coronavirus, Restrictions) (England) (No. 2) Regulations, which allow the Health Secretary to restrict access to public outdoor land.²⁰⁵ The Prime Minister announced on 17th July that ministers would be granted further powers at a later date:

“Where justified by the evidence, ministers will be able to close whole sectors or types of premises in an area, introduce local “stay at home” orders, prevent people entering or leaving defined areas, reduce the maximum size of gatherings beyond national rules, or restrict transport systems serving local areas.”²⁰⁶

There was confusion as to how and when local lockdowns would occur across the country, with local leaders seeking clarity from the Government. Mayor of London, Sadiq Khan, wrote to the Health Secretary on 29th June to ask for more details on how local lockdowns would be managed:

¹⁹⁹ Boris Johnson exclusive interview: We will not need another national lockdown – Edward Malnick, the Telegraph, 19th July 2020: <https://www.telegraph.co.uk/politics/2020/07/18/boris-johnson-exclusive-interview-will-not-need-another-national/>

²⁰⁰ Flare-ups in Bradford and Doncaster raise lockdown concerns – Chris Smyth, the Times, 1st July 2020: <https://www.thetimes.co.uk/edition/news/flare-ups-in-bradford-and-doncaster-raise-lockdown-concerns-35zxc92hl>

²⁰¹ Regulation 4(1)

²⁰² Regulation 5(1)

²⁰³ Regulation 6(1)

²⁰⁴ Regulation 3(1)

²⁰⁵ Health Protection (Coronavirus, Restrictions) (England) (No. 2) Regulations 2020, Regulation 6(1)

²⁰⁶ Prime Minister’s statement on coronavirus (COVID-19), 17th July 2020: <https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-17-july-2020>

“To support a localised approach we need more information about the Government’s plans for mobilising and delivering the response to local outbreaks.

“Without further clarity on the powers and resources at London’s disposal to manage any ‘local lockdown’ or enhanced social distancing measures, we cannot deliver public confidence in the response that Londoners expect and deserve.”²⁰⁷

In Leicester, as detailed, legislation was eventually used to require a local lockdown. In Blackburn with Darwen, the local authority published guidance recommending that residents limit visits to other households, wear face coverings and get tested after coronavirus cases began to rise. The council noted that this guidance was not legally enforceable, but rather “strongly recommended” steps.²⁰⁸ This was later followed by specific regulations, The Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Luton) Regulations 2020, which were laid on 24th July and came into force the following day. These Regulations prevented the re-opening of gyms and indoor swimming pools, although this was permitted across the rest of England.

In Southend-on-Sea, the council published a ‘Local Outbreak Control Plan’ which listed the various “draconian powers” it could use to quarantine individuals, close or destroy properties and keep a child away from their school.²⁰⁹ The Council noted that it could use ‘Part 2A orders’²¹⁰ to require “examination, isolation or quarantine” or to close businesses – powers which would require the approval of a magistrate.²¹¹ It also noted that the Coronavirus Act “gives powers to designated Public Health Officers (in PHE) (...) for imposing requirements on people for the purposes of screening, assessment, and possible restrictions afterwards.” Other legislation that the council has said it would rely on to enact a form of local lockdown includes the Health and Social Care Act 2012, the Public Health (Control of Disease) Act 1984 and the Civil Contingencies Act 2004. It is concerning that local authorities are taking a ‘pick and mix’ approach to the use of emergency laws in the absence of clear Government guidance over how local lockdowns will be enforced. Ronan Cormacain, Senior Research Fellow at the Bingham Centre for the Rule of Law, wrote that:

“emergency measures ought to be contained in a single legislative vehicle. They should all be sourced in the same place, all kept together and separate from

²⁰⁷ Local lockdown in Leicester as coronavirus cases surge – Joe Murphy and Ross Lydall, Evening Standard, 29th June 2020: <https://www.standard.co.uk/news/politics/leicester-local-lockdown-coronavirus-cases-surge-a4483051.html>

²⁰⁸ Introducing new local measures to control virus spread – The Shuttle, Blackburn with Darwen Council news, 14th July 2020: <https://theshuttle.org.uk/introducing-new-local-measures-to-control-virus-spread/>

²⁰⁹ Powers available to Southend Council to stop local lockdown – Steve Shaw, Clacton Gazette, 2nd July 2020: https://www.clactonandfrintongazette.co.uk/news/south_essex_news/18557462.powers-available-southend-council-stop-local-lockdown/

²¹⁰ The Health Protection (Part 2A Orders) Regulations 2010

²¹¹ Local Outbreak Control Plan V5 – Southend-on-Sea Borough Council, 29th June 2020: <https://www.southend.gov.uk/downloads/file/6708/local-outbreak-control-plan>

ordinary powers. In order to scrutinise, control and ultimately repeal emergency powers, it is necessary to first know where they are.”²¹²

Northern lockdown

At 9.16pm on 30th July, the Health Secretary tweeted that “from midnight tonight, people from different households will not be allowed to meet each other indoors” in areas of northern England.²¹³ Midnight also signalled the beginning of Eid. This sudden announcement and apparent enforcement of new, unknown, Ministerial legal restrictions via Twitter understandably has led to an outbreak of confusion and alarm.

Matt Hancock posted a list of cities and towns, consisting of Greater Manchester, Blackburn with Darwen, Burnley, Hyndburn, Pendle, Rossendale, Bradford, Calderdale, Kirklees which would be subject to these new, unspecified restrictions.²¹⁴ The list also stated that “the same restrictions will apply to the City of Leicester” - presumably meaning that The Health Protection (Coronavirus, Restrictions) (Leicester) (Amendment) (No. 2) Regulations 2020 will remain in force, but that Oadby and Wigston would no longer face restrictions. Guidance was published the following day, specifying that those living in the affected area may not visit another household’s home or garden, or visit venues with other households, although pubs will remain open.²¹⁵ These contradictory restrictions left many to question their validity, especially as Eid begins and families that were due to come together now legally cannot unless they were to go to a pub.

At the time of writing, the new restrictions are apparently in force but the statutory instruments are still yet to be published. This means legal restrictions carrying criminal sanctions are in force that neither the public nor the police are aware of. This makes a mockery of the rule of law, risks arbitrary policing and harms the public health effort.

Announcing restrictions that will impact the lives of millions of people on Twitter, just hours before they are due to come into force, is utterly unacceptable. The leader of the Opposition, Keir Starmer MP, said that this was “a new low for the government’s communications during this crisis”.²¹⁶

²¹² “Social Distancing” of Emergency Legislation during the Covid-19 Pandemic – Ronan Cormacain, UK Constitutional Law Association, 10th July 2020: <https://ukconstitutionallaw.org/2020/07/10/ronan-cormacain-social-distancing-of-emergency-legislation-during-the-covid-19-pandemic/>

²¹³ Twitter, Matt Hancock, 30th July 2020: <https://twitter.com/MattHancock/status/1288931608750444555?s=20>

²¹⁴ Twitter, Matt Hancock, 30th July 2020: <https://twitter.com/MattHancock/status/1288931858856710150?s=20>

²¹⁵ North West of England: local restrictions – what you can and cannot do – GOV.uk, 31st July 2020: <https://www.gov.uk/guidance/north-west-of-england-local-restrictions-what-you-can-and-cannot-do>

²¹⁶ Visiting people at home banned in parts of northern England – BBC News, 31st July 2020: <https://www.bbc.co.uk/news/uk-53602362>

Unavailable data

As detailed in our previous report, the process of placing Leicester under a local lockdown was chaotic and poorly organised. On 29th June, the day the lockdown was announced in parliament by the Health Secretary, the Mayor of Leicester said:

“They [the Government] have made neither the case that something needs to be done or given any explanation as to why this is the right thing to do. (...) If it is necessary, if they can prove it is necessary, of course we would go for it, but they have not provided the evidence that it is necessary or that it would make any difference.”²¹⁷

He also told LBC that the documents he had seen were of “very little substance” and told of his “incredible frustration” at getting information from the Government.²¹⁸

The lack of evidence may well be down to the Government’s failure to provide local authorities with accurate numbers of new infections. ‘Pillar one’ cases are those confirmed in hospitals, while ‘pillar two’ cases are all those confirmed through other testing methods, such as drive-in testing. Since the beginning of the outbreak, the Government has only published the number of pillar one cases but in many areas, pillar two cases make up the majority of cases, meaning “that hundreds of local authorities across the country are unable to see a timely picture of what is happening in their communities or compare that with other cities and regions of the UK.”²¹⁹ It was reported as early as May that testing data for pillar two cases was “disappearing into a data black hole,” as Deloitte, the company coordinating the national testing program alongside the Department of Health and Social Care, was not making the data available to local public health directors.²²⁰ In answer to a written question by Stella Creasy MP, Health Minister Nadine Dorries MP confirmed “that contract with Deloitte does not require the company to report positive cases to Public Health England and local authorities.”²²¹ On 5th March, Covid-19 was recognised as a notifiable disease, meaning that registered medical practitioners have a statutory duty to report any cases to local authorities.²²² It is

²¹⁷ Leicester mayor: ‘More evidence’ needed over proposed lockdown extension – Imogen Braddick, Evening Standard, 29th June 2020: <https://www.standard.co.uk/news/uk/leicester-extended-lockdown-mayor-peter-soulsby-a4482916.html>

²¹⁸ Local lockdown in Leicester as coronavirus cases surge – Joe Murphy and Ross Lydall, Evening Standard, 29th June 2020: <https://www.standard.co.uk/news/politics/leicester-local-lockdown-coronavirus-cases-surge-a4483051.html>

²¹⁹ Lack of local Covid-19 testing data hinders UK’s outbreak response - John Burn-Murdoch, Sarah Neville, Laura Hughes and Andy Bounds, Financial Times, 30th June 2020: <https://www.ft.com/content/301c847c-a317-4950-a75b-8e66933d423a>

²²⁰ Test data from commercial labs going into ‘black hole’ – Matt Discombe, HSJ, 12th May 2020: <https://www.hsj.co.uk/coronavirus/exclusive-test-data-from-commercial-labs-going-into-black-hole/7027619.article>

²²¹ Deloitte: Coronavirus: Written question – HC48980: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-05-19/48980/>

²²² The Health Protection (Notification) (Amendment) Regulations 2020

remarkable that, amid the Government's data-grabbing response to the pandemic, the most basic data required for public health was not being shared.

An article in the British Medical Journal, by a former regional director of public health and a professor of global public health, was scathing of the Government's lack of transparency over testing data and its reliance on corporate contracts:

“the government's paternalistic, centralising tendency has meant that efforts to control the spread of the virus have been overwhelmed by a lack of trust not just in individuals to make their own decisions, but in local professionals and teams. This chaotic system has been established by a government with little understanding of communicable disease control. The announcement of a further £5bn (€5.5bn; \$6.2bn) for contracts to provide covid-19 testing offers little hope for a change in direction.”²²³

Other local leaders complained that they too were not receiving true infection rates for their areas. Andy Burnham, the Mayor of Greater Manchester, said it was like “a light is coming on” after he was finally given the full infection rates for Manchester.²²⁴ In Wokingham, Cllr Charles Margetts, executive member for health, wellbeing and adult services for the council, expressed his frustration that the council had not received accurate testing data:

“This is a Public Health England and NHS cock up. I am very annoyed and deeply disappointed that Public Health England has not provided this information sooner. I'm calling on them for accurate and reliable information.”

“It is unreasonable for councils to take on the responsibility for track and trace if they are not given the correct and accurate information about what tests are being done, and when.”²²⁵

Chaand Nagpaul, the head of the British Medical Association, said that the Prime Minister's 'whack-a-mole' strategy for targeting local lockdowns was:

“no use if the people leading the response on the ground – be they public health teams or local leaders – are not given the most accurate up-to-date data possible.

²²³ Lessons from Leicester: a covid-19 testing system that's not fit for purpose – Mike Gill, Devi Sridhar and Fiona Godlee, BMJ, 7th July 2020: <https://www.bmj.com/content/370/bmj.m2690>

²²⁴ Government finally releases Greater Manchester coronavirus data... and there are six times more cases than local officials knew about – Jennifer Williams, Manchester Evening News, 26th June 2020: <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/government-finally-releases-greater-manchester-18496597>

²²⁵ Councillor calls latest coronavirus figures an 'NHS cock up' – Jess Warren, Wokingham Today, 3rd July 2020: <https://www.wokinghampaper.co.uk/councillor-calls-latest-coronavirus-figures-an-nhs-cock-up/>

This is crucial to allow swift action and to protect lives and the health service, and something that is not happening right now.”²²⁶

The Government’s approach of handing the management of sensitive health data to private companies has come to characterise its response to the pandemic. Deenan Pillay, a Professor of Virology at University College London and a member of Independent Sage, noted that the problems surrounding testing data “are some of the consequences of this being set up as a structure separate from the NHS.”²²⁷ As Lord Snape pointed out during the House of Lords debate on the latest Health Protection Regulations, it is “a strange system of data protection that shares information with private companies such as Serco yet refuses that information to local authorities.”²²⁸

It is remarkable that a Government that is pushing for increasing collection of health data through privatised Data Stores and dashboards, yet is failing to collect and distribute the most essential data required during a pandemic: test results.

Law v. guidance

It took the Health Secretary five days to pass legislation which enacted the renewed lockdown measures in Leicester, which was published just hours before it was due to come into force on 4th July.²²⁹ There was for this period what Emilia Cieslak, Fellow at the Bingham Centre for the Rule of Law, calls a “legal vacuum.”²³⁰ She also states that by making a statement that was expected to be followed by the population of Leicester (and subsequently was) before legislation was passed, the Health Secretary created problems for the rule of law. Firstly, “reliance on future law breaches the requirement that we are governed by rules, not the preferences of Ministers.” Secondly, “governing through Ministerial statements with a statutory instrument at some point in the future limits parliamentary scrutiny.” There has already been controversy surrounding the lack of scrutiny of the national legislation. To govern the Leicester lockdown in this manner makes it clear that the rule of law is being undermined by this government.

²²⁶ Flare-ups in Bradford and Doncaster raise lockdown concerns – Chris Smyth, the Times, 1st July 2020: <https://www.thetimes.co.uk/edition/news/flare-ups-in-bradford-and-doncaster-raise-lockdown-concerns-35zxc92h>

²²⁷ Local officials kept in the dark by Whitehall on Covid-19 testing data – James Tapper and Toby Helm, the Guardian, 5th July 2020: <https://www.theguardian.com/world/2020/jul/05/local-officials-kept-in-the-dark-by-whitehall-on-covid-19-testing-data>

²²⁸ HL Deb (24th July 2020) vol. 804, col. 2491: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

²²⁹ The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020

²³⁰ Getting the timing right- a review of the Leicester lockdown Regulations – Emilia Cieslak, UK Constitutional Law Association, 17th July 2020: <https://ukconstitutionalaw.org/2020/07/17/emilia-cieslak-getting-the-timing-right-a-review-of-the-leicester-lockdown-regulations/>

This gap between the announcement and legislation led to “chaos and confusion” among residents, business owners and police over the exact nature of the restrictions, according to the Leicester MP Liz Kendall.²³¹ The day after the Leicester lockdown was announced by the Health Secretary, the city’s director of public health said he had not yet seen the government’s plans for the city.²³² Leicestershire Live, a local newspaper, said they had “asked both the Department for Health and Social Care and Public Health England for answers to readers' questions but [were] yet to receive a response.”²³³ Instead, they relied on Leicestershire County Council to answer questions such as:

“I live within the red line but my nearest supermarket is outside of the lockdown area, can I travel there?”

“My family live outside of the city and affected county areas but I live within the red line, can I meet with them? If so, where?”

“I live in the county but have to travel into the locked down area to catch a train to get to work in another city, can I still travel to work?”

Residents were rightly anxious to know what they could and could not do. At this point, however, there was no legislation in place, leading the Council to essentially make up its own decisions about what people were able to do in the absence of any clarity from the Government. The council said people were permitted to travel to supermarkets as it was “essential travel for food”, but visiting family was “non-essential travel” and not permitted. The council also said that people were not permitted to provide care for family members who live outside of Leicester if they were clinically vulnerable, but “if [they] both live on [their] own, [they] could form a support bubble.” These answers are a jumbled combination of previous Regulations, and the council and police had no legal power at this point to enforce them.

Local business owner Debbie Bass told the Guardian:

“We didn’t know until 9.45am this morning [on Tuesday]. It was an absolute nightmare trying to work out if we could open or not. I was constantly refreshing the government website, just to get some clarification. The mayor was on TV this morning saying he didn’t know what parts were included, so we thought, ‘Well,

²³¹ Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 - Seventh Delegated Legislation Committee (16th July 2020) col. 8: [https://hansard.parliament.uk/commons/2020-07-16/debates/50f2bfa4-fe26-4e5a-b355-a7f8840d74df/HealthProtection\(CoronavirusRestrictions\)\(Leicester\)Regulations2020](https://hansard.parliament.uk/commons/2020-07-16/debates/50f2bfa4-fe26-4e5a-b355-a7f8840d74df/HealthProtection(CoronavirusRestrictions)(Leicester)Regulations2020)

²³² How will local lockdowns work? – BBC News, 30th June 2020: <https://www.bbc.co.uk/news/uk-england-52934822>

²³³ Leicester lockdown: Your questions answered – Amy Orton, Leicestershire Live, 30th June 2020: <https://www.leicestermercury.co.uk/news/leicester-news/leicester-lockdown-questions-coronavirus-government-4279922>

what chance have we got?' We still haven't had an official message or email. We just had to pick it up off the internet."

"If they'd given us 48 hours' warning, we could have time to adjust. We've worked really hard for the past two weeks to try and get our business back from nothing for three months."²³⁴

On 3rd July, five days after the Health Secretary announced the Leicester lockdown but before any legislation had appeared, Health Minister Nadine Dorries MP gave an interview with Leicestershire Live in order to provide clarity for Leicester residents on the nature of the lockdown. On whether legislation would be introduced, the Minister said:

"We haven't said we are going to put legislation through, what we said is that what we'd love is to see the people of Leicester follow the guidelines and to do what we're asking them to do."

"If they don't, if we get information that people are just driving out of the city, then we would have to bring in the legislation to stop that from happening and to give the police the powers. If they can't and it doesn't happen, then we will have to bring in legislation."

"But, we don't want to do that. We want Leicester to nail it."²³⁵

The next day, the government published The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020, legislation which enforced the lockdown measures.

The legislation states that no-one in Leicester may "without reasonable excuse, stay overnight at any place other than the place where they are living or where their linked household is living."²³⁶ Similarly, no-one who lives outside of Leicester may "without reasonable excuse, stay overnight at any place within the protected area other than the place where their linked household is living."²³⁷

Yet even after legislation was released, confusion between guidance and law persists. A Leicester city council spokesperson told Metro: "People from Leicester and the surrounding areas included in the lockdown should not travel outside the restricted area

²³⁴ Muddled messaging over Leicester lockdown leaves locals baffled - Matthew Weaver, Jedidajah Otte and Archie Bland, the Guardian, 30th June 2020: <https://www.theguardian.com/uk-news/2020/jun/30/muddled-messaging-over-leicester-lockdown-leaves-locals-baffled>

²³⁵ Health minister Nadine Dorries' Leicester lockdown interview: Fact checked - Dan Martin and Amy Orton, Leicestershire live, 14th July 2020: <https://www.leicesterm Mercury.co.uk/news/leicester-news/health-minister-nadine-dorries-leicester-4322494>

²³⁶ The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020, Regulation 5(1)

²³⁷ The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020, Regulation 5(2)

at the moment, unless for essential reasons.”²³⁸ A Leicester City Council web page addressing ‘Common questions on Leicester lockdown’, which was promoted on Twitter by Leicestershire MP Neil O’Brien²³⁹, also contains misrepresentations of the law,:

“If you live in Leicester you should only leave your home to work (if you cannot work from home), to obtain essential food or medical supplies, or to take exercise. You can travel in to Leicester from outside for essential reasons such as work.”

“If you are out (for example, taking exercise) you can still meet in a group of up to six people, but only outdoors and keeping a strict social distance of 2m apart.”

“People should stay 2m apart at all times, and only go out for essential reasons.”²⁴⁰

There is no legal requirement to stay at home, no list of essential reasons for leaving the house and, as always, no requirement to maintain a social distance of 2m.

The confusion surrounding what the residents of Leicester can and cannot do has resulted in those in surrounding areas attempting to “spot residents who have snuck out” to visit pubs or hairdressers.²⁴¹ Some establishments are even asking people to present their council tax bill to prove they are not from Leicester. Residents from Leicester are permitted to leave Leicester, as long as they do not spend the night elsewhere. Health Minister Nadine Dorries said: it “would not be proportionate or practicable to ban travel altogether.”²⁴²

When the law and guidance are not clear, this inevitably results in members of the public attempting to enforce the lockdown themselves, as we have demonstrated in our previous reports. It should be made clear to those in Leicester and the surrounding areas what is permitted, to ensure that Leicester residents are not unfairly treated if they leave the locked down area.

²³⁸ Can people living in local lockdown in Leicester go on holiday? – Sian Elvin, Metro, 4th July 2020: <https://metro.co.uk/2020/07/04/can-people-living-leicester-holiday-lockdown-12943746/>

²³⁹ Twitter, Neil O’Brien, 2nd July 2020: <https://twitter.com/NeilDotObrien/status/1278732745955557376?s=20>

²⁴⁰ Common questions on Leicester lockdown – Leicester City Council: <https://www.leicester.gov.uk/your-council/coronavirus/coronavirus-in-leicester-latest-news/common-questions-on-leicester-lockdown/>

²⁴¹ Leicester residents accused of sneaking into nearby pubs as locals identify their accent – Hayley Dixon, the Telegraph, 6th July 2020: <https://www.telegraph.co.uk/news/2020/07/06/leicester-residents-accused-sneaking-nearby-pubs-locals-identify/>

²⁴² Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 - Seventh Delegated Legislation Committee (16th July 2020) col. 4: [https://hansard.parliament.uk/commons/2020-07-16/debates/50f2bfa4-fe26-4e5a-b355-a7f8840d74df/HealthProtection\(CoronavirusRestrictions\)\(Leicester\)Regulations2020](https://hansard.parliament.uk/commons/2020-07-16/debates/50f2bfa4-fe26-4e5a-b355-a7f8840d74df/HealthProtection(CoronavirusRestrictions)(Leicester)Regulations2020)

Enforcement

In our previous reports, we have extensively demonstrated how confusion between guidance and law has led to arbitrary and excessive policing. In Leicester, the situation has been no different.

On 30th June, the day after the Health Secretary announced the Leicester lockdown (but five days before legislation was made) it was reported that police would be carrying out 'spot checks' on vehicles coming in and out of Leicester.²⁴³ Not only did the police have no legal power to justify these spot checks, but even the Health Secretary's speech made no reference to prohibiting people from leaving or entering Leicestershire. Craig Guildford, the chief constable of Nottinghamshire Police, said they "would act on intelligence and stop minibuses and coaches coming into the city if they were suspected of coming from the affected Leicester areas" and that British Transport Police would do that same. He said: "You are still allowed to travel to get to work, but they [British Transport Police] will be looking for a breach of the guidance such as going shopping or going on a night out." Police cannot enforce 'guidance,' as we have repeatedly stressed, and should not be intervening when they have no legal power to do so.

The College of Policing was forced to remind officers in its guidance that:

"It is likely that there may be some local confusion between the Health Protection Regulations pertaining to the rest of England and government guidance. Government guidance is not enforceable. There are no specific restrictions on travel in and out of Leicester at this time."²⁴⁴

However, police enforcing guidance, rather than law, has continued.

Leicestershire British Transport Police tweeted on 4th July: "People should only be travelling through Leicester if their journey is absolutely essential, so passengers can expect to see an enhanced presence of officers patrolling on trains and at the station."²⁴⁵

The same statement was tweeted again on 9th July, accompanied by an image of police officers standing by metal barriers erected in a local train station.²⁴⁶

²⁴³ Police will turn back drivers fleeing Leicester's coronavirus lockdown – Fiona Hamilton and John Simpson, The Times, 1st July 2020: <https://www.thetimes.co.uk/edition/news/police-will-turn-back-drivers-fleeing-leicester-s-coronavirus-lockdown-pml20c785>

²⁴⁴ COVID-19 – Police briefing in response to Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 – College of Policing, 4th July 2020: <https://www.college.police.uk/What-we-do/COVID-19/understanding-the-law/Documents/COVID-19-Leicester-Regs-briefing-030720.pdf>

²⁴⁵ Twitter, BTP Leicestershire, 4th July 2020: <https://twitter.com/BTPLeics/status/1279388880937070593?s=20>

²⁴⁶ Twitter, BTP Leicestershire, 9th July 2020: <https://twitter.com/BTPLeics/status/1281228241265741825?s=20>



BTP Leicestershire @BTPLeics · Jul 9

People should only be travelling through Leicester if their journey is absolutely essential, so passengers can expect to see an enhanced presence of officers patrolling on trains and at the station.

Officers will continue to be out over this coming weekend.

@leicspolice



In Charnwood, police tweeted that a “handful of people [were] turned away trying to sneak in from areas where they shouldn't be leaving (please be aware pubs are completing photo ID checks).”²⁴⁷ However, residents of Leicester are entitled to leave Leicester – the restriction only prevents overnight stays. It is concerning that police are encouraging ‘ID checks’ for the purpose of ascertaining a person’s address.

On 6th July, South Leicester Police told residents “if you are out for your daily exercise keep a safe distance.”²⁴⁸ The reference to “daily exercise” implies officers are referencing the original Health Protection Regulations which prohibited people from leaving their home without a reasonable excuse, one excuse being exercise. These restrictions were repealed on 1st June, and have not been re-introduced in Leicester. Furthermore, there has never been any restriction in England of the number of times a person may exercise daily, despite repeated confusion from police, local authorities and even Government Ministers.

²⁴⁷ Twitter, Charnwood Police, 4th July 2020: <https://twitter.com/CharnwoodPolice/status/1279543924391108609?s=20>

²⁴⁸ Twitter, South Leicester Police, 6th July 2020: <https://twitter.com/SouthLeicester/status/1280077920334229504?s=20>

Leicester lockdown debate

These Regulations were not debated in the House of Lords until 29th July: 25 days after coming into force. They have not been debated in the House of Commons.

Baroness Thornton criticised the Government's confused approach to announcing the Leicester lockdown:

“Over the weekend of 27 and 28 June it was briefed in the Sunday Times by the Home Secretary that Leicester was to be subjected to a lockdown, without warning or the involvement of the city council, local police or the NHS. I hope the lesson has been learned that this is completely unacceptable.”

“Does the Minister believe it acceptable that a local lockdown that affects hundreds of thousands of people should be announced in a national newspaper and in the national media?”²⁴⁹

Lord Scriven pointed out the mixed messages received by Leicester residents from both from police and Government:

“These regulations, made at speed, playing catch-up and at odds with government guidance, have caused confusion for local people—for example, being told not to leave the lockdown area when that is not in the regulations, and some police forces saying that they would turn back cars registered to a Leicester address.”

“Emergency, top-down and contradictory official guidance has become the norm, coming to this House many weeks after it has come into law.”²⁵⁰

Baroness Jones, a steadfast critic of the Government's approach to legislating lockdowns, again criticised the unnecessary delays in Parliamentary scrutiny:

“My Lords, I echo the words of the noble Baronesses, Lady Jolly and Lady Walmsley, that we are getting these regulations 25 days after they were first tabled. Why are the Government doing this? Why are they not bringing these regulations to the House before they impose them?”

“Your Lordships' House has been sitting since 21 April: there is no excuse for delaying to this extent. So my first question is: why the delay? My second question

²⁴⁹ HL Deb (29th July 2020) vol. 805, col. 308: [https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection\(CoronavirusRestrictions\)\(Leicester\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection(CoronavirusRestrictions)(Leicester)Regulations2020)

²⁵⁰ HL Deb (29th July 2020) vol. 805, col. 291: [https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection\(CoronavirusRestrictions\)\(Leicester\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection(CoronavirusRestrictions)(Leicester)Regulations2020)

is: are the Government going to continue to act in this anti-democratic, dictatorial way in the autumn, or can we expect more consideration for the upper House?”²⁵¹

Lord Liddle agreed:

“My Lords, once again we are debating a measure long after the horse has bolted. We need a radical change in our procedures so that we do not face this situation of Executive diktat in the future.”²⁵²

Baroness Brinton asked the Government to commit to re-instating proper scrutiny and democratic process:

“there is a real problem with the constant delaying of presenting these regulations to Parliament, which shows that the Government are really not taking seriously the job that we have to do, which is to scrutinise legislation. Can the Minister therefore assure us that when we return in September and virtual Grand Committee comes into operation, we will return to the pre-pandemic timetable of notification and presentation of SIs to your Lordships’ House?”²⁵³

Baroness Young decried the lack of helpful data being passed to local authorities and noted that it had led to some councils taking concerning measures:

“Some local authorities are doing crazy things, such as scanning test results to spot likely ethnic names to help them understand the characteristics of a community spread.”²⁵⁴

Baroness Jolly emphasised the importance of these reviews and called on the Government to publish their results:

“The Secretary of State must review them every fortnight. Given that 16 July has passed, can the Minister please let us know the outcomes of that first review? Has there been any significant change in the situation? How will this be conveyed to Parliament during the Recess?”²⁵⁵

²⁵¹ HL Deb (29th July 2020) vol. 805, col. 296: [https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection\(CoronavirusRestrictions\)\(Leicester\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection(CoronavirusRestrictions)(Leicester)Regulations2020)

²⁵² HL Deb (29th July 2020) vol. 805, col. 301: [https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection\(CoronavirusRestrictions\)\(Leicester\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection(CoronavirusRestrictions)(Leicester)Regulations2020)

²⁵³ HL Deb (29th July 2020) vol. 805, col. 305: [https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection\(CoronavirusRestrictions\)\(Leicester\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection(CoronavirusRestrictions)(Leicester)Regulations2020)

²⁵⁴ HL Deb (29th July 2020) vol. 805, col. 292: [https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection\(CoronavirusRestrictions\)\(Leicester\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection(CoronavirusRestrictions)(Leicester)Regulations2020)

²⁵⁵ HL Deb (29th July 2020) vol. 805, col. 293: [https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection\(CoronavirusRestrictions\)\(Leicester\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection(CoronavirusRestrictions)(Leicester)Regulations2020)

In Oadby and Wigston, Lord Garnier said “[the residents] are also entitled to a clear explanation of why their community is being brought in or out of local lockdown measures.”²⁵⁶ Baroness Brinton agreed:

“I am sorry to say that Councillor John Boyce, the leader of Oadby and Wigston, has still not heard from Matt Hancock, despite the latter saying publicly that he had spoken to him. However, it is not just the leader of the council. Many local residents are extremely concerned, as are senior councillors and officials, about the possibility of unrest if they continue to be treated unfairly compared to their neighbouring councils.”²⁵⁷

Ending local lockdowns

Much like the Government’s reviews of the England-wide lockdown regulations, the terms of the reviews of whether local lockdowns continue to be necessary are not known. Health Minister Nadine Dorries MP told Leicestershire Live that in order to come out of local lockdown, Leicester’s infection rate will need to be “on par with the rest of the country and the national average.”²⁵⁸ However, the Health Secretary later said that the Government would not “use or give a specific figure because both the level and the rate of change matters.”²⁵⁹

Leicester Mayor, Sir Peter Soulsby, has urged the Government to provide clarity over “what will constitute success in defeating the virus in Leicester (...) otherwise we could end up in a protracted lockdown - or end up leaving our isolation on the same wholly inadequate basis used to take us into it.”²⁶⁰

The Health Protection (Coronavirus, Restrictions) (Leicester) (Amendment) Regulations 2020 reduced the area subject to lockdown restrictions, but without a published review explaining why certain areas remained in lockdown. Accusations were made of politically motivated decisions. The Oadby and Wigston borough remains under lockdown, which

²⁵⁶ HL Deb (29th July 2020) vol. 805, col. 294: [https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection\(CoronavirusRestrictions\)\(Leicester\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection(CoronavirusRestrictions)(Leicester)Regulations2020)

²⁵⁷ HL Deb (29th July 2020) vol. 805, col. 305-6: [https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection\(CoronavirusRestrictions\)\(Leicester\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-29/debates/46468474-7765-4E8E-B030-D95E9EA2257A/HealthProtection(CoronavirusRestrictions)(Leicester)Regulations2020)

²⁵⁸ Health minister Nadine Dorries' Leicester lockdown interview: Fact checked – Dan Martin and Amy Orton, Leicestershire live, 14th July 2020: <https://www.leicestermercury.co.uk/news/leicester-news/health-minister-nadine-dorries-leicester-4322494>

²⁵⁹ How Leicester will come out of local lockdown - Matt Hancock gives update – Amy Orton, Leicestershire Live, 7th July 2020: <https://www.leicestermercury.co.uk/news/leicester-news/how-leicester-come-out-local-4302316>

²⁶⁰ Government under pressure to confirm conditions for lifting Leicester Lockdown – Dan Martin, Leicestershire Live, 10th July 2020: <https://www.leicestermercury.co.uk/news/leicester-news/government-under-pressure-confirm-conditions-4311854>

their council leader John Boyce called “a complete slap in the face to the residents.”²⁶¹ He alleged that the decision to keep the Liberal Democrat held borough under lockdown was made on “purely political grounds” and lambasted the County Council for not informing them that the borough would remain under lockdown.

Local MP Neil O’Brien wrote to the Health Secretary to complain that “two weeks is too long to wait for a review of local measures, given the finely balanced nature of the data which was cited to justify the continuing inclusion of Oadby and Wigston.”²⁶² He has called on the Health Secretary to bring forward the two week review.

RECOMMENDATION 21: Timely reviews and the evidence bases of local lockdowns should be published to allow for public scrutiny.

Wales

Welsh First Minister Mark Drakeford said a local lockdown would be introduced “[i]f there is evidence that coronavirus is seeping into the community” after outbreaks at meat packing factories in Anglesey and Wrexham.²⁶³ The First Minister suggested, in contrast to the approach taken in England, that the draconian Coronavirus Act could be used “to impose restrictions on entry and departure from any area in Wales,” rather than issuing Regulations under the Public Health (Control of Disease) Act 1984.

Scotland

Scotland has not passed any legislation that would result in a local lockdown, and unlike England, has not passed Regulations that give local authorities new powers to impose local restrictions.

Instead, First Minister Nicola Sturgeon announced that due to higher levels of coronavirus in some parts of Scotland, “the advice and guidance to people in the areas of Annan, Gretna, Dumfries, Lockerbie, Langholm and Canonbie is to continue to follow the five mile travel restriction over the weekend.” The wording of this is ambiguous. Ms Sturgeon states

²⁶¹ 'Decision made on political grounds': Oadby and Wigston council leader reacts to extended lockdown – Dan Martin and Amy Orton, Leicestershire Live, 16th July 2020: <https://www.leicestermercury.co.uk/news/local-news/decision-made-political-grounds-oadby-4335309>

²⁶² 'Release Oadby and Wigston from lockdown' - MP Neil O'Brien - Dan Martin and Amy Orton, Leicestershire Live, 17th July 2020: <https://www.leicestermercury.co.uk/news/leicester-news/release-oadby-wigston-lockdown-mp-4336478>

²⁶³ Local lockdowns possible if evidence of community transmission – FM – Nation Cymru, 29th June 2020: <https://nation.cymru/news/local-lockdowns-possible-if-evidence-of-community-transmission-fm/>

that it is 'guidance', but also terms it a 'restriction'. Subsequent reporting on this announcement stated that the "five-mile travel restriction is to remain in force"²⁶⁴ and referred to the "five-mile travel limit."²⁶⁵

Northern Ireland

In Northern Ireland, the government says that any local outbreaks will be handled using "appropriate infection control" in line with its normal guidelines for handling an outbreak of a disease.²⁶⁶ New legislation has not been produced to manage local outbreaks.

²⁶⁴ Nicola Sturgeon says five-mile travel restriction to remain in force in parts of Dumfries and Galloway – Stuart Gillespie, Daily Record, 2nd July 2020: <https://www.dailyrecord.co.uk/news/local-news/breaking-five-mile-travel-restriction-22289986>

²⁶⁵ Local lockdowns: areas in Scotland at risk of further lockdown rules as restrictions are extended in Leicester – Stephanie Rendall, Edinburgh Evening News, 6th July 2020: <https://www.edinburghnews.scotsman.com/health/coronavirus/local-lockdowns-areas-scotland-risk-further-lockdown-rules-restrictions-are-extended-leicester-2901677>

²⁶⁶ Coronavirus: What closes in a local lockdown- BBC News, 17th July 2020: <https://www.bbc.co.uk/news/uk-england-52934822>

FREEDOM OF EXPRESSION

Counter Disinformation Unit

We still know little about the work of the Counter Disinformation Unit and the Rapid Response Unit, which have been tasked with identifying and resolving “[u]p to 70 pieces of misinformation a week.”²⁶⁷ It is still unknown how misinformation is defined, how is it found and how it is “resolved.”

We are concerned that lawful speech is being curtailed through pressure from a mysterious Government unit, with no public or parliamentary scrutiny.

Instead of questioning the democratic role of such a unit, the DCMS Committee “raised concerns about the Government’s delays in standing up the Counter Disinformation Unit.”²⁶⁸ The Committee suggested that the Counter-Disinformation Unit convene a ‘Factchecking Forum’, uniting various fact checking organisations. It is worth noting that a ‘Factchecking Forum’ convened by a Government body could easily have the opposite intended effect, as warned by Dr. Megan Emma Smith in an evidence session.²⁶⁹

Freedom of assembly

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

While the new Regulations remove many of the restrictions on gatherings, there is still up upper limit of 30 people gathering indoors or outdoors. Whilst exceptions are made in the Regulations for gatherings organised by “a business, a charitable, benevolent or philanthropic institution, a public body, or a political body” if a risk assessment is carried out and all “reasonable measures to limit the risk of transmission of the coronavirus” are taken, this does not constitute the restoration of the right to protest.²⁷⁰ Protests organised by campaigning organisations, community groups or spontaneous demonstrations (that would constitute more than 30 people) are not allowed.

²⁶⁷ Government cracks down on spread of false coronavirus information online - Cabinet Office and Department for Digital, Culture, Media & Sport, 30th March 2020: <https://www.gov.uk/government/news/government-cracks-down-on-spread-of-false-coronavirus-information-online>

²⁶⁸ Misinformation in the COVID -19 Infodemic: Second Report of Session 2019–2, HC 234, 21st July 2020, Digital, Culture, Media and Sport Committee, p. 9: <https://committees.parliament.uk/publications/1954/documents/19089/default/>

²⁶⁹ Oral evidence: Online Harms and Disinformation, HC 234 , 4th June 2020, Digital, Culture, Media and Sport Sub-Committee on Online Harms and Disinformation, Q131: <https://committees.parliament.uk/oralevidence/459/pdf/>

²⁷⁰ Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 5(3)(a)

During the House of Lords debate on these Regulations, several peers raised the issue of continued restrictions on the right to protest. Baroness Walmsley expressed concern over the “criminalisation of peaceful protest”²⁷¹ and Lord Alton noted that the limited time for debate was “inadequate to explore the implications for dissent and protest.”²⁷² Baroness Jones asked for more clarity over the legal position of protests:

“What do the Government believe the current law is on people protesting? In what circumstances are protests allowed or not allowed? Is socially distanced protest allowed? What advice are the Government giving to police and local authorities on dealing with protests? These are all incredibly important questions. People are understandably confused. There does not seem to be any information or answers on GOV.UK.”²⁷³

Health Minister Lord Bethell offered no response to these questions, leaving continued uncertainty for those wishing to exercise their right to protest.

Powers for local authorities

The Government has published additional legislation which enables local authorities, as well as Ministers, to restrict events with few safeguards.

The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020 gives local authorities and the Health Secretary the power to cancel either a specific event or a certain type of event.²⁷⁴ Police officers can direct the event to stop, direct a person to leave the event and remove a person from the event, using reasonable force if the officer considers it is necessary.²⁷⁵ Event organisers or the owner of a premises where the event takes place can also receive a £100 Fixed Penalty Notice.²⁷⁶ ‘Event’ is not defined, meaning protests would likely fall under this new power (though on most readings, they are already prohibited).

A local authority may use this power if it considers there is a “serious and imminent threat to public health” and that is a necessary and proportionate response.²⁷⁷ It must have “due regard to any advice given to it by its director of public health” before imposing any

²⁷¹ HL Deb (24th July 2020) vol. 804, col. 2479: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

²⁷² HL Deb (24th July 2020) vol. 804, col. 2490: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

²⁷³ HL Deb (24th July 2020) vol. 804, col. 2481: [https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

²⁷⁴ Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 5(1)

²⁷⁵ Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 12(3),(5)

²⁷⁶ Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 14(1)

²⁷⁷ Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 2(1)

restriction.²⁷⁸ This is a weaker requirement than that imposed on the Health Secretary – if he wishes direct a local authority to impose a restriction under these Regulations, he “must consult the Chief Medical Officer.”²⁷⁹ Any restriction imposed must be reviewed every 7 days.²⁸⁰

The right to protest – particularly in the face of poor public health management, laws that suspend freedoms, and measures that fundamentally alter society – is essential to any democracy and can only be restricted if absolutely necessary. With many aspects of normal life resuming, including those which allow large groups of people in retail or leisure spaces, the right to protest must be restored as a matter of urgency.

Northern Ireland

In our previous report, we detailed Police Service Northern Ireland’s (PSNI) excessive approach to policing the Black Lives Matter protests across the country, with a significant number of arrests and fines issued. The enforcement of the restrictions on protests was also enforced in a highly arbitrary fashion, with those gathering the following week to ‘protect statues’ facing not police intervention.

This has resulted in anger across Northern Ireland, with black community leaders urging PSNI to issue an apology and withdraw all fines.²⁸¹ PSNI have also stated that they “anticipated legal proceedings in relation to protests on June 6, as well as a forthcoming judicial review.”

RECOMMENDATION 22: With gatherings of over 30 now permitted for a range of organisations, there is no longer a credible public health reason for the restriction on the right to protest. Ministers must amend the Health Protection Regulations to restore the right to protest.

²⁷⁸ Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 2(4)

²⁷⁹ Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 3(5)

²⁸⁰ Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 2(2)(b)

²⁸¹ Stalemate with PSNI, but black leaders still hoping for an apology – Jessica Black, Belfast Telegraph, 4th July 2020: <https://www.belfasttelegraph.co.uk/news/northern-ireland/stalemate-with-psni-but-black-leaders-still-hoping-for-an-apology-39338551.html>