

**EMERGENCY POWERS AND
CIVIL LIBERTIES REPORT**
[AUG - SEPT 2020]

About Big Brother Watch

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

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

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INTRODUCTION	4
RECOMMENDATIONS	6
EMERGENCY LAWS	10
HEALTH PROTECTION REGULATIONS	11
The Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020	11
The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020.....	11
The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 5) (England) Regulations 2020.....	14
Role of Parliament	16
Four week reviews.....	19
Accessible laws.....	19
Enforcement	21
Lockdown prosecutions	22
Lockdown fines	22
National divergence.....	24
Wales.....	24
Scotland	25
Northern Ireland	26
CORONAVIRUS ACT	27
Two-monthly reviews.....	27
Six month renewal	27
Schedule 21: detention powers	29
Parliamentary debate.....	31
Schedule 22: dispersal powers.....	32
NEW STATUTORY INSTRUMENTS	33
Requirement to Self-isolate	33
Face coverings.....	35
Role of parliament	35
Enforcement	36
Contact tracing requirement	36
Obligations of Undertakings	41
LOCAL LOCKDOWNS.....	43
England.....	43
Wales.....	44
Scotland	46
Northern Ireland.....	47
NHS AND BIG TECH	49
Covid-19 Data Store	50
Social media scraping.....	51
BIOSURVEILLANCE.....	53
Face mask recognition.....	53
Thermal scanners	54

CONTACT TRACING	57
Test and Trace	57
App.....	60
COVID MARSHALS.....	66
HEALTH PASSPORTS	67
FREEDOM OF EXPRESSION.....	68
Freedom of assembly.....	68
Case studies	68
Free speech online.....	70
VIRTUAL PARLIAMENT	71
LOCAL AUTHORITIES	72
UNIVERSITIES.....	73

INTRODUCTION

This report charts the Covid response during the months of August and September. During this time, the period of 'emergency' legislation in any genuine sense expired. On 30th September, MPs took less than 90 minutes to debate and renew the draconian Coronavirus Act and all its executive powers to suspend elections, close ports, ban protests and detain 'potentially infectious' citizens. These extreme powers are now consigned to the statute books for a further six months.

Even the controversial Schedule 21 detention powers – which are, as we have detailed in this and previous reports, responsible for a 100% unlawful prosecution rate under the Coronavirus Act – were renewed. The counter-terror years did not produce detention powers so extreme, arbitrary and unchecked that 100% of prosecutions were unlawful. The Health Secretary, devoid of evidence, defended the power as a "useful tool". This is the language of a Minister amid a power grab.

The controversial Act had sped through parliament on a three-day emergency timetable with barely a glance before the March lockdown on the promise of greater scrutiny in the weeks and months to come. It was a promise unfulfilled. As we wrote in our April report, three days to pass an Act of constitutional significance that incurred the greatest suspension of liberties in peace-time was far too little. It is dispiriting to report, six months later, only 90 minutes was afforded for parliamentary scrutiny and renewal of the Coronavirus Act. This is an "utter, utter disgrace," as Sir Charles Walker MP put it.

However, the backbench rebellion that ran alongside the motion signalled a direction change for how Parliament deals with the labyrinth of Covid Regulations, if not the Coronavirus Act itself. Backbench MPs, led by Sir Graham Brady, demanded prior debates and votes on statutory instruments with national effect and made a credible threat to inflict a government defeat if they did not get it. The Health Secretary gave a loose promise that prior votes will be offered only on "significant" national laws "where possible", merely restating the default role of parliament as though it were simply a gentleman's agreement to be grateful for. This was no concession, but a shattering reflection of how deeply power has been vested in Ministers' hands.

We are not a democracy simply on the promise of parliamentary scrutiny, but the actual performance of it.

Therefore, this report examines the vast legislative changes over the past two months in the hope of equipping parliamentarians with information and analysis to support their vital scrutiny role.

This is a moment when we desperately need people across the political spectrum with the courage to put principles before power. The backbench rebellion signalled the possibility of a course correction in Parliament – though it has not yet been seen through. With fresh diktats imposed during this reporting period banning dancing in bars and prescribing decibel limits

for music; imposing overnight lockdowns; changing rules dictating every inch of our work, family and social lives; and with images broadcast of students behind wire fences in their universities, held captive from their friends and families – a rebellion may well start to grow among the public too.

RECOMMENDATIONS

RECOMMENDATION: Absent an evidence base to the contrary, children should be exempt from the rule of six to bring key English restrictions into harmony with the nations of the UK.

RECOMMENDATION: Restrictions on 'mingling' are excessive, unclear and risk criminalising normal, safe behaviour. They should be revoked.

RECOMMENDATION: The Government cannot rely on financial penalties to effectively manage this public health crisis. Government guidance has been adhered to by the vast majority of people and effective guidance should be relied on to ensure public health, instead of excessive and draconian fines and criminalisation.

RECOMMENDATION: Any evidence justifying the necessity of a 10pm 'curfew' for bars and restaurants should be published. In absence of any compelling evidence, the restriction should be removed.

RECOMMENDATION: Parliamentarians must continue to apply pressure on the Government to restore meaningful, timely Parliamentary scrutiny. Coronavirus Regulations should be debated and approved by Parliament before they come into force.

RECOMMENDATION: 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: The Government must stop relying on complex and ever-changing criminal sanctions to enforce restrictions. Instead, clear, widely publicised and easily accessible guidance should be made available across a range of mediums and languages.

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

RECOMMENDATION: 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: It remains the case that Schedule 21 of the Coronavirus Act has never been used lawfully. It must be repealed.

RECOMMENDATION: Schedule 22 of the Coronavirus Act contains draconian powers that have never been necessary. It must be repealed.

RECOMMENDATION: There is no evidence to suggest that significant numbers of people are refusing to self-isolate. £10,000 fines are excessive, especially given the convoluted nature of the Regulations.

RECOMMENDATION: The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 are excessive, intrusive, punitive, potentially discriminatory and raise serious questions of compatibility with data and privacy laws. They should be reviewed.

RECOMMENDATION: Businesses across England have gone to great lengths to ensure that they are 'COVID-secure'. Threatening them with significant fines if they do not contain the minutiae of their customers' behaviour is unfair and unnecessary.

RECOMMENDATION: Local lockdowns across the United Kingdom have been beset with confused messaging, poor communication and illogical measures. Regulations should be simplified and reviewed regularly, with the evidence basis for measures published.

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

RECOMMENDATION: Plans for mass testing and digital health passes are scientifically unsound, vastly expensive and represent invasive health surveillance and monitoring. The Government must be clear and transparent about any plans for health passports, fully consider the rights implications, and submit any plans to Parliament at the soonest opportunity.

RECOMMENDATION: Political protests should be exempt from restrictions altogether. The requirement for a protest organiser to complete a risk assessment and implement health and safety measures should be changed to guidance, supported by online resources, rather than a legal requirement to avoid criminalising organic democratic participation and political dissent.

RECOMMENDATION: Hybrid proceedings and remote voting should be introduced to the House of Commons to ensure full parliamentary representation.

RECOMMENDATION: Local authorities should end any emergency measures which reduce the democratic involvement of councillors and scrutiny of decision making.

RECOMMENDATION: Students across the UK must not be subject to additional restrictions or guidance that go beyond local or national restrictions. Any 'lockdown' of accommodation must have a legal basis and be outlined clearly to any students impacted by measures. Any student wishing to leave accommodation in order to return to their family homes should be permitted to do so.

RECOMMENDATION: Students should be treated like responsible adults, not poorly behaved children. They should not be subject to increased surveillance, the presence of intimidating security forces or unwarranted police checks.



The present Prime Minister is fond of saying that he 'will not hesitate' before imposing some aggressive interference with our daily lives. The Health Secretary likes to say that he will 'stop at nothing' to beat the virus. But hesitation has its uses. Politicians surely ought to hesitate before making radical decisions that fundamentally affect the lives of every one of us. (...) As for 'stopping at nothing', this is the language of despots and fanatics."

— Lord Sumption¹

¹ Boris Johnson's 'strongman' Government is destroying democracy – Jonathan Sumption, the Telegraph, 2nd October 2020; <https://www.telegraph.co.uk/politics/2020/10/02/boris-johnsons-strongman-government-destroying-de-mocracy/>

EMERGENCY LAWS

The rate at which emergency laws have been introduced across the UK has not abated in recent months, despite the peak of pandemic having passed. Since our July report, 92 coronavirus statutory instruments (SIs) have been laid by UK Government, totalling 255 pieces of coronavirus-related delegated legislation at the time of writing.² Across all four nations, a total of 445 instruments have been laid containing the word 'coronavirus'. These instruments significantly impact every area of our lives and yet only 9 of these SIs were laid using the draft affirmative procedure, which requires parliamentary approval before an instrument becomes law.

These statutory instruments have been made under a vast array of Acts, 103 in total, as well as 3 Orders and one EU Regulation. They include powers from the Saint Helena Act 1833, to the European Communities Act 1972, Road Traffic Regulation Act 1984, the Human Fertilisation and Embryology Act 1990 and the Climate Change Act 2008. Just 16 SIs have been made under the Coronavirus Act 2020.

Many permanent legal changes in areas unrelated to the pandemic are being brought in under the cover of emergency legislation. Lord German, when debating the Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020 in the House of Lords noted that a significant and permanent amount of the Regulations had nothing to do with coronavirus:

“(...) two completely separate matters are addressed by these Regulations and only one is related to the coronavirus pandemic. The part of the legislation covering the building of additional storeys is both permanent and totally unrelated to the present pandemic, so it is quite legitimate to ask the Minister to explain why this planning law change is misrepresented as a response to the coronavirus health issue.”

“This is a perfect example of a major policy change being side-slipped through Parliament, first, under the cover of a response to the coronavirus crisis and, secondly, by the use of the negative procedure.”³

The sheer volume of 'emergency' legislation being passed months after the peak of the pandemic, and now at a faster rate than previous months, calls into question at what point abuse of the emergency procedure will end.

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

³ HL Debate, 10th September 2020, vol. 805, col. 940-1: [https://hansard.parliament.uk/lords/2020-09-10/debates/7BA4830A-E7CA-4F5B-BABD-48032A0C387B/TownAndCountryPlanning\(PermittedDevelopmentAndMiscellaneousAmendments\)\(England\)\(Coronavirus\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-10/debates/7BA4830A-E7CA-4F5B-BABD-48032A0C387B/TownAndCountryPlanning(PermittedDevelopmentAndMiscellaneousAmendments)(England)(Coronavirus)Regulations2020)

HEALTH PROTECTION REGULATIONS

The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, which came into force on 4th July and are the principle set of 'lockdown' Regulations, have been amended a total of six times – three times since our July report. The main effect of the latest amendments is to introduce £10,000 fines for unlawful gatherings, reduce the size of gatherings from thirty to six, introduce a 10pm curfew on the hospitality sector and mandate table service. The Regulations are now a complex jumble of amendments, making them hard to read and understand. The rushed pace of their release has led to drafting errors which have had to be regularly corrected by the next set of amendments to the Regulations, adding to confusion.

The Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020

The Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020 introduced £10,000 Fixed Penalty Notices for anyone organising a gathering of more than 30 people.⁴

We are concerned about the chilling effect this will have on fundamental rights to freedom of expression and assembly – this excessive fine has already been handed to multiple protest organisers. On the other hand, we welcomed the Regulations' definition of "political body" which clarifies that an exemption applies to any person carrying out activities "to promote, or oppose, changes in any law applicable in the United Kingdom or elsewhere, or any policy of a governmental or public authority",⁵ so long as a number of stringent conditions including police-approved risk assessments are met. We address the repercussions this amendment has had on freedom of expression further on in this report.

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020, in force since 14th September, amended the most recent set of 'lockdown' Regulations in England, which contain restrictions on gatherings, business openings and give the Health Secretary powers to restrict access to public places. The main effect of these Regulations is to impose the 'rule of six', reducing the maximum size of gatherings from 30 to 6 albeit with a significant number of exemptions, the most welcome exemption being for protests.

The logic of this new restriction was criticised by Baroness Barker, Liberal Democrat Peer:

⁴ The Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020, Regulation 2(5)(a)

⁵ The Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020, Regulation 7(a)

“The rule of six is a nonsense, and I think that people have worked out for themselves that it is arbitrary nonsense. Six individuals from different households meeting up every day, and six other individuals the next day—there is no way in which it makes sense, particularly in the absence of effective and timely test and trace data.”⁶

Indeed, Transport Secretary Grant Shapps suggested that there was no specific evidence for the limitation of six. When asked the reason for the number he answered: “There isn’t, to answer your question... it’s not that we looked around the world and we found ‘ah, this country has used a specific number’.”⁷

Furthermore, the inclusion of children in the rule of six contradicts the restrictions in the rest of the UK. No evidence base has been provided to explain why it is necessary to include children in the rule of 6 in England but not Wales or Scotland. The Children’s Commissioner for England has called on the Government to exempt children under 12 from the rule of six.⁸

These new Regulations are also the subject of a legal challenge by Simon Dolan, who argues that the restrictions are irrational, disproportionate and ultra vires of the Public Health (Control of Infectious Diseases) Act 1984, with lawyer Michael Gardner arguing:

“How can 500 people who don’t know each other be allowed to cram into train carriages when more than six people who know each other are breaking the law if they meet in a garden. It doesn’t make any rational sense.”⁹

RECOMMENDATION: Absent an evidence base to the contrary, children should be exempt from the rule of six to bring key English restrictions into harmony with the nations of the UK.

An offence under these Regulations could initially result in a Fixed Penalty Notice of £100, rising to £3,200 for repeat offences. However, the most recent amendment to the principle Regulations, in force since 23rd September but not yet scheduled for debate, has doubled these fines.¹⁰ A relevant person, including a police officer, PCSO or even a council official, “may take such action as is necessary to enforce” the restrictions on gatherings. This can include directing a gathering to disperse, directing any person in the gathering to return to the place where they are living, or removing a person from the gathering even with the use of “reasonable force.”¹¹

⁶ HL Deb (18th September 2020) vol. 805, col. 1584: [https://hansard.parliament.uk/lords/2020-09-18/debates/1ED373BA-17A3-410A-A463-97E34EC17D6C/HealthProtection\(CoronavirusWearingOfFaceCovering-sInARelevantPlace\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-18/debates/1ED373BA-17A3-410A-A463-97E34EC17D6C/HealthProtection(CoronavirusWearingOfFaceCovering-sInARelevantPlace)(England)Regulations2020)

⁷ ‘No specific reason’ why maximum of six chosen as limit for social gatherings, minister says – Stuart Henderson, Yahoo News, 10th September 2020: <https://uk.news.yahoo.com/coronavirus-rule-of-six-social-distancing-covid-072100730.html>

⁸ Childhood in the time of Covid – Children’s Commissioner, September 2020: <https://www.childrenscommissioner.gov.uk/report/childhood-in-the-time-of-covid/>

⁹ ‘Rule of six’ restrictions already facing legal challenge – Charles Hymas, the Telegraph, 10th September 2020: <https://www.telegraph.co.uk/politics/2020/09/10/coming-rule-six-restrictions-already-facing-legal-challenge/>

¹⁰ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020, Regulations 1(2), 2(7)(c)(ii)

¹¹ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 7(1)

Although Ministers announced that this new restriction had been introduced in order to simplify the rules on gatherings, the Regulations contain complicated exceptions to the 'rule of six' which require close reading and careful analysis – they are not immediately evident. Human rights barrister Adam Wagner said that the new restrictions were “the most complex and convoluted set of lockdown Regulations in England yet” and that “[he didn’t] see how these are enforceable in any real sense” since there are “so many complex exceptions.”¹² Analysis from the School of Law at Queen Mary University of London noted that “this ‘simple’ rule is deceptively complex” and that “tracking the changes to the 2020 Regulations is a protracted and exacting process.”¹³ The analysis concludes: “The public appear to remain confused, and those tasked with enforcing the regulations are asking for guidance and clarification. Who can blame them?”

The restrictions do not apply to households of more 6, linked households, if the gathering is reasonably necessary for work purposes, voluntary or charity services, for the purpose of education or training, for childcare, to provide emergency assistance, to avoid illness or escape the risk of harm, to provide care, for parental visits, to fulfil a legal obligation, or to support groups.¹⁴ Gatherings of up to 30 are permitted for funerals, weddings and wedding receptions under these Regulations; however the latest amendment to the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 limits weddings to 15 people.¹⁵

There are also exceptions for gatherings organised by a business, a charitable, benevolent or philanthropic institution, or a public body as long as they carry out a risk assessment and undertake “all reasonable measures to limit the risk of transmission of the coronavirus.”¹⁶ Exemptions for gatherings organised by political bodies have been removed, except if the gathering is an organised protest.¹⁷ This is an important and welcome exemption. However, the requirement that an organiser carries out a risk assessment and takes all reasonable measures to limit the risk of transmission sets a high bar for compliance. Protests without a central organiser, the resources to complete this type of assessment or the power to implement sets of measures across a group of protesters remain banned and subject to harsh penalties.

If a household, a group of 6, or two linked households attend a large gathering permitted under an exemption to the 'rule of six', they are not permitted to “mingle with any person who is participating in the gathering but is not a member of the same qualifying group as them.”¹⁸ 'Mingling' is not defined, either in the Regulations or in any other piece of legislation. Home Secretary Priti Patel told the Today program that mingling meant “people coming together” and when asked if two families bumping into each other and stopping to talk briefly constituted mingling, she answered that it was

¹² Adam Wagner, Twitter, 13th September 2020: <https://twitter.com/AdamWagner1/status/1305287499250630656?s=20>

¹³ 'Mingling' and the 'Rule of Six' – School of Law, Queen Mary University of London, 16th September 2020: <https://www.qmul.ac.uk/law/research/centres-institutes/dol/cjc/responding-to-covid-19/items/mingling-and-the-rule-of-six.html>

¹⁴ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020, Regulation 2(3)(b)

¹⁵ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 5) (England) Regulations 2020, Regulation 2(4)(a)(ii)

¹⁶ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020, Regulation 2(3)(e)

¹⁷ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020, Regulation 3(b)(iii)

¹⁸ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020, Regulation 3(a)

“definitely” mingling, and therefore illegal.¹⁹ This definition is extraordinarily broad and provides little clarity about the levels of social contact that are permitted under the Regulations. Queen Mary University’s School of Law noted:

“But for the fact that financial penalties attach to a breach of the 2020 regulations, such questions might amuse a class of law students for a long time. Alas, the reality is rather more serious.”²⁰

It is plainly absurd to prohibit ‘mingling’ and is virtually impossible to enforce without excessive and intrusive policing. Threats from a Government Minister that speaking to friends in the street could result in a fine of up to £6,400 should serve as a sharp reflection of how extreme, impractical and punitive the Government’s approach to legislating has become over the last 6 months.²¹ While it is to be expected that our behaviour will have to change in public health crisis, the Government’s approach to managing this pandemic has become increasingly draconian and nonsensical.

RECOMMENDATION: Restrictions on ‘mingling’ are excessive, unclear and risk criminalising normal, safe behaviour. They should be revoked.

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 5) (England) Regulations 2020

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 5) (England) Regulations 2020 were laid before Parliament on 24th September 2020, with some provisions coming into force on the same day and others coming into force on 28th September. The Regulations were not debated in the House of Commons until 13th October. These regulations introduced the England-wide ‘curfew’, which restricted restaurants, cafés, workplace canteens (unless “there is no practical alternative for staff at that workplace to obtain food”), bars, pubs and casinos from opening between 10pm and 5am,²² and restricted these businesses to providing table service only.²³

There have been calls for the publication of the evidence which suggests that curfews would help prevent the spread of coronavirus. The Science and Technology Committee asked the Health Secretary Matt Hancock to “detail the evidence and advice informing the decision to mandate the

¹⁹ Coronavirus restrictions outlaw ‘mingling’ - but what does it mean? - ITV News, 15th September 2020: <https://www.itv.com/news/2020-09-15/coronavirus-restrictions-outlaw-mingling-but-what-does-it-mean>

²⁰ ‘Mingling’ and the ‘Rule of Six’ – School of Law, Queen Mary University of London, 16th September 2020: <https://www.qmul.ac.uk/law/research/centres-institutes/dol/cjc/responding-to-covid-19/items/mingling-and-the-rule-of-six.html>

²¹ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020, Regulations 1(2), 2(7)(c)(ii)

²² The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020, Regulation 2(3)

²³ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020, Regulation 2(3)

closure of businesses selling food or drink between the hours of 10pm and 5am.”²⁴ Manchester Mayor Andy Burnham said:

“I think there needs to be an urgent review of the emerging evidence.

“My gut feeling is that this curfew is doing more harm than good. It’s potentially contradictory because it creates an incentive for people to gather in the streets or more probably gather in the home. I don’t think this has been fully thought through to be honest.”²⁵

MPs across parties have also criticised the measure, with Tory MP Tobias Ellwood saying it makes “no sense” and shadow justice secretary David Lammy MP said it was leading to a “situation where people are bubbling out of pubs, they’re hanging around towns and they’re potentially spreading the virus”.²⁶ Without proper parliamentary scrutiny of decision making, or Ministers who are willing to explain the reasoning or evidence behind new legislation, it is inevitable that there will be public frustration as restrictions curtail social and economic life.

There was widespread anger after it emerged that Parliament’s bars were exempt from the curfew after being labelled as “workplace canteens”. After public backlash, it was announced that the bars would no longer serve alcohol after 10pm.²⁷

RECOMMENDATION: Any evidence justifying the necessity of a 10pm 'curfew' for bars and restaurants should be published. In absence of any compelling evidence, the restriction should be removed.

A highly significant element of this amendment to the principle Regulations is that they double fines for all offences.²⁸ A breach of the Regulations can now result in a £200 Fixed Penalty Notice and can reach up to £6,400. Considering the vague prohibitions on mingling and the general public (and Ministerial) confusion as to what the restrictions actually consist of across the country, this level of penalty is excessive, especially in a period of economic hardship for many.

RECOMMENDATION: The Government cannot rely on financial penalties to effectively manage this public health crisis. Government guidance has been adhered to by the vast majority of people and effective guidance should be relied on to ensure public health, instead of excessive and draconian fines and criminalisation.

²⁴ Correspondence from the Chair to Rt Hon Matt Hancock MP, Secretary of State for Health and Social Care, regarding science advice behind COVID-19 measures – Science and Technology Committee, 30th September 2020: <https://committees.parliament.uk/publications/2798/documents/27474/default/>

²⁵ Coronavirus 10pm pub curfew 'doing more harm than good', Manchester mayor says – Ashley Cowburn, the Independent, 29th September 2020: <https://www.independent.co.uk/news/uk/politics/coronavirus-10pm-curfew-restrictions-uk-andy-burnham-b666755.html>

²⁶ Pressure mounts on government to review 'shambolic' 10pm curfew after drinkers crowd streets at closing time – Any Gregory, the Independent, 28th September 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-10pm-curfew-crowds-drinkers-pubs-england-latest-b652288.html>

²⁷ Parliament bars will stop serving drinks at 10pm – Ester Webber, the Times, 28th September 2020: <https://www.thetimes.co.uk/article/parliament-s-bars-exempt-from-10pm-coronavirus-curfew-wb6g6bbgp>

²⁸ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 5) (England) Regulations 2020, Regulation 2(7)

Role of Parliament

Over the past 6 months, we have been arguing and campaigning tirelessly for the restoration of full, timely parliamentary scrutiny of emergency legislation. It has become a national scandal with politicians, judges, and commentators from across the political spectrum pouring scorn on the Government's continued determination to rule by diktat. However, little has changed in the Government's approach.

Lady Hale, the former President of the Supreme Court, wrote that Parliament had "surrender[ed] control to the government at a crucial time (...) My plea is that we get back to a properly functioning constitution as soon as we possibly can."²⁹ Former Speaker John Bercow told BBC Radio 4:

"Debate, scrutiny and votes are the lifeblood of a pluralist system.

"Without them – and they are tremendously important safeguards – what you have is Government by executive fiat and it seems to me that there is a world of difference between the situation six months ago and that which pertains today.

"If governments feel that they can bypass or circumvent or stymie the voice of Parliament, if they don't really feel the need to consult the legislature anymore, well then they will just do things their own."³⁰

The current speaker, Sir Lindsay Hoyle has also repeatedly criticised the Government for making announcements to the press, rather than the House of Commons, and for continually relying on the made affirmative procedure to bypass parliamentary approval and scrutiny.

Sir Christopher Chope said he had expected to see a debate scheduled for the new Regulations in the House of Commons, after news of the 'rule of six' was reported in the media on 8th September 2020:

"It does not appear to have been laid, despite the Prime Minister making an announcement about it on Wednesday and the Secretary of State for Health and Social Care having made a statement yesterday. I am very concerned about the lack of opportunity for the public to see the text of these new regulations and about the Government's continuing reluctance to give any opportunity to Members to debate this. (...)

"That is not satisfactory, as we are talking about the most draconian introduction of new restrictions on our liberty, with criminal sanctions. We need to be aware of what is happening and given the opportunity to debate it."³¹

²⁹ Parliament surrendered role over Covid emergency laws, says Lady Hale - Owen Bowcott, Heather Stewart and Andrew Sparrow, the Guardian, 20th September 2020: <https://www.theguardian.com/world/2020/sep/20/parliament-surrendered-role-over-covid-emergency-laws-says-lady-hale>

³⁰ MPs must share decision making burden on draconian coronavirus laws – Tory rebel – Express & Star, 27th September 2020: <https://www.expressandstar.com/news/uk-news/2020/09/27/mps-must-share-decision-making-burden-on-draconian-coronavirus-laws-tory-rebel/>

³¹ HC Point of Order (9th September 2020) vol. 679, col. 892: <https://hansard.parliament.uk/Commons/2020-09-11/debates/270C18AE-B759-43A1-93E6-338334224DDF/Speaker%E2%80%99SStatement#contribution-F3CA0FA9-7D36-4FA6-8F7E-9251C7053CA6>

The Speaker agreed:

“May I say that I share your disappointment? I think that we should all be informed and the country should also know what is going on.”³²

During the debate on the Coronavirus Act on 30th September, the Speaker said:

“The way in which the Government have exercised their powers to make secondary legislation during this crisis has been totally unsatisfactory. All too often, important statutory instruments have been published a matter of hours before they come into force, and some explanations why important measures have come into effect before they can be laid before this House have been unconvincing; this shows a total disregard for the House.

“The Government must make greater efforts to prepare measures more quickly, so that this House can debate and decide upon the most significant measures at the earliest possible point. The use of made affirmative statutory instruments under the urgency procedure gives rise to particular concern.

“I am looking to the Government to remedy a situation I regard as completely unsatisfactory. I now look to the Government to rebuild the trust with this House and not treat it with the contempt that they have shown.”³³

Both the Public Administration and Constitutional Affairs Committee and the Joint-Committee on Human Rights were highly critical of the Government’s approach to legislating public health measures, with the former stating that:

“The fact that this legislation, which contains stark restrictions on people’s civil liberties, is not amendable by Members, made under the urgent procedure and therefore without parliamentary scrutiny or effective oversight (...) means the framework Parliamentary scrutiny of the Government’s handling of COVID-19 is inadequate.”³⁴

The Joint-Committee on Human Rights reported:

“Even more concerning is the amount of legislation coming into force before it has even been laid before Parliament, which is now high in volume and becoming routine. The Government has had to write to the Speaker at least twenty-five times since March to explain why legislation has come into force before it has been laid before Parliament.”³⁵

³² HC Point of Order (11th September 2020) vol. 679, col. 892: <https://hansard.parliament.uk/Commons/2020-09-11/debates/270C18AE-B759-43A1-93E6-338334224DDF/Speaker%E2%80%99SStatement#contribution-F3CA0FA9-7D36-4FA6-8F7E-9251C7053CA6>

³³ Speaker’s Statement (30th September 2020) vol. 681, col. 331: <https://hansard.parliament.uk/commons/2020-09-30/debates/8160262B-DA85-4D6C-B7FF-86717C8261B2/Speaker%E2%80%99SStatement>

³⁴ Parliamentary Scrutiny of the Government’s handling of Covid-19: Fourth Report of Session 2019–21, HC 377, 10th September 2020, Public Administration and Constitutional Affairs Committee, p. 17: <https://committees.parliament.uk/publications/2459/documents/24384/default/>

³⁵ The Government’s response to COVID-19: human rights implications: Seventh Report of Session 2019–21, HC 265, 21st September 2020, Joint-Committee on Human Rights, p. 69: <https://committees.parliament.uk/publications/2649/documents/26914/default/>

Parliamentarians across all parties have continued to express their frustration over the continued disregard for democracy and the rule of law. On 18th September 2020, the House of Lords debated three sets of amendments to the Health Protection (England) (No. 2) Regulations 2020, despite these amendments already being superseded by the Health Protection (England) (No. 2) (Amendment) (No. 4) Regulations 2020. Peers were scathing towards the severe delays in debating legislation. Lord Scriven has been a constant critic of the Government's use of the urgency procedure:

"any rational person watching this debate will not understand the logic of Parliament discussing the opening of parts of the economy and the rule of 30 when in the real world discussions and actions of government are about the rule of six, local lockdowns, the lack of effective test and trace, and the possibility of a two-week circuit break."

"It is a waste of time in the fight against the virus; it is potentially confusing to those who see or hear these debates, and it makes a total mockery of the need for sharp and effective parliamentary scrutiny of legislation and policies to help save lives and livelihoods."³⁶

Lord Liddle was equally unhappy with the reduced role of Parliament:

"My Lords, I do not know why we are having this debate. These Regulations have been in force for some time, and nothing we say today will alter that. What is more, the Covid situation has changed drastically since they were first introduced. I think the debates demonstrate the farce, frankly, of Parliament's present role."³⁷

Criticism came also from the Government's own benches, with Baroness Noakes stating:

"it is perfectly ludicrous to suggest that the Regulations which relax the restrictions are urgent on health grounds. This is an abuse of the statutory power in order to bypass normal parliamentary processes."³⁸

Peers have also noted that the lack of debate has led to rushed and poorly drafted laws. Responding to this criticism in an earlier debate, Health Minister Lord Bethell remarked that:

"These Regulations were hammered out in conversations between government, local authorities and DPHs in response to the needs and requirements of those local authorities and directors of public health (...) They were not unexpected or rushed; they were the subject of extensive consultation."³⁹

³⁶ HL Deb 18th September 2020, vol. 805, col. 1547:[https://hansard.parliament.uk/lords/2020-09-18/debates/B635E04F-07C9-4AE4-9625-890AA58A0022/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)\(Amendment\)\(No2\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-18/debates/B635E04F-07C9-4AE4-9625-890AA58A0022/HealthProtection(CoronavirusRestrictions)(No2)(England)(Amendment)(No2)Regulations2020)

³⁷ HL Deb 18th September 2020, vol. 805, col. 1555:[https://hansard.parliament.uk/lords/2020-09-18/debates/B635E04F-07C9-4AE4-9625-890AA58A0022/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)\(Amendment\)\(No2\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-18/debates/B635E04F-07C9-4AE4-9625-890AA58A0022/HealthProtection(CoronavirusRestrictions)(No2)(England)(Amendment)(No2)Regulations2020)

³⁸ HL Deb 18th September 2020, vol. 805, col. 1552:[https://hansard.parliament.uk/lords/2020-09-18/debates/B635E04F-07C9-4AE4-9625-890AA58A0022/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)\(Amendment\)\(No2\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-18/debates/B635E04F-07C9-4AE4-9625-890AA58A0022/HealthProtection(CoronavirusRestrictions)(No2)(England)(Amendment)(No2)Regulations2020)

³⁹ HL Deb (3rd September 2020) vol. col. 487: [https://hansard.parliament.uk/lords/2020-09-03/debates/D50831B1-5527-4791-806C-7827C002DD89/HealthProtection\(CoronavirusRestrictions\)\(England\)\(No3\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-03/debates/D50831B1-5527-4791-806C-7827C002DD89/HealthProtection(CoronavirusRestrictions)(England)(No3)Regulations2020)

The question must be asked then, as to why the urgent procedure was used to pass the Regulations before they could be debated by Parliament.

Scrutiny has been lacking across other Parliamentary channels. Politics Home reported that over 50 written questions from MPs to Ministers have gone unanswered, some for several months, despite convention dictating that they receive an answer within 7 days.⁴⁰

A lack of scrutiny not only undermines democracy but creates confusion around what is prohibited and negatively impacts the quality of legislation.

RECOMMENDATION: Parliamentarians must continue to apply pressure on the Government to restore meaningful, timely Parliamentary scrutiny. Coronavirus Regulations should be debated and approved by Parliament before they come into force.

Four week reviews

The Health Protection Regulations impose a duty on the Health Secretary to review the need for the restrictions every 28 days – initially this review was required every 21 days.⁴¹ The publication of these reviews would go a considerable way towards explaining the necessity and proportionality of measures. 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 when passing these Regulations, information as to why Government is maintaining or changing them is essential. To ensure public trust in ever-changing restrictions on our liberty and rights, there must be the chance for independent analysis of the impact of Government measures.

RECOMMENDATION: 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.

Accessible laws

The contempt the Government has shown for proper parliamentary scrutiny not only damages the rule of law and trust for democracy, but also makes the ever more complex rules harder to understand and follow. This ultimately undermines public health efforts. Lord Sumption pointed out the serious impact this mode of legislating has on the quality of decision-making:

⁴⁰ Dozens of MPs' Questions on Coronavirus Testing, Data and PPE Have Been Ignored by Ministers During the Pandemic – Kate Forrester, PoliticsHome, 22nd September 2020: <https://www.politicshome.com/news/article/unanswered-questions-coronavirus-department-of-health>

⁴¹ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 3(2)

“Whatever one’s view about the merits of its decisions, it is impossible to think well of the process which produced them. It has been jerky, clumsy, unprepared, inconsistent and ill thought out. It is not efficient, and in the long run is not even popular.”⁴²

The Public Administration and Constitutional Affairs Committee stated in its report into parliamentary scrutiny during the pandemic that it was “concerned” that the “scale of legislation, covering a large number of statutory instruments made under multiple sources, makes it very difficult for even experts to follow what legislation is in effect.”⁴³ Currently, an average of 8 new pieces of coronavirus legislation have been laid each week since March.⁴⁴ Without checking the Government’s website daily, it would be impossible for members of the public to remain up to date on new restrictions, many of which carry serious financial penalties and potential criminal convictions.

The result has been profound confusion about what is Government advice, what is law and what is guidance from health officials. A key tenet of the rule of law is that laws are accessible and foreseeable – without clarity, enforcement and punishment become arbitrary. As Dr Ronan Cormacain from the Bingham Centre for the Rule of Law wrote, “Even during a pandemic, the Rule of Law matters. Citizens are entitled to legal certainty.”⁴⁵ In early September, a poll found that over half of Britons think that the rules on gatherings are “unclear”, although ironically this survey was published alongside incorrect information as to the nature of the restrictions at the time.⁴⁶ Complex exceptions to the ‘rule of six’ mean that members of the public remain⁴⁷ confused.⁴⁸ The Joint-Committee on Human Rights reported:

“there have been over 25 variations in the lockdown regulations since March, an average of a new set of regulations each week. Whilst the Committee understands that the coronavirus pandemic requires regular changes to guidance and law, more can be done to make those laws clear and accessible”⁴⁹

This confusion is not limited to members of the public, however. Even Government Ministers are struggling to understand legislation. In one highly criticised incident, the Prime Minister demonstrated that he did not understand the Regulations just imposed on North East England, for

⁴² Boris Johnson’s ‘strongman’ Government is destroying democracy – Jonathan Sumption, the Telegraph, 2nd October 2020: <https://www.telegraph.co.uk/politics/2020/10/02/boris-johnsons-strongman-government-destroying-democracy/>

⁴³ Parliamentary Scrutiny of the Government’s handling of Covid-19: Fourth Report of Session 2019–21, HC 377, 10th September 2020, Public Administration and Constitutional Affairs Committee, p. 17: <https://committees.parliament.uk/publications/2459/documents/24384/default/>

⁴⁴ Coronavirus Statutory Instruments Dashboard – Hansard Society (updated 2nd October 2020): <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>

⁴⁵ Can I go to the park please Dad? Everyday lessons in legal certainty in the English Coronavirus Regulations – Ronan Cormacain, Bingham Centre for the Rule of Law, 19th May 2020: <https://binghamcentre.biicl.org/comments/92/can-i-go-to-the-park-please-dad-everyday-lessons-in-legal-certainty-in-the-english-coronavirus-regulations>

⁴⁶ Do you understand the Government’s rules around meeting others? Take the quiz – Lizzie Roberts, the Telegraph, 7th September 2020: <https://www.telegraph.co.uk/news/2020/09/06/half-think-rules-meeting-others-unclear/>

⁴⁷ Confusion reigns over ‘rule of six’ as No 10 says first offenders SHOULDN’T be fined and ‘mingling’ also banned – Sascha O’Sullivan, the Sun, 14th September 2020: <https://www.thesun.co.uk/news/12666669/more-confusion-six-rule-coronavirus/>

⁴⁸ ‘It’s hard to fathom’: confusion over England’s ‘rule of six’ on social gatherings – Rachel Obordo, the Guardian, 11th September 2020: <https://www.theguardian.com/world/2020/sep/11/its-hard-to-fathom-confusion-over-englands-rule-of-six-on-social-gatherings>

⁴⁹ The Government’s response to COVID-19: human rights implications: Seventh Report of Session 2019–21, HC 265, 21st September 2020, Joint-Committee on Human Rights, p. 22: <https://committees.parliament.uk/publications/2649/documents/26914/default/>

which he was forced to issue a correction on Twitter.⁵⁰ Similarly, Skills Minister Gillian Keegan responded to a question about local lockdown restrictions “I don’t know the answer to that question... but I’m sure they can find out the answer.”⁵¹

When even Government Ministers are unable to explain restrictions, is it clear that they are inaccessible to the general public.

RECOMMENDATION: The Government must stop relying on complex and ever-changing criminal sanctions to enforce restrictions. Instead, clear, widely publicised and easily accessible guidance should be made available across a range of mediums and languages.

Enforcement

As coronavirus cases begin to rise again in the UK, there has been an increased emphasis on “stronger enforcement” from the Prime Minister, as ‘rule-breaking’ individuals are blamed rather than the Government’s shambolic contact tracing system.⁵² New broad police powers, the deployment of ‘Covid Marshals’ across town centres and even the suggestion that the army could be drafted in⁵³ clearly demonstrate that the Government is not willing to trust its own citizens. It would rather rely on criminal sanctions and intrusive policing to combat a public health threat.

Police have warned that enforcing new laws would be a challenge. Chair of the Police Federation John Apter said forces were “struggling” and do not have the capacity to patrol city centres.⁵⁴

Government Ministers, perhaps aware that it is impossible for police to enforce the vast amounts of complex new legislation, have begun to encourage people to report on their neighbours. Policing Minister Kit Malthouse urged people to report neighbours to the police if they saw them hosting more than 6 people in their garden.⁵⁵ Home Secretary Priti Patel said she too would report her neighbours to the police if she saw them violating the restrictions on gatherings.⁵⁶ We have detailed in previous reports that many police forces have set up specific online hubs to allow people to report breaches of Covid Regulations, with some encouraging residents to use them in

⁵⁰ Boris Johnson apologises for confusing his own lockdown rules – Catherine Neilan, the Telegraph, 29th September 2020: <https://www.telegraph.co.uk/politics/2020/09/29/boris-johnson-lockdown-jobs-brexite-news-latest/>

⁵¹ Minister admits even she doesn't know details of north-east lockdown pub meet ban – Imogen Braddick, Evening Standard, 29th September 2020: <https://www.msn.com/en-gb/news/newslondon/minister-admits-even-she-doesnt-know-whether-north-east-local-lockdown-rules-apply-to-pub-gardens/ar-BB19wReJ>

⁵² Prime Minister's statement on coronavirus (COVID-19): 30 September 2020 – GOV.UK: <https://www.gov.uk/government/speeches/prime-ministers-statement-on-coronavirus-covid-19-30-september-2020>

⁵³ Prime Minister's statement on coronavirus (COVID-19): 22 September 2020 – GOV.UK: <https://www.gov.uk/government/speeches/prime-ministers-statement-on-coronavirus-covid-19-22-september-2020>

⁵⁴ Cops 'won't be able to cope' with cracking down on Covid rule-breakers: Police union chief calls for councils to help enforce draconian new regulations – as it's revealed government IS asking people to snitch on their neighbours – Mark Duell and Daniel Martin, Mail Online, 28th September 2020: <https://www.dailymail.co.uk/news/article-8780277/Overstretched-police-struggling-crack-curfew-breakers.html>

⁵⁵ Coronavirus: Report 'rule of six' breaches, minister urges – BBC News, 14th September 2020: <https://www.bbc.co.uk/news/uk-54142699>

⁵⁶ Priti Patel says she 'would call police' on neighbours breaking coronavirus restrictions – Ashley Cowburn, the Independent, 15th September 2020: <https://www.independent.co.uk/news/uk/politics/priti-patel-coronavirus-rule-six-social-gatherings-bbc-breakfast-b445406.html>

light of new restrictions.⁵⁷ West Midlands Police received over 500 reports of groups breaking the 'rule of six' within a week.⁵⁸

Lockdown prosecutions

The latest review conducted by the Crown Prosecution Service found another 16 unlawful lockdown prosecutions, out of 112 new charges under the Health Protection Regulations. This is a total of 63 unlawful prosecutions, or an average of 9.7% of all charges under the Regulations.

Lockdown fines

A total of 18,912 FPNs have been recorded as having been issued in England and Wales under Coronavirus Regulations between 27th March 2020 and 21st September 2020.⁵⁹

Big Brother Watch's analysis has found significant variance in FPNs issued across the country. Since the lockdown Regulations were introduced, Dyfed-Powys has issued by far the highest number of Fixed Penalty Notices, at 1,731 FPNs, or 334 FPNs issued per 100,000 people.⁶⁰ This is over twice the rate of fining as the next highest police force, Cumbria, which has issued 145 FPNs per 100,000 people and 84 times the rate of the lowest police force, Staffordshire which has issued 4 FPNs per 100,000 people. North Yorkshire Police Force has proportionately issued the third highest amount of FPNs, 140 per 100,000. It has issued 1,151 FPNs – more than the Metropolitan Police which has issued 1,088 and covers a population of nearly 9 million people.

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."⁶¹ It is concerning that the NPCC would suggest that it is acceptable for some police forces to take more aggressive enforcement action than others.

The CPS reviews have revealed an unacceptable amount of unlawful charges and demonstrates serious systemic failings in policing during this period. However, only charges have been reviewed - FPNs issued under the same laws have not been reviewed. Furthermore, by 22nd September it was reported that approximately half of all lockdown FPNs have not been paid, leaving 9,413 FPNs to be

⁵⁷ Dedicated webpage to report breaches of health protection regulations – Causeway Coast Community, 16th September 2020: <https://news.causewaycoastcommunity.co.uk/local-news/dedicated-webpage-to-report-breaches-of-health-protection-regulations/>

⁵⁸ Police swamped with over 500 complaints of Covid breaches in first week of 'rule of six' – Peter Madeley, Express & Star, 25th September 2020: <https://www.expressandstar.com/news/crime/2020/09/24/police-swamped-with-over-500-complaints-of-covid-breaches-in-first-week-of-rule-of-six/>

⁵⁹ Crime is close to pre-lockdown levels, and fines given to the public rise as new regulations introduced – National Police Chief's Council, 30th September 2020: <https://news.npcc.police.uk/releases/crime-is-close-to-pre-lockdown-levels-and-fines-given-to-the-public-rise-as-new-regulations-are-introduced-1>

⁶⁰ Force level totals of FPN data – National Police Chief's Council, 25th September 2020: <https://cdn.prgloo.com/media/2535a371453d4ce48e55b77ebfc4641e.png>

⁶¹ Ibid.

referred for prosecution.⁶² This forthcoming prosecution crisis is the consequence of an extreme and ineffective public order approach to this public health situation.

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 18,912 FPNs recorded in England and Wales were unlawfully issued, this would account for nearly 1,900 unlawfully issued FPNs. This represents serious injustice during the pandemic that must be investigated and remedied.

The Joint-Committee on Human Rights' report into the human rights impact of coronavirus said it had "significant concerns" over the number of FPNs issued under the lockdown Regulations.⁶³ It argued, as we have, that the Government should introduce a nationwide review of all FPNs issued under the Regulations to combat the multi-layered injustices of the Regulations and the way they had been enforced:

"It is unacceptable that many thousands of people are being fined in circumstances where (a) the lockdown regulations contain unclear and ambiguous language, (b) there is evidence that the police do not fully understand their powers, (c) a significant percentage of prosecutions have been shown to be wrongly charged, (d) there has been no systematic review of FPNs and (e) there is no appeal or review provided for under the Regulations."⁶⁴

We have been calling for nationwide review of fines since it first emerged that the Regulations were being so poorly and arbitrarily enforced. We repeat our previous recommendations.

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

RECOMMENDATION: 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.

⁶² Half of coronavirus fines go unpaid in England and Wales – Jamie Grierson, The Guardian, 30th September: <https://www.theguardian.com/uk-news/2020/sep/30/half-of-coronavirus-fines-go-unpaid-in-england-and-wales>

⁶³ The Government's response to COVID-19: human rights implications: Seventh Report of Session 2019–21, HC 265, 21st September 2020, Joint-Committee on Human Rights, p. 24: <https://committees.parliament.uk/publications/2649/documents/26914/default/>

⁶⁴ Ibid, p 25

National divergence

Across the devolved nations, approaches to restrictions have continued to vary in a way that defies logic and coherence, perhaps in part because the first ministers of Scotland and Wales reported that they had not heard from the Prime Minister for months.⁶⁵

Wales

The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020 were laid on 10th July 2020 and have since been amended 17 times. These constant amendments make the Regulations convoluted and difficult to decipher. A vast quantity of restrictions and requirements are contained with one statutory instrument, making scrutiny of measures far more difficult as individual measures cannot be approved or rejected without approving or rejecting the entire instrument.

The Regulations contain requirements on which businesses must remain closed (theatres, venues authorised to supply alcohol that play live or recorded music for the purpose of dancing, sexual entertainment venues and concert halls)⁶⁶, the requirement for businesses to take measures to ensure the customers remain 2 metres apart and to follow Government guidance on safety measures,⁶⁷ the requirement to collect and store contact tracing data from visitors,⁶⁸ and the requirement to wear face coverings on public transport⁶⁹ and in certain indoor places.⁷⁰ They also introduce a 10:20pm-5am curfew for restaurants and pubs and prohibit the sale of alcohol in all venues (including supermarkets) from 10pm.⁷¹

Indoor gatherings are restricted except for members of the same household, or if there is a reasonable excuse which includes work, to obtain care or medical assistance, to visit someone living in a care home, to attend a wedding or funeral of no more than 30 people, to attend a place of worship, to receive or provide childcare, activities relating to a house move, or to exercise with no more than 30 people "at a fitness studio, gym, swimming pool, other indoor leisure centre or facility or any other open premises."⁷² Four households may be treated as one extended household for the purpose of the restrictions on gatherings, provided all households agree, each household does not form another extended household and no more than 6 people gather indoors.⁷³

⁶⁵ Welsh and Scottish leaders: Johnson hasn't talked to us for months – Steven Morris and Libby Brooks, the Guardian, 18th September 2020: <https://www.theguardian.com/politics/2020/sep/18/welsh-and-scottish-leaders-johnson-hasnt-talked-to-us-for-months>

⁶⁶ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020, Schedule 2

⁶⁷ Ibid, Regulation 12(2)

⁶⁸ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 5) Regulations 2020, Regulations 1, 2(2)(b)

⁶⁹ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 2) Regulations 2020 Regulations 1(4), 3(7)

⁷⁰ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 9) Regulations 2020, Regulations 1, 2(4)

⁷¹ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 12) Regulations 2020, Regulations 1, 2(3)

⁷² The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020, Regulation 14

⁷³ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020, Regulation 2A

Gatherings outdoors are restricted to no more than 30 people, unless there is reasonable excuse which includes for work, for the training of elite athletes, to meet a legal obligation, to access public services, to access childcare or if an event is organised and approved in writing by Welsh ministers and at which there are no more than 100 people.⁷⁴ An organised event can only be organised by a business, a public body or a charitable, benevolent or philanthropic institution, a club or political organisation, or the national governing body of a sport or other activity, and has carried out a risk assessment.

Scotland

In Scotland, similarly to Wales, all restrictions and requirements relating to public health are contained with one statutory instrument, again making scrutiny or rejection of measures far more difficult.

The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 contain the requirement for certain businesses to close (nightclubs, sexual entertainment venues, indoor theatres, concert halls and soft play centres)⁷⁵, for anyone responsible for “a place of worship, carrying on a business or providing a service” to take measures to ensure a 1 or 2 metre (depending on the venue) distance is kept between households⁷⁶, to follow Scottish government guidance on preventing the transmission of coronavirus⁷⁷, and to wear face coverings on public transport and any indoor public place.⁷⁸ The amendment to the Regulations, which was made and came into force on 25th September 2020, also introduced a 10pm to 5am curfew for cafés, restaurants, bars and pubs and the requirement for table service at these venues.⁷⁹

Gatherings must not consist of more than 6 people from 2 households in a public place and are not permitted in private dwellings unless they take place outdoors and consist of no more than 6 people from 2 households.⁸⁰ Children under the age of 12 do not count towards the total of 6, but do count towards one of the number of households.⁸¹ Children between the age of 12 and 18 are permitted to gather in groups of 6 from any amount of households outdoors, and children under the age of 12 are permitted to gather in any size outdoors.⁸² The exemptions for children and teenagers is pragmatic and welcome.

There are also exemptions for work or providing voluntary or charitable services, childcare, education or training, attending a place of worship, facilitating a house move, an organised activity that either takes place outdoors or where all the attendees are under 18, organised exercise,

⁷⁴ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020, Regulation 14A

⁷⁵ The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020, Regulation 4

⁷⁶ Ibid, Regulation 5

⁷⁷ Ibid, Regulation 7

⁷⁸ Ibid, Part 4

⁷⁹ The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Amendment Regulations 2020, Regulation 2(2)

⁸⁰ The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020, Regulation 8(1)(a), Regulation 9(1)(a)

⁸¹ The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Amendment Regulations 2020, Regulation 1, 2(3)(b)

⁸² Ibid, Regulation 1, 2(3)(a)

gatherings related to a funeral, marriage ceremony or civil partnership registration, or is taking place in student accommodation if individuals share facilities.⁸³ A gathering is “organised” when it is organised by a business, a place of worship, a charity, a club or political organisation, or the governing body of a sport or other activity.⁸⁴ This would allow a political group or organise a protest, but prohibits non-organised groups or spontaneous protests. However, unlike the English Regulations, there is no prohibitive requirement to fill out a risk assessment or face a £10,000 FPN.

The Regulations also contain the requirement for restaurants, cafés, bars, pubs and hotels which serve food to collect and share contact tracing details, which is far more limited set of businesses than the English requirement applies to.⁸⁵

Fixed Penalty Notices under the Scottish Regulations have not increased at the dramatic rate of the English Regulations, but have stayed at £60 and double for each offence to a maximum of £960.⁸⁶

Northern Ireland

The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020 came into force on 23rd July 2020 and have been amended 8 times.

The Regulations restrict gatherings to no more than 15 people, both indoors and outdoors, although indoor gatherings in private dwellings are not permitted.⁸⁷ However, a gathering which is “organised or operated for cultural, entertainment, recreational, outdoor sports, social, community, educational, work, legal, religious or political purposes” is permitted, provided a risk assessment is undertaken and reasonable measures are taken to limit the spread of coronavirus.⁸⁸

The Regulations also contain restrictions on when alcohol can be sold: in venues which serve alcohol, it must not be served between 10:30pm and 11:30am, food or drink must not be served between 10:30pm and 5am and venues must close between 11pm and 5am.⁸⁹ They also require venues which serve alcohol to collect and store contact tracing details for 21 days⁹⁰, to prevent dancing and live music, to provide facilities for hand sanitisation on entry, to ensure customers are “immediately” seated at a table and that 2 metre distance is maintained between customers.⁹¹

⁸³ The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020, Regulation 8(1)(b)

⁸⁴ Ibid, Regulation 8(4)

⁸⁵ Ibid, Regulation 6(3)(a)-(b)

⁸⁶ Ibid, Regulation 16(3),(5)

⁸⁷ The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020, Regulations 5(1), 6(1)

⁸⁸ Ibid, Regulation 5(4)

⁸⁹ Ibid, Regulation 4B

⁹⁰ Ibid, Regulation 4C

⁹¹ Ibid, Regulations 4A, 4B

CORONAVIRUS ACT

Two-monthly reviews

Section 97 of the Act requires the Health Secretary to report to Parliament on key provisions in the Act every two months. The first report was published on 29th May, the second was on 31st July and the third on 30th September.

For the first time, the report published in September stated: “No regulations so far have been made to change the expiry date under section 90 of the Act.”⁹² Section 90 contains the power to extend provisions of the Act by up to 6 months. It is concerning that the Government appears to be already considering the extension of the Act, just 6 months after it was passed.

The modification of mental health legislation under s.10 and Schedule 8 of the Act has not been needed, and we welcome the Government’s decision “to revoke this power, in so far as it applies to England, shortly.”⁹³ However, the review found that the extreme powers under Schedule 21 “continue to be part of a suite of powers to support a range of strategic responses throughout the lifecycle of the pandemic” despite the fact that they have been used for unlawful prosecutions over 140 times, and never used for a lawful prosecution.⁹⁴

The Public Administration and Constitutional Affairs Committee stressed that:

“As a result of the timescales involved and the political situation, detailed scrutiny of the Coronavirus Bill was not practical. It is therefore very important that Government is held to account for how it uses and justifies the continued application of the Act.”⁹⁵

Six month renewal

The Coronavirus Act is due to expire 2 years after it was passed, which is a considerable time period. We argued that emergency powers should have emergency time limits, and successfully campaigned for a 6-month review of the Act.

On 30th September, MPs voted on the 6 month motion: “the provisions of this Act should not expire,” i.e. requiring that MPs either accept or reject the Act in its entirety. As we argued when the Coronavirus Bill and this concession was passed, it is extremely unsatisfactory that the motion to

⁹² Two-monthly report on the status on the non-devolved provisions of the Coronavirus Act 2020: September 2020 - GOV.UK, 30th September 2020: <https://www.gov.uk/government/publications/coronavirus-act-report-september-2020/two-monthly-report-on-the-status-on-the-non-devolved-provisions-of-the-coronavirus-act-2020-september-2020#contents>, emphasis added

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Parliamentary Scrutiny of the Government’s handling of Covid-19: Fourth Report of Session 2019–21, HC 377, 10th September 2020, Public Administration and Constitutional Affairs Committee, p. 9: <https://committees.parliament.uk/publications/2459/documents/24384/default/>

renew the Act is an 'all-or-nothing' motion. The Speaker appeared to criticise this approach, labelling it a "narrow, binary choice."⁹⁶

In the run-up to the review, Parliamentarians expressed their concern about the powers within the Act and the need to legislate the pandemic differently.

Baroness Thornton, Labour Health Minister said:

"[Lord Bethell, Health Minister] says that the population are getting a bit exhausted, that we definitely have a second wave coming and that there are things that we therefore need to think seriously about. The Minister has also said that we now know a great deal more about Covid, what happens and how to deal with outbreaks than we did at the beginning of March. When you put all those things together, it should say to us that we do not need the urgent legislation on the statute book that we agreed back in March. It needs to be reviewed."

"It is about time to ask the Minister to say to the Government that we need to end the emergency legislation. We need to review it and we need to stop it."⁹⁷

Steve Baker MP, along with other Conservative backbenchers, was vocal in his opposition to the Coronavirus Act, arguing that it was a "sprawling web of control" and "a blunt instrument that does more harm than good."⁹⁸ He argued that that the Government should "repeal and replace it with legislation that we can scrutinise full in the light of experience – before it damages faith in this Government, and our civil liberties beyond repair."

24 MPs voted against the renewal of the Coronavirus Act: 7 Conservative backbenchers, 6 Labour backbenchers, 9 Liberal Democrat MPs, Caroline Lucas MP of the Green Party and Stephen Farry MP from the Alliance Party of Northern Ireland.⁹⁹ Many of them expressed frustration, and even anger, at the short time for debate, the overall lack of scrutiny of the Act and at the Government's insistence that the draconian powers within the Act were still necessary and proportionate.

Sir Charles Walker, Conservative MP, expressed himself forcefully during the debate:

"Ninety minutes to debate the renewal of an Act that has fundamentally changed the nature of the relationship between the state and citizens is not good enough. If this is the portent of the promises to come, it is not good enough."

"Ninety minutes is an utter, utter disgrace. It is actually disrespectful to this House and it is disrespectful to colleagues."

⁹⁶ Speaker's Statement (30th September 2020) vol. 681, col. 331: <https://hansard.parliament.uk/commons/2020-09-30/debates/8160262B-DA85-4D6C-B7FF-86717C8261B2/Speaker%E2%80%99SStatement>

⁹⁷ HL Deb (3rd September 2020) vol. col. 485-6: [https://hansard.parliament.uk/lords/2020-09-03/debates/D50831B1-5527-4791-806C-7827C002DD89/HealthProtection\(CoronavirusRestrictions\)\(England\)\(No3\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-03/debates/D50831B1-5527-4791-806C-7827C002DD89/HealthProtection(CoronavirusRestrictions)(England)(No3)Regulations2020)

⁹⁸ The Coronavirus Act created the most dangerous changes to state power seen in a generation. It must be replaced – Steve Baker, Conservative Home, 29th September 2020: <https://www.conservativehome.com/platform/2020/09/steve-baker.html>

⁹⁹ Coronavirus Act 2020 (Review of Temporary Provisions) Motion, Division 12, 30th September 2020: <https://votes.parliament.uk/Votes/Commons/Division/863#noes>

"I am sorry, Secretary of State, if I sound—actually, I am not sorry that I am angry, because a lot of people in this place are angry. We want to see this virus beaten, of course we do, but it would be nice—just nice—if this House were shown some respect."¹⁰⁰

Sir Ed Davey MP, leader of the Liberal Democrats opposed the renewal of the Coronavirus Act:

"In March, when the Coronavirus Bill was rushed through, we were willing to take Ministers at their word that the Bill was essential, despite reservations about its impact on people's wellbeing, freedoms and rights, but with the benefit of six months' experience of the Act, we must today oppose its renewal."¹⁰¹

Labour backbencher, Rebecca Long Bailey MP strongly criticised the powers contained within the Act:

"Mr Speaker, this Act in its current form allows clumsy and asymmetric authoritarianism, powers to restrict mass gatherings might well have been necessary, but broad police powers under Schedule 21 to detain potentially infectious people have led to unlawful prosecutions 100% of the time. (...) the Government demands that people give up their liberties and livelihoods in this pandemic, Mr Speaker, yet it doesn't stand beside them."¹⁰²

It is disappointing that the Act was renewed for another 6 months, given the slim safeguards for rights and freedoms it contains.

Schedule 21: detention powers

On 25th September, the CPS published its fifth monthly review of prosecutions under the Coronavirus Act.¹⁰³ The CPS revealed that, once again, every single charge under the Act had been unlawful. 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. An addition 20 charges were found to be unlawful, bringing the total number to 141. Fifteen cases were withdrawn in court, with Regulation charges imposed for five offences.

This continues the unprecedented record of 100% unlawful prosecutions under the Coronavirus Act. 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 six months. There is no evidence that these powers are necessary, yet overwhelming evidence that they endanger rights and should be repealed.

¹⁰⁰ HC Deb (30th September 2020) vol. 681, col. 410-1: [https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020\(ReviewOfTemporaryProvisions\)](https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020(ReviewOfTemporaryProvisions))

¹⁰¹ HC Deb (30th September 2020) vol. 681, col. 410: [https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020\(ReviewOfTemporaryProvisions\)](https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020(ReviewOfTemporaryProvisions))

¹⁰² HC Deb (30th September 2020) vol. 681, col. 411: [https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020\(ReviewOfTemporaryProvisions\)](https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020(ReviewOfTemporaryProvisions))

¹⁰³ August's coronavirus review findings – Crown Prosecution Service, 25th September 2020: <https://www.cps.gov.uk/cps/news/augusts-coronavirus-review-findings>

The College of Policing is currently consulting on new practice advice for the use of Schedule 21 by police officers. The Government may claim this new practice advice justifies the continued use of Schedule 21 powers by police forces. However, the advice makes it obvious that these powers contain a worrying lack of safeguards and specificity over how and when they should be used.

The advice emphasises that many powers within Schedule 21 lack clear definitions, meaning the exercise of this power is wholly down to police discretion.

- Schedule 21 gives police powers to detain “potentially infectious” people yet the Act “does not specify how the process for keeping a person ‘at a place’ etc. should be conducted”¹⁰⁴ and “does not specify when the period that a person is being kept for will start.”¹⁰⁵
- Police officers are able to extend the period of detention, but the Act “does not specifically state that personal attendance of the Superintendent is necessary for the purpose of issuing an extension.”¹⁰⁶
- Powers can only be used if it is proportionate and necessary to do so. Yet the Act “does not define these terms.”¹⁰⁷

The guidance repeatedly stresses that police officers should only be using these powers without a public health officer “in the most exceptional of circumstances.”¹⁰⁸ It states “police officers are not medically trained”¹⁰⁹ and if they come across an individual who they suspect has coronavirus “a PHO should either be directing officers or giving them advice before action.”¹¹⁰ Clearly the College of Policing does not see Schedule 21 as an appropriate tool for ordinary police interventions.

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. In the Department’s third two month review, it once again failed to acknowledge the unlawful convictions.¹¹¹

¹⁰⁴ Draft practice advice Coronavirus Act 2020 – Schedule 21 – College of Policing, Consultation September 2020, p. 7: <https://paas-s3-broker-prod-lon-6453d964-1d1a-432a-9260-5e0ba7d2fc51.s3.eu-west-2.amazonaws.com/s3fs-public/2020-09/Practice-Active-Coronavirus-Act-Schedule-21-Consultation.pdf>

¹⁰⁵ Ibid, p. 9

¹⁰⁶ Ibid, p. 7

¹⁰⁷ Ibid, p. 9

¹⁰⁸ Ibid, p. 4

¹⁰⁹ Ibid, p. 4

¹¹⁰ Ibid, p. 10

¹¹¹ Two-monthly report on the status on the non-devolved provisions of the Coronavirus Act 2020: September 2020 – GOV.UK, 30th September 2020: <https://www.gov.uk/government/publications/coronavirus-act-report-september-2020/two-monthly-report-on-the-status-on-the-non-devolved-provisions-of-the-coronavirus-act-2020-september-2020#contents>

Parliamentary debate

In the run up to the parliamentary vote on the renewal of the Coronavirus Act, Big Brother Watch campaigned for the repeal of Schedule 21, coordinating a campaign that saw tens of thousands of people emailing their MPs asking them to support an amendment, which proposed to add “except for Schedule 21” to the renewal motion. The amendment was signed by 6 Conservative MPs, 10 Labour MPs and Green MP Caroline Lucas. It is deeply disappointing that the Speaker decided not to select this amendment, or any of the other amendments on the grounds that “any amendment to the motion before the House risks giving rise to uncertainty about the decision the House has taken.”¹¹²

This did not prevent MPs across the political benches from roundly criticising Schedule 21 and calling for its repeal. Joanna Cherry QC MP, said:

“141 unlawful prosecutions—100% unlawful prosecutions —is completely unacceptable. In Scotland, the police have not been using the powers in Schedule 21, so we have not had the same problem. Does the hon. Gentleman agree that we need fewer widely drawn powers, and that Schedule 21 needs to go?”¹¹³

Nick Thomas-Symonds, Shadow Home Secretary, agreed:

“The hon. and learned Lady is absolutely right. The problem comes with “potentially infected persons”. It is a very poorly drafted Schedule, and that is why we are seeing these consequences. I urge the Health Secretary again to look at it.”¹¹⁴ (...)

“On rights, there is a real issue with Schedule 21. (...) I cannot think of any other piece of legislation in parliamentary history that that could be said about. (...) With a provision like that, he needs to speak to the Home Secretary and the Justice Secretary and do so much better. A provision that has resulted in 141 unlawful prosecutions cannot be right.”¹¹⁵

Hilary Benn, Labour MP, raised issue with the broad scope of Schedule 21:

“Given the number of cases in which Schedule 21 has been inappropriately used, can the right hon. Gentleman explain to the House what the definition is of a “potentially infectious” person? How is a police officer meant to know who is potentially infectious, and in the middle of a pandemic does that not include every single one of us, and are not the powers that the police have been given to detain us really quite worrying? Will he undertake to look at this again?”¹¹⁶

¹¹² Speaker’s Statement (30th September 2020) vol. 681, col. 331: <https://hansard.parliament.uk/commons/2020-09-30/debates/8160262B-DA85-4D6C-B7FF-86717C8261B2/Speaker%E2%80%99SStatement>

¹¹³ HC Deb (30th September 2020) vol. 681, col. 400: [https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020\(ReviewOfTemporaryProvisions\)](https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020(ReviewOfTemporaryProvisions))

¹¹⁴ Ibid.

¹¹⁵ HC Deb (30th September 2020) vol. 681, col. 399: [https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020\(ReviewOfTemporaryProvisions\)](https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020(ReviewOfTemporaryProvisions))

¹¹⁶ HC Deb (30th September 2020) vol. 681, col. 391: [https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020\(ReviewOfTemporaryProvisions\)](https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020(ReviewOfTemporaryProvisions))

The Health Secretary replied that “it is crucial that in circumstances where it is necessary to act to keep people safe we have the powers to do so.”¹¹⁷ This is an incredibly weak defence of powers that have never been proven necessary. Given the new powers for police to remove those instructed to self-isolate back to their homes and fine them under The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Schedule 21 has become even more redundant.

We continue to campaign for the repeal of Schedule 21, the use of which has become one of the most shocking injustices of the past 6 months.

RECOMMENDATION: It remains the case that Schedule 21 of the Coronavirus Act has never been used lawfully. It must be repealed.

Schedule 22: dispersal powers

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, and The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020 also give local authorities the power to cancel events or types of events. There is absolutely no justification for these sweeping powers remaining on the statute books. Schedule 22 should be repealed.

RECOMMENDATION: Schedule 22 of the Coronavirus Act contains draconian powers that have never been necessary. It must be repealed.

¹¹⁷ Ibid.

NEW STATUTORY INSTRUMENTS

Over the course of September, the Government's approach to preventing the spread of coronavirus has increasingly relied on criminal sanctions and constant threats of 'tougher enforcement' of the rules. Guidance that has proved effective so far has now been put into legislation, creating dozens of new criminal offences which carry huge fines.

Requirement to Self-isolate

On 20th September, it was announced that those failing to self-isolate would be fined, with Fixed Penalty Notices starting at £1,000 and rising to a possible £10,000.¹¹⁸ Enforcement of the requirement to self-isolate will consist of NHS contact tracers "making regular contact with those self-isolating", using police to "check compliance in highest incidence areas and in high-risk groups, based on local intelligence", investigating and prosecuting egregious cases and using intelligence from "third parties" who report individuals who are not self-isolating when required.¹¹⁹

Despite being announced over a week before they were due to come into force, The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 were not laid in Parliament until the day they were due to come into force, on 28th September. The Health Secretary, however, claimed the requirement to self-isolate was already in law 4 days before it was laid.¹²⁰ These Regulations expire after a year and need only be reviewed after 6 months.¹²¹

The Regulations impose an obligation on anyone who receives a positive coronavirus test or is alerted by the Secretary of State, a person employed or engaged for the purposes of the health service or a person employed or engaged by a local authority to self-isolate in their home, in the home of a family member or friend, or in a bed and breakfast accommodation or other suitable place.¹²² We welcome the specific exclusion of notifications from "the NHS Covid 19 smartphone app developed and operated by the Secretary of State" to impose the requirement to self-isolate.¹²³

The period of time a person must self-isolate for is not immediately evident and requires careful reading of the Regulations. If a person receives a positive test result, they must isolate for 10 days beginning with whichever is the later of either the day they reported their symptoms or 5 days before their test.¹²⁴ If they receive a positive test result and did not report their symptoms, they must self-isolate for 10 days following their test result.¹²⁵ If a person is living in the same household as someone who has tested positive for coronavirus then they must self-isolate for 14 days beginning with whichever is the later of either the day the person reported their symptoms or 5 days before

¹¹⁸ New package to support and enforce self-isolation – GOV.UK, 20th September 2020: <https://www.gov.uk/government/news/new-package-to-support-and-enforce-self-isolation>

¹¹⁹ Ibid.

¹²⁰ Stefan Simanowitz, Twitter, 24th September 2020: <https://twitter.com/StefSimanowitz/status/1309054487911374855?s=20>

¹²¹ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 16

¹²² The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 2(3)(a)

¹²³ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 2(1)

¹²⁴ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 3(3)(a)

¹²⁵ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 3(3)(b)

the person received their test.¹²⁶ If the person who tested positive for coronavirus did not report their symptoms, the other person in the household must self-isolate for 14 days following the positive test result.¹²⁷ If a person has been in close contact with someone who has later tested positive with coronavirus, they should self-isolate for 14 days after their last contact with that person.¹²⁸ It is unacceptable that these Regulations require such convoluted calculations, especially considering that a breach could result in a fine of £10,000.

There is a limited set of reasonable excuses for leaving the place where one is self-isolating. A person may leave to seek medical assistance, to access veterinary services, to fulfil a legal obligation, to avoid a risk of harm, to attend a funeral of a close family member, to obtain basic necessities where it is not possible to obtain these provisions in any other manner, to access critical public services or to move to another place if it becomes "impracticable" to remain where they are.¹²⁹ There is no exception for exercise, which many people may require for physical and mental health if confined to a potentially very small space.

It is critically important that people with coronavirus self-isolate. But rather than ensure people have an abundance of local care, support with basic necessities and financial support to self-isolate, the Government is relying on punitive fines to compel compliance. A breach of the requirement to self-isolate, giving false information to a person employed or engaged for the purposes of the health service or a person employed or engaged by a local authority about the location where you will be self-isolating or falsely naming someone as a close contact is punishable by a £1,000 Fixed Penalty Notice, rising to £10,000 for a repeat offences.¹³⁰ If a person breaches the requirement to self-isolate and knowingly interacts with another person or group of people and "is reckless as to the consequences of that close contact for the health of that other person or group"¹³¹, the offence is punishable by a £4,000 Fixed penalty Notice, rising to £10,000 for a repeat offence.¹³² If an employer "knowingly allow[s] the worker or self-isolating agency worker to attend any place other than the designated place, during an isolation period, for any purpose related to the worker's or self-isolating agency worker's employment" then they can be punished with a £1,000 Fixed Penalty Notice, rising to £10,000 for repeat offences.¹³³ If an employee fails to notify their employer that they must self-isolate, they can be punished with a £50 Fixed Penalty Notice.¹³⁴ If an employee is an agency worker, the location where they are working must inform the worker's employer to their need to self-isolate, and vice-versa, or either organised can be punished with a £1,000 Fixed Penalty Notice.¹³⁵

These significant new fines represent an increasing desire to rely on criminal sanctions and oppressive policing and surveillance to respond to a public health crisis. Throughout the pandemic,

¹²⁶ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 3(4)(a)(i)

¹²⁷ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 3(4)(a)(ii)

¹²⁸ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 3(4)(b)

¹²⁹ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 2(b)

¹³⁰ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 12(4)

¹³¹ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 11(2)(c)

¹³² The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 12(5)

¹³³ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 12(6)

¹³⁴ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 12(7)

¹³⁵ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Regulation 12(8)

the public response has been defined by a willingness to undergo serious restrictions for the benefit of public health and there has been no indication that people are refusing to self-isolate once they have been requested to do so. This measure represents an unnecessary increase in police and state power over people's everyday lives. Commentator Laura Dodsworth pointed out that:

"a £4,000 fine would be a staggering *16-week salary* for someone in the bottom fifth of earnings. There is simply no equivalent in modern Britain to the self-isolation fines. They have more in common with the 'Weregild' and 'blood money' of the Dark Ages than any modern-day fixed-penalty notice."¹³⁶

RECOMMENDATION: There is no evidence to suggest that significant numbers of people are refusing to self-isolate. £10,000 fines are excessive, especially given the convoluted nature of the Regulations.

Face coverings

Role of Parliament

The House of Commons has not debated any Regulations relating to face coverings in the Chamber.

The House of Lords debated the Health Protection (Coronavirus) Wearing of Face Coverings in Relevant Places) Regulations 2020 on 18th September, along with its 3 subsequent amendments almost 8 weeks after they were laid.

Once again, many Peers expressed serious frustration at the retroactive nature of Parliamentary scrutiny. Baroness Thornton, Shadow Health Minister, went as far to propose the insertion of an amendment to the approval motion:

"and that this House welcomes the introduction of the Regulations, but regrets the delay in bringing forward the Regulations as Her Majesty's Government has advised the public to wear face coverings in enclosed public spaces since 11 May, announced that face coverings would be mandatory in shops from 24 July on 14 July, and laid these Regulations under the made affirmative procedure on 23 July; further regrets that this delay has caused confusion over where people will have to wear face coverings due to the absence of detailed legal requirements being available in advance; and notes the concerns of the Secondary Legislation Scrutiny Committee in its 19th Report, published on 25 June, which urged Her Majesty's Government 'to ensure that the legislation follows on more closely from any announcement that they have made'."¹³⁷

¹³⁶ The new Covid fines could destroy your life – Laura Dodsworth, Spiked, 6th October 2020: <https://www.spiked-online.com/2020/10/06/the-new-covid-fines-could-destroy-your-life/>

¹³⁷ HL Deb, 18th September 2020, vol. 805, col. 1569-70: [https://hansard.parliament.uk/lords/2020-09-18/debates/1ED373BA-17A3-410A-A463-97E34EC17D6C/HealthProtection\(CoronavirusWearingOfFaceCoveringsInARelevantPlace\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-18/debates/1ED373BA-17A3-410A-A463-97E34EC17D6C/HealthProtection(CoronavirusWearingOfFaceCoveringsInARelevantPlace)(England)Regulations2020)

Baroness Thornton described the amendment as a “protest” at the “truly incompetent way” by which the Government has been legislating emergency measures.¹³⁸ The amendment was supported by many Peers across the benches.

Baroness Noakes, a Conservative Peer, criticised the Government’s reliance on criminal sanctions:

“As is typical of this Government’s response to the virus, they were not content with guidance or encouragement, but went the full distance with legal requirements and fines. They started with public transport in June and went on from there in July and August with the orders before us. They have even increased the maximum fines.”¹³⁹

Enforcement

Alarming footage was published of train passenger who said he was exempt from wearing a face covering being threatened, aggressively handled and pepper sprayed by a police officer in Liverpool.¹⁴⁰ The passenger was asked by an officer from the British Transport Police to wear a mask, to which he responded that he was exempt due to a medical condition. The officer continued to insist the man wear a mask or leave the train, before moving to physically remove the passenger, sparking a violent tussle which resulted in the man being pepper sprayed and arrested.

The passenger had no legal obligation to wear a mask, as those with certain conditions are exempt, and thus the officer had no legal authority to attempt to remove him from the vehicle.

However, it appeared to be a different rule for the Prime Minister’s own father, Stanley Johnston, after he was photographed not wearing a face covering in a shop.¹⁴¹

Contact tracing requirement

The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 were laid before Parliament on 17th September and came partially into force on

¹³⁸ HL Deb, 18th September 2020, vol. 805, col. 1570: [https://hansard.parliament.uk/lords/2020-09-18/debates/1ED373BA-17A3-410A-A463-97E34EC17D6C/HealthProtection\(CoronavirusWearingOfFaceCovering-sInARelvantPlace\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-18/debates/1ED373BA-17A3-410A-A463-97E34EC17D6C/HealthProtection(CoronavirusWearingOfFaceCovering-sInARelvantPlace)(England)Regulations2020)

¹³⁹ HL Deb, 18th September 2020, vol. 805, col. 1576: [https://hansard.parliament.uk/lords/2020-09-18/debates/1ED373BA-17A3-410A-A463-97E34EC17D6C/HealthProtection\(CoronavirusWearingOfFaceCovering-sInARelvantPlace\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-18/debates/1ED373BA-17A3-410A-A463-97E34EC17D6C/HealthProtection(CoronavirusWearingOfFaceCovering-sInARelvantPlace)(England)Regulations2020)

¹⁴⁰ Shocking moment police officer pepper-sprays rail passenger for resisting arrest after ordering him to wear a face-mask - despite him claiming he is exempt due to a 'medical condition' – Dave Rudge and James Robinson, Mail Online, 4th September 2020: <https://www.dailymail.co.uk/news/article-8697125/Shocking-moment-bully-police-officer-PEPPER-SPRAYS-rail-passenger-resisting-arrest.html>

¹⁴¹ Jeremy Corbyn and Stanley Johnson apologise for Covid breaches – Jessica Elgot, the Guardian, 1st October 2020: <https://www.theguardian.com/world/2020/oct/01/jeremy-corbyn-stanley-johnson-apologise-covid-breaches-mask-rule-six>

18th September. Similar requirements to collect and share contact details were introduced in Wales on 17th August¹⁴², in Scotland on 14th September,¹⁴³ and Northern Ireland on 23rd September.¹⁴⁴

The Regulations came fully into force on 24th September, when the NHS Covid-19 app was released. This Regulation expires after 12 months¹⁴⁵ and the Health Secretary must review the necessity of the Regulation after six months (i.e. before 24th March 2021). The impact of this legal change cannot be understated. These Regulations introduce the potential for the mass recording of citizens' movements by an array of ill-equipped, over-stretched businesses.

Venues that fail to comply with these requirements commit an offence and are liable for prosecution¹⁴⁶ or a fine starting at £1,000 and going up to £4,000,¹⁴⁷ which may be issued by a police officer, PCSO, council official or other authorised person.¹⁴⁸ At a time when many businesses in the hospitality and leisure sector are struggling, in debt, closing or going bankrupt, these punitive fines backing unrealistic and extremist measures are harmful and prohibitive.

It is only by closely following Government websites that a business would even become aware of the new obligations and financial penalties. These Regulations were published just hours before coming into force and the communication of precisely what they entail has been minimal. Indeed, the Parliamentary Estate has been in breach of the Regulations. As recently as 30th September, Big Brother Watch found that contact details were not being collected at the parliamentary bars and canteens; QR codes were not being displayed and scanning was not being checked; and consequently, entry was not refused to those who did not comply,¹⁴⁹ all in breach of the present Regulations. Despite claims to the contrary, these Regulations do not exempt Parliament from the law and nor do they exempt workplace canteens if there is a wider test and trace system in the workplace.

The Regulations apply to venues in hospitality, the tourism and leisure industry, close contact services and local authority facilities. This includes:

- pubs
- bars
- restaurants
- workplace canteens

¹⁴² The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 5) Regulations 2020, Regulation 2(2)(b)

¹⁴³ The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020, Regulation 6

¹⁴⁴ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 5) Regulations (Northern Ireland) 2020, Regulation 3(2)

¹⁴⁵ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 21

¹⁴⁶ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 19

¹⁴⁷ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 18

¹⁴⁸ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 18(11)(a)

¹⁴⁹ Parliament faces £1,000 fine for not asking customers to give Covid-19 tracing contact details – Matt Dathan, The Sun, 30th September 2020: <https://www.thesun.co.uk/news/12803767/parliament-1000-fine-customers-contact-details/>

- amusement arcades
- art fairs
- museums and galleries
- public libraries
- youth and community centres-institutes
- village halls
- betting and bingo halls and casinos
- sports club, leisure centres and stadia
- outdoor swimming pools
- heritage locations open to the public
- hotels and any commercial guest accommodation including B&Bs, boats, campsites, caravans, chalets, guest houses, holiday parks, hostels, motels, pubs, sleeper trains and yurts
- music recording studios open for public hire or other public use
- barbers and hairdressers
- beauticians, wellness treatment providers, massage therapists, nail bars/salons
- piercing services and tattooists
- dress fitters, tailors and fashion designers

In venues with communal or open-plan dining areas such as food courts, the responsibility lies with the legal owner.¹⁵⁰ It is unclear how the obligations in this Regulation could be practically fulfilled by food court owners.

The Regulations require this wide range of premises to request contact details from individuals, including their name, phone number (or email address or postal address if this is unavailable) and the date and time¹⁵¹ in order to enter the premises.¹⁵² Where contact details are collected from an individual who is likely to interact with only one staff member, that staff member's name must be recorded as well.¹⁵³ If a group of people wishes to enter, the premises must either collect every individual's contact details or the details of a single member of the group. If the group lawfully exceeds six people, the premises must request, as a minimum, the contact details of one person per each sub-group of six.

¹⁵⁰ Maintaining records of staff, customers and visitors to support NHS Test and Trace – Department of Health and Social Care, 18th September 2020: <https://www.gov.uk/guidance/maintaining-records-of-staff-customers-and-visitors-to-support-nhs-test-and-trace> (accessed 6 October 2020)

¹⁵¹ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 10

¹⁵² The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 7(2)

¹⁵³ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 11

Only children under the age of 16 and people unable to provide details owing to a disability or health problem are exempt.¹⁵⁴ Furthermore, visits for post, orders or food collection are exempt (as well as visits by emergency responders and police).¹⁵⁵

As of 24th September, the release date of the NHS Covid-19 app, the Regulations additionally require premises to display a QR code¹⁵⁶ and require anyone entering the premises to either use the app to scan the QR code and thus register their entry,¹⁵⁷ or to provide their personal details to staff in the manual way described above. Government guidance states that, should an individual use the NHS app to scan a QR code in order to gain entry, “a venue should check their phone screen” to ensure they have actually “checked in”.¹⁵⁸ As such, this scheme gives license to thousands of people to demand to check the personal phones of individuals. Many people will rightly find this intrusive, and many business owners and employees will find this burden onerous.

Big Brother Watch has, along with many other NGOs and technologists, argued throughout this pandemic that any contact tracing app must be strictly voluntary, non-punitive and non-discriminatory. Trust in contact tracing should be earned; it cannot be compelled through exclusion and punishment. However, the Government is increasingly relying on criminal sanctions to manage public health instead of trusting citizens to act responsibly with free will.

The legal requirement for venues to ensure the app is used or personal details are given as a condition of entry makes use of the app de facto compulsory in order to engage in everyday life; it discriminates against people who cannot use the app, who are likely to be older people or poorer people who do not have smart phones with the latest software; and it punishes those who do not want to give their personal details by refusing their entry to everyday businesses.

We are aware of several reports of premises that now require use of the NHS app as a condition of entry. This is likely due to businesses’ self-awareness that they cannot become legally compliant data controllers overnight and their caution to avoid liability. Government guidance advises against this practice¹⁵⁹ — but it is an obvious consequence of their punitive legislative approach to the collection of personal details.

The premises must securely retain this personal data for 21 days and destroy the data after that period, “unless there is another basis outside these Regulations on which the details may lawfully be retained.”¹⁶⁰ Moreover, the data must be retained and secured in line with the Data Protection Act 2018 and GDPR. Furthermore, every affected business will have to register as a data controller with the Information Commissioner’s Office and pay the relevant fee. However, it is unrealistic to

¹⁵⁴ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 7(4)

¹⁵⁵ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 9(2)

¹⁵⁶ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 6

¹⁵⁷ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 6(2), 7(3)

¹⁵⁸ Maintaining records of staff, customers and visitors to support NHS Test and Trace – Department of Health and Social Care, 18th September 2020: <https://www.gov.uk/guidance/maintaining-records-of-staff-customers-and-visitors-to-support-nhs-test-and-trace> (accessed 6 October 2020)

¹⁵⁹ Ibid.

¹⁶⁰ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 13

expect businesses, especially small businesses, to become fully-compliant data controllers overnight. As a result, thousands of customers' data is highly likely at risk. Furthermore, it is important to note that this data may reveal sensitive personal information, such as individuals' sexuality, and thus requires a particularly high level of protection.

We are already aware of cases where contact details collected for the purposes of contact tracing have been retained and used for unwanted marketing, and even misused by staff to send unsolicited personal messages¹⁶¹ – a problem which overwhelmingly affects women and girls. We have notified the ICO of this in the course of acting for a young woman who was harassed by a male bartender after providing her details on request for contact tracing. The business denied any liability and the ICO did not intervene or reply to us. It is wholly disproportionate to force every person in England to expose themselves to this risk, against their will, in order to enter everyday premises.

The Department of Health and Social Care has provided a template privacy notice,¹⁶² as all affected businesses are expected to provide a legally-compliant privacy notice at the point of data collection. The template, which is incomplete, is 916 words long and takes approximately 8 minutes to read. It is clearly unrealistic that customers will be able to read such notices on a mass scale.

Premises must provide the data to the Secretary of State or a public health officer on request.¹⁶³ The Secretary of State may request the data where they consider it necessary for contact tracing.¹⁶⁴ It is unclear what persons, agencies, companies or other organisations may also receive or process the data transferred to the Secretary of State or public health officers. Article 13 GDPR requires that individuals are informed of “the recipients or categories of recipients of the personal data” at the point of data collection. However, even the most data protection compliant businesses cannot possibly do this if the Secretary of State will not readily disclose the recipients.

The Regulations impose on hospitality venues – namely pubs, bars, cafes and workplace canteens – a legal requirement to “take all reasonable steps to prevent entry” to anyone who does not either scan the QR code or provide their full and accurate personal details.¹⁶⁵ The accompanying guidance suggests that organisations “follow [their] own security procedures” if an individual becomes “unruly”, or even call the police “if you feel the individual poses a risk to yourself or others.”¹⁶⁶ This extraordinary legal requirement seeks to deputise businesses as agents of draconian state rules, requiring hospitality and leisure staff to deny physical entry to premises to members of the public. It is wholly disproportionate, inappropriate, and likely to seed conflict.

¹⁶¹ For example: Woman 'received creepy messages' from bus worker who 'got her details from her test and trace form' - Andy Wells, Yahoo News, 15th September 2020: <https://uk.news.yahoo.com/kat-kingsley-messages-test-trace-form-135407061.html>

¹⁶² Annex B – Template privacy notice; Maintaining records of staff, customers and visitors to support NHS Test and Trace – Department of Health and Social Care, 18th September 2020: <https://www.gov.uk/guidance/maintaining-records-of-staff-customers-and-visitors-to-support-nhs-test-and-trace> (accessed 6 October 2020)

¹⁶³ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 15

¹⁶⁴ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 14

¹⁶⁵ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, Reg. 16

¹⁶⁶ Maintaining records of staff, customers and visitors to support NHS Test and Trace – Department of Health and Social Care, 18th September 2020: <https://www.gov.uk/guidance/maintaining-records-of-staff-customers-and-visitors-to-support-nhs-test-and-trace> (accessed 6 October 2020)

The explanatory note to the Regulations states “No regulatory impact assessment has been provided for these Regulations.” A Data Protection Impact Assessment (DPIA) has been published for the NHS Covid-19 app¹⁶⁷ but it is not clear whether the DPIA or Equality Impact Assessment has been conducted for the Regulations, or the NHS Test and Trace system as a whole. These assessments are legally required prior to the roll-out of the scheme. Their absence throws the legal compliance of the system into question.

We instructed lawyers to urgently write to the Secretary of State on this point, on 23rd September. As of 6th October, we are yet to receive a reply. We are now considering further action.

RECOMMENDATION: The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 are excessive, intrusive, punitive, potentially discriminatory and raise serious questions of compatibility with data and privacy laws. They should be reviewed.

Obligations of Undertakings

Despite the vast majority of businesses going to great lengths to ensure that they are ‘Covid-secure’, the Government’s approach continues to favour criminalisation and police enforcement rather than support and guidance.

The Health Protection (Coronavirus, Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020 were laid on 17th September 2020 and came into force on 18th September 2020. They were subsequently amended by The Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) (Amendment) Regulations 2020 which were laid on 28th September 2020 and came into force on the same day. The lack of time given to businesses to understand their new, complex requirements is grossly unfair.

The Regulations create the requirement for any business “which provides food or drink for consumption on its premises” to ensure that no groups bigger than six are permitted to make reservations or are seated, and to ensure that “an appropriate distance is maintained between tables occupied by different qualifying groups.”¹⁶⁸ The amendment to the principle Regulations creates the requirement for those operating a business to take all reasonable measures to stop people from singing in groups of 6 or more and from dancing (unless it is a person’s wedding).¹⁶⁹ Businesses are now legally required to display signs informing people to wear masks, and it is now an offence for a business owner to seek to prevent someone from wearing a mask.¹⁷⁰

These new requirements are absurdly specific and excessive. They create criminal sanctions for the some of the most natural human behaviours and should remain as guidance, not law. They also

¹⁶⁷ NHS COVID-19 app: data protection impact assessment – updated 1st October 2020

¹⁶⁸ The Health Protection (Coronavirus, Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020, Regulations 2(2)(b), 2(1)(d)

¹⁶⁹ The Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) (Amendment) Regulations 2020, Regulation 2(5)(c)

¹⁷⁰ The Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) (Amendment) Regulations 2020, Regulation 2(6)

place significant pressure on venues to police their customers' behaviour at all times, or risk potentially crippling fines.

Hospitality venues are even prohibited from playing any music which exceeds 85 decibels at the source.¹⁷¹ In an article co-written by acoustics expert Peter Rogers and barrister Charles Holland, the pair noted that "the manner in which the new music level requirement has been drafted appears to betray a failure to draw upon suitability qualified expertise and understanding" of acoustics.¹⁷² Given that a breach of these Regulations can result in either a Fixed Penalty Notice of £1,000, or an unlimited fine upon summary conviction, this is a serious flaw.¹⁷³ Mr. Rogers noted that "these measures affect many tens of thousands of venues (..) determining compliance requires properly calibrated equipment and professional expertise" which local police forces or councils seem unlikely to possess.

Emma McClarkin, chief executive of the British Beer & Pub Association said:

"The cumulative impact of layering restriction upon restriction is making it harder for pubs to survive.

"The sector has not been consulted on the evidence base for these extra restrictions on music. We are acutely aware of our responsibilities as businesses, but the Government is in danger of cutting off any chance of a recovery.

"Instead of placing further restrictions on pubs, we need the Government to focus on putting a proper support package in place to help our sector survive"¹⁷⁴

RECOMMENDATION: Businesses across England have gone to great lengths to ensure that they are 'COVID-secure'. Threatening them with significant fines if they do not contain the minutiae of their customers' behaviour is unfair and unnecessary.

¹⁷¹ The Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) (Amendment) Regulations 2020, Regulation 2(6)

¹⁷² Music Noise limits in all hospitality venues to slow COVID spread are not technically sound – Peter Rogers and Charles Holland, Sustainable Acoustics, 29th September 2020: <https://www.sustainableacoustics.co.uk/post/music-noise-limits-in-all-hospitality-venues-to-slow-covid-spread-are-not-technically-sound>

¹⁷³ The Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) Regulations 2020, Regulation 4(6)

¹⁷⁴ Pubs banned from playing loud music – Emily Hawkins, the Morning Advertiser, 28th September 2020: <https://www.morningadvertiser.co.uk/Article/2020/09/28/Can-pubs-play-loud-music>

LOCAL LOCKDOWNS

England

The Government has continued its targeted approach towards lockdowns, placing much of the North, North East and North West of England under forms of restrictions, typically on different households meeting in either private dwellings or indoors. Announcements have generally been leaked to media before local authorities or Parliament are informed.

There has been significant confusion over the nature of the restrictions in local lockdown areas as vast quantities of legislation are announced, published and amended rapidly. Yasmin Quereshi, MP for Bolton South East, wrote to the Health Secretary to ask for clarification of the restrictions. She wrote:

"I have been contacted by a large number of constituents and there is a widespread feeling of exasperation and frustration with the way this has been handled."

"This is leading to an erosion of compliance with local lockdown measures."

"The current approach has sent mixed, confusing messages."¹⁷⁵

Bolton council leader said that residents felt frustrated and "forgotten", and even the Government does not understand the "complex" restrictions that residents were living under.¹⁷⁶ Baroness Beverley Hughes, Deputy Mayor for Greater Manchester said:

"We've now got variation across Greater Manchester about which restrictions apply and that makes it difficult to enforce, and we've also got confusion and complete lack of clarity by the government oscillating in terms of what restrictions should apply where."¹⁷⁷

Police officers have also expressed frustration over the confused announcements of local lockdowns and last minute publication of new Regulations. The chair of the West Yorkshire Police Federation, Brian Booth, criticised the North England regulations:

"Yet again we are struggling to police — and get to grips with — what can only be described as haphazard announcements made by the government in relation to tighter Covid-19 restrictions.

¹⁷⁵ Bolton MP critical of mixed coronavirus lockdown messages – Lyell Tweed, The Bolton News, 7th September 2020: <https://www.theboltonnews.co.uk/news/18703291.bolton-mp-critical-mixed-coronavirus-lockdown-messages/>

¹⁷⁶ Bolton hospitality sector 'thrown to the lions' by government, council leader says – ITV News, 30th September 2020: <https://www.itv.com/news/granada/2020-09-30/bolton-hospitality-sector-thrown-to-the-lions-by-government-council-leader-says>

¹⁷⁷ Rethink on enforcement of Covid rule breaks needed, says deputy mayor – Niall Griffiths, Oldham News, 3rd September 2020: <https://www.oldham-chronicle.co.uk/news-features/139/main-news/136327/rethink-on-enforcement-of-covid-rule-breaks-needed-says-deputy-mayor>

"It is an absolute nonsense that we as the police service have not been afforded the time to put things in place prior to an announcement."¹⁷⁸

Mayor of London Sadiq Khan questioned why local leaders were not consulted about local lockdown plans, after there had been media reports of a London lockdown. He warned that "[r]iding roughshod over democratically elected representatives who understand their communities better than ministers central will lead to worse outcomes for Londoners and the country as a whole."¹⁷⁹ He later said that local leaders "desperately need to know what the game plan is."¹⁸⁰

Rates of Covid-19 in the north of England have cast doubt on the efficacy of local lockdowns for containing the spread of the virus.¹⁸¹ Leader of the Opposition, Sir Keir Starmer, called for evidence that local lockdowns were working, noting that out of the 48 areas under localised restrictions, only Luton had seen the restrictions removed.¹⁸² Leicester, the first city to face local restrictions, has been under a form of local lockdown for over 3 months while cases continue to rise. The city's mayor Sir Peter Soulsby said that the "sledgehammer of the local lockdown" had not been effective and that the city has seen more success from targeted interventions at a local level where council is able to "encourage and inform people."¹⁸³

Wales

The first local lockdown in Wales was announced on the evening of 7th September.¹⁸⁴ The Welsh Government website stated that:

"People will not be allowed to enter or leave the Caerphilly County Borough Council area without a reasonable excuse;

"Everyone over 11 will be required to wear face coverings in shops;

"People will only be able to meet outdoors – meetings with other people indoors and extended households will not be allowed for the time being. No overnight stays will be allowed."¹⁸⁵

¹⁷⁸ Northern lockdown: Police hit out at 'nonsense' timing of announcement and warn rules may be 'impossible' to enforce – Lizzie Dearden, Independent, 1st August 2020: <https://www.independent.co.uk/news/uk/home-news/northern-lockdown-rules-police-enforcement-coronavirus-a9648616.html>

¹⁷⁹ Twitter, Theo Usherwood, 3rd August 2020: <https://twitter.com/theousherwood/status/1290176144096944128?s=20>

¹⁸⁰ 'What's the game plan?': Sadiq Khan urges Government to communicate over crucial Covid strategy – ITV News, 5th August 2020: <https://www.itv.com/news/london/2020-08-05/coronavirus-london-whats-the-game-plan-sadiq-khan-urges-government-over-crucial-covid-plan>

¹⁸¹ Covid-19 'could be endemic in deprived parts of England' – Toby Helm, the Observer, 5th September 2020: <https://www.theguardian.com/world/2020/sep/05/covid-19-could-be-endemic-in-deprived-parts-of-england>

¹⁸² WATCH: We need an "urgent review" into local lockdowns, says Starmer – Elliot Chappell, Labour List, 30th September 2020: <https://labourlist.org/2020/09/watch-we-need-an-urgent-review-into-local-lockdowns-says-starmer/>

¹⁸³ Covid-19: How is Leicester coping with lockdown? – BBC News, 24th September 2020: <https://www.bbc.co.uk/news/uk-england-leicestershire-54267301>

¹⁸⁴ Local lockdown restrictions imposed to control Caerphilly outbreak – Caerphilly County Borough Council, 7th September 2020: <https://www.caerphilly.gov.uk/News/News-Bulletin/September-2020/Local-lockdown-restrictions-imposed-to-control-Cae?lang=en-GB>

¹⁸⁵ Local lockdown restrictions imposed to control Caerphilly outbreak – Gov.Wales, 7th September 2020: <https://gov.wales/local-lockdown-restrictions-imposed-control-caerphilly-outbreak>

It also stated that restrictions would come into force at 6pm on 8th September. However, Regulations were not laid until 5:45pm on the day they were due to come into force, leaving residents unclear on what constituted a 'reasonable excuse' for leaving the county.¹⁸⁶ This did not stop the local police force from stopping 60 vehicles coming in Caerphilly within the first 3 hours of the lockdown to question their 'reasonable excuse' for entering the area..¹⁸⁷ Similarly, in Newport, police have stopped over 80 cars travelling into the county each day¹⁸⁸ and North Wales Police reported that they had been conducting "traffic stops" of vehicles entering areas under lockdown.¹⁸⁹



Local lockdowns were announced in Rhondda Cynon Taff on 16th September,¹⁹⁰ Merthyr Tydfil, Bridgend, Blaenau Gwent and Newport on 21st September,¹⁹¹ Cardiff, Swansea and Llanelli on 25th

¹⁸⁶ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 8) (Caerphilly) Regulations 2020
¹⁸⁷ Police won't check driving licences as they stop 60 cars in first three hours – Cathy Owen, Wales Online, 10th September 2020: <https://www.walesonline.co.uk/news/wales-news/caerphilly-lockdown-county-borough-police-18904681>
¹⁸⁸ Coronavirus lockdown checkpoints: Across the Severn Bridge, police are stopping scores of motorists - Sian Burkitt and Tristan Cork, Bristol Live, 25th September 2020: <https://www.bristolpost.co.uk/news/uk-world-news/coronavirus-lockdown-checkpoints-across-severn-4547287>
¹⁸⁹ North Wales Police on policing Covid-19 restrictions – North Wales Police, 5th October 2020: <https://www.north-wales.police.uk/news-and-appeals/north-wales-police-on-policing-covid-19-restrictions?lang=en-gb>
¹⁹⁰ Coronavirus: Rhondda Cynon Taf to go into lockdown – BBC News, 16th September 2020: <https://www.bbc.co.uk/news/uk-wales-54093100>
¹⁹¹ Covid lockdown for Newport, Bridgend, Merthyr Tydfil and Blaenau Gwent – BBC News, 21st September 2020: <https://www.bbc.co.uk/news/uk-wales-54234993>

September,¹⁹² and Neath Port Talbot, Torfaen and Vale of Glamorgan on 27th September.¹⁹³ Approximately two thirds of Wales' population is now under a form of local lockdown. As with the restrictions in Caerphilly, the majority of these sets of Regulations were laid before the Welsh Senedd hours before they were due to come into force.

A reasonable excuse to enter or leave the area includes obtaining food, medical supplies, or supplies for the essential upkeep of a household, to obtain money from a certain business, to receive medical treatment, to receive or supply care, to work (where a person cannot work from home), to train or compete if a person is an elite athlete, to provide or receive emergency assistance, to attend a wedding or funeral, to meet a legal obligation, to access public services, to access or receive childcare or education, to continue existing arrangements for visiting between parents and children, to move home, to avoid injury or escape harm, or to travel through the area to another area.¹⁹⁴

The prohibition on leaving the area under restrictions seems increasingly pointless as more areas of Wales are placed under lockdown. It also encourage excessive, intimidating police vehicle stops.

Scotland

On 5th August, Nicola Sturgeon announced new restrictions in Aberdeen.¹⁹⁵ From 5pm that same day, she said that those in Aberdeen "should no longer travel more than 5 miles for leisure or recreational purposes" and that the Scottish Government was "advising people not to travel to Aberdeen." The First Minister also said "from today, people in Aberdeen should not go into each other's houses. Extended household groups can continue to meet." Lastly, she said "we will be introducing Regulations (...) which will require all indoor and outdoor hospitality in the city to close by 5pm today" and the "regulations and the associated guidance and advice will be reviewed in 7 days time."

It was not clear from the First Minister's initial announcement what would be law and what was "the associated guidance and advice." Subsequent reporting did not distinguish between guidance and advice either, stating that:

"Under the reimposed restrictions, residents in the Aberdeen city area are being told to travel no more than five miles from their home. Locals are also being ordered not to enter each other's houses, while indoor and outdoor hospitality has been told to close by 5pm on Wednesday. Ms Sturgeon said people should not travel to Aberdeen, but those who are already there can remain."¹⁹⁶

¹⁹² Covid: Lockdowns for Cardiff, Swansea and Llanelli – BBC News, 25th September 2020: <https://www.bbc.co.uk/news/uk-54285704>

¹⁹³ Covid lockdown: Three more Welsh counties face local restrictions – BBC News, 27th September 2020: <https://www.bbc.co.uk/news/uk-wales-54316431>

¹⁹⁴ The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 8) (Caerphilly) Regulations 2020, Regulation 2 (7)

¹⁹⁵ Scottish Government, Twitter, 5th August 2020: <https://twitter.com/scotgov/status/1291040074835124227?s=20>

¹⁹⁶ Lockdown to be reimposed in Aberdeen after spike in cases – Greg Heffer, Sky News, 5th August 2020: <https://news.sky.com/story/coronavirus-lockdown-to-be-reimposed-in-aberdeen-after-spike-in-cases-12042945>

When the Regulations were published, at 4pm, just one hour before they were due to come into force, they revealed that only restaurant, café and pub closures were mandated by law, with the other restrictions remaining as guidance. These Regulations expired on 25th August.¹⁹⁷

On 1st September, First Minister Nicola Sturgeon announced that Glasgow, North and South Lanarkshire, East and West Dunbartonshire, Renfrewshire and East Renfrewshire would be placed under increased restrictions:

“From midnight tonight, if you live in local authority areas of East Renfrewshire, the city of Glasgow or West Dunbartonshire you should not host people from other households in your home and you should not visit someone else's home — no matter where that is.”¹⁹⁸

However, no laws were introduced to support these new requirements. Despite the First Minister's deliberate framing of the guidance as obligations, the measures remained as guidance only. Subsequent media reports followed the tone of the First Minister's address, framing the measures as 'rules'¹⁹⁹ and 'restrictions'.²⁰⁰ While we welcome the lack of criminal sanctions that come with the new guidance, it is unacceptable to misrepresent the nature of restrictions that vast amounts of the population believe they are subject to.

Northern Ireland

On 10th September, the Northern Ireland Executive announced that Belfast, Ballymena and postcodes BT28, BT29 and BT43 would be placed under local lockdown restrictions, whereby “no mixing of households in private dwellings” and no outdoor gatherings greater than 6 people from up to 2 households would be permitted.²⁰¹ The Northern Irish Executive's Twitter account posted: “If you live in an area with local restrictions you should not allow people you do not live with into your home”²⁰² and “If you live in an area with local restrictions you can have no more than six people in your garden, from no more than two households” over the following days.²⁰³ However, there was no legal authority for this pronouncement until 16th September, when the Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 4) Regulations (Northern Ireland) 2020 were laid.

These Regulations give the Minister of Health, after consulting with the Chief Scientific Advisor, Chief Medical Officer or any of the Deputy Chief Medical Officers of the of the Department of Health,

¹⁹⁷ The Health Protection (Coronavirus, Restrictions) (Aberdeen City) Amendment Regulations, Regulation 2(7)

¹⁹⁸ Nicola Sturgeon announces new lockdown rules for Glasgow as people are asked not to meet other households - after sudden rise in Covid cases leaves her with 'greater anxiety' than at any time in the 'last couple of months' – Jemma Carr, Mail Online, 1st September 2020: <https://www.dailymail.co.uk/news/article-8686565/Nicola-Sturgeon-announces-new-lockdown-rules-Glasgow.html>

¹⁹⁹ What are the rules in the new lockdown areas? - BBC News, 11th September 2020: <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-53997667>

²⁰⁰ Glasgow lockdown restrictions: Here's what it means for you – Caitlin Hutchinson, The Herald, 1st September 2020: <https://www.heraldscotland.com/news/18690466.glasgow-lockdown-restrictions-means/>

²⁰¹ Coronavirus NI - Entire Belfast City Council area and Ballymena issued with strict lockdown measures – Andrew Quinn, News Letter, 11th September 2020: <https://www.newsletter.co.uk/health/coronavirus/coronavirus-ni-entire-belfast-city-council-area-and-ballymena-issued-strict-lockdown-measures-ni-wet-pubs-given-september-21-indicative-date-when-they-can-reopen-man-dies-hospital-after-testing-positive-covid-19-2967443>

²⁰² nidirect, Twitter, 11th September 2020: <https://twitter.com/nidirect/status/1304479827794317312?s=20>

²⁰³ nidirect, Twitter, 12th September 2020: <https://twitter.com/nidirect/status/1304721418693861377?s=20>

the power to designate an area as a 'protected area', where indoor gatherings of two or more households and outdoor gatherings of more than 6 people from two households are prohibited.²⁰⁴ There is no requirement for the Minister of Health to review these restrictions and no expiry date.

Two directions were then published, adding all postcode beginning with BT60²⁰⁵, and then BT, to the protected area.²⁰⁶

RECOMMENDATION: Local lockdowns across the United Kingdom have been beset with confused messaging, poor communication and illogical measures. Regulations should be simplified and reviewed regularly, with the evidence basis for measures published.

²⁰⁴ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 4) Regulations (Northern Ireland) 2020, Regulation 2(8)

²⁰⁵ Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) Protected Area Direction No. 1 2020

²⁰⁶ Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) Protected Area Direction No. 2 2020

NHS AND BIG TECH

Since March, we have been calling for increased transparency over the Government and NHS's partnerships with big tech companies, who are being paid vast sums to collect and analyse sensitive data. Incomplete contracts and Data Protection Impact Assessments have provided only half of the picture and we still have many unanswered questions. As the Direction given by the Health Secretary to allow NHS organisation to share confidential data was extended by another 6 months, clearly the government does not envision these partnerships will end soon.²⁰⁷

The Joint Biosecurity Centre is also involved in processing data relating to Covid-19, but little is known about how it operates and its relationship to big tech companies. Former government chief scientific adviser Professor Sir David King expressed concern over the role of the Joint Biosecurity Centre:

"Are the JBC scientists going to be willing to be cross-examined by the media, or is it a body feeding information behind the scenes to ministers?"

"If it is the latter, then how will government regain the trust of the public?"²⁰⁸

Independent SAGE member, Gabriel Sally, said "I don't know, and I've asked lots of people to tell me, what organisations the Joint Biosecurity Centre is joint between. It is in the shadows – shadowed from citizens' knowledge of it and we have no idea how exactly it operates."²⁰⁹

Sir Paul Nurse, the Nobel laureate and director of the Francis Crick Institute, criticised the lack of clarity surrounding the role of big tech companies in public health during the pandemic:

"Decisions are too often shrouded in secrecy. They need challenge and we need processes to ensure that happens. If they are going to keep the trust of the nation, they need to make those discussions more public.

"It sometimes seems like a 'black box' made up of scientists, civil servants and politicians are coming up with the decisions.

"It needs to be more open. We need greater transparency, greater scrutiny and greater challenge to get the best results.

²⁰⁷ Notice under regulation 3(4) of the Health Service (Control of Patient Information) Regulations 2002 – Department of Health and Social Care, GOV.UK, 6th August 2020: <https://www.gov.uk/government/publications/coronavirus-covid-19-notification-of-data-controllers-to-share-information/coronavirus-covid-19-notice-under-regulation-34-of-the-health-service-control-of-patient-information-regulations-2002-general>

²⁰⁸ New government unit to take over Covid response – BBC News, 8th July 2020: <https://www.bbc.co.uk/news/health-53325081>

²⁰⁹ Stefan Simanowitz, Twitter, 31st July 2020: <https://twitter.com/StefSimanowitz/status/1289185045236727814?s=20>

“What worries me is that we have an increasingly technocratic and complex society and we are going to increasingly need complex discussions involving science and the use of science that will impact on policy.”²¹⁰

Baroness Barker, Liberal Democrat health spokesperson in the House of Lords, criticised the Government’s reliance on big tech companies and “the mistaken belief that Department of Health Ministers, their spads and their friends in tech companies know better than local government and public agencies how to handle the pandemic.”²¹¹

A cross-party group of 20 MPs wrote to the Information Commissioner Elizabeth Denham, criticising the ICO’s poor approach to regulating the Government during the pandemic. The MPs highlighted the lack of transparency on the Covid-19 Data Store, the missing DPIA for the Test and Trace system and the failed NHSX app as areas where the ICO failed to intervene sufficiently. They stated that “ICO action is urgently required for Parliament and the public to have confidence that their data is being treated safely and legally.”²¹² Liberal Democrat MP Daisy Cooper said in a statement alongside the letter: “The public needs a data regulator with teeth. The ICO must stop sitting on its hands and start using its powers – to assess what needs to change and enforce those changes – to ensure that the government is using people’s data safely and legally.”²¹³

Covid-19 Data Store

On 1st September, the NHS began a procurement process for a supplier to continue the 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.”²¹⁴ 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.²¹⁵ 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.²¹⁶

²¹⁰ Secrecy has harmed UK government’s response to Covid-19 crisis, says top scientist – Ian Sample, the Guardian, 2nd August 2020: <https://www.theguardian.com/world/2020/aug/02/secrecy-has-harmed-uk-governments-response-to-covid-19-crisis-says-top-scientist>

²¹¹ HL Deb (3rd September 2020) vol. col. 483: [https://hansard.parliament.uk/lords/2020-09-03/debates/D50831B1-5527-4791-806C-7827C002DD89/HealthProtection\(CoronavirusRestrictions\)\(England\)\(No3\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-03/debates/D50831B1-5527-4791-806C-7827C002DD89/HealthProtection(CoronavirusRestrictions)(England)(No3)Regulations2020)

²¹² Letter to Elizabeth Denham CBE, UK Information Commissioner – 21st August 2020: <https://www.openrightsgroup.org/app/uploads/2020/08/Letter-for-MPs-Final-signs-1.pdf>

²¹³ MPs slam UK data regulator for failing to protect people’s rights – Matt Burgess, Wired, 21st August 2020: <https://www.wired.co.uk/article/ico-data-protection-gdpr-enforcement>

²¹⁴ 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>

²¹⁵ 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>

²¹⁶ Provision of Palantir Foundry Services, Contract between Palantir and NHS Arden &GEM CSU: https://cdn-prod.open-democracy.net/media/documents/Palantir_Agreements.pdf, p. 38

The contract could be worth up to £18 million a year, for a five-year period.²¹⁷ It seems likely that Palantir will win the contract, having started the project. This means Palantir will be enmeshed with the NHS for the near future, and that the NHS has no plans to retire its vast Data Store, which holds large amounts of sensitive data.

RECOMMENDATION: 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: 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.

Social media scraping

In our June report, we reported on AI company Faculty's third Covid-related contract – a £400,000 contract with the Ministry of Housing, Communities and Local Government (MHCLG) to “provide urgent additional capacity and data science capability (...) to support critical analytical work to inform the response of MHCLG to the COVID-19 crisis.”²¹⁸ Yet again, this was a non-competitive process.

We discovered an updated contract, published in August, which revealed the true extent of the contract which was later covered by the Guardian.²¹⁹ We discovered the government paid Faculty £400k to provide “Topic analysis of Social Media to understand public perception and emerging issues of concern to HMG arising from the COVID-19 crisis” over 3 months of the pandemic.²²⁰ The contract admits that due to the personal nature of the content, the data “unavoidably contain[s] identifiable personal data” and “is not considered anonymised.”

Faculty has been scraping our social media accounts for content without our consent or even our knowledge. Worst still, this personal content is being automatically processed to unknown ends using machine learning, obstructing accountability or public trust. This is secretive AI-powered mass political surveillance, intended to inform policy-making. The premise is highly questionable – Twitter is not representative of public opinion as a whole.

This covert capture and storage of potentially hundreds of thousands of pieces of personal content, content that the Government admits cannot be made anonymous, represents a serious

²¹⁷ NHS seeks supplier to continue Palantir's work on Covid-19 data store – Andrea Downey, Digital Health News, 4th September 2020: <https://www.digitalhealth.net/2020/09/nhs-seeks-supplier-to-continue-palantirs-work-on-covid-19-data-store/>

²¹⁸ Data scientists for MHCLG Covid-19 response– Ministry of Housing, Communities and Local Government, 3 June 2020: <https://www.contractsfinder.service.gov.uk/Notice/Attachment/244384>

²¹⁹ Government paid Vote Leave AI firm to analyse UK citizens' tweets – David Pegg, the Guardian, 15th August 2020: <https://www.theguardian.com/world/2020/aug/10/government-paid-vote-leave-ai-firm-to-analyse-uk-citizens-tweets>

²²⁰ Data scientists for MHCLG Covid-19 response, contract amendment 01 – Ministry of Housing, Communities and Local Government, 18th August 2020: <https://www.contractsfinder.service.gov.uk/Notice/b7bbcaf0-22f0-4684-9a22-06667fdd2177>

breach of privacy and threatens freedom of expression. This contract may have expired, but it should never have been signed in the first place. The Government's reliance on tech companies to collect excessive personal data must stop.

BIOSURVEILLANCE

As people return to work, education and leisure spaces, companies are turning to biosurveillance tools that monitor health-related data 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.

In one particularly chilling example, Buckswood School in East Sussex is requiring staff and pupils to wear Bluetooth tracking devices at all times.²²¹ The independent boarding school has made 'Shield for Schools' wristbands compulsory, which for some staff and students who reside at the school, means 24 hours a day. Fitamax, the company responsible for this technology, said that another school has also bought the system and that "many others" were also interested.

Face mask recognition

Some companies have developed cameras which detect whether face masks are being worn. Motorola Solutions has developed 'Face Mask Detection Technology':

"Individuals not following health guidelines around the use of protective face masks can be detected using AI-enabled edge intelligence and analytics running on fixed video security cameras. This Face Mask Detection technology can be used to help determine if a person appears on camera without face mask protection and can notify security or operations through alerts in the video management software."²²²

Some venues are using forms of face detection technology to monitor whether visitors are complying with requirements to wear face masks. A garden centre in Mirfield has installed the mask-recognition technology at its entrance.²²³ There have also been reports of schools installing CCTV to monitor "mask compliance."²²⁴

²²¹ School tracks staff 24/7 to fight Covid — Amy Gibbons, TES, 5th August 2020: <https://www.tes.com/news/exclusive-school-tracks-staff-247-fight-covid>

²²² <https://www.youtube.com/watch?v=y3WZ1fOBnw>

²²³ Mirfield: Face mask cameras installed at garden centre - BBC News, 29th September 2020: <https://www.bbc.co.uk/news/uk-england-leeds-54326830>

²²⁴ Overzealous social distancing is turning the return to school into a tragedy – Molly Kingsley, the Telegraph, 7th September 2020: <https://www.telegraph.co.uk/education/2020/09/07/overzealous-social-distancing-turning-return-school-tragedy/>

Thermal scanners

We have previously argued that thermal scans are inadequate for providing accurate core body temperature readings that would indicate a fever, as demonstrated in a range of scientific studies.²²⁵ The UK's Medicines and Healthcare products Regulatory Agency has warned:

“Many thermal cameras and temperature screening products were originally designed for non-medical purposes, such as for building or site security. Businesses and organisations need to know that using these products for temperature screening could put people's health at risk.”

“These products should only be used in line with the manufacturer's original intended use, and not to screen people for COVID-19 symptoms. They do not perform to the level required to accurately support a medical diagnosis.”²²⁶

Health Minister Lord Bethell gave a similar warning:

“As pubs and restaurants begin to reopen, it's important businesses do not rely on temperature screening tools and other products which do not work.”²²⁷

Dr David Thomas, an infectious disease specialist at Johns Hopkins University School of Medicine, told the New York Times that temperature checks are akin to “getting the oil checked before you go on a long car trip. It makes you feel better, but it's not going to keep you from wrecking the car or prevent the tires from falling off. It's not going to make your trip any safer.”²²⁸

An individual's access to education, health care, travel, employment and leisure should not be predicated on experimental technology.

In France, the Conseil d'Etat (the Supreme Court) ruled that the installation of thermal cameras in municipal offices and schools was unlawful.²²⁹ It ruled that thermal scanners process sensitive personal data, engaging the GDPR and consequently the city had unlawfully installed them as they had not demonstrated the necessity of the technology, nor had it gained the consent of citizens.

Despite these strong warnings from Government officials, the scientific community and data protection law, the use of thermal scanners has only increased across the UK.

²²⁵ Temporal Thermometry Fails to Track Body Core Temperature during Heat Stress – Davod A. Lowe et al., *Medicine & Science in Sports & Exercise*, July 2007: https://journals.lww.com/acsm-msse/Fulltext/2007/07000/Temporal_Thermometry_Fails_to_Track_Body_Core.1.aspx

²²⁶ Don't rely on temperature screening products for detection of coronavirus (COVID-19), says MHRA – GOV.UK, 3rd July 2020: <https://www.gov.uk/government/news/dont-rely-on-temperature-screening-products-for-detection-of-coronavirus-covid-19-says-mhra>

²²⁷ Ibid.

²²⁸ The Maitre d' Will Take Your Temperature Now – Roni Caryn Rabin, the New York Times, 13th September 2020: <https://www.nytimes.com/2020/09/13/health/covid-fever-checks-dining.html>

²²⁹ Caméras thermiques à Lisses, Coseil d'Etat No. 441065, 26th June 2020: <https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-26-juin-2020-cameras-thermiques-a-lisses>

Visit Britain, the official tourist board for the UK, is promoting the use of thermal scanners in the tourism industry in its 'Good to Go' video, which highlights best practice for tourism venues who wish to re-open safely.²³⁰



Cardiff Sixth Form has installed a thermal camera in its reception.²³¹ King David High School in Crumpsall has invested £5,900 in thermal cameras and told Manchester Evening News that any pupil with an elevated temperature will be immediately sent home.²³² They have also installed cameras and microphones in every room to assist with distanced learning. Despite these measures, a case of Covid-19 was reported in the school, with the thermal scanner evidently not identifying the case.²³³

W3 Club, a gym in West London, has mandatory temperature check on arrival. If an individual displays an elevated temperature they are required to leave the premises.²³⁴ Nuffield Health gyms advertises that it will also be carrying out temperature checks on visitors.²³⁵

²³⁰ The 'We're Good to Go' Mark – Love Great Britain, YouTube, 17th September 2020: <https://www.youtube.com/watch?v=NNXZlvoKt74>

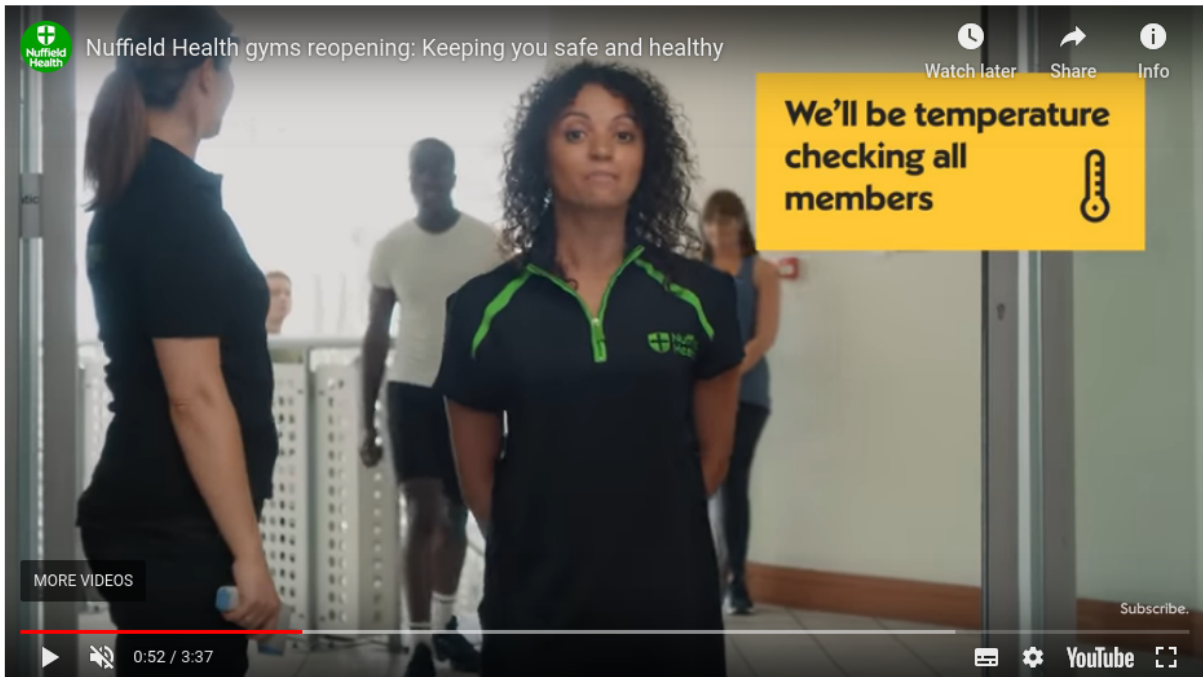
²³¹ Twitter, Cardiff Sixth Form, 16th July 2020: <https://twitter.com/CSFCOfficial/status/1283806270181519360?s=20>

²³² Manchester school spends £21,000 as it takes 'drastic steps' to tackle Covid-19 – Charlotte Cox, Manchester Evening News, 26th August 2020: <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/school-covid-19-thermal-cameras-18830371>

²³³ Pupils self-isolating after positive case of coronavirus at high school – Emma Gill, Manchester Evening News, 3rd September 2020: <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/pupils-self-isolating-after-positive-18873580>

²³⁴ Reopening – W3 Club: <https://w3club.co.uk/reopening/>

²³⁵ We're making our gyms safe for you – Nuffield Health: <https://www.nuffieldhealth.com/reopening>



Here's what you can expect at your local club when we reopen our doors.

There have also been reports of medical and dental service providers mandating thermal scans. Fox Lane Dental Care in London requires patients to be scanned before receiving treatment,²³⁶ and we have also received reports that some medical centres have been using thermal scanners on patients seeking routine treatments.

We have received reports of workplaces, restaurants, bars and shops also using thermal scanners. We are investigating all instances of thermal scanning being used across the UK and seeking clarification as to whether the scans are mandatory and how businesses are ensuring that individuals are not discriminated against.

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

²³⁶ COVID-19/Coronavirus Important Notice – Fox Lane Dental Care: <https://foxlanedentalcare.co.uk/>

CONTACT TRACING

Test and Trace

Public trust in the system is low, as demonstrated by low levels of engagement in the Trace and Test system. Fewer than half of people who had been in contact with someone diagnosed with Covid-19 have been traced — only 45% of people in August, down from 51% in July.²³⁷

We had warned that requiring venues to collect contact tracing details risked people, particularly women, being harassed. Kat Kingsley, a 25-year-old woman from Cornwall, was contacted by a bus driver after she left her details for Test and Trace when travelling on a tour bus in Windsor.²³⁸ The bus driver asked to see her, despite "knowing all the risk involved in using data that's not supposed to be for me." Ms Kingsley said she felt the Test and Trace system was "not very safe", "needs re-evaluating" and that she was now unwilling to give over her contact details for contact tracing purposes again. Journalist Sophie Ridge tweeted that when writing down her contact details for Test and Trace her waiter had joked that he would contact her that night – she said the joke was "not that funny."²³⁹ Journalist Nicola Keaney received a message from a restaurant manager who wrote: "Hi Nicola, the government has fully endorsed you as a potential match for me so the next step is to arrange a drink, NHS test and trace."²⁴⁰

In early September, Public Health Wales accidentally published the details of 18,105 Welsh residents who had tested positive for Covid-19 online.²⁴¹ The details were online for 20 hours before being taken down. Most had their initials, date of birth, geographical area and sex published; 1,928 people living in supported accommodation also had their addresses published. Chief executive Tracey Cooper said it was one of the "biggest data breaches" she had come across and said it "should never have happened." It later emerged that the Welsh executive had been informed about the breach but had not held any meetings with Public Health Wales to investigate, which Conservative health spokesperson Andrew RT Davies MS said was "astonishing."²⁴² He stressed that the "effectiveness of track and trace is dependent on people having trust in the system and the protection of their data" and that this incident would "only to serve to undermine public confidence."

²³⁷ Under-fire Test and Trace scheme reaches fewer than half of coronavirus contacts – Martin Bagot, the Mirror, 4th September 2020: <https://www.mirror.co.uk/news/politics/under-fire-test-trace-scheme-22627074>

²³⁸ Woman, 25, 'in shock' after 'creepy' tour bus driver used her test-and-trace data to text her 'you're living in my head' – Chiara Fiorillo, the Sun, 15th September 2020: <https://www.thesun.co.uk/news/12673237/bus-tour-driver-text-woman-test-and-trace/>

²³⁹ Sophy Ridge, Twitter, 26th September 2020: <https://twitter.com/SophyRidgeSky/status/1309822461014355968?s=20>

²⁴⁰ Nicola Keaney, Twitter, 26th September 2020: <https://twitter.com/NicKeaney/status/1309867637090988033?s=20>

²⁴¹ Coronavirus: 18,000 test results published by mistake – BBC News, 14th September 2020: <https://www.bbc.co.uk/news/uk-wales-54146755>

²⁴² Covid: Health bosses 'did not discuss data breach with minister' – BBC News, 23rd September 2020: <https://www.bbc.co.uk/news/uk-wales-politics-54270774>

However, in our exclusive with the Sun newspaper, we revealed that Parliament's bars were breaching this new legal requirement and were neither displaying QR codes nor collecting contact details.²⁴³

Amidst the failures of Test and Trace, Deloitte, a company contracted by the Government to form part of the Covid testing system, has emailed local authorities attempting to sell a "local test and trace solution." A recipient of the email accused the company of profiteering:

"The enduring failure of NHS test and trace to deliver is now being seen as an opportunity by companies involved in mobile testing units to profit. Even the NHS test and trace's own delivery companies clearly can't believe this shambles is working."²⁴⁴

²⁴³ PARLY BAR FINE Parliament faces £1,000 fine for not asking customers to give Covid-19 tracing contact details – Matt Datham, the Sun, 30th September 2020: <https://www.thesun.co.uk/news/12803767/parliament-1000-fine-customers-contact-details/>

²⁴⁴ Deloitte accused of 'profiteering' after attempt to sell 'local test and trace solution' - Jessica Hill, Local Government Chronicle, 30th September 2020: <https://www.lgcplus.com/politics/coronavirus/exclusive-deloitte-accused-of-profiteering-after-attempt-to-sell-local-test-and-trace-solution-30-09-2020/>



By now, it is widely accepted by companies and civil society alike that the promise of technology to support human rights and human security has a dark inverse — it has become a powerful weapon for fomenting violence, conflict, and abuse. (...) And contact tracing tools developed to stop the spread of COVID-19 are no exception — they pose significant risks to human security.”

— Jennifer Easterday, Executive Director of
JustPeace Labs, LSE IDEAS²⁴⁵

245 Technology in Conflict: how COVID-19 contact tracing apps can exacerbate violent conflicts – Jennifer Easterday, LSE IDEAS, 12th August 2020: <https://www.lse.ac.uk/ideas/publications/updates/technology-in-conflict>

App

In June 2020 the UK Government dropped its ill-judged centralised contact tracing app. Six months after the pandemic hit the UK, with precious time and millions of pounds of public money wasted, the alternative was released on 24th September.

The roll-out of the app is being led by Accenture, the company behind West Midlands Police's failed predictive policing tool. The company was paid over £850,000 for just 10 weeks work. Liberal Democrat Health spokesperson Munira Wilson said "we need full transparency and proper accountability when it comes to these lucrative contracts."²⁴⁶

It was reported in mid-August that the new app would began trials on the Isle of Wight and the London Borough of Newham.²⁴⁷ The launch of the trials began on 21st August "without much fanfare, because it is still not clear when a formal national rollout will occur," according the BBC.²⁴⁸ Despite promises that the development of an app would be transparent, no information about the app's trials in Newham and the Isle of Wight has been published on the app's website. Mayor of London Sadiq Khan expressed frustration over the lack of information London officials had been given over the trial of the app in the borough of Newham. The Mayor said: "I'm keen to make sure, during this pilot phase, we learn the lessons. Otherwise what is the point of a pilot?"²⁴⁹ The trial of app in these areas was not due to finish until 27th September, three days after the app was rolled out nationwide, severely limiting the usefulness of trial and raising questions about how much scrutiny of the app there has been. One Newham resident said,

"My fear is that this is going to be just another waste of a vast amount of public money which could have been avoided by getting the pilot results in first, tweaking the app if possible or abandoning it if it looks likely to have minimal take up."²⁵⁰

While we welcome the app's move to a decentralised method of contact tracing, one which is more privacy preserving than the initial NHSX plans to store all data collected by the app centrally, concerns remain around the app's efficacy and role in the wider testing and tracing system. Technology expert Rachel Coldicutt told the BBC:

"Not only is the app late to launch, but it will be hindered by the delays in the testing system."

²⁴⁶ Government defends use of consultancy to lead roll-out of UK's new contact-tracing app - Rowland Manthorpe, Sky News, 20th August 2020: <https://news.sky.com/story/coronavirus-government-defends-use-of-consultancy-to-lead-roll-out-of-uks-new-contact-tracing-app-12053085>

²⁴⁷ Trials of second contact-tracing app launched - Rowland Manthorpe, Sky News, 14th August 2020: <https://news.sky.com/story/coronavirus-trials-of-second-contact-tracing-app-launched-12048458>

²⁴⁸ England's contact-tracing app gets green light for trial - Leo Kelion, BBC News, 12th August 2020: <https://www.bbc.co.uk/news/technology-53753678>

²⁴⁹ Mayor of London Sadiq Khan 'frustrated' over 'lack of information' about contact tracing app - Rowland Manthorpe and Rob Catherall, Sky News, 3rd September 2020: <https://news.sky.com/story/coronavirus-mayor-of-london-sadiq-khan-frustrated-over-lack-of-information-about-contact-tracing-app-12063046>

²⁵⁰ The NHS Test and Trace app has two flaws: QR codes and people - Nicole Kobie, Wired, 23rd September 2020: <https://www.wired.co.uk/article/nhs-covid-app-trial-newham>

"If you don't have symptoms, will a push notification saying you were near someone a week ago make you and your family self-isolate and spend days hitting refresh on the testing website, trying to find a test?"²⁵¹

There are concerns over who will be able to access the app: those who cannot afford more recent models of smartphones and those who are unable to operate smartphones will be excluded from the app. Only phones made in the past 5 years will be able to download the app, which the government estimates is around 13% of smartphone users.²⁵² An 82-year-old Newham resident calculated it would cost him over £350 to purchase a mobile phone capable of running the contact tracing app and that the app was "a hair-brained scheme unless it works for everyone."²⁵³ Age UK warned that it could lead to elderly people being "second-class citizens" in relation to contact tracing.²⁵⁴ Certainly, under new legislation, those who do not or cannot use the app are required to hand over personal details directly to the venue, which is not anonymous and is more vulnerable to data breaches.

Despite initial claims that the app would require around 80% uptake from the British public, this has since been downgraded to "the more people that use the app the better."²⁵⁵ However a study by UCL of 15 different contact tracing apps found that over 80% of the population is required to download an app if it is to be found effective, and that apps offer no comparison to manual contact tracing. It says there is an "urgent need for further evaluation of these apps."²⁵⁶ Lead author Dr Isobel Braithwaite, of the UCL Institute of Health Informatics, warned: "Too much reliance on automated contact tracing apps may also increase the risk of Covid-19 for vulnerable and digitally-excluded groups such as older people and people experiencing homelessness."

The NHS Covid-19 app has nine functions:

- Exposure notification: the app shows when it is scanning and notifies the user if they have been significantly exposed to any app user who has tested positive for the virus
- Risk level: most users should be able to see the current level of coronavirus risk in their postcode district
- Venue check in: app users receive an alert if they have visited a venue where they may have come into contact with coronavirus
- Check symptoms: app users can check if they have coronavirus symptoms and see if they need a test – if they do, they will be redirected to the GOV.UK website to book one

²⁵¹ NHS Covid-19 app: One million downloads of contact tracer for England and Wales – Leo Kelion and Rory Cellan-Jones, BBC News, 24th September 2020: <https://www.bbc.co.uk/news/technology-54270334>

²⁵² Coronavirus: Millions of phones too old for tracing app – Tom Knowles, the Times, 25th September 2020: https://www.thetimes.co.uk/edition/news/coronavirus-millions-of-phones-too-old-for-tracing-app-q3zlr7lsc?utm_

²⁵³ Questions raised over how Newham pensioners can access NHS test and trace app – Jon King, Newham Recorder, 3rd September 2020: <https://www.newhamrecorder.co.uk/news/health/test-and-trace-app-criticised-over-access-1-6819776>

²⁵⁴ Ibid.

²⁵⁵ Trials of NHS contact-tracing app 'very encouraging' – Andrea Downey, Digital Health, 18th September 2020: <https://www.digitalhealth.net/2020/09/trials-of-nhs-contact-tracing-app-very-encouraging/>

²⁵⁶ Why the NHS Test and Trace app is doomed to fail: Major review finds contact tracing via smartphones 'is unlikely to reduce the spread of Covid-19' – Ryan Morrison and Joe Pinkstone, Mail Online, 20th August 2020: <https://www.dailymail.co.uk/sciencetech/article-8644015/NHS-contact-tracing-app-unlikely-reduce-spread-Covid-19.html>

- Read latest advice: users will be redirected to the GOV.UK website
- Enter test result: if a user books a test through the app, it will automatically notify them if they test positive; otherwise the user can manually enter the code they receive from the testing service
- Report exposures: if the user has tested positive they will be asked to upload the device IDs the app has recorded them as having been near to, and they should also be contacted by a contact tracer
- Self-isolate: users can keep track of the self-isolation countdown period recommended by the app, based on any reported symptoms or test result
- Manage my data: users can see what data the app is currently storing about them; deleting all of this data resets the app

The main function of the app is the 'exposure notification'. This means the app aims to let users know if they have been near to the phone of someone who has received a positive Covid test for long enough that they could be at risk of infection. This works by Bluetooth "proximity tracing", picking up on Bluetooth signals from phones running the app that come near other users of the app, and recording how long and how far away each device is from each other. This is so that, should an app user test positive for Covid-19 and report this via their app to the central system, other app users who may be at risk of infection can be alerted. If a user receives such an alert, they will be advised on what to do (e.g. self isolate). A user may also be provided with a 'token' to apply for a test if these are available.

The app's algorithm designates two app users as having had 'close contact' once a certain threshold of contact has been reached within one day. The algorithm scores interactions:

0-2m for 5 minutes scores 300 points

2-4m for 5 minutes scores 150 points

4m+ scores no points²⁵⁷

If encounters with a person adds up to more than 900 points in a day, and one of the users inputs a positive test result, the other will be alerted to self-isolate. However, the sensitivity of Bluetooth can vary significantly between phones, meaning this level of proximity precision will be hard to guarantee.

Another method of exposure notification is the second function, 'Check in'. Lots of premises, including cafes, restaurants, pubs and libraries are now legally required to display a Government-issued QR code. Under a new data collection law, all hospitality and leisure premises (including cafes, restaurants, pubs and even workplace canteens) are legally required to ensure that individuals scan either this QR code or provide full and accurate personal contact details in order

²⁵⁷ NHS Covid-19 app: How England and Wales' contact-tracing service works – Leo Kelion and Rory Cellan-Jones, BBC News, 23rd September 2020: <https://www.bbc.co.uk/news/technology-54250736>

to enter, in case needed for contact tracing later — if a person declines, some venues (hospitality only) are legally required to refuse entry. If the user scans a QR code, the venue and time will be stored on your phone for 21 days unless you manually delete it. If local health protection teams decide that a person may have spread coronavirus at a venue, they may decide anyone who was at that venue at a certain time should get an alert. However, reporting into the app's trial in Newham showed that many people do not know how to use a QR code. Many did not know what one was.²⁵⁸ Issue also arise if venues display a series of different QR codes, either from private companies providing contact details collection or other functions, such as menus, making it unclear which QR is an official government code.

There is a significant risk of false alerts being generated by the QR code function, as there is no way of 'checking out' of a venue. Local public health teams will not be able to specify which devices to send an alert to, so it is possible that app users who were not present at a location at the same time as a person with coronavirus will receive an alert to self-isolate regardless. The app also cannot account for protective measures such as face masks, screens or even walls, meaning an alert could be generated even if both parties were taking precautions to stop the spread of coronavirus. Proximity tracing can be turned off, but it is unlikely that an individual will remember to turn off tracing every time they put on a mask or stand behind a screen. And if people are repeatedly told to self-isolate on the basis of false alarms – which will cause disruption to family and social life, work and ability to earn, ability to seek healthcare, and more – they may decide to stop using the app.

At the moment, the data collected includes:

- the first half of your postcode
- 'core details' including current postcode district, device model, operating system, app version, and start/end dates for app use
- diagnosis keys (these relate to your app and change every day)
- rolling proximity identifiers or 'broadcast keys' (these relate to your diagnosis keys and are randomly generated every 15 minutes)
- test results (pseudonymised when shared)
- whether the symptom checker was used and if it recommended isolation (this stays on your phone)
- QR codes from venues visited (this stays on your phone but can be deleted), and the number of deleted QR codes
- analytics data (to monitor app use/performance, including app upload/download stats, total background tasks, uploaded in anonymous form. NB: your IP address is automatically shared with the Department for Health when you share data through the App, but is deleted as soon as it is received)

²⁵⁸ The NHS Test and Trace app has two flaws: QR codes and people – Nicole Kobie, *Wired*, 23rd September 2020: <https://www.wired.co.uk/article/nhs-covid-app-trial-newham>

- whether use of the app has been paused, and for how long
- records of your contact with other app users
- which includes
- other users' broadcast keys
- the dates of the encounters
- the Bluetooth signal strength and power (used to estimate the distance between the phones)
- the length of time the phones were in contact

Any personal data collected stays on the app user's phone and can be deleted at any time. If the user receives a positive test result, the app will ask for permission to share their daily codes with other app users. If the user agrees, their daily codes will be uploaded to the central system (the DHSC secure computing infrastructure, hosted on Amazon Web Services UK and Microsoft Azure Cloud Services). The central system will then send the codes to every app user's phone and each user's app will check for any matches. Where there are matches, the user will get an alert that they have been in contact with someone who tested positive — but no user will know who, where or when. The central system does not know who a user has been in contact with and it doesn't record any matches.

It was reported when the app was first launched that approximately one in three people asked to self-isolate by the app will have been given a false positive.²⁵⁹ This proved to be correct. Many people have received false alerts from the app, which when clicked on, disappear without advice or explanation, causing understandable anxiety for app users.²⁶⁰ Maurice Leaver told Sky News he has received the message that he had been exposed to coronavirus and was unable to clarify with contact tracers what has happened: "I'm now self-isolating, just to be on the safe side... I don't know whether it's correct or not." Kathryn Sian, a biomedical scientist in an NHS lab, said she had also received a notification which had left her "very stressed" and now had "no confidence in this app at all." Many others have reported similar notifications. A spokesperson for the Department of Health and Social Care said this was an error caused by the Apple/Google API, but app developer Luke Redpath explained that this was caused by the app developers attempting to insert a custom scoring system into the app's exposure notification, which was not compatible with the API.²⁶¹ The spokesperson told Sky News that app users should "ignore" the incorrect notification, a response which totally undermines both the stress many people will feel receiving such a notification and the fundamental purpose of the app.

²⁵⁹ Download NHS Covid-19 tracing app to protect your families, public told – Chris Smyth and Tom Knowles, the Times, 24th September 2020: <https://www.thetimes.co.uk/edition/news/download-coronavirus-tracing-app-to-protect-your-families-public-told-sjqr5wqk8>

²⁶⁰ Coronavirus: Some users of NHS tracing app incorrectly given COVID-19 exposure alerts – Rowland Manthorpe, Sky News, 1st October 2020: <https://news.sky.com/story/coronavirus-some-users-of-nhs-tracing-app-incorrectly-given-covid-19-exposure-alerts-12086225>

²⁶¹ Luke Redpath, Twitter, 1st October 2020: <https://news.sky.com/story/coronavirus-some-users-of-nhs-tracing-app-incorrectly-given-covid-19-exposure-alerts-12086225>

The law does not expressly require you to download and use the app – but the Government is strongly inducing people to do so by other legal means. The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 mean most premises are legally required to collect customers' contact details as a condition of entry - including coffee shops, restaurants, bars, pubs, workplace canteens, gyms, hotels, museums, heritage sites, libraries, barbers, community and youth centres, village halls and many more. The only exception to this is if you use the app - making use of the app a de facto requirement.

If an individual does not use the app - whether because you don't have a smart phone, you don't have the latest software, or you simply choose not to — these premises are legally required to manually record and keep your personal details, and if you deal with a single staff member, their name too, for 21 days.

If you don't use the app and do not wish to provide considerable amount of personal data as condition of entry, or if you fail to provide contact details that the venue's staff member thinks are full and accurate, some businesses - coffee shops, restaurants, bars, pubs and workplace canteens – are legally required to refuse you entry. Some businesses have decided simply to require customers to scan the app as a condition of entry, presumably to avoid collecting paper details they can't easily manage or protect. As a result, we've heard many cases where people who have been refused entry to various places because they aren't using the app.²⁶²

²⁶² See for example: Middle-aged customers claim they are being embarrassed by 'young and arrogant' bar staff who turned them away for not having the NHS Covid-19 app (despite rules saying they don't need one – Dan Sales, Mail Online, 29th September 2020: <https://www.dailymail.co.uk/news/article-8785123/Customers-embarrassed-young-arrogant-bar-staff-Covid-app.html>

COVID MARSHALS

On 9th September, along with announcing new restrictions on gatherings, the Prime Minister announced that “Covid secure marshals” would be appointed to “ensure social distancing in town and city centres.”²⁶³ It was not immediately clear what powers these marshals would have. Commentator Adrian Hilton asked on Twitter:

“What powers will a #CovidMarshall have? Warning? Arrest? Fine? Who appoints them? To whom are they accountable? Can their decisions be appealed? Has this new tier of law enforcement been debated in Parliament?”²⁶⁴

“Does anyone know? If I am harassed by #CovidMarshalls, how do I identify them? Will they have a badge with a number? Are they obliged to produce it on request? What powers do they possess? By what law are they so empowered? How do I appeal their judgment?”²⁶⁵

There is still little clarity or answers to these questions, as it appears that local authorities will decide how to deploy Covid marshals.

The first Covid marshals were deployed in Rugby on 24th September and have “multi-disciplinary powers and responsibilities covering littering and environmental crime, antisocial behaviour and support for licensed and food premises.”²⁶⁶

²⁶³ Prime Minister’s press conference – GOV.UK, 9th September 2020: <https://www.gov.uk/government/speeches/pm-press-conference-statement-9-september-2020>

²⁶⁴ Twitter, Adrian Hilton, 10th September 2020: https://twitter.com/Adrian_Hilton/status/1303967969261826048?s=20

²⁶⁵ Twitter, Adrian Hilton, 9th September 2020: https://twitter.com/Adrian_Hilton/status/1303752684315586561?s=20

²⁶⁶ First Covid-19 marshals deployed in Rugby – Madeleine Clark, CoventryLive, 26th September 2020: <https://www.coventrytelegraph.net/news/coventry-news/first-covid-19-marshals-deployed-19002079>

HEALTH PASSPORTS

On 9th September the Prime Minister announced 'Operation Moonshot', a plan to drastically increase testing millions of daily tests. If it were to be successful, the entire British population would be tested at least weekly to enable those with negative results to resume 'normal life' without the need for social distancing.

However, in order to facilitate this approach, some form of health passport would be necessary, in order for citizens to prove their health status. A leaked memo seen by the British Medical Journal confirmed that digital immunity passports would be used in conjunction with the mass testing "to allow people who test negative to return to workplaces, travel, and participate in other activities."²⁶⁷ The plan is estimated to cost approximately £100 billion, which would almost match the Government's yearly spend on NHS England. Currently, the UK has neither the capacity nor the technology to undertake this program.²⁶⁸

EveryDoctor and Good Law Project have sent pre-action letters to the Department for Health and Social Care, asking for an explanation of the cost of such a program and the procurement process for the technology.²⁶⁹ Lawyers at Bindmans LLP, acting on behalf of the Good Law Project, noted that "leading organisations such as SAGE, the National Screening Committee ("the NSC"), the WHO and the Royal Statistical Society have profound concerns" about the project "which involves 'punting' unprecedented sums of public money on technology that does not exist." The lawyers noted that this approach raises "stark and entirely proper concerns about the decision-making processes and public and Parliamentary transparency."

Aside from the vast expense and questionable science behind this program, we are concerned by the prospect of digital health passports. The British public has always rejected moves towards the use of digital ID cards, and these health passports could be similarly invasive, if not more, centred on sensitive medical data. Such a mass programme would inevitably lead to additional purposing for other medical and vaccination data. This plan would normalise identity checks, increase state control over law abiding citizens and create a serious risk of sensitive data being exploited by cybercriminals.

RECOMMENDATION: Plans for mass testing and digital health passes are scientifically unsound, vastly expensive and represent invasive health surveillance and monitoring. The Government must be clear and transparent about any plans for health passports, fully consider the rights implications, and submit any plans to Parliament at the soonest opportunity.

²⁶⁷ Covid-19: Government plans to spend £100bn on expanding testing to 10 million a day - Gareth Iacobucci and Rebecca Coombes, BMJ, 9th September 2020: <https://www.bmj.com/content/370/bmj.m3520>

²⁶⁸ 'Completely wrong': Boris Johnson's plans for mass coronavirus testing may not work, government's top scientific adviser warns - Andrew Woodcock, Independent, 11th September 2020: <https://www.independent.co.uk/news/uk/politics/coronavirus-testing-boris-johnson-covid-rapid-government-advice-b421150.html>

²⁶⁹ Letter before Action under the Pre-Action Protocol for Judicial Review, Re: Project Moonshot - Bindmans LLP, 17th September 2020: <https://rebrand.ly/moonshot-pap>

FREEDOM OF EXPRESSION

Freedom of assembly

There has been sustained confusion and contradiction over the status of the right to protest in England. We welcomed the new definition of a 'political body' introduced by the Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020, and later the introduction of an exemption for protests in The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020. This is the first time in this period of emergency laws that the right to protest has been acknowledged in Health Protection Regulations. However, this amendment does not constitute a full restoration of freedom of expression and assembly.

The requirement that an organiser carries out a risk assessment and takes all reasonable measures to limit the risk of transmission sets a high bar for compliance.²⁷⁰ Protests without a central organiser, the resources to complete this type of assessment or the power to implement sets of measures across a group of protesters remain banned and subject to harsh penalties.

Protests can only be organised by a business, a charitable, benevolent or philanthropic institution, a public body, or a political body.²⁷¹ These groups must also carry out a risk assessment and take "all reasonable measures to limit the risk of transmission of the coronavirus", which includes taking account of "any guidance issued by the government which is relevant to the gathering."²⁷² Fines for unauthorised gatherings of more than 30 people still carry a £10,000 fine. This is an extreme and authoritarian approach to public health and chills freedom of assembly and expression, as people may be unwilling to risk organising a lawful protest due the vast potential fines.

The requirement to carry out risk assessments means that groups have had to submit documents to police officers for approval. Police officers are not public health officials and are not qualified to make such significant decisions. The requirement for a risk assessment also means that spontaneous protests or demonstrations are prohibited.

Many protesters have faced restrictions, bans and even prosecutions under the Regulations, despite exemptions in legislation for political groups and protests.

Case studies

On 25th August, prior to the revision of the definition of 'political body' under the Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020, Ken Hinds, a black community activist, was threatened with arrest after contacting the Metropolitan Police regarding an anti-racism march he was planning. Police told Mr Hinds that he did not qualify

²⁷⁰ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020, Regulation 3(b)(iii)

²⁷¹ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020, Regulations 3(a)

²⁷² The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020, Regulations 3(b)(e)

as “a business, a charitable, benevolent or philanthropic institution, a public body, or a political body” and therefore “that you are encouraging anyone attending to commit an offence contrary to [Health Protection] regulations 5 and 8.” Only after the threat of legal action did the Metropolitan Police relent and grant permission for the march to go ahead.

A protest against the Coronavirus Act and the lockdown measures led to the arrest and £10,000 fine of its organiser Piers Corbyn on 29th August. Mr Corbyn told the Guardian that he and the other organisers had carried out the appropriate risk assessment and plans to challenge the fine in court. A week later, Mr Corbyn was fined another £10,000 for the same offence in Sheffield.²⁷³

Trans Rights Collective UK was forced to cancel a planned protest, after the Metropolitan Police “informed [them] that there is a likelihood that [they], any participants, stewards and even BSL interpreters of the Trans Rights Protest will be arrested on 5th September.” The group had previously received assurances from police that it would not face enforcement action and the reason for the sudden reversal was not explained.

Four people, including a 70-year-old woman, were arrested in Newcastle on 26th September 2020 at an anti-lockdown protest.²⁷⁴ A officer said “After engaging with a number of those taking part and explaining the importance of following the restrictions, it became clear enforcement action was required.” On the same day, another anti-lockdown protest was shut down by police for “not [complying] with the conditions of their risk assessment” which the Metropolitan Police said “voided” the assessment and therefore their right to protest.²⁷⁵ 16 people were arrested.

Other groups, including Extinction Rebellion, Resist the Government, Move One Million, have also faced enforcement action, with the Metropolitan Police handing out twenty £10,000 fines to protest organisers.²⁷⁶ In the conditions imposed by the Metropolitan Police on Extinction Rebellion’s protest action, it states “participating in any gathering of over 30 persons outdoors in an offence contrary to Regulation 7 [of the Regulations],” making no mention of the exemptions for political bodies.²⁷⁷

The right to protest is now contingent on police approval. Police decisions as to who can protest and under what terms appear to have been made in an arbitrary fashion.

RECOMMENDATION: Political protests should be exempt from restrictions altogether. The requirement for a protest organiser to complete a risk assessment and implement health and

²⁷³ Man charged following illegal gathering in Sheffield city centre – South Yorkshire Police, 7th September: <https://www.southyorks.police.uk/find-out/news-and-appeals/2020/september-2020/man-charged-following-illegal-gathering-in-sheffield-city-centre/>

²⁷⁴ Covid-19: Four arrested at Newcastle anti-lockdown protest – BBC News, 27th September 2020: <https://www.bbc.co.uk/news/uk-england-tyne-54315633>

²⁷⁵ Covid: Clashes as police shut down protest over new rules – BBC News, 26th September 2020: <https://www.bbc.co.uk/news/uk-54309603>

²⁷⁶ Twenty protest organisers face £10,000 fines following Extinction Rebellion demonstrations in central London – Imogen Braddick, Evening Standard, 5th September 2020: <https://www.standard.co.uk/news/uk/protest-organisers-fines-extinction-rebellion-protests-london-a4541081.html>

²⁷⁷ Conditions imposed on an assembly by Extinction Rebellion - 3 September 2020 – Metropolitan Police Service, 2nd September 2020: <http://news.met.police.uk/documents/conditions-imposed-on-an-assembly-by-extinction-rebellion-3-september-2020-99589>

safety measures should be changed to guidance, supported by online resources, rather than a legal requirement to avoid criminalising organic democratic participation and political dissent.

Free speech online

We remain concerned about the work of the Counter-Disinformation Unit, a body working within the Department for Culture, Media and Sport to counter 'disinformation' online relating to coronavirus.

We sent a freedom of information request which revealed the Unit's definition of 'disinformation': "deliberate creation and dissemination of false and/or manipulated information that is intended to deceive and mislead audiences, either for the purposes of causing harm, or for political, personal or financial gain." The Unit noted that disinformation may relate to "Conspiracy theories falsely linking Covid-19 with 5G technology; pages promoting false Covid-19 cures; and misinformation about public health."

As we have previously stressed, however well-intended, censoring lawful speech is dangerous and it is particularly dangerous when resulting from the wishes of Ministers. We are concerned that lawful speech is being curtailed through pressure from a secretive Government unit, with no public or parliamentary scrutiny.

VIRTUAL PARLIAMENT

A cross-party group of MPs have continued to call for the restoration of hybrid parliamentary proceedings, in order to allow all Members to participate, regardless of whether they are self-isolating. As cases begin to rise again across the country, it is likely that more MPs will have to self-isolate or may choose to avoid travelling long distances on public transport. Their ability to participate in Parliament and represent their constituents should not be hampered by requirements.

Dawn Butler MP called the decision to end remote proceedings an “attack on our country’s democracy and parliamentary representation.”²⁷⁸

“I rise to present this Bill, which was originally tabled by my hon. Friend the Member for Swansea West (Geraint Davies). He would have presented it today but, ironically, he is self-isolating, and his right to speak in this Chamber remotely was removed by the Government in June.”

“At this time like no other, all voters and constituents must have their voices heard equally in this place, the mother of all Parliaments. Debate, dialogue and scrutiny are paramount to help us chart the best possible route through these unprecedented and turbulent times. That was happening in April and May, with MPs from all corners of the United Kingdom successfully participating as equals in debates using video conferencing technology. It is the 21st century; we should be getting with the programme. However, in June, the Government disenfranchised millions of voters by abolishing online participation in parliamentary debates.”²⁷⁹

RECOMMENDATION: Hybrid proceedings and remote voting should be introduced to the House of Commons to ensure full parliamentary representation.

²⁷⁸ HC Remote Participation in House of Commons Proceedings (Motion), vol. 680, col. 337: [https://hansard.parliament.uk/commons/2020-09-16/debates/E2D4C801-7AC1-4B99-A465-FAB38C2F5B78/RemoteParticipationInHouseOfCommonsProceedings\(Motion\)](https://hansard.parliament.uk/commons/2020-09-16/debates/E2D4C801-7AC1-4B99-A465-FAB38C2F5B78/RemoteParticipationInHouseOfCommonsProceedings(Motion))

²⁷⁹ HC Remote Participation in House of Commons Proceedings (Motion), vol. 680, col. 336: [https://hansard.parliament.uk/commons/2020-09-16/debates/E2D4C801-7AC1-4B99-A465-FAB38C2F5B78/RemoteParticipationInHouseOfCommonsProceedings\(Motion\)](https://hansard.parliament.uk/commons/2020-09-16/debates/E2D4C801-7AC1-4B99-A465-FAB38C2F5B78/RemoteParticipationInHouseOfCommonsProceedings(Motion))

LOCAL AUTHORITIES

Bromley Council voted to continue the use of “sweeping” emergency powers which were first agreed to in March.²⁸⁰ The emergency powers allow the leader of the Council to make major decisions without consulting other councillors. Cllr Nicholas Bennett suggested that the powers awarded to the executive were no longer necessary, given that the Council “now have the Zoom method of having meetings” which he said “does seem to work.” Cllr Angela Wilkins agreed, noting that: “The public don’t know what emails are being exchanged between members of the executive and neither do I for that matter. There’s a really, really important point about scrutiny here.” However, councillors voted to extend the measures until January 2021, 10 months since the new powers were first introduced.

RECOMMENDATION: Local authorities should end any emergency measures which reduce democratic involvement of councillors and scrutiny of decision making.

²⁸⁰ Sweeping councillor powers to remain at Bromley until January – Lachlan Leeming, News Shopper, 16th September 2020: <https://www.newsshopper.co.uk/news/18726155.sweeping-councillor-powers-remain-bromley-january/>

UNIVERSITIES

Students across the United Kingdom have been facing lockdowns in university accommodation, after coronavirus outbreaks amongst first year students moving into university accommodation. Manchester Metropolitan University ordered students living in certain sections of its accommodation to remain in their flats, unless there was a medical emergency, with no exemptions for studying or employment. Students reported that a van of police officers arrived at their accommodation to prevent them from leaving, which one first year student described as "scary and confusing" and said "no one's really told us much and then the police turn up as well with security outside – it's a really, really difficult situation."²⁸¹ When questioned about the legal basis for this confinement by a concerned parent, the university tweeted that anyone testing positive was required by law to self-isolate, a set of Regulations that had not come into force at that point and had not even been published.²⁸² Law firm Levins Solicitors offered to act pro bono for students placed under lockdown in their accommodation, and wrote to Manchester City Council to question their suggestion that students would be breaking the law if they left their accommodation and to challenge their use of security guards to enforce what the university later admitted was not a legal requirement.²⁸³

Similar restrictions have been placed on other students across the country, with the President of the National Student's Union, Larissa Kennedy, telling ITV News that students were having to go without food in "disgusting conditions" as security guards watch exits to ensure they stay indoors.²⁸⁴

Students have also been threatened with serious punishments by universities for failing to precisely follow the laws, and in some cases the guidance, around socialising and social distancing. Some universities have fined or even expelled students who do not follow the laws. Queen's University Belfast has suspended 27 students, Ulster University has suspended 10 students, St Mary's University College in Belfast has suspended 7 students and Stranmillis University College has suspended 3 students.²⁸⁵ Northern Ireland's Economy Minister Diane Dodds even threatened that breaching the Regulations could impact students' future careers.

Other universities have brought in additional security to monitor students, break up gatherings and ensure they do not leave their accommodation if required to isolate. At Manchester Metropolitan University, security guards with body-worn cameras were sent to break up parties.²⁸⁶ In Glasgow, a student reported that police had been patrolling the accommodation blocks: "It really did feel like a prison. It was insane. I do understand they were doing it out of concern for our safety but we really

²⁸¹ Coronavirus: Students 'scared and confused' as university halls locked down 'without warning' - Peter Stubley, the Independent, 27th September 2020: <https://www.independent.co.uk/news/uk/home-news/manchester-university-lockdown-students-police-coronavirus-b632513.html>

²⁸² Manchester Metropolitan University, Twitter, 26th September 2020: <https://twitter.com/ManMetUni/status/1309799532901920769?s=20>

²⁸³ Levins Solicitors, Twitter, 28th September 2020: <https://twitter.com/LevinsLaw/status/1310567997648637953/photo/2>

²⁸⁴ Thousands of students 'trapped' amid coronavirus outbreaks in at least 30 universities – Daniel Hewitt, ITV News, 29th September 2020: <https://www.itv.com/news/2020-09-28/thousands-of-student-trapped-amid-coronavirus-outbreaks-in-at-least-30-universities>

²⁸⁵ Coronavirus: 27 QUB students suspended over Covid breaches – BBC News, 23rd September 2020: <https://www.bbc.co.uk/news/uk-northern-ireland-54264380>

²⁸⁶ Students locked down after illegal parties at UK universities – Sally Weale, the Guardian, 21st September 2020: <https://www.theguardian.com/education/2020/sep/21/students-locked-down-after-parties-at-uk-universities>

shouldn't have been here in the first place if that's what they were so worried about.”²⁸⁷ In Cardiff, police officers have been attending students' houses off campus to ask about the number of residents and to remind them of the restrictions on gatherings. One student reported that police had arrived to investigate a possible breach of the restrictions and “looked through every room and in the garden,” describing the experience as “nerve-wracking.”²⁸⁸ At Leeds University, additional security guards have been patrolling student accommodation, some with dogs.²⁸⁹ One student reported to us that security guards had threatened to “set the dogs” on students hosting parties.



Universities Scotland, the official body representing Scottish universities, published guidance on “Preventing spread of coronavirus in universities” for students, which characterised requests for students to limit socialising as ‘requirements’.²⁹⁰ No new legislation has been introduced to govern student-specific socialising and as such these suggestions are not legal requirements. The guidance stated that:

²⁸⁷ The Pure Hell of Quarantining in Student Halls During a Coronavirus Outbreak – Ruby Lott-Lavigna, Vice, 29th September 2020: <https://www.vice.com/en/article/jgx74k/glasgow-university-murano-student-quarantine-coronavirus>

²⁸⁸ Cardiff Police tell students they can enter houses ‘by any means necessary’ - Sophie Bott, the Cardiff Tab, 3rd October 2020: <https://thetab.com/uk/cardiff/2020/10/03/cardiff-police-tell-students-they-can-enter-houses-by-any-means-necessary-53405>

²⁸⁹ Leeds Uni security are breaking up flat parties with dog squads – Danny Shaw, The Leeds Tab, 23rd September 2020: <https://thetab.com/uk/leeds/2020/09/22/leeds-uni-security-are-breaking-up-flat-parties-with-dog-squads-52193>

²⁹⁰ Preventing spread of coronavirus in universities – Universities Scotland, 24th September 2020: <https://www.universities-scotland.ac.uk/preventing-spread-of-coronavirus-in-universities/>

- “All universities will make absolutely clear to students that there must be no parties, and no socialising outside their households [...] Breaches will not be tolerated.”
- Universities should bring in additional staff to monitor student accommodation “to be vigilant against any breaches of guidance”
- Students were required “to avoid all socialising outside of their households and outside of their accommodation” and were asked “not to go to bars or other hospitality venues.”
- Universities would “intensify [...] liaison with Police Scotland”
- Universities would also “require all students to download the Protect Scotland [contact tracing] app”

These measures are framed as requirements rather than requests, placing unnecessary pressure and stress on young people, many of whom are living in small rooms away from family and friends. The role of universities is to educate, not to enforce sanctions. It is especially concerning that Universities Scotland stated that they would encourage private providers of student accommodation to “strictly enforce guidance” as well, giving landlords and companies licence to monitor and police the lives of student renters.

Dr Nick McKerrell, senior law lecturer at Glasgow Caledonian University, warned that this use of guidance to impose lockdowns or to punish students could be unlawful:

“The issues are the additional restrictions and punishments that the Universities have added for students specifically on top of the general legal situation which we all face as Scottish citizens. Although these were given support by the First Minister they do not have the force of law or even a governmental guidance. Thus the universities have placed themselves in the firing lines.

“A student only lockdown — either having to stay in halls or banning them from visiting pubs and cafés may be justified but it was announced [without] any legal procedure or even debate that more general lockdown rules would require. This verges on being an arbitrary use of power.

“Without evidence or proper legal process in drawing up the rules ending someone's Higher Education career looks entirely disproportionate.”²⁹¹

There was confusion even from Scotland’s officials over whether students could visit their parents. Scotland’s Education Secretary John Swinney said that even students who have tested negative for coronavirus should stay in their accommodation,²⁹² while Scotland's national clinical director, Prof Jason Leitch, said that it was “not illegal” for students to visit their parents. However, he later

²⁹¹ Student lockdown puts Universities at risk of 'legal action', claims leading law academic – Ellie Forbes and Tara Fitzpatrick, Daily Record, 28th September 2020: <https://www.dailyrecord.co.uk/news/scottish-news/student-lockdown-puts-universities-risk-22753380>

²⁹² Scottish Education Secretary urges students to stay in accommodation – Craig Paton, Yahoo News, 27th September 2020: <https://uk.news.yahoo.com/scottish-education-secretary-urges-students-101549451.html>

retracted this, stating on Twitter that parents "are a separate household. There are exceptions, eg caring responsibilities, but the law is clear: they can't meet indoors with another household – even mum and dad. Sorry."²⁹³

An email sent to students at the University of Edinburgh from Vice-Chancellor Professor Colm Harmon said students must "avoid all socialising outside of your household."²⁹⁴ Professor Harmon warned that "to do so will be a breach of the law and will be subject to enforcement and even police action." This is guidance, not law. At the time of that email being sent, Regulations in Scotland limited gatherings to groups of no more than 6, made up of no more than 2 households.²⁹⁵ The following day, this Regulation was amended to specify that these gatherings could only take place outdoors, but did not prohibit socialising with other households.²⁹⁶ The university also encouraged students to report anyone whose actions they believe "places others at risk, or appears to be intentionally failing to follow the guidelines" on their 'Good Citizen' reporting form. The university asks for the name and "identifying information" of the student not following the rules, an example being "where a student has ignored requests to keep a safe distance from other people in class."²⁹⁷

We have already demonstrated the significant levels of confusion around the nature of Regulations in different parts of the UK, coming even from the Prime Minister himself. As we have repeatedly emphasised over the course of the pandemic, blurring the lines between what is a legal requirement and what is guidance only increases confusion, damages trust in authorities and harms public health.

RECOMMENDATION: Students across the UK must not be subject to additional restrictions or guidance that go beyond local or national restrictions. Any 'lockdown' of accommodation must have a legal basis and be outlined clearly to any students impacted by measures. Any student wishing to leave accommodation in order to return to their family homes should be permitted to do so.

RECOMMENDATION: Students should be treated like responsible adults, not poorly behaved children. They should not be subject to increased surveillance, the presence of intimidating security forces or unwarranted police checks.

²⁹³ Covid in Scotland: 172 test positive in Glasgow University outbreak – BBC News, 24th September 2020: <https://www.bbc.co.uk/news/uk-scotland-54268780>

²⁹⁴ New Covid-19 restrictions this weekend: keeping yourself and others safe – Email from Professor Colm Harmon, 24th September 2020

²⁹⁵ The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020, Regulation 8(1)(a)

²⁹⁶ The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Amendment Regulations 2020, Regulation 2

²⁹⁷ Good Citizen Guidelines reporting form – The University of Edinburgh, 4th September 2020: <https://www.ed.ac.uk/students/academic-life/conduct/good-citizen-guide/good-citizen-guidelines-form>