

**EMERGENCY POWERS AND
CIVIL LIBERTIES REPORT**

[OCT 2020]

About Big Brother Watch

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

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

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Emergency Powers & Civil Liberties Report

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Introduction

The month of October saw yet more policy and legal lurches across the UK. The month began with parliamentary debates on the Rule of 6, was dominated by the imposition of new 'tiered' restrictions, and ended with the announcement of a new national lockdown for England, voiding the prior regulations. The new set of 'tiered' regulations for England sliced the nation into one of three bands of restrictions and criminal sanctions — but only lasted three weeks. Meanwhile, Scotland imposed a five-tier system; Wales imposed a "fire break" lockdown; and Northern Ireland imposed a four-week lockdown.

Across the four nations, a total of 515 pieces of legislation have been laid containing the word 'coronavirus' since the start of this year. Since the end of September, 33 coronavirus statutory instruments have been passed in England, totalling 285 pieces of delegated legislation at the time of writing.¹ These instruments make a significant impact on every area of our lives, yet only 13 of these used the draft affirmative procedure, requiring parliamentary approval before an instrument becomes law.

These statutory instruments have been made under a vast array of Acts, 105 in total, as well as 3 Orders and one EU regulation. They include powers as various as the Saint Helena Act 1833, the Misuse of Drugs Act 1971, the Football Spectators Act 1989, the Osteopaths Act 1993 and the European Union (Withdrawal) Act 2018. Just 17 statutory instruments have been under the Coronavirus Act 2020, despite the Government's emphasis on its urgent and continued necessity.

The Government's heavy-handed approach to public health has been characterised by the creation of excessive new legal obligations for individuals, businesses and organisations. We have long argued that the Government's focus during this public health crisis should be on providing for people, rather than threatening them with legal action. The Government's push toward more legislation, greater enforcement and bigger fines has been questioned by senior police officers. Chief Constable Kelly of Gwent Police told the Home Affairs Committee:

"We need to think much more broadly around what enforcement looks like. It is not all about fixed penalty notices (...) It is very difficult to deviate away from [the] four Es and go straight to enforcement because people are confused in communities."²

As coronavirus cases rise across the United Kingdom once again, it is evident that draconian laws and increased enforcement do not work. Meanwhile, the nations of the UK are drifting from long-held values — and from each other.

We urge the Government to pursue an approach to coronavirus which focuses on public health and supports people, rather than criminalises them.

¹ Coronavirus Statutory Instruments Dashboard — Hansard Society (updated 6th November 2020): <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>

² Oral evidence: Home Office preparedness for Covid-19 (Coronavirus), HC 232, Home Affairs Committee, 21st October 2020, Q 797: <https://committees.parliament.uk/oralevidence/1097/pdf/>

Recommendations

RECOMMENDATION 1: The return to a national lockdown represents a significant interference with our rights and freedoms and is not a long-term solution to a public health threat. The UK Government must use November to develop a strategy that does not result in the British public being placed under what is effectively house arrest every few months.

RECOMMENDATION 2: The Secretary of State should issue written and oral statements in the House of Commons (or, during recess, online) following each review of the necessity of the Health Protection (Coronavirus, Restrictions) Regulations 2020 to foster transparency and to open subsequent measures to democratic scrutiny. The same process should take place by respective Ministers in devolved administrations.

RECOMMENDATION 3: If the Government resumes a tiered system for restrictions it must publish a clear 'roadmap' that explains the criteria used for moving areas between tiers to ensure clarity and fairness.

RECOMMENDATION 4: Exemptions to restrictions on gatherings must be consistent and fair — if the Government accepts that individuals are able to gather in a safe way for Remembrance Sunday, this must be applied equally across other significant religious and cultural events.

RECOMMENDATION 5: Restrictions on 'mingling' are excessive, unclear and risk criminalising normal, safe behaviour. They should not be used again.

RECOMMENDATION 6: Restrictions on businesses under each COVID-19 Alert Level must be harmonised in each of the regions they apply to, to avoid confusion and ensure fairness across the country.

RECOMMENDATION 7: 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.

RECOMMENDATION 8: Research has shown significant disparity in the issuing of Fixed Penalty Notices across ethnicities and areas which must be remedied. As the number of FPNs issued begins to rise again, it is critical that procedures for reviews of FPNs issued under the Health Protection Regulations are put in place across England and Wales.

RECOMMENDATION 9: Guidance that prevents people from buying 'non-essential' items is poorly drafted, disadvantages those without access to online shopping and leads to arbitrary decision-making by retailers. The guidance should be revoked and these attempts at micro-control must be avoided.

RECOMMENDATION 10: It remains the case that every prosecution under Schedule 21 of the Coronavirus Act has been unlawful. It must be repealed.

RECOMMENDATION 11: Schedule 22 of the Coronavirus Act contains draconian powers that have never proven necessary. It must be repealed.

RECOMMENDATION 12: Medical confidentiality is the foundation of public health. The Department of Health and Social Care's Memorandum of Understanding with the National Police Chiefs' Council to allow police forces to access the details of those required to self-isolate has significantly damaged public trust in the contact tracing system. The MoU must be withdrawn.

RECOMMENDATION 13: Whilst contact tracing should be encouraged, the legal requirement on businesses to display a QR code or receive a £1,000 Fixed Penalty Notice should be scrapped.

RECOMMENDATION 14: Health passports pose a threat to privacy and could result in discrimination. The UK Government should not endorse or pursue health passports.

RECOMMENDATION 15: In a public health crisis, local authorities should be educating and supporting residents and businesses in staying healthy and safe, not spying on and penalising them. Local authorities must cease all forms of covert surveillance for the purpose of enforcing Covid regulations.

RECOMMENDATION 16: The Government and local authorities should immediately end the use of secretive mass surveillance to monitor social distancing.

RECOMMENDATION 17: We urge all companies, authorities and institutions to immediately cease use of thermal surveillance, absent a strong evidence base and robust safeguards.

RECOMMENDATION 18: Big tech companies should not censor or demote lawfully-held views, petitions or debates related to coronavirus simply because they are contentious or criticise Government policy.

RECOMMENDATION 19: 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.



During the Covid-19 pandemic, the British state has exercised coercive powers over its citizens on a scale never previously attempted. It has taken effective legal control, enforced by the police, over the personal lives of the entire population: where they could go, whom they could meet, what they could do even within their own homes. (...) All of this has been authorised by ministerial decree with minimal Parliamentary involvement. It has been the most significant interference with personal freedom in the history of our country.”

— Lord Sumption, Cambridge Freshfields Annual Law Lecture, 27th October 2020³

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Government by decree: Covid-19 and the Constitution — Lord Sumption, Cambridge Freshfields Annual Law Lecture, 27th October 2020: https://resources.law.cam.ac.uk/privatelaw/Freshfields_Lecture_2020_Government_by_Decree.pdf

Emergency Laws

Health Protection Regulations

October has seen dramatic and rapid alterations in the UK's coronavirus restrictions. The month began with a patchwork of local regulations and restrictions, which was overhauled in favour of a tiered system that saw different areas of England placed into one of three tiers. This system however, lasted less than 3 weeks before the Prime Minister announced the return to a national lockdown on 31st October. Devolved administrations pursued entirely different approaches, with Wales and Northern Ireland entering into two-week 'circuit breakers', and the Scottish government announcing a five-tier system.

The UK response to the pandemic has been characterised by confusion and fragmentation throughout. This has never been more evident, however, than in the past month. Regulations have been altered and amended so rapidly that parts of the North of England have been subjected to a new set of Regulations almost every week. This puts people in an impossible situation — they cannot be expected to understand and follow constantly shifting and complex restrictions but face potentially vast fines if they do not.

In our previous report, we provided a detailed analysis of the fourth and fifth amendments to the second set of Health Protection Regulations, which introduced the 'rule of six' and the 10pm curfew respectively. Despite these Regulations coming into force on 14th September and 24th September, the Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020 were not debated in the House of Commons until 6th October and the Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020 were debated after they were superseded by the tier system, on 13th October. This does not represent meaningful Parliamentary scrutiny.

The continued spread of coronavirus despite increasing restrictions and repeated threats of tougher enforcement makes it plain that the Government's strategy has failed. Indeed, even in European countries such as France and Greece, where enforcement measures have been even more severe, cases have continued to rise.

RECOMMENDATION 1: The return to a national lockdown represents a significant interference with our rights and freedoms and is not a long-term solution to a public health threat. The UK Government must use November to develop a strategy that does not result in the British public being placed under what is effectively house arrest every few months.

Tier system

The tier system was the third set of national 'lockdown' regulations since March and replaced the confused jumble of national and local regulations that had been in place since June. It consisted of three sets of regulations which all came into force on 14th October 2020 and, prior to the national lockdown, applied to different areas of England: The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020 and The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020. These Regulations were amended three times in just two weeks, on 23rd, 27th and 30th October. The Regulations were revoked on 5th November by Regulation 25 of the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 (the new national 'lockdown').

These Regulations also revoked the majority of The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, which came into force on 4th July 2020, restricting gatherings and requiring certain businesses to close. However, the powers contained within Regulation 6 to restrict access to public places were retained. This wide executive power enables the Health Secretary to close any public outdoor land just by making a direction so long as he reviews the closure every 7 days. There is no maximum length of time this closure can last, and individuals can be fined £200 for entering the prohibited area.

The Health Secretary called the new tiers "super-simple."⁴ While they may be clearer than the patchwork of restrictions that previously covered parts of England, these Regulations could not be called 'simple.' Each set of Regulations contained complex restrictions and requirements for businesses. Exemptions for the restrictions on gatherings ran to four pages, with narrowly worded definitions of new legal categories such as 'outdoor sports gatherings', 'alternative wedding ceremonies', and 'support groups.' Human rights barrister, Adam Wagner, who has been providing analysis of the lockdown Regulations, rejected the idea that the tier system was simple or clear: "the idea that public and police will digest and understand these hugely complex rules is I think farcical (...) There are so many exceptions, they become almost impossible to know or enforce."⁵ Indeed, 66% of people said they didn't understand the tier system and 19% of people said they didn't even know what tier they were living in.⁶

Reviews of restrictions

The Secretary of State was required to review the need for "each of the Tier 1 [2 and 3] restrictions" every 28 days.⁷ He was also required to review whether each area should remain under Tier 2 restrictions every 14 days.⁸ There was no requirement to review whether each area should remain under Tier 3 restrictions. An area's entry to Tier 3 expired after 28 days, although there was nothing to prevent a Minister re-adding

⁴ HC Deb (13th October 2020) vol. 682, col. 198: <https://hansard.parliament.uk/commons/2020-10-13/debates/1081EDA2-9232-4C9E-9B01-4D5879390AAF/PublicHealthCoronavirusRegulations>

⁵ Adam Wagner, Twitter, 12th October 2020: <https://twitter.com/AdamWagner1/status/1315718147496972288?s=20>

⁶ Most British adults clueless when it comes to coronavirus restrictions, poll finds — Adrian Hearn, the Independent, 19th October 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-restrictions-lockdown-tiers-boris-johnson-covid-b1153523.html>

⁷ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 Regulation 8(1); The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020, Regulation 8(3), The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, Regulation 8(1)

⁸ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020, Regulation 8(1)

an area to Tier 3 by publishing an amendment to the Regulations.⁹ Tier 1 and 2 restrictions expired after 6 months.¹⁰

We have been calling on the Health Minister to publish required reviews for regional and national restrictions since April, along with MPs across all benches.¹¹ The enormous restrictions placed on our liberties cannot be waved through on the promise of reviews which neither the public nor parliament are given sight of. It is essential for Government transparency and public trust that these critical reviews are published.

RECOMMENDATION 2: The Secretary of State should issue written and oral statements in the House of Commons (or, during recess, online) following each review of the necessity of the Health Protection (Coronavirus, Restrictions) Regulations 2020 to foster transparency and to open subsequent measures to democratic scrutiny. The same process should take place by respective Ministers in devolved administrations.

As well as refusing to provide clarity on the effectiveness of restrictions, the Government also refused to provide clarity on when restrictions would end.

Leader of the Opposition, Sir Keir Starmer MP, questioned the Prime Minister on how an area would leave a higher tier. Mr Johnson only vaguely responded that it was “a decision based on a number of things.”¹² A group of 50 Conservative MPs from the North of England echoed this question, writing to the Prime Minister for clarity on the “roadmap” out of restrictions.¹³ Former Minister Jake Berry said:

“What I would like to see on a personal basis is that information provided in an easily digestible consumer-facing, public-friendly way that can show people a route out of these restrictions.”¹⁴

Without an understanding of how an area would move out of a certain tier, many felt overwhelmed at the prospect of endless restrictions. The Government has a duty to explain why restrictions are being put in place, how effective they are, and what the criteria is for them ending.

RECOMMENDATION 3: If the Government resumes a tiered system for restrictions it must publish a clear ‘roadmap’ that explains the criteria used for moving areas between tiers to ensure clarity and fairness.

⁹ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, Regulation 9(1)

¹⁰ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 Regulation 9(1); The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020, Regulation 9(1)

¹¹ See our May Emergency Powers and Civil Liberties Report, p 18: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/06/Emergency-Powers-and-Civil-Liberties-Report-May-2020-Final.pdf>

¹² HC Engagements (21st October 2020), vol. 682, col. 1053: <https://hansard.parliament.uk/commons/2020-10-21/debates/CEB6A2C5-8BBE-46C7-895F-415DAA86C0A3/Engagements>

¹³ Covid: More than 50 Tory MPs call for ‘road map’ out of lockdown — BBC News, 27th October 2020: <https://www.bbc.co.uk/news/uk-54699820>

¹⁴ Where’s lockdown exit plan, Boris? London echoes demand for clear strategy to leave Covid tiers - Joe Murphy, Ross Lydall and Nicholas Cecil, Evening Standard, 27th October 2020: <https://www.standard.co.uk/news/politics/boris-johnson-lockdown-exit-strategy-london-a4573108.html>

Medium tier ('Tier 1')

All of England was subject to the restrictions contained within The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 (the Tier 1 Regulations) by default, unless the area had been added to the Tier 2 or Tier 3 Regulations. The wording of this legislation marked a clear shift away from the short term, emergency response - 'medium alert' was the default. There was no 'low alert' area.

The Regulations restricted gatherings, closed certain businesses and placed restrictions on other businesses.

No one could participate in a gathering of more than 6 people unless the gathering fell under one of the exemptions.¹⁵ There were 26 exceptions to the restrictions on gatherings, many of which were complex, and many of the exemptions came with convoluted definitions.

Gatherings of over 6 were permitted if the gathering consisted of members from the same or linked household (a linked household must consist two households, one of which may comprise of one adult or one adult and an unlimited number of children under the age of 18),¹⁶ if the gathering was a "permitted organised gathering", if it was for work, education, childcare, to provide emergency assistance, to avoid injury, illness or to escape the risk of harm, to provide care or assistance to a vulnerable person, to arrange contact between parents and children or siblings, for a prospective adopter to meet a child, to fulfil a legal obligation, if the gathering took place in criminal justice accommodation, if the gathering was for a support group of no more than 15 people and did not take place at a private dwelling, if a person was attending a birth, if a gathering was for a marriage ceremony or wedding reception of no more than 15 people, if the gathering was for a funeral of no more than 30 people, if the gathering of up to 15 people was for an event commemorating a life (a wake) and did not take place in a private dwelling, or if the gathering was for a protest organised by a business, charitable institution, or a public or political body.¹⁷

There were also exceptions for elite athletes to compete and train, for "relevant outdoor activities", for outdoor sports activities organised by a business, charitable institution or public body for the "purposes of allowing persons who are not elite sportspersons to take part in any sport or other fitness related activity" or indoor sports activities organised by a business, charitable institution or public body for "the purposes of allowing persons who have a disability and who are not elite sportspersons."¹⁸

Despite no exceptions on the restrictions on gatherings for significant religious holidays such as Easter, Yom Kippur or Eid, which was effectively cancelled with just few hours' notice for those in the North of England, there was a specific exemption for gatherings that take place to commemorate Remembrance Sunday, provided a risk assessment was undertaken and reasonable measures were taken to prevent the spread of coronavirus.¹⁹

¹⁵ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Schedule 1, Part 1, para 4(2)

¹⁶ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Schedule 1, Part 1, para 1(1)

¹⁷ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Schedule 1, Part 1, para 3(2)-(13)

¹⁸ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Schedule 1, Part 1, para 7(6)

¹⁹ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Schedule 1, Part 1, para 3(17)

RECOMMENDATION 4: Exemptions to restrictions on gatherings must be consistent and fair — if the Government accepts that individuals are able to gather in a safe way for Remembrance Sunday, this must be applied equally across other significant religious and cultural events.

Under the tier systems, a permitted organised gathering had to take place at a premises operated by a business, a charitable institution or a public body, or, if on public outdoor land, it had to be organised by a business, a charitable institution, public body or a political body. A person could only attend this gathering if they did so as part of a “qualifying group”, which must consist of no more than 6 people, one household or two linked households. Whilst at the gathering, a qualifying group was not permitted to “mingle” with any other qualifying group — a term which has been previously criticised by legal experts for its ambiguity.²⁰

RECOMMENDATION 5: Restrictions on ‘mingling’ are excessive, unclear and risk criminalising normal, safe behaviour. They should not be used again.

A “relevant outdoor activity” was an outdoor physical activity, for which a licence or permit granted by a public authority must be held.²¹ This same exemption caused outrage in the previous set of Regulations, as many saw it as a deliberate exemption for hunts and shoots, especially given reports that a Cabinet meeting was scheduled (and cancelled) with the single agenda of ‘Exemption: hunting and shooting’ the day before the Regulations were published.²²

Nightclubs, dance halls, discos, and sexual entertainment venues remained closed²³, while the 10pm-5am curfew applied to restaurants, pubs, casinos, bowling alleys, cinemas, theatres, amusement arcades or other indoor leisure centres, funfairs, theme and adventure parks, bingo halls, and concert halls.²⁴ Venues which served food had to ensure that customers remained seated while consuming the food or drink and that orders are only taken at the table.²⁵ If the venue did not serve alcohol, orders did not have to be taken at the table but had to be consumed while seated.

These Regulations were evidently complex, with a myriad of exemptions and qualifications, as well as a number of drafting errors. Yet they carried hefty fines. An offence under these Regulations would result in a £200 fine, doubling after each offence to a maximum of £6,400.²⁶ Organising a gathering of more than 30 people in a private dwelling or outdoor public land, or an indoor rave of more than 30 people would

²⁰ See our August–September Emergency Powers and Civil Liberties Report (p 13): <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/10/Emergency-Powers-and-Civil-Liberties-Report-AUG-SEPT-2020.pdf>

²¹ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Schedule 1, Part 1, para 7(9)

²² Grouse hunts and shooting get special exemption from ‘rule of six’- Jordan King, Metro, 14th September 2020: <https://metro.co.uk/2020/09/14/grouse-hunts-and-shooting-get-special-exemption-from-rule-of-six-13269362>

²³ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Schedule 1, Part 2, para 10

²⁴ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Schedule 1, Part 3, para 12(1)

²⁵ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Schedule 1, Part 3, para 14

²⁶ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Schedule 1, para 1(1), Regulation 6(6)(a)

result in a £10,000 fine.²⁷ A venue owner could receive a £1,000 fine, increasing to £10,000 for repeat offences.²⁸

'Medium plus' tier

On 28th October, the Mayor of Bristol announced that the city would move into 'Tier 1 plus', which would mean "the introduction of eight COVID marshals, deeper analytic work to identify rising tides of cases and taking on further powers of our local test and trace service."²⁹ However, this new tier had no legal backing and was the invention of local authorities. A Department of Health spokesperson stressed that "there are three Local Covid Alert Levels which are enshrined in law and we are not considering the introduction of a 'plus' system."³⁰

The introduction of additional quasi-tiers only added to confusion around restrictions, both in Bristol and the rest of England.

High tier ('Tier 2')

The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020 (the Tier 2 Regulations) were broadly similar to the Tier 1 Regulations but placed additional limits on indoor gatherings.

Under Tier 2 restrictions no one could participate in an indoor gathering of more than two people, unless the gathering was covered by an exemption.³¹ The exemptions were the same as those for Tier 1 Regulations, with the additional exemption of visiting a person who is receiving treatment or care in a hospital or hospice.³² No one could participate in an outdoor gathering of more than six people, unless the gathering was covered by an exemption, which were also the same as those in the Tier 1 Regulations.³³

Businesses required to close remained the same as those in Tier 1 areas, as were restrictions on opening hours and table service requirements.

Scotland Yard drew criticism after writing to businesses as London was moved into Tier 2, encouraging them to ask customers for addresses and even identification to ensure that groups seated indoors were all from the same household.³⁴ Asking businesses to investigate their patrons was hugely intrusive and had no basis in law. It also placed an unfair burden on those working in hospitality, who were likely to face resistance from members of the public. Prior to the national lockdown, the Health Protection (Coronavirus,

²⁷ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Schedule 1, para 2, Regulation 6(9)

²⁸ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, Regulation 6(10)

²⁹ Bristol entering 'Tier 1 plus' of COVID-19 measures, says city's mayor — Greg Heffer, Sky News, 28th October 2020: <https://news.sky.com/story/coronavirus-bristol-entering-tier-1-plus-of-covid-19-measures-says-citys-mayor-12116969>

³⁰ Ibid.

³¹ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020, Schedule 1, Part 1, para 1

³² The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020, Schedule 1, Part 1, para 4(13)

³³ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020, Schedule 1, Part 1, para 2

³⁴ Now show us your papers! Scotland Yard urges pubs and restaurants snoop on customers by asking for photo IDs and addresses to stop customers breaking lockdown rules — Rebecca Camber, the Daily Mail, 20th October 2020: <https://www.dailymail.co.uk/news/article-8861089/Coronavirus-Scotland-Yard-tells-London-pubs-photo-IDs-stop-customers-breaking-Tier-2.html>

Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020 required premises to make sure that groups of no bigger than 6 were able to make reservations or receive service.³⁵ There has never been a legal obligation to ensure that the groups are from the same household. Mike Kill, chief executive of the Night Time Industries Association, said:

“We have sought legal advice regarding the communication from the Metropolitan Police. We feel it's potentially unlawful and misleading advice. Suddenly demanding photo ID and proof of address could decimate businesses. If people turn up and their addresses or names don't match because people aren't married or older children have moved back home do they turn them away?”³⁶

After widespread public criticism, the Metropolitan Police withdrew the advice, saying “the advice, although well-intentioned, does not reflect our policy.”³⁷

Very High tier ('Tier 3')

Under the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020 (the Tier 3 Regulations), gatherings of two or more people were prohibited, both indoors and outdoors, unless an exemption applied.³⁸ Unlike Tier 1 and 2, wedding receptions were no longer an exemption. Gatherings of up to 6 were permitted on public outdoor land where “no payment is required by any member of the public to access that place” or on outdoor sports grounds, at botanical gardens or the gardens or grounds of stately homes or castles.³⁹

The Regulations also required the closure of certain businesses. Nightclubs, dance halls, discos, sexual entertainment venues, as in Tiers 1 and 2, were required to close.⁴⁰ Hospitality venues were not permitted to open unless they served alcohol only with a “table meal, and the meal is such as might be expected to be served as the main midday or evening meal, or as the main course at either such meal.”⁴¹ This led to confusion for business owners — different areas or groups will naturally conceive of a main meal or main course differently. It also inevitably led to arbitrary distinctions: Robert Jenrick, Housing Minister, told LBC that a pasty by itself was not a substantial meal, but if it was served with a salad then it was.⁴² This did not stop police officers in Liverpool visiting pubs to check that main meals were being eaten alongside drinks, with one bar manager sharing a video where “6 police officers (...) swoop in to check people are having a pie with their pint. More police in there than customers.”⁴³

One of the benefits of the tier system should have been that all areas under the same tier would face the same restrictions, meaning more clarity and a sense of fairness between different areas. However, this

³⁵ The Health Protection (Coronavirus, Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020, Regulation 2(1)

³⁶ Ibid.

³⁷ Police U turn: Scotland Yard withdraws guidance to pubs over asking for ID — EJ Wards, LBC, 22nd October 2020: <https://www.lbc.co.uk/radio/presenters/nick-ferrari/pubs-police-photo-id-robert-jenrick/>

³⁸ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, Schedule 1, Part 1, para 1(1)

³⁹ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, Schedule 1, Part 1, para 2(4)

⁴⁰ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, Schedule 1, Part 1, para 17(1)

⁴¹ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, Schedule 1, Part 2, para 16(2)

⁴² Coronavirus restrictions: Is a pasty enough to keep a pub open? — BBC News, 13th October 2020: <https://www.bbc.co.uk/news/newsbeat-54523232>

⁴³ Twitter, 20th October 2020: https://twitter.com/_Gillespie_/status/1318632894022156289

was almost immediately undermined by variations in which businesses were required to close in different Tier 3 areas.

In Liverpool, betting shops and adult gaming centres, casinos, indoor gyms, fitness and dance studios, and indoor sports facilities were required to close. In Lancashire, however, indoor gyms and fitness facilities were allowed to remain open, while car boot sales and soft play areas were required to close. An amendment to the Regulations saw soft play areas required to close in Liverpool too, several days later. In Greater Manchester and South Yorkshire, which were moved to Tier 3 on 23rd October, betting shops and adult gaming centres, casinos, bingo halls, and soft play areas were required to close, but not indoor gyms and fitness facilities. In Nottinghamshire however, Tier 3 restrictions were far more extensive and required betting shops and adult gaming centres, casinos, bingo halls, car boot sales, auction houses, theme parks, circuses, funfairs, fairgrounds, spas and beauty salons, nail bars, tanning salons, tattoo and piercing parlours, saunas, conference centres and exhibition halls, museums and galleries, visitor attractions, amusement arcades, bowling alleys, play centres, soft play areas, skating rinks, indoor games, recreation and entertainment venues (such as laser quests and escape rooms) and hookah bars to close.⁴⁴ Off licences were also prohibited from selling alcohol between 9pm and 5am.⁴⁵

The decision to move areas into higher tiers resulted in serious disputes between local leaders and central Government, partially due to low engagement and poor communication. In Greater Manchester, Mayor Andy Burnham spoke publicly of his anger that the region's move to Tier 3 had been announced in the media, rather than communicated directly to local leaders,⁴⁶ with Conservative MP William Wragg agreeing in the Commons.⁴⁷ After a call with local MPs and Government ministers, Andy Burnham publicly stated that local leaders "unanimously reject" the proposed move to Tier 3, due to insufficient financial support for the region.⁴⁸ After a series of failed negotiations, the Prime Minister stated that Greater Manchester would be moved to the highest tier of restrictions against the wishes of local leaders.

A legal challenge to the commencement of Tier 3 Regulations in Greater Manchester has been brought by Sacha Lord, the night-time economy adviser for Greater Manchester. Mr Lord said the local authorities had been shown "no tangible scientific evidence" for the restrictions on the hospitality industry.⁴⁹ This followed another legal challenge launched on 5th October by Jeremy Josephs, owner of G-A-Y nightclub in London, against the curfew, arguing that it made "no sense." He said the Government had "failed to show why the 10pm curfew was put in place and has published no scientific evidence to substantiate its implementation."⁵⁰

RECOMMENDATION 6: Restrictions on businesses under each COVID-19 Alert Level must be harmonised in each of the regions they apply to, to avoid confusion and ensure fairness across the country.

⁴⁴ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High and Very High) (England) (Amendment) (No. 3) Regulations 2020, Regulation 4(5)(b)

⁴⁵ The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High and Very High) (England) (Amendment) (No. 3) Regulations 2020, Regulation 4(5)(b)

⁴⁶ Andy Burnham, Twitter 14th October 2020: <https://twitter.com/AndyBurnhamGM/status/1316459803666010118?s=20>

⁴⁷ HC Deb (15th October 2020), vol. 682, col. 561: <https://hansard.parliament.uk/Commons/2020-10-15/debates/65300455-4BF7-4E15-9EBA-5DFA1C639D20/Covid-19Update#contribution-FC2574A8-6FA6-470B-B0A5-92E607A9D87F>

⁴⁸ Andy Burnham says Greater Manchester 'unanimously rejects flawed Tier 3 restrictions' - Chiara Fiorillo, the Mirror, 15th October 2020: <https://www.mirror.co.uk/news/politics/andy-burnham-says-greater-manchester-22852241>

⁴⁹ Night-time industry launches legal challenge over local lockdown — Express & Star, 12 October 2020: <https://www.expressandstar.com/news/business/2020/10/12/night-time-industry-launches-legal-challenge-over-local-lockdown/>

⁵⁰ G-A-Y nightclub owner launches legal action against government over 10pm curfew — Ben Chapman, the Independent, 5th October 2020: <https://www.independent.co.uk/news/business/gay-nightclub-legal-action-judicial-review-10pm-curfew-b808943.html>

Role of Parliament

Throughout the pandemic, the sovereignty of Parliament has been undermined, with Ministers using the urgent procedure to make legislation that enacts huge changes to our lives with little scrutiny.

The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020, which introduced the 'rule of six' were debated on 6th October, although they were laid and came into force on 14th September. Once again, this is a considerable delay to parliamentary scrutiny. The main effect of these Regulations, which we analysed in our previous report, is to reduce the maximum size of gatherings from 30 to 6 albeit with a significant number of exemptions, the most welcome exemption being for protests. We briefed all MPs on these Regulations prior to the debate, calling for exemptions for children to the rule of six and for protests to be exempt from restrictions on gatherings.

The Minister introducing the Regulations, Helen Whately MP, did not appear to have a complete understanding of the Regulations. Referring to them as "social distancing regulations", she was unable to answer questions from her own benches, such as whether police have powers of entry under the Regulations, or at what point an assessment would be made as to the impact of the limitations on socialising.⁵¹

Many Conservative backbenchers asked for the rationale in including children in the rule of six, when in both Wales and Scotland children were exempt. Sir Desmond Swayne MP asked "is it any less simple that the six should exclude children than that it should include them, or do we imagine that our constituents are stupid?"⁵² Steve Brine MP asked for the logic behind including children who were considered too young to wear masks in the rule of six.⁵³ Steve Baker MP asked the Government to introduce new legislation that would amend the Regulations to exempt children.⁵⁴ Liberal Democrat Health spokesperson Munira Wilson highlighted the mental health implications for large families who would not be able to meet other people.⁵⁵ Former Conservative Chief Whip, Mark Harper MP, asked for evidence that the limitations on gatherings were making any difference to the spread of coronavirus, given that they had been in force for three weeks and numbers of cases continued to rise.⁵⁶

Justin Madders, shadow Health Minister, said that while the rule of six appeared simple on the surface, the rules were in fact highly complex:

"It is a simple, easily understood message, although anyone who has read the 10 pages of regulations, the plethora of exceptions and the many laws that they amend will realise that the simple message has not survived the process of drafting the regulations."⁵⁷

⁵¹ HC Deb (6th October 2020), vol. 681, col. 846: <https://hansard.parliament.uk/commons/2020-10-06/debates/B97F9EF6-950B-4012-9568-6CAEAEC5E3FA/PublicHealth>

⁵² HC Deb (6th October 2020), vol. 681, col. 851: <https://hansard.parliament.uk/commons/2020-10-06/debates/B97F9EF6-950B-4012-9568-6CAEAEC5E3FA/PublicHealth>

⁵³ HC Deb (6th October 2020), vol. 681, col. 847: <https://hansard.parliament.uk/commons/2020-10-06/debates/B97F9EF6-950B-4012-9568-6CAEAEC5E3FA/PublicHealth>

⁵⁴ HC Deb (6th October 2020), vol. 681, col. 854: <https://hansard.parliament.uk/commons/2020-10-06/debates/B97F9EF6-950B-4012-9568-6CAEAEC5E3FA/PublicHealth>

⁵⁵ HC Deb (6th October 2020), vol. 681, col. 861: <https://hansard.parliament.uk/commons/2020-10-06/debates/B97F9EF6-950B-4012-9568-6CAEAEC5E3FA/PublicHealth>

⁵⁶ HC Deb (6th October 2020), vol. 681, col. 857: <https://hansard.parliament.uk/commons/2020-10-06/debates/B97F9EF6-950B-4012-9568-6CAEAEC5E3FA/PublicHealth>

⁵⁷ HC Deb (6th October 2020), vol. 681, col. 851: <https://hansard.parliament.uk/commons/2020-10-06/debates/B97F9EF6-950B-4012-9568-6CAEAEC5E3FA/PublicHealth>

(...)

“When we debated the first lockdown regulations, I stated that as regulations changed, it was vital that the rules remain clear and consistent. That consistency not only carries across advice but carries across laws and all forms of official communication. It is very clear that that has not happened in this case.”⁵⁸

The Labour Shadow Minister also identified many other serious issues with the Regulations, such as the prohibition on mingling, whether or not the Regulations could be enforced, and the logic of the rule of six covering children. Sir Christopher Chope, Conservative MP and critic of the Government’s approach, replied:

“The logic of what (Justin Madders) has just been saying is that the Opposition should be opposing the regulations and calling upon the Government to come back with a fresh set of regulations that overcome the shortcomings he has so articulately identified. I, for my part, certainly hope we will have an opportunity to test the will of the House on the regulations, because this is the first freedom we have been given on such regulations for months. I hope we can then get the Government to go back to the drawing board and come forward with regulations that are consistent with their other policies elsewhere in the country.”⁵⁹

Health Minister Helen Whately drew the ire of her colleagues when she accused detractors of the Regulations of taking the position of “just allowing the virus to let rip” across the country.⁶⁰ Both Steve Baker and Mark Harper responded that this was a mischaracterisation of their position, and that they sought to improve the Government’s strategy. However, as statutory instruments cannot be amended, the Regulations passed without alteration. 12 Conservative MPs and 5 DUP MPs voted against the Regulations.⁶¹

After a pledge from the Health Secretary that all “significant national measures” would be debated before being passed, the tier Regulations were the first set of national measures to face prior Parliamentary scrutiny before they were introduced.

After floating the proposals in the press for several weeks, the new approach was finally confirmed by the Prime Minister on 12th October.⁶² But despite the fact that these new Regulations had clearly been in the works for some time, the new laws were rushed through Parliament, with MPs given only a few hours to debate the new restrictions. In fact, along with the three sets of ‘Medium’, ‘High’ and ‘Very High’ tier regulations, four other sets of Regulations were crammed into just one debate which lasted only 3 and a half hours. MPs were given only 3 minutes each to speak, with the Deputy Speaker stating: “this is not an occasion for long-thought-out speeches on matters of principle, but on matters to do with individual constituencies.”⁶³

⁵⁸ HC Deb (6th October 2020), vol. 681, col. 855: <https://hansard.parliament.uk/commons/2020-10-06/debates/B97F9EF6-950B-4012-9568-6CAEAEC5E3FA/PublicHealth>

⁵⁹ HC Deb (6th October 2020), vol. 681, col. 857: <https://hansard.parliament.uk/commons/2020-10-06/debates/B97F9EF6-950B-4012-9568-6CAEAEC5E3FA/PublicHealth>

⁶⁰ HC Deb (6th October 2020), vol. 681, col. 869: <https://hansard.parliament.uk/commons/2020-10-06/debates/B97F9EF6-950B-4012-9568-6CAEAEC5E3FA/PublicHealth>

⁶¹ Division 127 (6th October 2020): <https://hansard.parliament.uk/Commons/2020-10-06/division/3A07DE94-7849-4FF1-B339-F742AEFE9CE3/PublicHealth?outputType=Party>

⁶² Prime Minister announces new local COVID Alert Levels — GOV.UK, 12th October 2020: <https://www.gov.uk/government/news/prime-minister-announces-new-local-covid-alert-levels>

⁶³ HC Deb (13th October 2020) vol. 682, col. 200: <https://hansard.parliament.uk/commons/2020-10-13/debates/1081EDA2-9232-4C9E-9B01-4D5879390AAF/PublicHealthCoronavirusRegulations>

This is not meaningful scrutiny. These Regulations have a vast impact on the lives and liberties of everyone in England. The debate covered the introduction of the 10pm curfew for hospitality venues, the complex self-isolation requirements, the prohibition of singing and dancing in pubs and restaurants, contact tracing requirements for businesses, as well as the tier Regulations, which give Ministers the power to close businesses, limit gatherings and social contact and impose curfews on the hospitality sector. Such laws should not be rushed through in a matter of hours, with no chance for MPs to raise “matters of principle”.

MPs across the benches expressed concern about the consistently changing Regulations, and the impact that would have on compliance. Derek Twigg, Labour MP, said:

“These statutory instruments come on top of as many as four previous announcements between 14 September and 3 October on additional national or local restrictions. The last was a few days ago on 3 October. There lies part of the problem: we have another raft of rules in these SIs today yet the public are bewildered and confused about the previous changes. That has resulted in many people not listening anymore. They just want to use their common sense and get on with their lives. They want more clarity.”⁶⁴

Tom Tugendhat, Conservative MP, made a similar argument:

“What we are looking for is the consistency to know that, over the next two, three, or perhaps five years, we will have to live with this virus and perhaps without a fully effective vaccine. We need a system that people can rely on, can know what they are doing and can be able to plan their lives, because, at the moment, it is off the bus, on the bus, off the bus, on the bus.”⁶⁵

Conservative back bencher John Redwood MP said warned that without public “buy in”, the complex new laws would be unenforceable:

“There is no perfect set of rules or laws that can be enforced. We do not have enough police and that would require a mighty explanation task, so the more they can do by means of persuasion, the better. Sharing with the public the dangers and showing them how hand washing, distancing and not mingling in enclosed spaces are going to work are the way forward.”

“I am apprehensive about how much of this is enforceable.”⁶⁶

Sir Graham Brady, chair of the 1922 Committee, reaffirmed his argument that “it is wrong to use public health legislation designed to control infected people to direct the lives of an entire population,” speaking to concerns that the Health Protection Regulations are ultra vires of the Public Health (Control of Disease) Act 1984.⁶⁷ We share these concerns.

24 Conservative MPs, 23 Labour MPs, 1 Green MP, 10 Liberal Democrat MPs and 6 DUP MPs voted against the introduction of the tier system.⁶⁸

⁶⁴ HC Deb (13th October 2020) vol. 682, col. 208: <https://hansard.parliament.uk/commons/2020-10-13/debates/1081EDA2-9232-4C9E-9B01-4D5879390AAF/PublicHealthCoronavirusRegulations>

⁶⁵ HC Deb (13th October 2020) vol. 682, col. 242: <https://hansard.parliament.uk/commons/2020-10-13/debates/1081EDA2-9232-4C9E-9B01-4D5879390AAF/PublicHealthCoronavirusRegulations>

⁶⁶ HC Deb (13th October 2020) vol. 682, col. 210: <https://hansard.parliament.uk/commons/2020-10-13/debates/1081EDA2-9232-4C9E-9B01-4D5879390AAF/PublicHealthCoronavirusRegulations>

⁶⁷ See our April Emergency Powers and Civil Liberties Report (p 57): <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>

⁶⁸ HC Division 132 (13th October 2020): <https://hansard.parliament.uk/Commons/2020-10-13/division/575DA5CF-C615-4AF9-89C7-64897E92C59D/PublicHealthCoronavirusRegulations?outputType=Party>

Accessible law

The Government has drawn criticism from MPs, legal experts, police chiefs and behavioural scientists for its reliance on complex and rapidly changing legislation to respond to the public health crisis. Key principles of the rule of law are accessibility and foreseeability — if it becomes impossible for people to know and understand the rules governing their lives, they should not face criminal sanctions. 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.

One study found that:

- 1 in 5 adults did not know what tier their area was in
- Only 12% knew the correct amount of time a person is required to self-isolate if they receive a positive coronavirus test result
- 53% said they did not know whether they were allowed to visit other UK countries
- 20% said they did not know whether they were currently allowed to visit their local pub⁶⁹

These results make it clear that there has been serious and widespread confusion about the restrictions people are required to live under. Policing Minister, Kit Malthouse, said England's tier system involved some "complexity" but claimed it was the responsibility of people to research new laws:

"There's plenty of information out there on the internet where people can go and inform themselves about what the regulations are in their area and that fundamentally is what we would recommend everybody has to do."⁷⁰

For some regions in England, the tiered approach was the latest in a long line of complicated changes. Yvette Cooper MP, Chair of the Home Affairs Committee, asked Chief Constable Andy Rhodes of Lancashire Constabulary how many changes of Regulations the area had seen:

"I tried to look up how many changes. It looked like it changed on 1 August. You had some local lockdowns. Then on 8 August in Preston, on 26 August there were some other variations—some areas strengthening, some areas easing. On 2 September, the same thing happened again—some areas in further lockdowns, others eased. The same again on 22 September, with further local lockdown measures, then on 26 September all of Lancashire went under local lockdown restrictions, then there was tier 2 on 14 October, and then tier 3 on 21 October. If you were a neighbourhood police officer in the middle of Burnley, for example, how would you keep track of any of that and know how to respond if someone asks you what they are allowed to do or not?"⁷¹

When she then asked the head of the National Police Chief's Council's coronavirus response whether separate households were able to meet indoors, Assistant Chief Constable Weatherill admitted that he did

⁶⁹ Most British adults clueless when it comes to coronavirus restrictions, poll finds — Adrian Hearn, the Independent, 19th October 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-restrictions-lockdown-tiers-boris-johnson-covid-b1153523.html>

⁷⁰ Covid rules: Stoke, Coventry and Slough face tighter restrictions in tier 2 — BBC News, 22nd October 2020: <https://www.bbc.co.uk/news/uk-54643672>

⁷¹ Oral evidence: Home Office preparedness for Covid-19 (Coronavirus), HC 232, Home Affairs Committee, 21st October 2020, Q 782: <https://committees.parliament.uk/oralevidence/1097/pdf/>

not know the answer. Another senior police officer attempted to answer the question, but gave an incorrect answer, stating that households were only prohibited from meeting indoors in Tier 3 areas.⁷²

It is telling that even senior police officers, tasked with handling the police response to the pandemic are unable to answer a straightforward question about the nature of the Regulations. Andrew Gwynne MP summarised that “there is a lot of complexity and misunderstanding, not just with the public but also perhaps with the law enforcers.”⁷³ Adam Wagner, a human rights barrister who publishes explainers on the lockdown Regulations said,

“This really is ridiculous. Is there anyone out there who knows what the rules are? It's impossible - each Tier is around 12,000 words of text, a mixture of micro-management of everyday lives and unresolvable ambiguity. No wonder the police are giving up”⁷⁴

The tier system is evidently far from simple.

The tier system is evidently far from 'super-simple.' It cannot be fair that members of the public risk life-changing fines for not understanding the law, when even MPs and police chiefs are not able to do the same.

RECOMMENDATION 7: 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

The complexity of legislation has directly impacted enforcement. Assistant Chief Constable Owen Weatherill head of the National Police Chiefs' Council's coronavirus response (Operation Talla) told the Home Affairs Committee:

“The complexity of the regulations and enabling officers to do their job effectively is a real issue for us. With every evolution, that needs to be reset, revised and new guidance issued. We find we are frequently doing that in a very time-sensitive environment, and on numerous occasions we have struggled to get that guidance out to officers on time when those new regulations take effect.”⁷⁵

Chief Constable Pam Kelly of Gwent Police noted that the continued last-minute publication of Regulations had led to a lack of clarity for police officers as well as the public: “the regulations have been

⁷² Oral evidence: Home Office preparedness for Covid-19 (Coronavirus), HC 232, Home Affairs Committee, 21st October 2020, Q 784-6: <https://committees.parliament.uk/oralevidence/1097/pdf/>

⁷³ Oral evidence: Home Office preparedness for Covid-19 (Coronavirus), HC 232, Home Affairs Committee, 21st October 2020, Q 792: <https://committees.parliament.uk/oralevidence/1097/pdf/>

⁷⁴ Adam Wagner, Twitter, 21st October 2020: <https://twitter.com/AdamWagner1/status/1319047441849659393?s=20>

⁷⁵ Oral evidence: Home Office preparedness for Covid-19 (Coronavirus), HC 232, Home Affairs Committee, 21st October 2020, Q 774 :<https://committees.parliament.uk/oralevidence/1097/pdf/>

late landing and that has caused us problems in terms of getting messages out to our communities and, of course, the officers who apply those regulations.”⁷⁶

The Director of Knowledge and Innovation of the College of Policing What Works Centre for Crime Reduction, Rachel Tuffin, acknowledged that there had been problems with the enforcement of lockdown regulations:

“Without the time to reach consensus on content, and with very different contexts across counties and countries, there were instances where some felt we went too far, and others felt we had not gone not far enough. There were ambiguities and errors in how the legislation was interpreted which couldn’t be avoided.”⁷⁷

Poor communication, last-minute publication and complicated restrictions means it has been difficult for people to understand exactly what rules have been in force in their area and in other areas. However, the Government has continued its emphasis on ‘rule-breakers’ to explain the spread of coronavirus, with promises to continue to increase enforcement powers. Rhetoric has pivoted from encouraging a collective, community response, as was seen in March, to singling out “complacent and blasé” rule-breakers.⁷⁸

This push has inevitably led to arbitrary and excessive enforcement.

The Metropolitan Police fined the owner of a burger shop after he served a customer food at 22:04.⁷⁹ Police officers checked the customer’s receipt, which showed that the restaurant took the order at 22:00, but noted that the customer did not receive the food until 4 minutes later, resulting in a £1,000 Fixed Penalty Notice. Human rights barrister Kirsty Brimelow QC said on Twitter that this kind of “draconian action by police batters any remaining trust” and that the Regulations “are not to be used as a revenue collecting exercise.”⁸⁰

In North Yorkshire, police have received funding for ‘Covid cars’ which will “react to calls regarding non-compliance with public health rules.”⁸¹ In South Yorkshire, a dedicated Covid response unit has been formed which will focus on enforcement of the Regulations. Assistant Chief Constable David Hartley said “we started by focusing our efforts on engagement and education to allow people time to become aware of and understand the rules. This period has now passed.”⁸²

In Great Yarmouth, a vulnerable man was prosecuted for an offence committed in spring under the Health Protection Regulations, after he told police he was going to visit friends.⁸³ Allan Scott, who had been confined to a single room in a bed & breakfast and was in a “fragile mental state” after the death of family members, said he “needed social contact (...) for [his] mental health and wellbeing” and that he believed

⁷⁶ Oral evidence: Home Office preparedness for Covid-19 (Coronavirus), HC 232, Home Affairs Committee, 21st October 2020, Q 786 :<https://committees.parliament.uk/oralevidence/1097/pdf/>

⁷⁷ Taking the risk of getting it wrong in a pandemic — Rachel Tuffin, Campaign for Social Science, 8th October 2020: <https://campaignforsocialscience.org.uk/news/taking-the-risk-of-getting-it-wrong-in-a-pandemic/>

⁷⁸ Covid-19: Boris Johnson says everyone got ‘complacent’ over virus — BBC News, 2nd October 2020: <https://www.bbc.co.uk/news/uk-54392187#>

⁷⁹ Takeaway fined £1,000 for serving food 4 minutes after 10pm curfew — Ewan Somerville, LBC, 3rd October 2020: <https://www.lbc.co.uk/news/uk/police-fine-takeaway-1-000-curfew-ilford-redbridge-10pm-boris-johnson/>

⁸⁰ Kirsty Brimelow, Twitter, 3rd October 2020: https://twitter.com/Kirsty_Brimelow/status/1312405202935451648?s=20

⁸¹ Police to launch ‘Covid cars’ to respond to tip-offs about rule breakers — The Press, 19th October 2020: <https://www.yorkpress.co.uk/news/18804342.police-launch-covid-cars-respond-tip-offs-rule-breakers/>

⁸² A dedicated response to Covid incidents in South Yorkshire — South Yorkshire Police, 19th October 2020: <https://www.southyorkshire.police.uk/find-out/news-and-appeals/2020/october-2020/a-dedicated-response-to-covid-incidents-in-south-yorkshire/>

⁸³ Man who ‘needed social contact’ found guilty of breaching coronavirus rules — Sarah Burgess, Great Yarmouth Mercury, 3rd October 2020: <https://www.greatyarmouthmercury.co.uk/news/great-yarmouth-man-charged-with-breaking-coronavirus-rules-1-6867365>

“that was a reasonable excuse.” The public interest in pursuing this case seems scant. The magistrate who convicted him also showed that she had not understood the law correctly, noting that “We were all in the same boat - we had one hour out of the house per day and that was it.” The magistrate appeared to be referencing a comment made by the Cabinet Secretary Michael Gove MP, that individuals were only allowed one hour of exercise each day during the initial national lockdown.⁸⁴ Mr Gove’s comment had no basis in law and it is extremely concerning that a magistrate would refer to this while convicting an individual.

The vast £10,000 FPNs, which can be awarded to those who organise a gathering of more than 30 people, have been extensively levelled at teenagers and students holding house parties. Three students at the University of East Anglia were fined £10,000 each for hosting a house party that was attended by 100 people.⁸⁵ Four students in Nottingham were also fined £10,000 each for hosting around 30 people in their home. The students were also suspended from Nottingham Trent University and could face expulsion.⁸⁶ A student in Portsmouth was reported for summons by Hampshire Constabulary after holding a party in his student residence.⁸⁷ Teenagers in Canterbury have also received £10,000 fines for holding house parties of more than 30 people.⁸⁸ These punitive fines are impossible to pay for most people, particularly students, and could have a life-changing impact. They are a clear embodiment of the Government’s erroneous belief that compliance with complex, ever-changing and harsh rules can be achieved by the threat of extreme punishment.

Liberty Investigates found that police use of force has vastly increased since March. There were 163,749 recorded instances of use of force from April to June compared to 145,543 from January to March.⁸⁹ This represents an increase of 18,206, or 12.5%, despite the lockdown and that crime rates reduced by 19%. The largest increase in use of force was recorded by West Yorkshire Police, where incidents increased by 49%. Humberside and Wiltshire Police recorded increases of 32% and 33% respectively. These increases are extremely concerning. During a period of when much of the public is under significant pressure and stress, police officers should be especially aware that they are required to police by consent, not by force.

Unlawful lockdown prosecutions

The latest review conducted by the Crown Prosecution Service found another 15 unlawful lockdown prosecutions, out of 122 new charges under the Health Protection Regulations. This is a total of 78 unlawful prosecutions, or an average of 10% of all charges under the Regulations.

Lockdown fines

⁸⁴ Keep walks to an hour during virus lockdown, says Michael Gove — Robert Mendick, the Times, 29th March 2020: <https://www.telegraph.co.uk/news/2020/03/29/keep-walks-hour-virus-lockdown-warns-michael-gove/>

⁸⁵ Three UEA students fined £10,000 for organising house party for 100 people — Ruth Lawes, Eastern Daily Press, 14th October 2020: <https://www.edp24.co.uk/news/crime/uea-students-fined-after-throwing-party-at-norwich-home-1-6879803>

⁸⁶ Four STUDENTS are fined £10,000 EACH and suspended from Nottingham Trent University after hosting lockdown-breaching house party with 30 revellers — Jack Elsom, Mail Online, 21st October 2020: <https://www.dailymail.co.uk/news/article-8865133/Four-STUDENTS-fined-10-000-hosting-lockdown-breaching-house-party.html>

⁸⁷ Police report 19-year-old for summons following student house party in Portsmouth — Hampshire Constabulary, 27th October 2020: <https://www.hampshire.police.uk/news/hampshire/news/appeals/2020/october/police-report-19-year-old-for-summons-following-student-house-party-in-portsmouth/>

⁸⁸ Teenagers who hosted Canterbury house party hit with county's first £10,000 fines - Joe Wright, Kent Online, 29th October 2020: <https://www.kentonline.co.uk/canterbury/news/10k-fines-for-teens-who-held-house-party-236455/>

⁸⁹ Revealed: Surge in police use of force during height of lockdown — Liberty Investigates, 29th October 2020: <https://libertyinvestigates.org.uk/articles/revealed-surge-in-police-use-of-force-during-height-of-lockdown/>

A total of 20,223 FPNs have been recorded as having been issued in England and Wales under Coronavirus Regulations between 27th March 2020 and 19th October 2020.⁹⁰ This is an increase of 1,103 FPNs since the end of September, the sharpest rise in FPNs for several months. This total does not include fines issued under International Travel Quarantine, Self-Isolation, Alert Level or Face Covering Regulations, meaning that the total number of FPNs is likely to be much higher. The NPCC noted: "it is evident that there has been an increase in enforcement activity, with 318 FPNs issued in the last full week (9th and 15th October), and 518 issued in the week prior (2nd to 8th October)."⁹¹

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 1,735 FPNs, or 335 FPNs issued per 100,000 people.⁹² This is over twice the rate of fining as the next highest police force, Cumbria, which has issued 148 FPNs per 100,000 people and 84 times the rate of the lowest police force, Staffordshire which has issued less than 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 1,138 and covers a population of nearly 9 million people.

There has also been significant disparity in the enforcement of local lockdown Regulations. Greater Manchester issued 374 FPNs under local Regulations, whereas Merseyside issued 86 FPNs.⁹³ Greater Manchester issued more FPNs under local restrictions than were issued during the initial lockdown period (316). Leicestershire and Lancashire issued only 39 and 54 FPNs respectively, despite significant proportions of their policing areas being under local restrictions. In our previous report, we noted that 50% of FPNs issued during the initial lockdown period were unpaid. 35% of FPNs issued in local lockdowns also remain unpaid, leading to the prospect of a prosecutions crisis.⁹⁴

64 FPNs have been issued across England in relation to gatherings of more than 30 people, which include fines for protests.⁹⁵ It is striking, however, that a much larger portion of fines relating to gatherings have been issued to those breaking the 'rule of six' — 399 FPNs. Significant numbers of people are facing large fines for holding small gatherings.

258 FPNs were issued between 15th June and 19th October for breaches of the Face Coverings Regulations across England and Wales.⁹⁶ 86 of these were issued relating to public transport and 172 relating to relevant indoor places. 125 FPNs were issued relating to the International Travel Regulations. The NPCC reports that police officers carried out 4,518 'investigations' into whether a person required to self-isolate under the travel Regulations was doing so and found that no further action was required.

The NPCC did not publish figures on enforcement or fines relating to the Self-Isolation Regulations, "due to the Memorandum of Understanding between the NPCC (on behalf of all territorial forces) and DHSC only being recently implemented."⁹⁷ It is not clear why this arrangement prevents figures from being published.

⁹⁰ Crime is lower than a year ago, and more fines given to the public under Coronavirus regulations — National Police Chief's Council, 28th October 2020: <https://news.npcc.police.uk/releases/crime-is-lower-than-a-year-ago-and-more-fines-given-to-the-public-under-coronavirus-regulations>

⁹¹ Fixed penalty notices issued under COVID-19 emergency health regulations by police forces in England and Wales — National Police Chief's Council, 28th October 2020: <https://cdn.prgloo.com/media/50f6bfc817a54825828b6e6f2df59616.pdf>

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Oral evidence: Home Office preparedness for Covid-19 (Coronavirus), HC 232, Home Affairs Committee, 21st October 2020, Q 774: <https://committees.parliament.uk/oralevidence/1097/pdf/>

⁹⁵ Crime is lower than a year ago, and more fines given to the public under Coronavirus regulations — National Police Chief's Council, 28th October 2020: <https://news.npcc.police.uk/releases/crime-is-lower-than-a-year-ago-and-more-fines-given-to-the-public-under-coronavirus-regulations>

⁹⁶ Ibid.

⁹⁷ Ibid.

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 20,223 FPNs recorded in England and Wales were unlawfully issued, this would account for over 2,000 unlawfully issued FPNs. This represents serious injustice during the pandemic that must be investigated and remedied.

RECOMMENDATION 8: Research has shown significant disparity in the issuing of Fixed Penalty Notices across ethnicities and areas which must be remedied. As the number of FPNs issued begins to rise again, it is critical that procedures for reviews of FPNs issued under the Health Protection Regulations are put in place across England and Wales.

National divergence

October saw the most significant divergence in how the four nations are attempting to manage the coronavirus pandemic. Each of the devolved nations has implemented entirely new and vastly different sets of legislation to tackle rising case numbers. While England and Scotland continued to take a localised approach, Wales and Northern Ireland opted for different types of 'circuit breaker' lockdowns, which saw the entire nations placed back into lockdowns similar to those initiated in March.

These variations have been particularly challenging for those living and working between countries. Assistant Chief Constable Owen Weatherill, head of the National Police Chiefs' Council's coronavirus response (Operation Talla), told the Home Affairs Committee:

"The largest challenge for us at a national level is that differentiated piece across the country and enabling our staff across the country to understand what that means, because it is not just about the regulations in their own area.(...) The best example of that in the current context (...) is the difference now between Wales and England, and the ability to travel across borders or not (...) The complexity of the regulations and enabling officers to do their job effectively is a real issue for us."⁹⁸

We concur with the Institute for Government's report into divergence across the four nations, which concluded:

"The lack of a clear UK-wide message could make it harder for people to understand and therefore comply with the rules in each part of the UK. Differences in restrictions between each part of the UK, without a clear explanation, could also mean the public are less likely to accept their necessity, and therefore less likely to adhere to them."⁹⁹

⁹⁸ Oral evidence: Home Office preparedness for Covid-19 (Coronavirus), HC 232, Home Affairs Committee, 21st October 2020, Q 794: <https://committees.parliament.uk/oralevidence/1097/pdf/>

⁹⁹ Devolution and coronavirus — Institute for Government, October 2020: <https://www.instituteforgovernment.org.uk/sites/default/files/publications/coordination-divergence-devolution-coronavirus.pdf>

Wales

Like England, Wales began October with a system of local restrictions, which as well as introducing curfews and restrictions on gatherings, prevented people from leaving or entering 'protected areas.' At the beginning of the month, approximately two thirds of Wales was under a form of local lockdown, with Wrexham, Denbighshire, Flintshire and Conwy being added on 1st October.¹⁰⁰ James Davies, Welsh Conservative MP, said the prohibition on crossing "often meaningless county council boundaries" had caused "huge disruption" to people's lives.¹⁰¹

Further to restrictions on those in protected areas of Wales leaving those areas, Regulations were also introduced to prevent travellers from Northern Ireland, Tier 2 and 3 areas of England and central Scotland from entering Wales, as well as those in Wales travelling to those areas, absent of a 'reasonable excuse'.¹⁰² The head of the Police Federation in Wales said the ban was "unenforceable," but First Minister Mark Drakeford said that if visitors managed to evade the police, they would be faced with an "anxious, fearful" population "on the lookout for people who shouldn't be in those areas."¹⁰³ The Welsh cabinet minister, Simon Hart MP, expressed concern that this approach would "risk stirring division and confusion" and asked for clarity on the legality of such an approach and on whether students from England would be allowed to return home if necessary.¹⁰⁴

The Welsh government, following the approach of the Northern Irish Executive, implemented a two week 'fire break lockdown'.¹⁰⁵ The Welsh Health Minister, Vaughan Gething MS, pledged that the lockdown would not be extended beyond 9th November, regardless of case numbers, the number of hospitalisations or the number of daily deaths.¹⁰⁶ Instead, the Welsh government hoped to see a longer term reduction in case numbers, rather than an immediate decline.

The Health Protection (Wales) (No. 3) Regulations 2020 were laid before the Senedd on 21st October and came into force at 6pm on 23rd October. The Regulations were not debated or approved prior to them coming into force. While the Senedd did approve a motion calling for the implementation of a 'fire break' lockdown, the motion contained very little detail of what said lockdown would consist of and did not constitute full parliamentary approval.

The Regulations require residents of Wales to remain in the place where they are living, unless they have a reasonable excuse. There are exceptions for obtaining supplies from a business allowed to remain open, obtaining or supplying medical assistance, providing or receiving care, work "where it is not reasonably practicable to do so from home", training or competing for elite athletes, exercise which must start and finish at the place where the person is living (preventing travel for exercise), attending a wedding or funeral, meeting a legal obligation, accessing a critical public service, children seeing parents not in their household, obtaining or depositing money, moving home, avoiding injury or escape the risk of harm.¹⁰⁷

¹⁰⁰ Wrexham, Denbighshire, Flintshire and Conwy go into local lockdown — ITV News, 1st October 2020: <https://www.itv.com/news/wales/2020-09-29/wrexham-denbighshire-flintshire-and-conwy-to-go-into-local-lockdown>

¹⁰¹ Covid: Welsh quarantine considered for UK coronavirus hotspots — BBC News, 5th October 2020: <https://www.bbc.co.uk/news/uk-wales-politics-54420708>

¹⁰² The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 19) Regulations 2020, Regulation 2(6)

¹⁰³ Covid: Wales to ban people coming from UK hotspots — BBC News, 14th October 2020: <https://www.bbc.co.uk/news/uk-wales-politics-54540764>

¹⁰⁴ Welsh ban on travel from Covid hotspots 'risks division and confusion' — Steven Morris, the Guardian, 15th October 2020: <https://www.theguardian.com/uk-news/2020/oct/15/welsh-government-insists-police-can-enforce-covid-travel-ban>

¹⁰⁵ Coronavirus firebreak: frequently asked questions — Welsh Government, 23rd October 2020: <https://gov.wales/coronavirus-firebreak-frequently-asked-questions> (accessed 23rd October 2020)

¹⁰⁶ Kay Burley, Twitter, 23rd October 2020: <https://twitter.com/KayBurley/status/1319539373201829888?s=20>

¹⁰⁷ The Health Protection (Coronavirus Restrictions) (No. 3) (Wales) Regulations 2020, Regulation 3(2)

There is also an exemption for outdoor Remembrance Sunday events of consisting of less than 30 people.¹⁰⁸

Despite no mention of 'essential travel' in the Regulations, police forces across Wales have been attempting to enforce this requirement. North Wales British Transport Police tweeted (in a now deleted Tweet) that they were checking whether those travelling were doing so for "essential" reasons. This approach is heavy-handed and excessive — there is no stop and account power under these Regulations.



Some construction workers, concerned about being stopped by the police on their way to work, were issued with 'letters of proof'.¹⁰⁹ While this was not official guidance from the Welsh Government, it speaks to the concern many citizens feel about their ability to conduct entirely lawful behaviour.

People were not permitted to gather with anyone who is not part of their household or is their carer, without a reasonable excuse, which are the same as those given for leaving one's home, except for exercise.¹¹⁰ People living outside Wales could not enter or remain in the country without a reasonable excuse. Gloucestershire Police force said it would be working to prevent people from leaving or entering Wales. AP reports:

"The Gloucestershire Constabulary will patrol routes from Wales and pull over drivers they believe are making long journeys. Travellers without a good excuse will be asked to turn around. If they don't comply, officers will inform their Welsh counterparts so they can take action because Gloucestershire police don't have the authority to fine people traveling from Wales, the department said."¹¹¹

¹⁰⁸ The Health Protection (Coronavirus Restrictions) (No. 3) (Wales) Regulations 2020, Regulation 3(3)

¹⁰⁹ Wales lockdown: workers issued 'letter of proof' as construction continues — Ian Weinfass, Construction News, 20th October 2020: <https://www.constructionnews.co.uk/health-and-safety/wales-lockdown-workers-issued-letter-of-proof-as-construction-continues-20-10-2020/>

¹¹⁰ The Health Protection (Coronavirus Restrictions) (No. 3) (Wales) Regulations 2020, Regulation 4

¹¹¹ No escaping from Wales: UK police to enforce travel ban — Danica Kirka, AP, 24th October 2020: <https://apnews.com/article/virus-outbreak-england-police-wales-europe-9bd5bde3d97d2b9ed3b465a2641e30b6>

There was significant backlash over Government guidance to retailers that they not sell 'non-essential' items. The policy was first introduced not for public health reasons but so that retailers required to close under the lockdown would not lose out. The Regulations made no mention of essential or non-essential items, yet this policy was approached by the Welsh government and by retailers as if it were law — leading to farcical scenes of clothing, homeware and toiletries being taped off in supermarkets. Licensing lawyer Gerald Gouriet QC called the guidance "clumsily written and confusing" and stated "guidance is being promulgated as if it is enforceable in law... it isn't."¹¹²

Retailers, however, were understandably confused by the vague guidance which itself acknowledged that there may be confusion around categories:

"In any cases where there may be doubt as to whether a product can be sold (for example as to whether a product for the home is truly a necessity) shops will be expected to use their best endeavours to consider what should be available."¹¹³

Under the possible threat of legal sanctions, retailers have been overcautious. There was public outrage after a woman reported that she was unable to access sanitary products. The Welsh government responded that sanitary products were "essential", but the danger of introducing such vague measures inevitably means that poor decisions will be made.¹¹⁴ Another woman complained that she was unable to access baby formula¹¹⁵ and another store had taped over smoke alarms and carbon monoxide alarms.¹¹⁶

What individual items are 'essential' or not should not and cannot be determined by law or guidance. Far from encouraging fair competition between retailers, this pushed people towards online retailers like Amazon, leaving those without access to online shopping without items they needed. Welsh Conservative MP David Jones wrote that the "barmy policy" means "the inability to purchase goods that are not luxuries, but items [people] need to live their everyday lives."¹¹⁷

RECOMMENDATION 9: Guidance that prevents people from buying 'non-essential' items is poorly drafted, disadvantages those without access to online shopping and leads to arbitrary decision-making by retailers. The guidance should be revoked and these attempts at micro-control must be avoided.

On 30th October, First Minister Mark Drakeford announced that new measures would come into force in Wales at the end of the 'fire break' lockdown. He told Welsh residents not "to ask what I can and cannot do, but what I should and should not do." Whilst well-intended, this drastically undermines the weight of criminal law and the seriousness of the penalties levelled against citizens for breaches of inaccessible,

¹¹² Wales lockdown: What 'essential' items can I buy? - BBC News, 27th October 2020: <https://www.bbc.co.uk/news/uk-wales-54692441>

¹¹³ Closure of businesses and premises: coronavirus (COVID 19) — Welsh Government, 23rd October 2020: <https://gov.wales/coronavirus-covid-19-closure-businesses-and-premises-html>

¹¹⁴ Wales lockdown: Tesco 'wrong' to say period products 'not essential' — BBC News, 26th October 2020: <https://www.bbc.co.uk/news/uk-wales-54685886>

¹¹⁵ Baby milk, dummies and kids' clothes top 'banned' list in Wales lockdown — but booze and fake eyelashes 'essential' - Alex Winter, the Sun, 26th October 2020: <https://www.thesun.co.uk/news/13026769/baby-milk-dummies-kids-clothes-banned-wales-booze-eyelashes/>

¹¹⁶ Wales lockdown: Tesco 'wrong' to say period products 'not essential' — BBC News, 26th October 2020: <https://www.bbc.co.uk/news/uk-wales-54685886>

¹¹⁷ 'Amazon is the biggest winner from a barmy policy that should be scrapped immediately' — David Jones, Business Live, 25th October 2020: <https://www.business-live.co.uk/economic-development/opinion-amazon-biggest-winner-barmy-19162091>

complex and frequently changing restrictions. People should absolutely ask what they can and cannot do — moreover, authorities need to make this critical information clear, coherent and accessible.

Scotland

In early October, the Scottish Government introduced targeted restrictions across the central belt of Scotland. The new rules were made as an amendment to the already vast Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 and came into force on 9th October. The Regulations were then amended again on 15th October.

Nightclub and discos, sexual entertainment venues, indoor theatres, concert halls, soft play centres, snooker and pool halls, bowling alleys, casinos, and bingo halls were required to close across Scotland. In the 'protected area' licensed premises were required to close, while in the rest of Scotland they were subject to a 6pm indoor curfew and 10pm outdoor curfew.¹¹⁸ There was confusion after First Minister Nicola Sturgeon said that licensed cafes were allowed to remain open, hours before the restrictions were due to come into force, and Scotland's clinical director Jason Leitch admitted there was no "neat division" between cafes and restaurants.¹¹⁹ Unlicensed premises were required to close from 6pm to 6am and to prevent the consumption of alcohol on their premises.¹²⁰

Gatherings of no more than 6 people from 2 households are permitted under the Regulations, although outdoor gatherings of children under 12 are exempt from this limit, and gatherings of children under 18 years old can be of any number of households, provided there are no more than 6 people.¹²¹ Gatherings are also permitted if organised by a person who is responsible for carrying on a business or providing a service, a person who is responsible for a place of worship, a charity or other not-for-profit organisation, a club or political organisation, or the governing body of a sport or other activity.¹²²

On 24th October, the Scottish First Minister Nicola Sturgeon announced that the Government would be introducing a 5-tier system.¹²³ Levels would start at 0, with Level 4 areas facing similar restrictions as the first UK-wide lockdown. Level 0, however, will not be 'normal' life. Instead it would be "the closest to normality we think we can safely get to with more effective treatments or a vaccine."¹²⁴

¹¹⁸ The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020, Regulation 7(2), 12(1), 13(1)

¹¹⁹ No 'neat division' between cafes and restaurants in Scotland admits Jason Leitch ahead of 6pm lockdown — Chris McCall, Daily Record, 9th October 2020: <https://www.dailyrecord.co.uk/news/politics/no-neat-division-between-cafes-22817509>

¹²⁰ The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020, Regulation 8(1)

¹²¹ The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020, Regulation 11(1)(a)-(b)

¹²² The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020, Regulation 11(4)

¹²³ Covid: Scotland to enter new five-level alert system — BBC News, 24th October 2020: <https://www.bbc.co.uk/news/uk-scotland-54661494>

¹²⁴ Nicola Sturgeon outlines new lockdown levels for Scotland - video — the Guardian, 23rd October 2020: <https://www.theguardian.com/uk-news/video/2020/oct/23/nicola-sturgeon-outlines-new-lockdown-levels-for-scotland-video>

Northern Ireland

On 14th October, the Northern Irish Executive announced a four-week 'circuit breaker' lockdown, which would come into force on 16th October.¹²⁵ The new lockdown was passed without the prior approval of the Assembly for reasons of 'urgency.' There is no obligation to review the measures, although if "the Department of Health considers at any time that any restriction or requirement imposed by this schedule is no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection with the coronavirus, the Department must without delay revoke that restriction."¹²⁶

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 10) Regulations (Northern Ireland) 2020 introduced an 'active period', during which certain businesses would be required to close, people would not be able to stay overnight where they are not living, indoor gatherings of households are not permitted and outdoor gatherings of more than 6 are prohibited, although children under 12 are exempt.¹²⁷ Businesses required to close includes all venues which sell food and drink, close contact services, driving instruction, campsites and caravan parks for touring caravans, museums and galleries, bingo halls, cinemas (but not cinemas at which visitors remain in a vehicle), funfairs, indoor amusement arcades, skating rinks and indoor visitor attractions.¹²⁸

Confusion between guidance and law from Ministers has continued. In Northern Ireland, Communities Minister attempted to prohibit fans from entering sports stadiums, despite their being no regulations against this.¹²⁹ Whilst backtracking on her statement, Caral Ni Chuilin told the BBC "I appreciate the regulations are silent [on stadiums]. I understand all that. But they're not silent when it comes to unnecessary travel". However, News Letter pointed out that the Regulations are also silent on unnecessary travel.¹³⁰ Instead, the Minister was referring to guidance, which is not legally enforceable.

¹²⁵ Northern Ireland imposes four-week circuit breaker restrictions as Covid cases soar — Andrew Woodcock and Ashley Cowburn, the Independent, 14th October 2020: <https://www.independent.co.uk/news/uk/politics/northern-ireland-lockdown-circuit-breaker-coronavirus-new-restrictions-covid-b1033806.html>

¹²⁶ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 9) Regulations (Northern Ireland) 2020, Regulation 3(5)

¹²⁷ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 9) Regulations (Northern Ireland) 2020, Regulation 3(5)

¹²⁸ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 9) Regulations (Northern Ireland) 2020, Regulation 3(5), Regulation 7(2)

¹²⁹ Confusion as First Minister contradicts order banning fans from top-level events — BBC Sport, 16th October 2020: <https://www.bbc.co.uk/sport/northern-ireland/54577892>

¹³⁰ Second gaffe from Sinn Féin minister who doesn't understand coronavirus law she helped create — Sam McBride, News Letter, 20th October 2020: <https://www.newsletter.co.uk/news/politics/second-gaffe-sinn-fein-minister-who-doesnt-understand-coronavirus-law-she-helped-create-3009195i>

Coronavirus Act

Schedule 21: detention powers

On 28th October, the CPS published its sixth monthly review of prosecutions under the Coronavirus Act.¹³¹ 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 26 charges were found to be unlawful, bringing the total number to 167. 22 cases were withdrawn in court, with Regulation charges imposed for 4 offences.

This result is no longer surprising and speaks to the serious risk Schedule 21 poses to rights and justice in the UK. It continues the unprecedented record of 100% unlawful prosecutions under the Coronavirus Act. 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.

RECOMMENDATION 10: It remains the case that every prosecution under Schedule 21 of the Coronavirus Act has been unlawful. 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 11: Schedule 22 of the Coronavirus Act contains draconian powers that have never proven necessary. It must be repealed.

¹³¹ September's coronavirus review findings — Crown Prosecution Service, 28th October 2020: <https://www.cps.gov.uk/cps/news/septembers-coronavirus-review-findings>

Requirement to Self-isolate

It was revealed on 17th October that police forces are being granted access to Test and Trace data in order to enforce these Regulations, through a Memorandum of Understanding (MoU) between the Department of Health and Social Care and the National Police Chiefs' Council (NPCC). Police officers have access to "the recorded name and contact details of an individual who has been instructed to self-isolate, the date on which they were told to self-isolate and the date on which the period of self-isolation ends."¹³²

This is as counter-productive as it is chilling. Medical confidentiality is the bedrock of public health. Without the assurance that their sensitive health data will be kept private, many people will be unwilling to either take a coronavirus test or engage with the Department of Health's contact tracers — particularly given the threat of harsh punishments.

This approach resulted in significant backlash, including from the British Medical Association which said:

"We are already concerned that some people are deterred from being tested because they are anxious about loss of income should they need to self-isolate — and we are worried should police involvement add to this."¹³³

It was reported that even the office of England's Chief Medical Officer, Chris Whitty, has expressed concern that this approach would lead to a reduction in engagement with the Test and Trace system.¹³⁴ Furthermore, SAGE behavioural science advisor Professor Susan Michie said this move would 'further cause distrust in the Government which is a massive problem in terms of adherence to restrictions.'¹³⁵

Members of the House of Lords also expressed their concern about this draconian approach to public health. Lord Hunt noted that "sharing what is essentially health information with the police is a highly sensitive matter", while Lord Scriven stated the MoU had "undermined some people's trust in Test and Trace."¹³⁶ Despite claims from Health Minister Lord Bethell that police were accessing "isolation information" not "health information", this is clearly not the case.¹³⁷ Whether or not an individual is required to self-isolate will necessarily reveal health information. Health data is highly sensitive and is a special category of data under the GDPR. Giving police access to this sensitive personal data is a violation of privacy and the public's trust in the Test and Trace system.

Yet again, the Government is using ever more extreme policing, fines and intrusion to paper over its failures to manage this public health situation. The Government should provide people with the proper provision of support to self-isolate when they need to rather than the threat of life-changing fines. Treating test and

¹³² HL Covid-19: Information Sharing with Police Forces (20th October 2020), vol. 806, col. 1419: <https://hansard.parliament.uk/lords/2020-10-20/debates/A263ED69-1C9A-4072-AF34-AC9E3E722F8D/Covid-19InformationSharingWithPoliceForces>

¹³³ Been Told to Self-Isolate by Test And Trace? Police Could Get Access to Your Data — Chris York, Huffington Post, 18th October 2020: https://www.huffingtonpost.co.uk/entry/test-and-trace-police-data_uk_5f8bfd2ec5b66ee9a5f0ce71

¹³⁴ Coronavirus: Police granted access to details of people told to self-isolate by Test and Trace — Sky News, 18th October 2020: <https://news.sky.com/story/coronavirus-police-granted-access-to-details-of-people-told-to-self-isolate-by-test-and-trace-12106988>

¹³⁵ Backlash as police get test and trace data: Michael Gove is forced to defend the move after officers were handed personal details amid privacy row — George Odling and Victoria Allen, Mail online, 18th October 2020: <https://www.dailymail.co.uk/news/article-8853311/amp/Backlash-police-test-trace-data.html>

¹³⁶ HL Covid-19: Information Sharing with Police Forces (20th October 2020), vol. 806, col. 1417-8: <https://hansard.parliament.uk/lords/2020-10-20/debates/A263ED69-1C9A-4072-AF34-AC9E3E722F8D/Covid-19InformationSharingWithPoliceForces>

¹³⁷ HL Covid-19: Information Sharing with Police Forces (20th October 2020), vol. 806, col. 1418: <https://hansard.parliament.uk/lords/2020-10-20/debates/A263ED69-1C9A-4072-AF34-AC9E3E722F8D/Covid-19InformationSharingWithPoliceForces>

trace like an inquisition is a certain way to deter people from getting tests and giving their contact information.

RECOMMENDATION 12: Medical confidentiality is the foundation of public health. The Department of Health and Social Care’s Memorandum of Understanding with the National Police Chiefs’ Council to allow police forces to access the details of those required to self-isolate has significantly damaged public trust in the contact tracing system. The MoU must be withdrawn.

Role of Parliament

The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 came into force on 28th September, but were not debated in the House of Commons until 13th October, along with 6 other coronavirus related statutory instruments.

There was criticism of the complexity of the Regulations. Lord Rooker said:

“My Lords, the message was “clarity”; that is a joke. There are no less than five ways to calculate the period of time for self-isolation in the regulations: at Regulation 3(3)(a), Regulation 3(3)(b), Regulation 3(4)(a)i, Regulation 3(4)(a)ii and Regulation 3(4)(b). Who makes the calculation? If you slip up, potentially more than once, as the Minister indicated, there could be a fine of up to £10,000. This is completely unacceptable.”¹³⁸

Lord Hunt, referencing our briefing,¹³⁹ agreed, stating:

“I am extremely sympathetic to the argument of Big Brother Watch, and of my noble friend Lord Rooker, that the sheer complexity of the regulations means that the period of time that a person must isolate for is not immediately evident and requires very careful reading of the regulations — not a good basis for public trust.”¹⁴⁰

Many Peers also raised the point that those without a smartphone would be far more likely to receive a £10,000 fine under these Regulations — as those who receive an alert through the NHS Covid-19 App are not covered. Lord Loomba¹⁴¹, Baroness Altmann,¹⁴² Lord Hunt,¹⁴³ Baroness Walmsey¹⁴⁴ and the Secondary Legislation Scrutiny Committee all criticised this approach, which leads to poorer and elderly people facing harsh fines.¹⁴⁵

¹³⁸ HL Deb (22nd October 2020) vol. 806, col. 1660: [https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection\(CoronavirusRestrictions\)\(Self-Isolation\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection(CoronavirusRestrictions)(Self-Isolation)(England)Regulations2020)

¹³⁹ Big Brother Watch Briefing on the Health Protection (Self Isolation) Regulations for House of Lords — 22nd October 2020: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/10/Big-Brother-Watch-Briefing-on-Health-Protection-Regulations-Self-Isolation-for-House-of-Lords-22nd-October-2020.pdf>

¹⁴⁰ HL Deb (22nd October 2020) vol. 806, col. 1660: [https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection\(CoronavirusRestrictions\)\(Self-Isolation\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection(CoronavirusRestrictions)(Self-Isolation)(England)Regulations2020)

¹⁴¹ HL Deb (22nd October 2020) vol. 806, col. 1663: [https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection\(CoronavirusRestrictions\)\(Self-Isolation\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection(CoronavirusRestrictions)(Self-Isolation)(England)Regulations2020)

¹⁴² HL Deb (22nd October 2020) vol. 806, col. 1671: [https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection\(CoronavirusRestrictions\)\(Self-Isolation\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection(CoronavirusRestrictions)(Self-Isolation)(England)Regulations2020)

¹⁴³ HL Deb (22nd October 2020) vol. 806, col. 1662: [https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection\(CoronavirusRestrictions\)\(Self-Isolation\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection(CoronavirusRestrictions)(Self-Isolation)(England)Regulations2020)

¹⁴⁴ HL Deb (22nd October 2020) vol. 806, col. 1663: [https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection\(CoronavirusRestrictions\)\(Self-Isolation\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection(CoronavirusRestrictions)(Self-Isolation)(England)Regulations2020)

¹⁴⁵ 29th Report of Session 2019—21, HL 138, Secondary Legislation Scrutiny Committee, 8th October 2020: <https://committees.parliament.uk/publications/2885/documents/27975/default/>

This punitive approach to public health not only risks criminalising people who are unable to self-isolate for financial reasons, but also risks backfiring. Baroness Finlay argued:

“Crippling fines and a police record will only disincentivise people to seek testing and disclose their contacts. The criteria behind the instruction to self-isolate are not transparent and there is no appeal mechanism for those who feel they have been inappropriately instructed. That runs counter to the principles of co-production and the findings from the CORSAIR study, which showed that practical support and financial reimbursement, with targeted messaging and clear policies, are likely to improve adherence.”

“Punitive measures set up blame and division, not supportive collaboration.”¹⁴⁶

¹⁴⁶ HL Deb (22nd October 2020) vol. 806, col. 1668: [https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection\(CoronavirusRestrictions\)\(Self-Isolation\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CD0/HealthProtection(CoronavirusRestrictions)(Self-Isolation)(England)Regulations2020)

Contact Tracing

Big Brother Watch and Open Rights Group have initiated legal action in respect of the Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020, instructing data rights agency AWO. As we detailed in our previous report, the Regulations represent a significant threat to privacy and raise serious questions as to adherence to data protection law. Without proper legal safeguards, they place businesses in a precarious position by requiring them to take sole legal responsibility for the collection and protection of potentially thousands of people's personal data.

Again, this draconian approach seeks to compensate for the major failures of the Government's Test and Trace system.

Role of parliament

As previously noted, the House of Commons debated the Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 on 13th October, along with 6 other coronavirus related statutory instruments. Although MPs made general points about the problems with the Test and Trace system, with members from across the benches calling for the system to be put in the hands of local health teams, the contents of the Regulations were not mentioned. As a result, the 'debate' on these Regulations was non-existent.

The House of Lords, however, considered the Regulations independently, on 7th October. Once again, this represents a significant delay of nearly three weeks. Lord Hunt, again quoting our briefing on the Regulations,¹⁴⁷ criticised this approach:

"My Lords, this debate is taking place three weeks after these regulations came into force. As Big Brother Watch points out, the impact of this legal change cannot be overstated. The regulations introduce the potential for the mass recording of citizens' movements by an array of overstretched businesses."

"I am not opposed to the regulations, but it is simply not acceptable—and I repeat what has been said in the last week—for these kinds of draconian measures to be introduced without Parliament having its say first."¹⁴⁸

Baroness Thornton, Labour Shadow Health Minister, agreed:

"In the case of these regulations, there is no justification for their having been laid at the eleventh hour using an urgent procedure. In his introduction, the Minister used the word "housekeeping". That is an inappropriate word for what is democratic accountability. The app has taken six months to roll out and, in that time, thought should have been given to these regulations and key stakeholders should have been consulted. (...) That can only help the Government to allow

¹⁴⁷ Big Brother Watch Briefing on The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 for the House of Lords: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/10/Big-Brother-Watch-Briefing-on-The-Health-Protection-Coronavirus-Collection-of-Contact-Details-etc-and-Related-Requirements-Regulations-2020-for-the-House-of-Lords.pdf>

¹⁴⁸ HL Deb (7th October 2020) vol. 806, col. 653: [https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/HealthProtection\(CoronavirusCollectionOfContactDetailsEtcAndRelatedRequirements\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/HealthProtection(CoronavirusCollectionOfContactDetailsEtcAndRelatedRequirements)Regulations2020)

time for those who are going to have to implement the regulations to review them, which would prevent mistakes and reduce the need for amending regulations.”¹⁴⁹

Liberal Democrat Peer Baroness Barker pointed out the lack of evidence for the necessity of these Regulations, and for many of the Government’s new powers:

“after three weeks, we have nothing but assertions (...) The Government are very short on evidence when they come back with repeated requests for regulatory powers.”

(...)

“the Minister is trying the patience of the House when he repeatedly requests powers without any evidence to back them up.”¹⁵⁰

There were also widespread concerns about privacy and data protection. Lord Greaves asked: “does it mean that everybody who is involved in collecting this information has to register with the Information Commissioner as a data controller? What is happening to make sure that happens, if that is true?”¹⁵¹ Lord Loomba asked: “what measures are in place to protect citizens from data loss and breaches of privacy, so that they can have faith in using the system?”¹⁵² Baroness Jones was also highly critical of the new Regulations:

“My Lords, these regulations are excessive, intrusive, punitive and potentially discriminatory to older and poorer people. They also raise important questions about compatibility with data and privacy laws.”

“On data protection, collection of contact details is important, but a lot of places gather this personal data without any security. I have also visited pubs and I can say that some keep their log-books open and available for other people to take photographs of them. This would clearly infringe all sorts of privacy matters.”¹⁵³

Lord Bethell responded to these concerns by stating that “we require pubs and hospitality to comply with GDPR.”¹⁵⁴ This may be the case, but evidently, many venues are not aware of what this means. The entire hospitality sector cannot expect to understand the obligations of a data controller overnight.

¹⁴⁹ HL Deb (7th October 2020) vol. 806, col. 663:[https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/HealthProtection\(CoronavirusCollectionOfContactDetailsEtcAndRelatedRequirements\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/HealthProtection(CoronavirusCollectionOfContactDetailsEtcAndRelatedRequirements)Regulations2020)

¹⁵⁰ HL Deb (7th October 2020) vol. 806, col. 640:[https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/HealthProtection\(CoronavirusCollectionOfContactDetailsEtcAndRelatedRequirements\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/HealthProtection(CoronavirusCollectionOfContactDetailsEtcAndRelatedRequirements)Regulations2020)

¹⁵¹ HL Deb (7th October 2020) vol. 806, col. 655:[https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/HealthProtection\(CoronavirusCollectionOfContactDetailsEtcAndRelatedRequirements\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/HealthProtection(CoronavirusCollectionOfContactDetailsEtcAndRelatedRequirements)Regulations2020)

¹⁵² HL Deb (7th October 2020) vol. 806, col. 656:[https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/HealthProtection\(CoronavirusCollectionOfContactDetailsEtcAndRelatedRequirements\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/HealthProtection(CoronavirusCollectionOfContactDetailsEtcAndRelatedRequirements)Regulations2020)

¹⁵³ HL Deb (7th October 2020) vol. 806, col. 657:<https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/>

¹⁵⁴ HL Deb (7th October 2020) vol. , col. 666:<https://hansard.parliament.uk/lords/2020-10-07/debates/OCAAB153-4E4C-4D12-8D39-6D6657A349C7/>

Test and Trace

As coronavirus cases soar, the Test and Trace system has been performing increasingly poorly, with the percentage of those reached steadily declining.¹⁵⁵ The weaknesses of the system were further compounded by major backlogs in testing data being received, widely reported to be due to data incorrectly stored on an Excel spreadsheet, meaning that tens of thousands of cases were delayed in being referred to contact tracers.¹⁵⁶

The system is now relying on contractors without medical training to carry out contact tracing, against the advice of public health officials.¹⁵⁷ This had led to contact tracers with just 4 hours of training, many of whom are students or school leavers, being asked to not only contact those who need to self-isolate, but also to speak to coronavirus patients and collect data about their contacts for the past 14 days.¹⁵⁸ This role initially was advertised as requiring “experienced clinicians.”

Spending on the Test and Trace system is now estimated to be around £12 billion, with consultants from Boston Consultant Group being paid the equivalent of £7,000 per day and consultants from Deloitte as much as £2,360 per day to help run the system.¹⁵⁹

Meanwhile, many businesses have turned to private companies to handle their contact tracing obligations, which has led to a confusing mixture of systems — all venues must display an official NHS Covid-19 app QR code, but many also use QR codes linked to private contact tracing systems, as well as online systems to ‘log in’ to a venue and books where people can manually write down their details. Many of these private suppliers of contact tracing systems claim to be GDPR compliant, meaning that they are cannot use the data collected for contact tracing purposes for any other purpose. However, we have previously raised concerns that this patchwork of contact tracing systems is difficult to regulate and could lead to companies using the data collected for marketing or other purposes. It was therefore not a surprise that the Information Commissioner’s Office has opened investigations into 15 companies which provide contact tracing systems for hospitality venues, after it emerged that some systems were in fact selling confidential client data.¹⁶⁰ One business, Pub Track and Trace, requires users to accept a privacy policy that states their data will be used to “make suggestions and recommendations to you about goods or services that may be of interest to you” and shared with third parties including “service providers or regulatory bodies providing fraud prevention services or credit/background checks.” It may also “collect, use, store and transfer” records of access to certain premises including “time, ID number and CCTV images.”¹⁶¹

These privately run systems, many of which were rushed out after the Government asked hospitality venues to retain customer data for contact tracing purposes on 23rd June, a request which became a legal requirement on 18th September. Despite the Government’s insistence that this approach is necessary to

¹⁵⁵ Test and trace figures hit another weekly low with just 59% of contacts identified — ITV News, 22nd October 2020: <https://www.itv.com/news/2020-10-22/test-and-trace-figures-hit-another-weekly-low-with-just-59-of-contacts-identified>

¹⁵⁶ 16,000 cases missed ‘because health chiefs ran out of columns on Excel’ - Joe Roberts, Metro, 5th October 2020: <https://metro.co.uk/2020/10/05/16000-cases-missed-because-health-chiefs-ran-out-of-columns-on-excel-13373100/>

¹⁵⁷ Test and trace forced to bring in untrained workers as system is overwhelmed by second wave, leaked email reveals — Shaun Lintern, the Independent, 21st October 2020: <https://www.independent.co.uk/news/health/coronavirus-test-and-trace-serco-untrained-tracing-b1204648.html>

¹⁵⁸ How teenagers ended up operating crucial parts of England’s test and trace system — George Monbiot, the Guardian, 28th October 2020: <https://www.theguardian.com/commentisfree/2020/oct/28/england-coronavirus-covid-test-and-trace-teenagers>

¹⁵⁹ Test-and-trace consultants are being paid £7,000 a day — Robert Miller, the Times, 15th October 2020: <https://www.thetimes.co.uk/article/test-and-trace-consultants-are-being-paid-7-000-a-day-ngl8vlqvw>

¹⁶⁰ Contact-tracing data harvested from pubs and restaurants being sold on — Shanti Das and Shingi Mararike, the Times, 11th October 2020: <https://www.thetimes.co.uk/article/contact-tracing-data-harvested-from-pubs-and-restaurants-being-sold-on-s0d85mkr?ilc=timesradio:morefromthetimes>

¹⁶¹ Ibid.

assist NHS Test and Trace, it has been revealed that this data has barely been used by Government contact tracers. Hospitality UK conducted a survey of over 12,500 venues, which had in total seen over 250 million visitors, and found just 104 instances where Track and Trace has contacted venues.¹⁶² Julian Ross, the chief executive of one business that supplies contact tracing data collection for venues, said that the Track and Trace system was “window dressing” and that he did not believe there was the “infrastructure in the background that was ready to process this data.”¹⁶³ Indeed, the Government’s own scientific advisers have found that system is having a “marginal impact” on the spread of coronavirus.¹⁶⁴

This is a catalogue of failures. While the Government fails to run its essential program of testing those infected and tracing their contacts, it is using draconian legislation and excessive enforcement to paper over the cracks of its failures.

App

The second version of the NHS Covid-19 app was released in September and has been plagued with errors and mismanagement.

While we welcome the app’s decentralised design, which respects privacy far more than the original app’s centralised design, there are still significant questions about the efficacy of the app and the social impacts of using technology to automate exposure notifications. Allison Gardiner, lecturer in computer science at Keele University and co-founder of Women Leading in AI expressed concerns about the Government’s emphasis on an unproven app:

“the lack of evidence is a concern given the focus and money devoted to these apps and the policy decisions made around them. This kind of ‘tech solutionism’ could be a distraction from developing proven manual contact-tracing systems. Indeed, the Council of Europe has raised the question of whether, given the lack of evidence, the promises made about these apps are ‘worth the predictable societal and legal risks.’”¹⁶⁵

Data protection lawyers Jonathan Kirsop and Mario Subramaniam from Pinsent Masons law firm argued that there were “ethical questions” around whether the app “marginalises some people in society, such as the elderly or those with particular health or learning difficulties, who may not have access to mobile devices.”¹⁶⁶

It appears that the development of the app has been approached in an ad hoc manner, after it was announced that the app would change leadership for a second time, with Gaby Appleton being brought in to replace Simon Thompson, who in turn took over the development of the app from NHSX director Matthew Gould. Ms Appleton’s contract is for just 6 months, meaning a fourth executive will shortly replace her.¹⁶⁷ A source told Sky News the constant alterations were hampering the app’s development:

¹⁶² Coronavirus: Pub check-ins barely used by test and trace — Sean O’Neill, the Times, 24th October 2020: <https://www.thetimes.co.uk/article/coronavirus-pub-check-ins-barely-used-by-test-and-trace-gkb6wvw5h>

¹⁶³ Ibid.

¹⁶⁴ UK’s test and trace ‘having marginal impact’: which countries got it right? – Peter Beaumont, the Guardian, 13th October 2020: <https://www.theguardian.com/world/2020/oct/13/uks-test-and-trace-having-marginal-impact-which-countries-got-it-right>

¹⁶⁵ Contact-tracing apps: There’s no evidence they’re helping stop Covid-19 – Allison Gardner, Metro, 21st October 2020: <https://www.metro.news/contact-tracing-apps-theres-no-evidence-theyre-helping-stop-covid-19/2190953/>

¹⁶⁶ Impact of NHS contact-tracing app should be monitored –

¹⁶⁷ New boss of Test and Trace app Gaby Appleton only contracted for six months — Rowland Manthorpe, Sky News, 26th October 2020: <https://news.sky.com/story/coronavirus-new-boss-of-test-and-trace-app-gaby-appleton-only-contracted-for-six-months-12114798>

"the endless recycling of people at the top, each entering with their own ideas and agenda, and departing after just a few months" was "counter-productive."¹⁶⁸

It is perhaps this approach which has led to serious problems with the app's functioning. There was widespread confusion as an incorrect message was sent from the app to as many as 4 million people, telling them that the risk level in their area had changed. Those living in areas that had been moved into Tier 3 ('Very High') received an alert telling them they had been downgraded to 'High', while those in Tier 2 ('High') were told their area had been downgraded to 'Medium' risk.¹⁶⁹ An information security specialist told Sky News that while that error had "no technical risk (...) what has been lost is the reputational aspect. You are losing the reputation which is all important for this app."

The app suffered another blow to its reputation after it was revealed that phones using an unregistered language, which includes French, Spanish and Italian, are unable to load any text from the app — leading many to uninstall the app in the belief that it did not work.¹⁷⁰

There have also been many reports that teachers have been told to delete the app, over concerns that it will trigger unnecessary alerts.¹⁷¹

While it is not possible to record the number of people asked to self-isolate through the app's proximity tracker (which works by measuring Bluetooth signals to other devices also running the app), it has been revealed that just one alert was sent through the app's QR code function.¹⁷² The QR code function allows visitors to 'check-in' to venues, meaning that public health officials can contact them if there is a risk that coronavirus has spread at a venue. There is a legal requirement for venues to display the Department of Health issued QR codes, and venues have already received £1,000 fines for failing to do so.¹⁷³ The ineffectiveness of this system calls into question the necessity of legally requiring all venues to display these QR codes.

RECOMMENDATION 13: Whilst contact tracing should be encouraged, the legal requirement on businesses to display a QR code or receive a £1,000 Fixed Penalty Notice should be scrapped.

¹⁶⁸ Coronavirus: Contact tracing app gets third boss in six months — Rowland Manthorpe, Sky News, 21st October 2020: <https://news.sky.com/story/former-publishing-director-to-lead-contact-tracing-app-for-england-and-wales-12110087>

¹⁶⁹ 'Fat finger error' gives contact-tracing app users wrong alert levels — Rowland Manthorpe, Sky News, 17th October 2020: <https://news.sky.com/story/coronavirus-contact-tracing-app-users-given-wrong-alert-levels-after-fat-finger-error-12106113>

¹⁷⁰ NHS Covid app does not work for phones set to French and Spanish — Alex Hern, the Guardian, 28th October 2020: <https://www.theguardian.com/world/2020/oct/28/nhs-covid-app-does-not-work-for-phones-set-to-french-and-spanish>

¹⁷¹ NHS Covid-19 app: Why are some teachers being told not to use it? - BBC News, Rory Cellan-Jones, 8th October 2020: <https://www.bbc.co.uk/news/technology-54465356>

¹⁷² NHS Covid app 'has only sent one alert about a virus outbreak in a venue' - Sam Courtney-Guy, Metro, 9th October 2020: <https://metro.co.uk/2020/10/09/nhs-covid-app-has-only-sent-one-alert-about-a-virus-outbreak-in-a-venue-13396206/>

¹⁷³ Business given £1,000 fine for not displaying NHS Coronavirus QR code — Ellis Lane, Gloucestershire Live, 16th October 2020: <https://www.gloucestershirelive.co.uk/news/gloucester-news/business-given-1000-fine-not-4612011>

Health Passports

While immunologists and scientists have warned against the introduction of forms of health passports (which either confirm that an individual has tested negative for coronavirus or has coronavirus antibodies), this has not stopped companies from developing and marketing them.

Trials of digital health passports have begun for air travellers between the UK and US. The CommonPass system, which is backed by the World Economic Forum, is being trialled for flights between Heathrow to Newark, US. Airlines are paying for the system which creates a digital record of “lab results and vaccination records” tied to identifying data, which is then “used to validate [an individual’s] COVID status.”¹⁷⁴ The current UK trial requires passengers to be tested at Heathrow airport and then issued with a QR code after receiving a negative test result. While the scheme is not Government-run, the Department for Transport commented on the story, stating that it was “working at pace with industry to identify and implement options to reduce the self-isolation period through testing while protecting public health.”¹⁷⁵

Digital health passports have serious implications for privacy and freedom of movement, as well as being of questionable value as a public health intervention. Businesses keen to restore consumer confidence are pushing technological solutions which are experimental at best and pose a risk to human rights at worst.

RECOMMENDATION 14: Health passports pose a threat to privacy and could result in discrimination. The UK Government should not endorse or pursue health passports.

¹⁷⁴ CommonPass — The Common Project (accessed 30th September 2020): <https://thecommonproject.org/commonpass>

¹⁷⁵ Digital 'health passport' trials under way to aid reopening of borders — Mattha Busby, the Guardian, 17th October 2020: <https://www.theguardian.com/world/2020/oct/17/digital-health-passport-trials-commonpass-travel-covid-19>

Covid Marshals

On 8th October, it was announced that £60 million of public money would be available specifically to fund “compliance and enforcement activities” relating to coronavirus restrictions. Half of this would be available for local authorities, ideally for the work of “marshals, wardens, stewards, ambassadors or similar roles to support compliance social distancing in public places.”¹⁷⁶ Government guidance stated that the role of Covid marshals “is not to enforce COVID-19 regulations, or have any enforcement powers, which should remain the remit of the police and designated local authority compliance and enforcement officers.”

Government guidance advises that Covid marshals are to:

- “promote social distancing and encourage public compliance with COVID-19 public health measures
- “educate and explain COVID-19 Secure guideline
- “identify and support businesses and premises not following guidelines, escalating as appropriate.”¹⁷⁷

Since they have no enforcement powers themselves, Covid marshals are expected to report those not abiding by Regulations to the police. In Northamptonshire, marshals wear radios to allow immediate contact with police officers, and even record footage on body worn cameras.¹⁷⁸

Other local authorities have hired Covid enforcement officers, who, unlike Covid marshals have powers to enforce the Regulations. Brent County Council advertised for five officers to “respond to and investigate complaints regarding compliance with guidelines and regulations, carry out spot checks and, where necessary, take appropriate enforcement action to ensure adherence with Covid 19 controls.”¹⁷⁹ The officers were also advertised to carry out “routine or unplanned visits and inspections, covertly or overtly as required, to ensure compliance with current guidance and/or legislation.” Big Brother Watch is taking action with the council, which will be reported on in our November report. Absent serious justification and judicial authorisation, councils have no legal basis on which to conduct covert spying operations to enforce coronavirus restrictions.

We are concerned that this covert approach to enforcement is unlawful under the Regulation of Investigatory Powers Act 2000 (RIPA). Under RIPA, local authorities are only able to authorise covert surveillance for the investigation of criminal offences which carry a minimum of 6 months imprisonment, or for the investigation of underage sales of alcohol or tobacco.¹⁸⁰ There are no offences under any of the

¹⁷⁶ Guidance to support local authority compliance and enforcement activity, including COVID-19 secure marshals or equivalents — Ministry of Housing, Communities and Local Government, 8th October 2020: <https://www.gov.uk/government/publications/covid-19-local-authority-compliance-and-enforcement-grant/guidance-to-support-local-authority-compliance-and-enforcement-activity-including-covid-19-secure-marshals-or-equivalents>

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Councils hire Covid enforcement officers with the power to snoop on law-breakers — Josh Layton, Metro UK, 29th October 2020: <https://metro.co.uk/2020/10/29/councils-hire-covid-enforcement-officers-with-the-power-to-snoop-on-law-breakers-13482032/>

¹⁸⁰ The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) Order 2012

emergency powers which could result in a prison sentence. Furthermore, any covert surveillance carried out by local authorities must have the approval of a magistrate.¹⁸¹

Redbridge Council has also hired Covid enforcement officers who take part in plainclothes operations.

This approach treats residents with suspicion and breeds hostility. Local authorities should focus on providing resources for those impacted by coronavirus, rather than attempting to spy on and punish members of the public.

RECOMMENDATION 15: In a public health crisis, local authorities should be educating and supporting residents and businesses in staying healthy and safe, not spying on and penalising them. Local authorities must cease all forms of covert surveillance for the purpose of enforcing Covid regulations.

¹⁸¹ Protection of Freedoms Act 2012, Sections 37 and 38.

Biosurveillance

The surveillance of health, bodies and movements as a means of combating the spread of coronavirus has continued to grow. As we have previously stressed, much of this technology lacks a rigorous evidence base and may be doing little more than providing the feeling of security, rather making a contribution to public health.

We are concerned by the 'stackable' nature of these new forms of surveillance, as companies race to develop products that give temperature readings, monitor social distancing and detect masks. Nokia Labs, for example, has developed cameras which "fully automate the process of identifying people with elevated temperatures and confirms mask compliance."¹⁸²

One UK based company has even developed an automatic hand sanitisation system which uses facial recognition technology to log and rate the number of times an employee sanitises their hands.¹⁸³

Social distancing

Vivacity Labs, a company that provides AI-powered 'smart sensors' that "capture, classify and track live transport usage" for over 30 UK councils, has "been gathering data on cycling, walking, and social distancing" during the lockdown period.¹⁸⁴ This data is shared with the Department for Transport in monthly reports, which inform the Government's coronavirus policy decisions.¹⁸⁵ The company has been awarded £250 million of Government funding as part of its 'Active Travel' scheme, which seeks to encourage people to walk or cycle rather than use public transport.¹⁸⁶

Technologies that automate monitoring and deepen surveillance of the public pose a risk to privacy. This secretive roll-out is particularly concerning since the behaviour Vivacity is monitoring and reporting on is entirely lawful. As we have previously stressed, social distancing is guidance and not legally enforceable, nor should it be.

There is also a lack of clarity as to the purposes for which local authorities will use this data. Without a public consultation or consent, residents are kept in the dark as to a significant local surveillance expansion and its purposes.

We have written to Kent County Council, after it was reported that they were considering the use of this technology, and to the Department for Transport to ask important questions about privacy and our data rights.¹⁸⁷

¹⁸² Nokia Launches Automated Solution to Detect Temperature and Mask Compliance — Ella Tansley, 20th October 2020: <https://www.twinfm.com/article/nokia-launches-automated-solution-to-detect-temperature-and-mask-compliance>

¹⁸³ Tracking Hygiene Habits With Smart Hand Sanitising — Ella Tansley, This Week in FM, 23rd July 2020: <https://www.twinfm.com/article/tracking-hygiene-habits-with-smart-hand-sanitising>

¹⁸⁴ Local councils choose Vivacity Labs for Active Travel insights ahead of funding deadline — Cath Firmin, Vivacity, 5th August 2020: <https://vivacitylabs.com/local-councils-choose-vivacity-labs-for-active-travel-insights-ahead-of-funding-deadline/>
¹⁸⁵ AI cameras introduced in London to monitor social distancing and lockdown restrictions — April Roach, the Independent, 8th October 2020: <https://www.standard.co.uk/news/uk/ai-cameras-london-social-distancing-rules-a4566446.html>

¹⁸⁶ Local councils choose Vivacity Labs for Active Travel insights ahead of funding deadline — Cath Firmin, Vivacity, 5th August 2020: <https://vivacitylabs.com/local-councils-choose-vivacity-labs-for-active-travel-insights-ahead-of-funding-deadline/>

¹⁸⁷ Government-funded artificial intelligence cameras and sensors used in UK towns to monitor social distancing — Big Brother Watch, 7th October 2020: <https://bigbrotherwatch.org.uk/2020/10/government-funded-artificial-intelligence-cameras-and-sensors-used-in-uk-towns-to-monitor-social-distancing/>

The Government has also contracted Emodo, the “data activation and monetisation” arm of telecoms company Ericsson, to provide “Mobility and Proximity Analysis” through phone data from 1st September to 1st December.¹⁸⁸ Emodo will provide “mobility monitoring” which includes twice weekly reports, showing the “daily and hourly footfall by agreed upon location types and hotspots”, and the “proximity between individuals by agreed upon location types and hotspots.”¹⁸⁹ These locations can change at any time, depending on the priorities of the Cabinet Office. It will also provide “forensic analysis for locations of concern”, which can also change at any time. This can cover an area as small as 200x200m. Emodo will also provide analysis of journeys from origin to destination, as well as “bespoke mobility analysis” for “priority issues.”

While the Cabinet office will not receive any personal data on the movements of individuals, we are concerned this could be used to track certain groups, or even protests — “bespoke mobility analysis” is extremely broad. There is no mention in the contract that the data must be collected for the purpose of public health or in relation to the Government’s coronavirus response.

This level of surveillance is unnecessary, especially considering keeping a distance from other people is not proscribed in law. Local authorities already have an understanding of busy areas and many have put in place reminders to keep 2m apart from others. It does not require mass tracking of the population’s movements to ascertain that stations, retail centres, parks and beaches (all areas Emodo are analysing)¹⁹⁰ will be busier than other areas, typically at evenings and weekends. This not only is a disproportionate interference with privacy but is a waste of £300,000 of public money.

RECOMMENDATION 16: The Government and local authorities should immediately end the use of secretive mass surveillance to monitor social distancing.

Thermal scanners

Evidence continues to mount that the use of thermal scanners for the prevention of the spread of coronavirus is not only a form of security theatre, but also could represent a danger to public health. The University of Oxford’s Centre for Evidence Based medicine warned strongly against the use of thermal surveillance to screen for coronavirus:

“The current vogue for use of these machines lends more to marketing than medical evidence. Infrared screening for temperature results in large numbers of false positives, either offering false reassurance or unnecessary alarm — and potential exclusion of the person from work or leisure activities. The nature of this testing risks public embarrassment and confidentiality when used in the mass setting. Temperature screening is not reliable and should therefore not be used.”¹⁹¹

Health Protection Scotland also stated there “is not enough evidence to recommend the use of ITI

¹⁸⁸ COVID 19 Direct Award to EMODO for Mobility and Proximity Analysis — Cabinet Office contract, 8th October 2020: <https://www.contractsfinder.service.gov.uk/Notice/Attachment/6b4ba17d-ef3b-465c-bf59-6b73307184e8>

¹⁸⁹ Ibid, p 4

¹⁹⁰ Ibid, p 5

¹⁹¹ More Marketing than medical evidence: infrared thermometers to screen for COVID-19 — University of Oxford Centre for Evidence Based Medicine, 3rd August 2020: <https://www.cebm.net/2020/08/screening-for-covid-19-with-infrared-thermometers-more-marketing-than-medical-evidence/>

[infrared thermal imaging]” and “that health and care settings should not implement infrared thermal imaging as a means of detecting COVID-19 patients.”¹⁹²

CEO of MoviTherm, a company which supplies thermal scanners, Markus Tarin warned that a lot of cameras were being sold under false pretences:

“A thermal camera can only detect, measure and document the variations of skin surface temperatures. It cannot detect or diagnose (...) if somebody has a fever or not, if somebody is sick or healthy, if somebody has an infection of any kind, if somebody is contagious or not.”¹⁹³

We are continuing to track the use of thermal surveillance across the UK. Luton Airport¹⁹⁴, Stanstead Airport¹⁹⁵ Manchester Airport¹⁹⁶, and East Midlands Airport¹⁹⁷ are all undergoing trials of thermal surveillance. Gatwick Airport had trialled the technology, but has decided not to use it as “according to PHE’s medical, clinically informed, and evidence driven approach to identify those at risk, temperature checks are not a required or effective way of keeping the public safe.”¹⁹⁸ National Express coaches are also using handheld thermal scanners on those wishing to board.¹⁹⁹

All theme and adventure parks run by Merlin Entertainment, which includes Thorpe Park and Alton Towers Resort, are also using temperature scanners on staff and visitors.²⁰⁰

We have also received reports of workplaces, restaurants, bars and shops 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.

Our repeat our previous recommendation.

RECOMMENDATION 17: We urge all companies, authorities and institutions to immediately cease use of thermal surveillance, absent a strong evidence base and robust safeguards.

¹⁹² Infrared thermal imaging in health and care settings for the prevention of COVID-19 transmission — Health Protection Scotland, 3rd July 2020: <https://www.hps.scot.nhs.uk/web-resources-container/infrared-thermal-imaging-in-health-and-care-settings-for-the-prevention-of-covid-19-transmission/>

¹⁹³ Elevated Body Temperature Screening | 6 Things you need to know before buying a thermal camera — movitherm, YouTube, 15 April 2020: https://www.youtube.com/watch?v=kBrBlohq9gg&feature=emb_logo

¹⁹⁴ Privacy Notice- Luton Airport: <https://www.london-luton.co.uk/privacy-notice>

¹⁹⁵ London Stansted Airport & Coronavirus (COVID-19) — London Stanstead Airport: <https://www.stanstedairport.com/coronavirus/>

¹⁹⁶ Manchester Airport & Coronavirus (COVID-19) — Manchester Airport: <https://www.manchesterairport.co.uk/coronavirus/>

¹⁹⁷ East Midlands Airport & Coronavirus (COVID-19) — East Midlands Airport: <https://www.eastmidlandsairport.com/coronavirus/>

¹⁹⁸ Covid-19 Travel Information — Gatwick Airport: <https://www.gatwickairport.com/at-the-airport/passenger-services/coronavirus/>

¹⁹⁹ Making coach travel safer - National Express: <https://www.nationalexpress.com/en/help/coronavirus-safety>

²⁰⁰ COVID-19: Protecting our Guests and Employees — Merlin Entertainment: <https://www.merlinentertainments.biz/media/3093/merlin-entertainments-covid-19-protecting-our-guests-employees-11052020.pdf>

Freedom of Expression

Free speech online

Big Brother Watch and Article 19 wrote to Google in response to claims that the search engine had reduced the ranking of the Great Barrington Declaration in search results, a statement written and signed by scientists and medical professionals across the world calling for public health policies which prioritise 'focused protection' of the most vulnerable until herd immunity is reached.²⁰¹ Whatever the merits or otherwise of this position, Big Tech companies should not be in the role of censoring scientific debate.

The free exchange of information and ideas is critical at all times, but especially during a pandemic. An open forum of ideas is essential for the development of successful public health policies. It is only through a free forum of ideas that citizens understand, contextualise, critique and trust information, not through harsh restrictions on information sharing. In a democracy, this vital right is not restricted to information that supports government policies. Any suggestion of censorship is extremely damaging, both to freedom of expression and to the development of science, medicine and public policy.

RECOMMENDATION 18: Big tech companies should not censor or demote lawfully-held views, petitions or debates related to coronavirus simply because they are contentious or criticise Government policy.

Protest

Under the Tier Regulations, political protests were an explicit exemption to restrictions on gatherings. However, there remained significant restraints on the right to protest.

As has been the case since July, public and political bodies, businesses and charities are able to organise large gatherings, provided they carry out a risk assessment and the organiser has "taken all reasonable measures to limit the risk of transmission of the coronavirus", including "any guidance issued by the government which is relevant to the gathering." This exemption was the same in Tiers 1, 2 and 3.

A protest outside the Polish Embassy against the new restrictions on abortion in the country was cancelled after the Metropolitan Police refused permission for the protest to go ahead.²⁰² Activists from Polish Migrants Organise for Change had previously safely organised a protest on 24th October, but plans to host further protests were leant on heavily by police officers. Organisers told us that police officers contacted them over the phone regarding a protest planned on 30th October and warned that "exemptions were granted to formal political organisations such as political parties only."²⁰³ When organisers asked if they would be exempt if members of a political party (for example, the Labour party) were to organise the protest, they were told they "would still need to comply with a very complex risk assessment that would have to include a track and trace system of how people are travelling to and from the protest." Organisers also reported to us that police officers told them people were neither allowed to travel from outside London to attend the protest, nor to use public transport for non-essential reasons.

²⁰¹ Big Brother Watch and Article 19 ask Google about search results — Big Brother Watch, 13th October 2020: <https://bigbrotherwatch.org.uk/2020/10/big-brother-watch-and-article-19-ask-google-about-search-results/>

²⁰² Twitter, Netpol, 26th October 2020: <https://twitter.com/netpol/status/1320825354097991682?s=20>

²⁰³ Comment from Polish Migrants Organise for Change, via correspondence

These comments had no basis in law. The Regulations defined a 'political body' as "a political campaigning organisation within the meaning of regulation 2 of the Health and Social Care (Financial Assistance) Regulations 2009" — which is "any person carrying on, or proposing to carry on 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." This broad definition is welcome, but clearly police officers are either unaware or are deliberately misleading would-be protesters. There is no requirement in the Regulations to include a "track and trace system" and no probation on people travelling from different tier areas.

In emails sent to protest organisers and seen by Big Brother Watch, police officers required the following information:

"What is the nature of your protest/What is the issue being protested about?"

"What is the name of the organisation involved in the event?"

"What is the demographic of the group, will there be children/families present?"

"Have you organized an event like this before?"

"Will your group have banners/placards?"

"If so, what will their dimensions be and what slogans will they have?"

One police officer also wrote in an email: "I should also point out that the reason for your protest does NOT meet the legal exemption to protest so therefore you would be liable to be fined and/or arrested." There is no requirement to have a valid "reason" for protesting, only that a risk assessment is carried out and Government guidance is followed.

In the case of the protest against Poland's new anti-abortion laws, a spontaneous protest occurred regardless, although protesters reported that after several hours they were threatened with significant fines if they did not disperse. It is unacceptable that protesters are forced to choose between risking a £200 FPN or being unable to demonstrate.

RECOMMENDATION: There is significant evidence that police officers are misrepresenting the restrictions on gatherings to deter legally permitted protests. This must stop. It is the role of police to facilitate protests — freedom of expression and assembly should not be contingent on police approval.

Protests against the Coronavirus Act and lockdown measures have consistently faced aggressive police interventions and vast fines. Piers Corbyn, a prominent anti-lockdown campaigner has faced multiple £10,000 fines after for organising protests of more than 30. Most recently, an anti-lockdown protest was dispersed by police after they "voided their risk assessment", resulting in 18 arrests.²⁰⁴

Commander Ade Adelekan from the Metropolitan Police said: "I would urge those looking at attending a protest tomorrow that these events may not be exempt from the regulations if the organisers do not

²⁰⁴ Coronavirus: Arrests as police officers injured at anti-lockdown protests in central London — Sky News, 24th October 2020: <https://uk.news.yahoo.com/coronavirus-arrests-police-officers-injured-180800894.html>

comply with the regulations and submit a satisfactory risk assessment.”²⁰⁵ This denies the reality that many protests do not have a single organiser or a system whereby those wishing to attend can check if the organisers have filled out a risk assessment. Many protests are organised en masse by people passing on information through social media or word of mouth, or may even be spontaneous — telling the public that some protests “may” not be allowed without providing any more clarity chills participation as many may feel unable to take a risk in attending. This is the response reported by protesters we have spoken to.

Under the current lockdowns in Wales and Northern Ireland, there are no exemptions for protests or gatherings organised by political bodies, meaning the right to protest is effectively suspended. In Scotland, “a club or political organisation” is permitted to organise an outdoor gathering, with no requirement to complete a risk assessment.²⁰⁶

RECOMMENDATION 19: 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.

²⁰⁵ Met policing plan ahead of protests and events across London this Saturday — Metropolitan Police, 23rd October 2020: <https://news.met.police.uk/news/met-policing-plan-ahead-of-protests-and-events-across-london-this-saturday-413570>

²⁰⁶ The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020, Regulation 11(c)(v)