

# **BIG BROTHER WATCH**

**Big Brother Watch Briefing on Health Protection (Coronavirus, Restrictions) (No. 4) (England) Regulations 2020 for the House of Commons**

November 2020

## About Big Brother Watch

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

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

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## INTRODUCTION

We welcome the opportunity to provide this briefing to the House of Lords ahead of the debate on the Health Protection (Coronavirus, Restrictions) (No. 4) (England) Regulations 2020, ahead of the debate on 4<sup>th</sup> November 2020.

## RECOMMENDATIONS

**RECOMMENDATION 1: We urge Members of Parliament to vote against the Health Protection (Coronavirus, Restrictions) (No. 4) (England) Regulations 2020.**

**RECOMMENDATION 2: Given the lack of scrutiny required by the Public Health Act, and the very real risk that Regulations made under this law are ultra vires, any lockdown Regulations should in future be made under the Civil Contingencies Act, which contains greater safeguards and requires meaningful parliamentary scrutiny.**

**RECOMMENDATION 3: The Government must stop relying on complex and ever-changing criminal sanctions as public health measures. Expanding powers to force to untrained council officials and PSCOs is dangerous and wrong. Instead, clear, widely publicised and easily accessible guidance should be made widely available.**

**RECOMMENDATION 4: Political protests should be exempt from restrictions altogether. The legal requirement for a protest organiser to complete a risk assessment and implement health and safety measures does not reflect the way in which many protest movements function and should be changed to guidance supported by resources, to avoid criminalising organic democratic participation and political dissent.**

## EFFECT OF THE REGULATIONS

The Health Protection (Coronavirus, Restrictions) (No. 4) (England) Regulations 2020 prohibit the entire population from “leav[ing] or be[ing] outside of the place where they are living without a reasonable excuse.”<sup>1</sup> There is a long, complex list of exemptions to this requirement, including to buy goods for any business of service permitted to open, for exercise, to visit an outdoor public place for “open air recreation”, to attend a place of worship, to attend an event commemorating Remembrance Sunday, to visit a member of a linked household, to collect food, drink or other goods that have been ordered from a business, to visit a waste disposal centre, for the purpose of work (if it is “not reasonably possible” to work from home), for education, to provide care or emergency assistance, to access critical public services, for competition or training if the person is an elite athlete, for medical need, to attend a support group, to visit a dying person, to attend a funeral or wedding, for children to move between households, for animal welfare, if returning home from a holiday which began before the Regulations came into force, or for prison visits.<sup>2</sup> This is a non-exhaustive list.

Gatherings of two or more people are prohibited unless people are members of the same or linked household, for work purposes, for educational purposes, to provide emergency assistance, to enable a person to escape harm, to provide care, to facilitate a house move, to fulfil a legal obligation, if the gathering takes place in criminal justice accommodation, for support groups of no more than 15 people, to provide respite care, to attend a birth, to attend a funeral or marriage (provided that one of the parties to the marriage is seriously ill), to visit a dying person, for the purpose of training or competition for elite sportspeople, for children to move between households or for an event commemorating Remembrance Sunday.

All businesses are required to close, unless listed in Part 3 of the Schedule to the Regulations.

A relevant person, including a police officer, PCSO or even a council official, may “direct a person to return to the place where they are living”, and may disperse a gathering, or remove a person from the gathering using “reasonable force.”<sup>3</sup> This is an extraordinary expansion of state power and means that individuals with little experience and no training in the use of force will be empowered to use force against members of the public. This is extremely dangerous and risks the safety of both relevant persons and members of the public. Furthermore, a relevant person “may issue a fixed penalty notice to anyone that the authorised person reasonably believes— has committed an offence under these Regulations, and is aged 18 or over.”<sup>4</sup>

An offence under these Regulations could initially result in a Fixed Penalty Notice of £200, rising to £6,400 for repeat offences.<sup>5</sup> An individual found to be the organiser of a gathering of more than 30 people could also face a Fixed Penalty Notice of £10,000.<sup>6</sup>

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1 Regulation 5(1)  
2 Regulation 6  
3 Regulation 19 (3),(5),(6)  
4 Regulation 21(16)  
5 Regulation 21 (6)(ii)  
6 Regulation 21(9)

## ULTRA VIRES?

The imposition of a national lockdown via statutory instruments under the Public Health Act has raised questions as to whether the “stay at home” requirement in the Regulations is ultra vires, that is, whether it goes beyond the legal powers of the UK government. These are not questions of the necessity of the restrictions for the protection of public health, but of whether they are lawful in their current form. There is also compelling analysis that the Regulations are a disproportionate interference with rights protected by the European Convention on Human Rights, including Article 8 privacy rights and Article 11 rights to freedom of assembly.<sup>7</sup>

These questions have been addressed with considerable legal scholarship<sup>8</sup> and a legal challenge to the Regulations from businessman Simon Dolan, which has to date received £395,000 of public funding.<sup>9</sup> We believe these arguments are of great significance for the legal status of the repeated ‘stay at home’ requirement.

The legal basis for the Regulations is the Public Health (Control of Disease) Act 1984. Section 45C(1) allows a relevant Minister to introduce restrictions across England and Wales to prevent the spread of an infectious disease, and allows for “imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health.” These restrictions or requirements can require children to be kept away from school, prohibit public gatherings, and can include “a special restriction or requirement” (s.45C(4)). Requiring the population to stay at home unless they have a “reasonable excuse” as per Regulation 5 in the present statutory instrument could be considered to fit the definition of a special requirement or restriction. However, this special restriction or requirement can only be imposed by a magistrate (s.45C(6)(a)) or a Minister when it may not be practical for magistrate to oversee individual cases (s.45D), but 45D(3) explicitly prohibits the relevant Minister from imposing special restrictions that pertain to the detention or isolation of an individual.

Given this limitation on ministerial power to impose physical confinement on a person, it is questionable whether the blanket nature of the Regulation 5 restrictions on movement applying to the whole population have a clear basis in the Act. Lord Jonathan Sumption, former Supreme Court judge, has made a similar argument:

“The result [of the Public Health Act] is that ministers can make regulations controlling people thought to be infectious. There is no specific power under the Act to confine or control the movements of healthy people. To interpret it as conferring such a power would not only be

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7 A disproportionate interference with rights and freedoms – Francis Hoar, Field Court Chambers, 21<sup>st</sup> April 2020: <https://fieldcourt.co.uk/wp-content/uploads/Francis-Hoar-Coronavirus-article-on-ECHR-compatibility-20.4.2020-2.pdf> ; see also a summary, A disproportionate interference: the Coronavirus Regulations and the ECHR – Francis Hoar, UK Human Rights Blog, 21 April 2020: <https://ukhumanrightsblog.com/2020/04/21/a-disproportionate-interference-the-coronavirus-regulations-and-the-echr-francis-hoar/>

8 Can we be forced to stay at home? - David Anderson QC, 26<sup>th</sup> March 2020: <https://www.daqc.co.uk/2020/03/26/can-we-be-forced-to-stay-at-home/> ; Coronavirus and Civil Liberties in the UK - Tom Hickman QC, Emma Dixon and Rachel Jones, Blackstone Chambers, 6 April 2020: [https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#\\_edn4](https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#_edn4) ; Lockdown: A Response to Professor King – Robert Craig, UK Human Rights Blog, 6<sup>th</sup> April 2020: <https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/> ; Ultra Virus – the constitutionality and legality of the Coronavirus Regulations – David Allen Green, the Law and Policy Blog, 8<sup>th</sup> April 2020: <https://davidallengreen.com/2020/04/ultra-virus-the-constitutionality-and-legality-of-the-coronavirus-regulations/>

9 Join the Legal Challenge to the UK Govt Lockdown – Simon Dolan, Crowdfunder: <https://www.crowdfunder.com/case/lockdownlegalchallenge/> [accessed 4<sup>th</sup> November 2020]

inconsistent with the principle of legality. It would also be contrary to the whole tenor of this part of the Act.”<sup>10</sup>

**RECOMMENDATION 1: We urge Members of Parliament to vote against the Health Protection (Coronavirus, Restrictions) (No. 4) (England) Regulations 2020.**

**RECOMMENDATION 2: Given the lack of scrutiny required by the Public Health Act, and the very real risk that Regulations made under this law are ultra vires, any lockdown Regulations should in future be made under the Civil Contingencies Act, which contains greater safeguards and requires meaningful parliamentary scrutiny.**

### UNDERVALUING DEMOCRATIC SCRUTINY

The substance of the Health Protection (Coronavirus, Restrictions) (No. 4) (England) Regulations 2020 were leaked to the press on 30<sup>th</sup> October 2020, announced by the Prime Minister on 31<sup>st</sup> October, and published less than 24 hours before Members of Parliament are due to vote on them. These Regulations reintroduce the 'stay at home requirement' for the entire population of England, prevent gatherings and close businesses.

On 31<sup>st</sup> October, the Prime Minister announced “From Thursday until the start of December, you must stay at home.”<sup>11</sup> This authoritarian approach deliberately overrode parliamentary democracy and undermined the rule of law, yet again, treating the hard-won parliamentary vote as a mere formality. His pronouncements that there is “no alternative” compound his continued approach of rule by decree. We reiterate: the Prime Minister cannot make laws simply by announcing them.

The publication of these Regulations, and the announcement of the lockdown itself, has been rushed and disordered. This has very real implications for people’s lives and livelihoods. These Regulations represent a highly draconian response to a public health threat and deserve close and careful scrutiny. The three-hour debate accompanying the vote does not represent meaningful scrutiny considering their severe implications for the population.

The chaotic implementation of this Regulations damages the rule of law. It is wholly unacceptable in a democracy to plunge the nation into house arrest via leaks, press statements and complex, last minute Regulations.

Further, there is no opportunity for parliamentarians to amend and improve the Regulations. A binary yes/no vote is clearly inappropriate for Regulations of such constitutional significance.

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<sup>10</sup> Government by decree: Covid-19 and the Constitution – Lord Sumption, Cambridge Freshfields Annual Law Lecture, 27<sup>th</sup> October 2020:

[https://resources.law.cam.ac.uk/privatelaw/Freshfields\\_Lecture\\_2020\\_Government\\_by\\_Decree.pdf](https://resources.law.cam.ac.uk/privatelaw/Freshfields_Lecture_2020_Government_by_Decree.pdf)

<sup>11</sup> Prime Minister's statement on coronavirus (COVID-19): 31 October 2020 :

<https://www.gov.uk/government/speeches/prime-ministers-statement-on-coronavirus-covid-19-31-october-2020>

## CONFUSED IMPLEMENTATION AND COMPLEX RESTRICTIONS

The continued contempt the Government has shown for proper parliamentary scrutiny not only damages the rule of law and trust in democracy, but also makes 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:

“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.”<sup>12</sup>

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.”<sup>13</sup> Given that a breach of the Regulations can carry a life-changing £10,000 fine, it is unacceptable that the communication and implementation of these Regulations has been so confused.

Prior to the Regulations being published, Government Ministers had already spread confusion by announcing what would be allowed under the new laws and then rapidly back-peddalling. On Facebook, Cabinet Secretary Michael Gove said that golf and singles’ tennis would “probably” to be allowed under the new laws, contradicting the Prime Minister, which he later apologised for.<sup>14</sup> Housing, Communities and Local Government Secretary Robert Jenrick in turn made misleading statements about families being able to meet with friends outdoors, contradicting the Government’s guidance when attempting to clarify Mr Gove’s comments to BBC Breakfast.<sup>15</sup>

Government guidance has stated that overnight stays and visiting second homes is prohibited, however this is not written into law.<sup>16</sup> Given that the lists of “reasonable excuses” for leaving one’s home is non-exhaustive, there may well be a need for an individual to stay overnight somewhere other than their home. Similarly, Government guidance that people “should avoid travelling in or out of your local area” and that only “a short journey” is permitted for exercise is not contained within the Regulations.<sup>17</sup>

The Government appears to have learned nothing from its early cacophony of mistakes during the pandemic about the importance of providing clarity between guidance and the law – a vital distinction, to protect the integrity of the rule of law.

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

13 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, 19<sup>th</sup> 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>

14 Michael Gove, Twitter, 3<sup>rd</sup> November 2020: <https://twitter.com/michaelgove/status/1323527178773008384>

15 Ministers add to confusion over England Covid lockdown rules – Simon Murphy and Archie Bland, the Guardian, 3<sup>rd</sup> November 2020: <https://www.theguardian.com/world/2020/nov/03/ministers-prompt-confusion-over-england-covid-coronavirus-lockdown-rules>

16 New National Restrictions from 5 November: <https://www.gov.uk/guidance/new-national-restrictions-from-5-november>

17 Ibid

The Regulations are dense and convoluted, containing over 60 exemptions. The requirement to stay at home has many complex exemptions, as does the restriction on gatherings. It is unreasonable to expect members of the public to fully understand and digest these in less than 2 days.

**RECOMMENDATION 3: The Government must stop relying on complex and ever-changing criminal sanctions as public health measures. Expanding powers to force to untrained council officials and PSCOs is dangerous and wrong. Instead, clear, widely publicised and easily accessible guidance should be made widely available.**

### FREEDOM OF ASSEMBLY AND EXPRESSION

A major human rights issue arising from the Regulations is the constraint on the right to protest.

The right to protest is fundamental in a democracy – particularly during a time of serious expansion of state powers, unprecedented restrictions and a public health crisis.

Gatherings organised by “a business, a charitable, benevolent or philanthropic institution, a public body or a political body” which take place on a vessel or a “public outdoor place” are only permitted<sup>18</sup> if the organiser has carried out a risk assessment and “takes all reasonable measures to limit the transmission of coronavirus,” which includes taking account of “any guidance issued by the government which is relevant to the gathering.”<sup>19</sup> 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, fines and even prosecutions for attending or organising protests. Furthermore, police appear to have made somewhat arbitrary decisions about which groups are permitted to protest. We are particularly concerned about restrictions on the right to protest in light of media reports that the Home Secretary has briefed police chiefs “to stop protests of more than two.”<sup>20</sup> This would clearly go beyond the restrictions proposed in these Regulations.

#### Case studies

Protests against the Coronavirus Act and lockdown measures have consistently faced aggressive police interventions and vast fines. Piers Corbyn, an anti-lockdown campaigner, has faced multiple £10,000 fines after for organising protests of more than 30 despite attempts to produce risk assessments. Most

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<sup>18</sup> The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020, Regulation 10(6)

<sup>19</sup> The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020, Regulation 14 (2),(3)

<sup>20</sup> Coronavirus lockdown: Priti Patel wants police to stop protests of more than two – Fiona Hamilton, the Times, 3<sup>rd</sup> November 2020: <https://www.thetimes.co.uk/edition/news/coronavirus-lockdown-priti-patel-wants-police-to-stop-protests-of-more-than-two-zdpv3xczx>

recently, an anti-lockdown protest was aggressively dispersed by police after police alleged they "voided their risk assessment", resulting in 18 arrests.<sup>21</sup>

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.<sup>22</sup>

Trans Rights Collective UK was forced to cancel their 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 they would not face enforcement action and the reason for the sudden reversal was not explained.

Similarly, a protest outside the Polish Embassy against the new restrictions on abortion in country was cancelled after the Metropolitan Police refused permission for the protest to go ahead.<sup>23</sup>

**RECOMMENDATION 4: Political protests should be exempt from restrictions altogether. The legal requirement for a protest organiser to complete a risk assessment and implement health and safety measures does not reflect the way in which many protest movements function and should be changed to guidance supported by resources, to avoid criminalising organic democratic participation and political dissent.**

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21 Coronavirus: Arrests as police officers injured at anti-lockdown protests in central London – Sky news, 24<sup>th</sup> October 2020: <https://uk.news.yahoo.com/coronavirus-arrests-police-officers-injured-180800894.html>

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

23 Twitter, Netpol, 26<sup>th</sup> October 2020: <https://twitter.com/netpol/status/1320825354097991682?s=20>