HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence (Virtual Proceeding): The Government's response to Covid-19: human rights implications of long lockdown, HC 1004

Wednesday 24 February 2021

Watch the meeting

Members present: Ms Harriet Harman (Chair); Lord Brabazon of Tara; Ms Karen Buck; Joanna Cherry; Lord Dubs; Lord Henley; Baroness Ludford; Baroness Massey of Darwen; Lord Singh of Wimbledon.

Questions 21-31

Witnesses

I: Kirsty Brimelow QC, Doughty Street Chambers; Lochlinn Parker, Head of Civil Liberties, ITN Solicitors; Gracie Bradley, Interim Director, Liberty.

Examination of witnesses

Kirsty Brimelow QC, Lochlinn Parker and Gracie Bradley.

Q21 **Chair:** Good afternoon and welcome to this session of the Joint Committee on Human Rights. As our name implies, we are a joint parliamentary committee between the House of Commons and the House of Lords. Half our members are Members of Parliament and half are Members of the House of Lords. Our concern is with human rights and we are again looking today at the issue of human rights during the Covid pandemic.

People will know that there are a number of basic human rights, such as the right to demonstrate, the right not to be detained unlawfully, the right to free speech, the right to protest, and the right not to be dealt with unfairly by the criminal justice system. Many of those human rights have been at issue as the Government have struggled on our behalf to deal with the pandemic. Their primary obligation is the right to life, but the question is whether their response to ensuring the right to life has been proportionate and has respected human rights.

We will be looking at a number of issues: fixed penalty notices, which have been issued in order to enforce the regulations and the restrictions; the size of the fines at £10,000 and whether they are excessive—normally, fixed penalty notices are no more than £500; whether people have adequate rights to challenge those fines if fixed penalty notices are issued to them; whether they are issued fairly or in a discriminatory way; whether the right to peaceful protest is adequately protected; and the situation regarding the police entering people's homes to enforce the rules on no gathering in people's homes.

We are very grateful to have two panels of very distinguished people to give us evidence on this. The first panel are concerned first and foremost with human rights: Kirsty Brimelow QC, from Doughty Street Chambers, Lochlinn Parker, who is head of civil liberties at ITN Solicitors, and Gracie Bradley, who is interim director of Liberty. Thanks to you all for joining us.

On our second panel will be Owen Weatherill, assistant chief constable, the National Police Coordination Centre, Ben-Julian Harrington, who is the Essex chief constable and public order and public safety lead for the National Police Chiefs' Council, and John Apter, who is the national chair of the Police Federation of England and Wales.

We are very grateful to you all for joining us. Can I start by asking Kirsty the first question? Protecting life has been at the fore of the Government's approach to the pandemic, and they have put

regulations in place to protect life, but interferences with human rights caused by these regulations must be proportionate in order to protect our rights. The principal sanctions that have been used to encourage compliance and to punish those who do break the rules have been fixed penalty notices. Kirsty, how do you believe that the issue of fixed penalty notices to enforce lockdown rules engages human rights issues?

Kirsty Brimelow: I would answer that question in two parts. It is well established that rights under Article 8, which is the right to family life, and Article 10, which is the right concerning freedom of expression, are qualified rights in that they are not absolute. The first part of your question is about whether there is any interference with those rights. Any restriction—for example, on the liberty of somebody—is an interference. That is certainly something that this committee has dealt with previously. The first point is that the regulations themselves are an interference.

The second aspect is the extent of that interference. There are two aspects to that. The first is whether there is a pressing social need for it. The second is whether it is proportionate or not. As to pressing social need, we need to go back to the reason for the regulations. They come under the Public Health Act, as everybody is familiar with now, and, summarising the core intention of that Act, the purpose is to prevent the spread of the virus.

We need to consider whether the regulations do that. If they step outside their public health purpose, they simply restrict movement and other aspects of family life, such as worship and interacting with other people. We will come on to Article 10 later, particularly in relation to protest. Then you have an immediate warning that they will probably not be proportionate.

The second aspect is enforcement, and this is where fixed penalty notices come in. Any enforcement also engages the right to move, to socialise, to interact with your family. Again, we are looking at whether it is necessary and proportionate. We have seen a large number of examples where the issuing of fixed penalty notices, the enforcement part, has been unlawful—they have been issued where there has been no breach of the regulations themselves—or they have, arguably, been disproportionate because they have then been set aside.

There are a number of matters to break down there. However, in summary and in answer to the question, yes, fixed penalty notices do engage human rights and potentially on occasions breach them. We will undoubtedly in this session dig a little more into the extent to which that breach is occurring.

Chair: Thank you very much indeed. These are very unprecedented times. Baroness Ludford will ask the next question.

Q22 **Baroness Ludford:** Thank you very much to our witnesses. Can I ask you about enforcement through fixed penalty notices, which is designed to be the last resort for the police, who are supposed to use the so-called model of engage, explain, encourage? Is that model an effective way of encouraging compliance, and what alternatives, especially to the use of fixed penalty notices, might be available? I note in this context that on Monday, I think, a conviction for obstructing a police officer because of refusal to give name and address was struck down by the High Court sitting in Cardiff. This chap was prosecuted for obstructing a police officer and the court said the right to silence applied in this context, which no doubt gives the police another challenge. Gracie, do you want to go first on this one?

Gracie Bradley: Yes, thank you. In Liberty's view, the four Es model is very good in principle. From what we have seen, it has not worked hugely well in practice. It has not been applied consistently across forces and, as you will have already noted, there has been widespread confusion on the part of more or less everybody about what is law and what is guidance.

The four Es model has not really helped with that. We have seen numerous instances of officers acting beyond the law, which explaining and engaging does not really address. I will give some examples, which are obviously non-exhaustive. We saw only last month that two women in Derbyshire on an exercise trip were surrounded by police and told that was unlawful. At the start of January in Lancashire we found that police were using the police national computer to assess whether cars were from outside the local area, on the grounds that that was a blatant breach of the Covid regulations, which was not strictly true. Last week, the *Times*, I think it was, reported that a police force had threatened members of the public with fines for being outdoors and throwing snowballs. The four Es model is good in principle, but it has been unevenly used in practice and I think more broadly has failed to deal with that problem of the gap between the guidance and the law.

In terms of alternatives, Liberty advocates for a genuine public health approach. The pandemic is first and foremost a public health crisis that has been exacerbated by deep-rooted inequalities, and the regulations that have been made allow the Secretary of State to make laws for the purpose of providing a public health response

to the spread of disease and not for the purpose of policing public order.

There is quite a lot of evidence for a public health approach. The recent briefing note from Independent SAGE, for example, discusses the fact that, "Punishment for blatant and visible violations may have a role in maintaining a sense of justice for the majority who are adhering, but evidence suggests that prioritising punitive approaches can be ineffective or even counterproductive. Punitive approaches applied to the one area where adherence is low—self-isolation—also distract from the real causes of failure of adherence".

That is just one example. There is quite a lot of evidence on a public health approach, which I could go into in more detail, but I will leave that there.

Kirsty Brimelow: What is interesting about the four Es is that the point of them was originally to stop criminalisation. Obviously, there are two aspects: fixed penalty notices were set out, and they are set out still in the regulations as a diversion from the criminal justice system.

What has developed is that because of the way fixed penalty notices are set up they have become part of the criminal justice system, in that often people cannot pay the fines or they dispute the fixed penalty notices, so they find themselves in the magistrates' court and in the criminal justice system.

I think what we are seeing quite often is the police still considering a fixed penalty notice not to be enforcement because they have decided: "We won't prosecute you or report you to the CPS for prosecution. We'll deal with you in a diversionary way by fixed penalty notice". That was certainly how we started to see FPNs being used last year from 26 March onwards. Now, the four Es have perhaps been lost in that they should have also applied to fixed penalty notices, because they are firmly within the criminal justice system and are being enforced there.

On the alternatives, I agree with the position of Liberty that guidance and guidelines should be used. I say "should", because they are meant to be public health guidelines. The word "should" features in the guidelines to show that that is what they are. They are not "do not" or "must not", which is law and has an element of enforcement to it. The difficulty we have in mixing guidance with law—I know that the committee has looked at this previously—is that not only have we lost the four Es, but we have also lost looking at an alternative to fixed penalty notices, which is the use

of directions by officers, such as to go home, giving them a warning and various other steps that you usually see within a criminal justice system, which seems to have fallen away here.

I regularly get emails from members of the public with concerns about fixed penalty notices or letters promising a fixed penalty notice that have been issued to them. An alternative is to move away from fining people, which is leading to criminalisation, and moving towards guidance and engaging with people, perhaps in the way that, ironically, countries like Japan have been doing.

Chair: Thank you. The next question is from Lord Brabazon.

Q23 **Lord Brabazon of Tara:** I am a Conservative Member of the House of Lords and a member of this Joint Committee. My question is to all the witnesses. Sanctions such as fixed penalty notices issued where there has been no breach of the law risk infringing human rights, especially the requirement that there should be no punishment without law under Article 7 of the ECHR. What are the challenges faced by the authorities with the power to issue fixed penalty notices that may lead to misapplication? I do not know who would like to start off on that one.

Chair: Gracie, would you like to pitch in first on that, and could you speak quite slowly because we had a bit of interference on your line with your first answer?

Gracie Bradley: Yes, I can speak slowly. I did not have a comment on this question.

Kirsty Brimelow: I am happy to take that if it would assist. It is an interesting question, because it looks at how there should be no punishment without law under the European convention. We could also take a step back and consider that there should be no punishment if there has been no breaking of the law.

The first point to make is that there has been a huge amount of unlawfulness with the wrong application of guidance, which is not enforceable, and sometimes of pronouncements from politicians and Ministers, which have been misunderstood to be law but are not enforceable, rather than with the law itself.

The starting point there is that unlawfulness corrodes trust, and it is bad for rule of law in any event. There is a challenge to authorities in these times when powers have also been given to local authorities that they have not had before. We saw, for example, how some local authorities used their powers in relation to universities, such as earlier this year or the end of last year concerning Manchester Metropolitan University, when students

were saying that they were being detained. There were a number of issues there in that the local authority had no power because it had not followed the regulations in obtaining appropriate consent, and security officers at the gates also had no power to prevent students from leaving. That is probably quite a good example from a practical perspective of what happens when local authorities are given powers that they are not used to having but are unclear as to what those powers are and the safeguards of those powers.

We have seen that any safeguards in draconian powers have not been understood and so have not been applied and have resulted in unlawful action by authorities. It is harder for local authorities that are perhaps less used to having these types of powers than for the police, who are perhaps more used to these types of enforcement powers.

Q24 **Ms Karen Buck:** Very much flowing on from that is the fact that the CPS analysis shows that about one in eight of these penalty notices has been incorrectly charged, primarily by the police. Do we know anything about the pattern of this or whether there is any trend emerging from it—it might be regional or to do with types of offences—that underpins what you have been saying about the confusions? Is the number of prosecutions being incorrectly brought—one in eight—surprisingly high, or is it possibly fairly consistent for a new set of powers? Do you have a response to that kind of figure?

Kirsty Brimelow: Thank you for the question. I am quite happy to lead off on this one.

The first case I became involved in was literally a few days after these regulations first came into force on 26 March 2020. It became quite an emblematic case and was of a young woman standing on her own at a train station in Newcastle. That highlighted first the misuse of the law in that the wrong Act was applied, and there were further very concerning misuses of powers in that she was detained in cells for two nights. There is no power to detain somebody under the regulations. This went all the way through to a district judge, who convicted her. There were subsequent similar examples of the right regulations being used but for the wrong jurisdictions, such as the Welsh laws applied in England for a case in Oxford. Those are two examples in the early days.

There are two headings here. First, we should not still be under emergency regulations, and statistics from the Crown Prosecution Service show that there remains a lack of clarity about the application of those regulations. The latest statistics show that 25%

of prosecutions or charges under the coronavirus regulations were wrong. We do not have any more analysis than that. That in itself is very concerning, because there are safeguards in that lawyers are reviewing them, but 100% of prosecutions under the Coronavirus Act to date have been wrong. That shows me that there is a very strong case for repealing the section that is continually being used wrongly and unlawfully against members of the public.

I do not think that those statistics are usual in a criminal justice context. It is not usual at all to see the law being repeatedly unlawfully applied. It demonstrates that the safeguards are not working within the criminal justice system. It is highly likely, where there are no safeguards in the application of fixed penalty notices, where there is no lawyer overseeing them, that thousands of those fixed penalty notices have been unlawfully issued.

Lochlinn Parker: If I could add to what Kirsty has said, these issues have real-world consequences for individuals, whether that is fixed penalty notices that remain on records and are potentially disclosed in enhanced criminal records checks, or prosecutions and convictions. These powers are hopefully on the way out, and the issue that they were brought in to press may well be on the way out, at least temporarily.

This all seems to suggest, given all the problems we have had, that some kind of comprehensive review is needed. That might be an inquiry by Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services and so on that dip-samples across forces and looks at fixed penalty notices and what has happened, and the CPS is brought into that. We will move on from this sooner or later, but a lot of people will be left with the consequences of it. The injustice that has been apparent needs to be addressed, and we should not just simply move on from that.

Chair: Could I follow up that point with you, interrupting Karen's flow of questions, which we will return to? Would you suggest a general review, or would you suggest that after the pandemic is finished and we are all unlocked in June, or whenever it is, that there should be a look at each of the prosecutions and that people should be given some additional right to ask for a review if they have been given big fixed penalties?

More than just looking at the policy and seeing whether it was right, should there be some right for individuals to say, "Look, we know this was done in an unprecedented situation. It had to be done quickly. We didn't know what the pattern of the virus spread

would be. We didn't know how people would respond. We had to take these powers, but we now think we'd better have a look and see whether there might have been some unfairness in them"?

Do you think that the Government should instigate that approach, so that we are not just looking in principle at whether they did the right thing but are giving any person who, as it turns out, has suffered an injustice the opportunity to challenge that, but after the pandemic is over and the whirlwind has moved on?

Lochlinn Parker: The only thing I would say is that after the pandemic is over is like a piece of string. We do not know, and it will still have real-world consequences for people over the next months or the next year if we go into a fourth lockdown and these powers are still around.

The problems will still exist for people. The process of looking at how this can be done has to start now, and potentially dip-sampling across forces could provide the evidence that in fact we are not just talking about a number of cases that have come to lawyers and the papers but that this is widespread, and that therefore there should be an individual right to have that fixed penalty notice, that conviction, reviewed.

Perhaps what should happen now is the process of looking into the issue in detail at a local force level and looking at those fixed penalty notices to see whether or not they have been issued incorrectly.

Kirsty Brimelow: Could I add to that, to assist? A number of us—lawyers, groups of lawyers, and the NGO Big Brother Watch—formally put together a request that was directed at Martin Hewitt. We suggested that there be panels set up by each police force where those who have been issued with fixed penalty notices could submit their fixed penalty notice for review. This followed the commendable action taken by the CPS in setting up its review; it saw that there was a problem and that people were being wrongly prosecuted.

The response from Martin Hewitt to date has been that they will not take that step, but no reasons have been given as to why not. Certainly, if you compare the CPS data to the FPN data, taking into account the fact that there are no safeguards, the data show that it is likely that thousands of FPNs have been unlawfully issued. We have made that request repeatedly, and so far we have had a negative response.

Q25 **Ms Karen Buck:** Again, flowing on from that is the fact that the

scope for challenging an FPN is for people to go to court. In some cases this may be because people have an in-principle objection, but in other cases it will be because they cannot afford a substantial fine of the scale that has been levied. In what way is that process protecting people's rights to be consistent with the law, whether or not the concern is about the ability to pay the fine? There is a subsequent question on proportionality, but if we assume that the £10,000 maximum fine is a very substantial penalty, is there an alternative to this and how is that working in practice?

Kirsty Brimelow: What you are talking about in your question, which is very important, is due process. Here there is no right of appeal. This is a big problem. In fact, we have a case currently pending before the High Court on this very issue, challenging that it is a remedy to wait to be prosecuted in the magistrates' court. That is not a remedy at all, because most people, even if they have been wrongly issued an FPN, will pay the fine rather than risk being prosecuted and then getting a criminal record and conviction, and those without any money are in an impossible situation.

An informal process has grown up among lawyers whereby we have been writing informally to the specific police force and stating why it has the law wrong, or in some cases that the FPN is not proportionate or just, and asking that it sets it aside. On quite a number of those occasions that has been successful, so we have developed an informal system. An informal system is necessarily arbitrary, and we are seeing a difference in attitudes across different forces. That is not really a sustainable or positive solution, but it is one that we are taking forward. I should add that we are all acting pro bono. It is really a public service, and that should not be happening either when people are already suffering different stresses due to the pandemic itself.

There needs to be a formal appeal system, as for a parking ticket; if you get a parking ticket, you can appeal it. There needs to be that in the regulations and there is no excuse for it still to be lacking. I and many others raised this as far back as the end of March last year.

Lochlinn Parker: A lot of this work is done pro bono also because legal aid is not available for it. The potential of having a fine in the magistrates' court means that it does not meet the interests of justice test and criminal legal aid is not available. You will end up paying possibly the same as the fine you may be seeking to avoid in legal fees, which you will not necessarily get back, or at least in whole. A lot of people are left without legal advice and are left

vulnerable as a result, and most likely take the fixed penalty notice to avoid the fear of conviction.

Ms Karen Buck: Is anybody monitoring the different, and arbitrary, pattern of responses across the country, or what is happening to people who are making the decisions based on their ability to pay as opposed to their principled objection to the penalty being applied in the first place?

Lochlinn Parker: I am not aware of anything.

Kirsty Brimelow: It is not systematic. I will hand over to Gracie on this, who will be more across the policy, but the last statistics from the police on the issuing of fixed penalty notices and the disparity according to police forces were last summer. There has been no update.

As to monitoring payment and so on, a journalist recently investigated due process and something even more concerning, which is that many of the convictions are being processed without public access, without people being present; they are being done through the post. There are a huge number of concerns coming through about how the courts are managing these cases and that people are probably being convicted without any access to the court system. As Lochlinn has said, legal advice is prohibitive unless people can act pro bono. I will pass over to Gracie. She might have more information.

Gracie Bradley: No.

Chair: Thank you for those answers to Karen's questions. We move on to the next question from Baroness Massey.

Q26 **Baroness Massey of Darwen:** I am a Labour peer and I am finding all this very interesting. It brings up a lot of the confusions that I think we have all been labouring under.

I want to ask about discrimination and was touched on earlier by Kirsty when she talked about incorrect prosecutions and gave examples concerning, for example, young people. Gracie stressed the public health issue and that it was therefore a public service, which we might want to take up again. Lochlinn also made a really important statement about people being left with these consequences when all this is over. Are the people carrying out this legislation unclear about the instructions? Are they misinterpreting the instructions? What is going on?

My main question is this. The ECHR, as we know, protects people from discrimination in their enjoyment of human rights. The National Police Chiefs' Council statistics show that black and Asian

people have been 1.8 times more likely to be issued an FPN under the coronavirus regulations than white people. They also show that over 72% of FPNs have gone to men. Do you feel that there is an issue with discrimination in the application of FPNs, which engages Article 14 of the ECHR, the prohibition of discrimination, or are these figures out of date? Do you have any comments on why it seems to be so skewed? Is it just discrimination or is it misinterpretation? What is it?

Gracie Bradley: I am happy to speak to that. When the regulations came into force first time around, Liberty and lots of other organisations warned that, in the absence of meaningful safeguards, powers of this nature would be disproportionately deployed against minority ethnic communities. This was confirmed in an investigation by Liberty Investigates and the *Guardian* that revealed that between 27 March and 11 May last year black and minority ethnic people in England were 54% more likely to be fined under the regulations than white people.

Of course, these disparities are cause for profound concern, and I hear you asking why this is happening. I think it is important to reflect on this disproportionality in its context, because the overpolicing of certain communities is not a new development. Overall rates of stop and search, for example, have decreased since 2014, but race disproportionality in the use of the powers has risen. Despite a dramatic drop in people being outdoors during the first lockdown, use of stop and search in London surged to its highest in over seven years. We have not seen necessarily less police activity, and Liberty's view is that the Government failed to take steps to assess, address or mitigate the foreseeable impact of race discrimination when the regulations were made and additionally since they have been implemented.

We are concerned furthermore that this is a stark failing in light of the fact that it is, of course, communities of colour among other minority groups who have borne the brunt of the pandemic itself, with people of colour being more likely to die of Covid and to be in insecure or precarious work, and to be living in high density areas or overcrowded households where the disease might spread more rapidly and so on. Liberty's concern has been that during this enormous public health crisis black and minority ethnic people have been overpoliced and underprotected.

Baroness Massey of Darwen: Can I follow up on that with you, Gracie? We know that in relation to things like stop and search young black men have been very disproportionately focused upon. Do you have any comments on young people who are being given

these notices? It seems to me that it is a very dispersed group, or groups, of young people. Do you have any comment on that? Do you have any evidence of discrimination going on there with young people?

Gracie Bradley: Anecdotally, yes. Liberty runs an advice and information service and we have had complaints or concerns about treatment relating specifically to young people, with parents being issued with fixed penalty notices because they could not be issued to the children. We have had complaints of that nature to our advice and information service, so that has been a concern.

We do not have systematic evidence on that front. I have spoken specifically about race disparity, but I know that there are potentially also concerns in respect of gender disparities in enforcement too along multiple axes. When you consider who is potentially most likely to understand the rules, but also who has the most power to potentially challenge or give a valid reason for being out and about, younger people have less of that kind of power. As far as I am aware, there has not been a huge amount of targeted information to younger people, so we can see that it may have been more difficult for them to explain what they were out and about doing.

Kirsty Brimelow: The only comment I would add is that when those statistics came out last summer, there was a response from the police, from Martin Hewitt, who indicated that there are a lot of complex factors here and that there would need to be additional analysis. I have not seen additional analysis and we would hope that after this amount of time that analysis could have taken place. Then it would be clearer whether what we are seeing is a matter of discrimination, and whether it is direct or indirect discrimination.

Currently, it is difficult to comment further on individual cases that we have. I also have a case where young people on the street are challenging the issuing of a fixed penalty notice last year. Anecdotally, we cannot really pull it all together, but the police forces are in a position to do so. My only suggestion would be that they are pushed on the next panel.

Q27 **Lord Henley:** I am Conservative peer. Can we go back to proportionality of the fixed penalty notices? At the beginning, Kirsty talked about some being unlawful and some not being proportionate, and there has been further discussion about that as you and Gracie have given evidence. Do you think that the size of the fines imposed by fixed penalty notices and the recent example of a student at Edge Hill University, who was fined £10,000 for

hosting a house party, is proportionate to the behaviour that FPNs are designed to stop? Other groups may feel that the impact of fixed penalty notices may be disproportionate on those individuals or groups, such that it may infringe their human rights.

Kirsty Brimelow: The £10,000 is an eye-watering figure. First, we do not know where that was plucked from, but the vast majority of the population cannot afford that. Secondly, for fines in the magistrates' court, if you are there under a criminal charge and you are being fined, it has to be means tested for that very reason: the court cannot set somebody up to fail by imposing a fine that they cannot pay.

Then there are ways of payment so that they are able to pay per week or month, to pay gradually. Here we have a fine where there is no means testing. In the Edge Hill example that you referred to, the student said at the time, "How is a 20 year-old expected to pay £10,000?" People came to her house. She said that she had not invited so many and had not expected so many to come. Whatever the position, only a year ago this would have been seen as normal student behaviour. She was saying that it was not worth £10,000.

The issue is one of proportionality and impacting on young people, students, who can be selfish and reckless and can think about things in different ways. Young people can behave differently. Potentially, if they do not pay the fine or it is not set aside by informal representation—if they do not know that they can take that route—they could end up at the start of their young lives with a criminal conviction, which will remain with them. It is the real casual criminalisation of people. You are setting people up to fail with the size of this fine and it is not proportionate to the activity.

It goes back to my first comment: how much of a danger are students mixing together, in any event? In some ways, we have not seen whether this sort of activity is adding particularly to the spread of the virus or not. We have that unknown in that we do not know whether it is strictly necessary, so criminalising is arguably disproportionate in a legal case. I would say that it is disproportionate.

Chair: Can I follow up on that and take you forward a bit? Is the proportionality judged on the basis of the person who has been given the fixed penalty notice and their ability to pay, or is it, rather, proportional to the damage that we are trying to prevent, which is potentially the loss of life? If, for example, people at this party then went home and infected people who then died, is the proportionality better connected to the harm that might be caused by the breaking of the regulations rather than the person's ability

to pay?

Kirsty Brimelow: That is a good question, because it is splitting the two aspects of when somebody's human rights might be breached.

You have the first aspect, which is the issuing of the notice itself, regardless of the amount of money that that fixed penalty notice carries with it. That part can be disproportionate at that stage if somebody is in a house or, say, in a shared university hall. I can give you a practical example of a case I had in Nottingham. Students had gone from their shared flat downstairs to a shared flat upstairs, and there was probably a maximum of 10 people in there. Then the police came in and issued them all with letters, which threatened either prosecution or a fine. They said that if the police had said to them, "Where are you from? Go downstairs to your accommodation", they would have done that. That is where it is arguable that there was a breach; it was disproportionate to go to the enforcement.

The second step, of course, is the next part of the interference, the punishment part. That is where there may be a second breach and you are looking at the amount of money and proportionality—at whether it is £50 or £10,000.

So, in effect, there are two parts. You might not have a breach with some kind of enforcement if somebody is having a huge rave; that might not be disproportionate. However, you then have to look at what penalty is being imposed. There are two biting points when you are looking at somebody's breach of human rights. In advance of that, you have to step back to things like whether these laws are vires or not. Are they sufficiently connected to the purpose of the Public Health Act 1984, amended 2008, which is to prevent the spread of the virus? That is where we have had these other examples that have been referred to of people walking in beauty spots outside, where according to the scientific evidence there would be absolutely minimal risk of them spreading the virus.

Is a regulation in any way restricting that? Would that be outside the Public Health Act in that it is not doing anything to prevent the spread of the virus but is looking at liberty of the person rather than public health, which is what the Public Health Act is there to address? It is not there for public order, and that is one aspect that I would emphasise: that the police have powers for public order under the Public Order Act. There are various sections right down to Section 5, which is the least draconian when it comes to

offences. The regulations are not to do with public order; they are all about public health. I think that sometimes becomes confused.

Chair: Presumably, the proportionality also has to refer to the damage and the harm that might be caused. Arguably, our knowledge of the likelihood of harm being caused has developed as we have gone along. There is now evidence that washing your hands is not as important as people first thought it was. There is now much more concern about the indoor spread of the disease than outdoor. Do the authorities not have to be judged by what they thought might be the case at the time, not by what then emerged to be the case with hindsight, if they are doing their Article 2 duty, which is to protect lives?

Kirsty Brimelow: Yes. The washing of hands is a really good example of something within public health guidance. Similarly, guidance in the first lockdown was exercise once a day. That was never within the law. The two-metre distancing was guidance. There is no complaint with that. Where the issue really comes into sharp focus is where you are moving into liberty of a subject as opposed to autonomy of a person, how somebody lives, and that personal autonomy is within guidance.

Putting that within the law is where you are potentially acting in a way that is incompatible with the European convention. We should take the situation at the time, but this is the problem with using old laws that were not set up to deal with this situation, such as the Public Health Act, and shoehorning in restrictions on liberty and running businesses and so on. They do not quite fit.

It has always struck me as bizarre that when the regulations came in they focused on activity outside, but, even then, the science on the spread of the virus was that it was more likely inside, which made more sense in any event. Yet the restrictions were all outside. That was one of the points in a judicial review that I brought at the end of Ramadan. A mosque in Bradford was seeking to reopen for one specific prayer, the Jumu'ah prayer on a Friday, complete with social distancing and every sort of Covid-secure measure.

We received permission to judicially review the regulations, as they then were, which were restricting, but one of the arguments was that all the restrictions were about the outside in any event, and what the mosque was proposing was far safer than what people at that stage were allowed to do inside. There has always been a real gap between the science as known, even back in March, and the regulations, so the regulations have struck more definitively at

liberty and the usual norms of life rather than at health and preventing the spread of the virus.

Chair: Thanks very much. Could we go on to Lord Dubs for the next question about the vexed issue of quarantine?

Q28 **Lord Dubs:** I am a Labour Member of the Lords. This question is directed at Kirsty in the first instance. Do you consider that the new travel regulations, which require quarantine in hotels when arriving from certain destinations, engage the right to liberty and security under Article 5? Do you see any difficulties with how they may be applied from a human rights perspective?

Kirsty Brimelow: Any restriction in that way is likely to engage Article 5, and the devil really will be in the detail when it comes to enforcement and the quarantine regulations. Potentially, there is an issue of incompatibility with the European convention, which goes back to the point I stressed about making regulations in this way under a law that was never brought through Parliament for this purpose. Even the amendments to the Public Health Act in 2008 were not brought in for a national lockdown or a restriction of people's liberty in this way. By trying to use that Act as opposed to the Civil Contingencies Act 2004, which would place more power with Parliament to amend and review regulations—or by doing what other countries have done that have derogated from the convention rights, which again sets up a number of safeguards—we are in territory where potentially what we are doing could be incompatible with the European convention.

My view is that a decision should have been made by now. There can always be some excuse in the early months of an emergency, and no doubt there will be an inquiry into it, but a decision should have been made by now to bring in new legislation, a coronavirus Act No. 2, dealing not with potentially infectious people, which is what the Coronavirus Act deals with, but with situations where it could have been properly debated and amended.

Alternatively, there should have been consideration of derogation from the European convention so that those reporting mechanisms would then be brought into place and there would be supervision on the restriction on rights of people. The way the legislation has been done by this Government—by fiat, by government by decree—has caused a huge number of potential breaches of people's very important fundamental rights.

Q29 **Joanna Cherry:** Thank you, panel, for joining us this afternoon. Kirsty, I was very interested in what you said there about these regulations being made under the Public Health Act, but they are

not really there for public order.

That links into the question that I want to ask about the impact of these regulations, the restrictions on people's right to peaceful protest and people's right to freedom of expression and freedom of assembly. Do you think these restrictions have been reasonable? Do you think that the law, in so far as it impacts on our rights under Article 10 and Article 11 of the ECHR, has been accessible and foreseeable, having regard to the frequent changes in the law and the sometimes conflicting messages coming from the police and government, thinking back to the Black Lives Matter protests last summer?

Kirsty Brimelow: Taking the last part of your question first, the laws have been completely inaccessible and opaque. We have seen that through the statistics, probably from the CPS, and so many wrongful prosecutions of acts that nobody is suggesting are deliberate and malicious. People are just confused. That goes all the way to those who are sitting in positions as district judges and similarly with the fixed penalty notices. The law is being wrongly applied, which shows that it is not accessible.

The regulations now are probably around 130 pages long. They are quite often not even linked specifically to the guidance. Even the lawyers get confused going through them. Laws that are inaccessible mean that they might be unlawful, because in order for a law to be lawful it has to be clear and accessible so that people will understand that they have committed an offence. That is the territory we are in now. The amendments have been made so often and in such a confusing way, with guidance being mixed with amendments to the law, that people no longer know where they stand and perhaps some have given up on trying to abide in some way.

Protests were another source of confusion that we saw. With the Black Lives Matter protest, for example, people were confused because the regulations were entirely silent about protest. It seemed very confusing that there were restrictions on who could meet with who outside, yet there were thousands of people gathering in this way. Then, a specific exemption was brought into the regulations to protect rights to protest. There were exemptions to restrictions on the right to protest, and then they were removed. We are in a position where the law is now silent again. None of that is satisfactory. Restrictions on protest could have a chilling effect.

Particularly in a pandemic, there is a lot of frustration, a lot of upset and a lot of anguish. People need to be able to express that. It obviously needs to be done in such a way that people are safe,

and this comes back to the need to focus on guidance, on public health advice, which is what the guidelines are. They need to be split from any connection with criminal law, which is where they have been placed. If they were just headed, "These are the public health guidelines and we are recommending that you follow them", and a separate section, "Here is the law. If you do this, these are the potential consequences", that would assist.

Obviously, Article 10 and Article 11 are qualified rights, and you have to weigh up the absolute right of protecting of life, but there is no reason why protests cannot take place with sufficient safeguards around them. The regulations now allow unlimited numbers in church services, for example, certainly under tier 4. There is also a lot of illogicality around where the red lines are drawn and elasticity over what people can do. That is what has led to a lot of the frustration: people do not see the logical connection with public health on a lot of occasions. It is very important that we protect our rights to free speech and protest and gatherings.

Lochlinn Parker: Kirsty has touched on the deterrent effect and the fact that inconsistency and lack of clarity in rules might deter people from getting involved in protesting. Certainly, anecdotally there is a great deal of evidence there.

The other side of it, of course, is that protest has never been banned. Silent protest is still allowed as a common law right enhanced by the Human Rights Act. The police have a duty to facilitate protest in these circumstances, regardless of what the regulations say. The issue that has become very problematic is how restrictions are enforced, what restrictions are decided, and how the police go about doing that.

We have talked about the four Es: engage, explain, encourage, enforce. There is a fundamental flaw there if officers do not understand what the regulations are. Who are you engaging with? Why? What are you explaining? What are you encouraging them to do? Ultimately, when you are taking enforcement action, are you sure, or do you have a reasonable belief, that somebody is acting contrary to the guidance—sorry, the regulations? There is the obvious slip: the guidance and the regulations.

That has been a major issue, and some forces have treated protests as being banned, except when protest was specifically exempt. Forces have also just got it wrong in general. I do not want to talk about our own cases, but a case I had in August, prior to the new regulations in September, indicated that over the summer the Met Police had not understood the regulations at all on

the protests. They threatened to arrest a client of mine who was seeking to organise a protest. They said that he was not exempt when he quite clearly was, which they eventually accepted after pre-litigation.

Without an understanding of what the regulations are, the police should not try to enforce restrictions on protests. Protests that adhere to the guidance at least of "hands, face, space", as it were, should not have interference at all. The duty to facilitate has certainly been in the manuals for the last decade-plus, and the police should be adept at facilitating that protest and focusing on public order, because they are not experts in public health. Unless there is an obvious breach of it, they should not be getting involved.

That inconsistency across the country in different forces has certainly been a problem, and that is why you have seen different approaches at different times. If we have this going forward, there needs to be greater clarity about it, but there also needs to be an understanding by the police about their duty to facilitate.

Q30 **Joanna Cherry:** I am conscious of the time, but the police would say that at present, so far as they are concerned—I am talking about England only at the moment—the national lockdown was enacted by moving the whole of England into tier 4 and strengthening restrictions, and protest is no longer permitted because there is no exemption for it. If more than two people are gathering outdoors, that is against the law and there is no exemption. There is an exemption for picketing, but not for protesting. If the police were to say that, what would your response be?

Lochlinn Parker: My response would be—Gracie, please step in as well, particularly if I get it wrong—that the courts have already accepted that a reasonable excuse to leave the house engages convention rights. That was the Dolan case at the Court of Appeal. There always remains the common-law right to protest unless it has been specifically banned by the Government. They have never specifically banned it, so it still exists, and the police's duty to facilitate it still exists.

It is a problem that it is not specifically exempted, because it does not create that clarity, but the police, with their legal advisers, should understand the common-law right to protest by now and their duty to facilitate it.

Joanna Cherry: That is helpful, thanks. Can I bring Gracie in as well, please?

Gracie Bradley: Liberty has been in correspondence with police forces that accept that protest should not be treated as if it were banned outright. We are in agreement on that point. You may be aware of the case of two people seeking asylum, and accommodated at Napier barracks, who were threatened with enforcement in January for protesting their conditions. Liberty subsequently wrote to Kent Police asking them to set out the legal grounds for that approach.

The force then admitted that it would be wrong for officers to interpret the absence of a protest exemption in the current regulations as constituting an outright ban on protest. They stated that for two reasons: first, because the set of reasonable excuses for leaving home is non-exhaustive; and, secondly, because the restriction on participating in outdoor gatherings is also subject to several exemptions, including where people are members of the same household, as the two people seeking asylum were.

There are differences in approach between different police forces. If you can trust what we heard from Kent Police there, there is a difference with what the Met was saying on 28 November in respect of anti-lockdown protests. The press statement said outright that protest is illegal. Again, that lack of clarity in the law has essentially left police forces having to interpret whether or not protest can go ahead. We have to acknowledge that protest is a fundamental right. It is absolutely vital to democracy. Therefore, a question that important simply cannot be left to a force-by-force approach.

Lochlinn Parker: If I could add one final point, there is a case which the committee might want to keep an eye on in Northern Ireland, where the PSNI treated protest as being banned and issued fines to people. That is, I think, the only judicial review case that is going on. Jude Bunting, one of Kirsty's colleagues at Doughty Street, is counsel on that. I can provide more details to the committee if that is helpful.

Q31 **Lord Singh of Wimbledon:** I am a Cross-Bench Member of the House of Lords. My question is addressed to Lochlinn and Gracie. We all saw protests last summer that went ahead without significant police interference, but other protests seem to have been prevented. Has a fair and balanced approach been taken to all public protest, or do you feel that any protests have been particularly unfairly policed?

Lochlinn Parker: I will take the first part of the question. Yes, there is poor communication. Conflation has been an issue in deterring protestors from having their protest, whether that is an

annual protest that has gone on for ever, which they decided to forgo this year because of concerns about getting a fine, or just people attending protests that are happening. There is definite concern about that. It has led to inconsistent approaches, because police forces and individual police officers have taken different views on what is allowed and what is not allowed.

Again, it is the fundamental problem of the four Es. If you do not know what the regulations are, how can you go through the four Es and provide that diversionary approach in a consistent manner? Yes, it has been a significant problem.

Gracie Bradley: I can come in with some more specific examples. Obviously, we have discussed the case at Napier arracks. To come back to the issue with the Met, various anti-lockdown protests were planned in London for 28 November. Liberty, with Big Brother Watch, wrote to the Met setting out concerns about its statement that protest was explicitly banned. The regulations in force at that time included a clear exemption for the organisation of gatherings by a business, charity and so on, including political bodies, so long as required precautions had been undertaken under Regulation 14. The *Guardian* subsequently reported that 155 people had been arrested. That was one example that we were concerned by.

We were further concerned by the policing of a Black Lives Matter protest in Belfast in June last year, where police issued numerous fixed penalty notices, despite organisers taking care to ensure that they were adhering to social distancing, facemask guidance, and restrictions on group sizes. The ombudsman for the Police Service of Northern Ireland has confirmed her view that the BLM protest there was policed unfairly as compared with other protests that took place around the same time.

Finally, I would draw the committee's attention to research published by Netpol considering the policing of last summer's Black Lives Matter protests. That report concluded that black-led protests were disproportionately treated with excessive interventions by the police.

I know that there has been a narrative in some quarters that BLM was allowed to proceed and that anti-lockdown protests have been disproportionately enforced against, but the evidence that I have seen is far more complex and ultimately points to the problem of there being massive inconsistency between police forces, but crucially to the lack of an explicit exemption in the law, which we had before and which should be introduced again.

Lord Singh of Wimbledon: The inconsistency seems disturbing,

but thank you.

Chair: I thank our panel, Kirsty Brimelow, Lochlinn Parker and Grace Bradley, for their evidence here this afternoon and the work that they have been doing that has led up to their evidence. In particular, their pro bono support for individuals to protect their human rights during this pandemic is very important work. Thank you for what you are doing, as well as your evidence to us.