

20 May 2020



**JOINT COMMITTEE ON
HUMAN RIGHTS**



**CHAIR'S SECOND BRIEFING PAPER ON
THE LOCKDOWN REGULATIONS**

**THE HEALTH PROTECTION (CORONAVIRUS, RESTRICTIONS) (ENGLAND)
REGULATIONS 2020 & THE LOCKDOWN RESTRICTIONS**

SUMMARY: The Health Protection (Coronavirus, Restrictions) (England) Regulation 2020 and their counterparts in the other UK jurisdictions give legal effect to the “lockdown”, the most significant and blanket interference with individual liberty in modern times.

There have been some significant changes to the lockdown regulations since the Chair's previous Lockdown Regulations Briefing Paper – notably people are now allowed outside for general recreation in England and the level of the fines has significantly increased. However, concerns remain around (1) the clarity of the regulations for both the public and police, (2) the lawfulness of some prosecutions brought and Fixed Penalty Notices issued, and (3) a deficit of Parliamentary scrutiny.

It is essential that an urgent review is undertaken of Fixed Penalty Notices issued under the lockdown regulations and that, in any event, there should be a means of challenging fixed penalty notices by way of administrative review or appeal in the next set of amendments.

To ensure adequate parliamentary scrutiny of such sweeping restrictions, any new regulations or amendments to regulations should be announced to parliament before they are laid. Time should be allowed to debate and a vote held on any amending regulations as soon as possible given the significant implications for human rights. Moreover, the regulations should be amended so as to require a proportionality review every 21 days, as required by the equivalent Welsh regulations, and each review should be published.

I. Introduction

1. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ('the Regulations') were made and came into force on Thursday 26 March 2020. Equivalent (although not identical) measures were made in respect of Wales, Scotland and Northern Ireland. The Regulations have now been amended a number of times in each separate jurisdiction. In England amendment regulations were made on 22 April and 13 May and entered into force without requiring a prior debate or vote in Parliament¹. This paper follows the previous Chair's

¹ Using the 'emergency procedure' under s.45R(2) of the Public Health (Control of Disease) Act 1984:

Briefing Paper on the Lockdown Regulations published on 8 April 2020 which sets out the background on the lockdown Regulations.²

II. Overview of the changes to the Regulations

2. The amendments are, in summary:

a. On 22 April 2020³, the following amendments were made to the English Regulations:

i. Clarified that the grounds surrounding a crematorium, including any burial ground or garden of remembrance, may remain open⁴;

ii. In respect of Regulation 6 (restrictions on movement):

1. Add the underlined words: “*no person may leave or be outside of the place where they are living without reasonable excuse*”

2. Add the following to the list of “reasonable excuses”:

a. to obtain money from or deposit money with any business listed in paragraphs 33 or 34 of Schedule 2⁵

b. to collect goods which have been ordered from a business in any way permitted under regulation 5(1)(a)

c. to visit a burial ground or garden of remembrance, to pay respects to a member of the person’s household, a family member or friend;

3. To give police the power, in respect of a person accompanying a child who has responsibility for the child in a gathering in contravention of Regulation 7 (i.e. two or more people not from the same household), if they consider it necessary and proportionate to do so, to direct that individual to take the child to the place where s/he is living⁶;

4. In the case of a child who a police officer believes is repeatedly failing to comply with the restriction on gatherings in Regulation 7, if they consider it necessary and proportionate to do so, to direct any individual who has responsibility for the child to secure, so far as reasonably

“The instrument may be made without a draft having been laid and approved [...] if the instrument contains a declaration that the person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved”

² <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/correspondence/Chairs-briefing-paper-regarding-Health-Protection-Coronavirus-Restrictions-England-Regulation-2020.pdf>

³ The Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020)

⁴ Regulation 5(8A)

⁵ 22 April 2020 Amendment Regulations

⁶ Regulation 8(10A)

practicable, that the child complies with that restriction (this reflects similar powers in relation to Regulation 6)⁷;

5. To lower the age limit for the imposition of a fixed penalties to those over 18 to those 18 and over;
 6. To extend the categories of those who are able to impose fixed penalty notices to include an officer designated by the secretary of state or a local authority⁸
- iii. On 13 May 2020⁹ the following amendments were made to the English Regulations:
1. To allow various kinds of holiday accommodation (hotels, hostels etc) to be used to accommodate ‘critical workers’ as defined in government guidance if their need for accommodation is connected to their work¹⁰;
 2. In respect of Regulation 6 (restrictions on movement), to add the following to the list of “reasonable excuses”:
 - a. to collect goods which have been ordered from a business if permitted under the Regulations;
 - b. to take exercise (i) alone, (ii) with one or more members of their household, or (iii) with one member of another household (this replaced the original wording: “*to take exercise either alone or with other members of their household*”)
 - c. to visit a public open space for the purposes of open-air recreation to promote their physical or mental health or emotional wellbeing (i) alone, (ii) with one or more members of their household, or (iii) with one member of another household¹¹;
 - d. to use a recycling centre;
 - e. to visit estate agents/letting agents/developer sales offices show homes agents, to view residential properties to buy or rent, and generally move home;
 3. Increased the potential fixed penalties for breaches of the regulations from £60 to £100 for a first Fixed Penalty Notice (‘FPN’) (£50 if paid within 14 days) and raising the maximum fixed penalty for repeated FPNs from £960 to £3,200 for six breaches;

⁷ Regulation 8(10B)

⁸ Regulation 10(1)(a)

⁹ [The Health Protection \(Coronavirus, Restrictions\) \(England\) \(Amendment\) \(No. 2\) Regulations 2020 \(S.I. 2020/500\)](#)

¹⁰ Regulation e5(4)(aa)

¹¹ Public open space is non-exhaustively defined

4. Made provision (in Schedule 2) for outdoor sports courts and garden centres to open.

Analysis of the updated Regulations

3. In the Chair's previous briefing paper on the Lockdown Regulations, a number of concerns were raised. These were, in summary:
 - a. Legal uncertainty and unclear/inconsistent public communications (paragraphs 17 to 25);
 - b. Heavy-handed policing (paragraphs 26 to 33);
 - c. Lack of parliamentary scrutiny (paragraphs 14 to 16).
4. It is now almost two months since the Regulations came into force. The concerns raised above are still pertinent for the reasons explored below.

a. Legal uncertainty and unclear/inconsistent public communications

5. In the Chair's previous briefing paper on the Lockdown Regulations, we said that the communication of the guidance and new laws has at times been confusing and unclear leading to widespread confusion as to what people are and are not permitted to do.¹² This has therefore raised concerns about the rule of law as well as under Article 7 of the European Convention on Human Rights (no punishment without law), combining with concerns that enforcement efforts have gone beyond what is required by law thus infringing civil liberties unnecessarily and unlawfully.
6. This issue has been repeated in relation to the subsequent amendments:
 - a. It was widely reported that the change to the public guidance from the "stay at home" message to "stay alert" caused significant public confusion.¹³
 - b. There remains a divergence between the Government's guidance and the Regulations. For example, the guidance¹⁴, under the heading "*what can I do that I couldn't do before*", refers to "*mee[ting] one other person from a different household outdoors - following social distancing guidelines*". However, there is no requirement under the Regulations to socially distance.¹⁵ The guidance also refers to being able to "exercise outdoors as often as you wish" as something which people can do but could not before, although there was never a legal prohibition in England against exercising more than once per day.

¹² Paragraph 21

¹³ More than half (53%) of those asked do not feel the slogan of "Stay Alert, Control the Virus, Save Lives" is very clear:

<https://www.politicshome.com/news/article/public-confidence-in-governments-handling-of-coronavirus-crisis-drops-amid-confusion-over-stay-alert-message>

¹⁴ <https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do>

¹⁵ The Welsh regulations impose social distancing in places of business however this is not a feature in the English regulations.

- c. Public communications by Ministers have at times added to the confusion, for example on the morning after the Prime Minister’s announcement (but before the Regulations were amended) Dominic Raab told the Today programme that someone could meet both their parents at the same time if they are 2m apart.¹⁶ His statement was later contradicted by the Government.
 - d. The restrictions imposed by the Regulations have diverged significantly in different parts of the United Kingdom. For example, the relaxation to allow meetings between individuals from different households only applies in England. The requirement in law to impose social distancing applies in Wales but not England. It is not clear whether there is an England-specific public health justification for the divergence, however it is likely that the different rules for different jurisdictions is causing significant and potentially unnecessary further confusion. It is notable that the Crown Prosecution Service’s review of prosecutions under the Regulations in England and Wales, found errors “usually involved Welsh regulations being applied in England or vice versa” which suggests there has been confusion amongst police leading to wrongful charges being brought.¹⁷
 - e. There remain issues of unclear language, potentially causing problems under Article 7 ECHR. The amendments may have made Regulation 6 in effect unenforceable as it is now a reasonable excuse to “visit a public open space for the purposes of open-air recreation to promote their physical or mental health or emotional wellbeing”. The language of this provision is so wide that it arguably encompasses practically any activity outdoors. It may be argued that there is still a residual purpose to Regulation 6, for example to prohibit leaving the place where you live in order to visit someone else’s house for social purposes, or travel to an unlawful gathering, however this is a far more limited scope than its previous incarnations.
7. Even if Regulation 6 still serves a limited purpose, it is now so wide and unclear that it risks generating further confusion both amongst the public and police. In combination with the inconsistent public communications, the effect is likely to be that some people will be reluctant to leave their homes for fear of falling foul of an extensive but unclear law, and wrongful convictions remain likely as is discussed below.

b. Heavy-handed policing (paragraphs 26 to 33)

8. In the Chair’s previous briefing paper on the Lockdown Regulations, a number of concerning statements by police on social media were highlighted.¹⁸ These statements appear, anecdotally at least, to have reduced in number, perhaps because police forces have become more familiar with the new powers, assisted

¹⁶ <https://www.bbc.co.uk/news/uk-52612449>

¹⁷ <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

¹⁸ See paragraph 22

by the helpful guidance which has been issued and regularly updated by the National Police Chief's Council (NPCC) and College of Policing.

9. However, since the first Lockdown Regulations Chair's briefing paper the Crown Prosecution Service has reviewed the first 200 cases prosecuted under both the Regulations and the Coronavirus Act. It found that 12 of 187 prosecutions under the Regulations and, shockingly, all 44 of 44 prosecutions under the Coronavirus Act were wrongly charged.¹⁹
10. Additionally, the NPCC has issued an update on Fixed Penalty Notices given under the Regulations.²⁰ According to the report, there were a total of 154,812 "Covid-19 related incidents"²¹ in the four weeks to 10 May and 16,184 FPNs given between 27 March and 11 May. Of this total, 62% of FPNs were for breaches of Regulation 6. There is also data in relation to the proportion of FPNs issued by gender, age and ethnicity. This shows that 81% of FPNs have been issued to men and in respect of age the largest category (37%) is age 18-24, with 79% of FPNs being given to those age 39 and under.
11. The initial data referred to above is of concern, particularly the number of wrongful charges. If around 6% of prosecutions under the Regulations have been wrongfully charged, it may be assumed that at least some of the Fixed Penalty Notices have been wrongly given (6% of the current total is close to 1,000). Moreover, it is worth noting that the figure of 6% wrongly charged relate to cases where people have been found guilty – i.e. where both the prosecutor and the judge have agreed with the police that an offence has been committed. One can imagine that the figures for incorrect application of the law governing Fixed Penalty Notices, which have fewer safeguards and do not require the involvement of a prosecutor or a judge, will be even higher. This is particularly of concern as there is no right of appeal or review against the FPNs and the vast majority of people will probably be unwilling to risk a criminal conviction by refusing to accept the FPN, which is currently the only way to challenge the FPNs under the Regulations.
12. It is unacceptable that many thousands of people are being fined in circumstances where (a) the Regulations contain unclear and ambiguous language, (b) there is evidence that the police do not fully understand their powers, (c) a significant percentage of prosecutions have been shown to be wrongly charged, (d) there has been no systematic review of FPNs and (e) there is no appeal or review provided for under the Regulations. It is therefore essential that an urgent review of FPNs is undertaken and that, in any event, the Government introduce a means of challenging FPNs by way of administrative review or appeal in the next set of amendments.

¹⁹ <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

²⁰ <https://news.npcc.police.uk/resources/fixed-penalty-notices-issued-under-covid-15th-may>

²¹ Described as including "incidents where officers have proactively offered advice to people, responded to reports from the members of the public about breaches of the regulation by others and offences where criminals have sought to take advantage of the pandemic to commit a crime"

c. Lack of parliamentary scrutiny

13. The Regulations are the most draconian restrictions on civil liberties since the Second World War, seriously impinging on a range of rights albeit for the legitimate purpose of protecting public health. These extensive restrictions have received very little parliamentary time to date especially given that they represent such a significant incursion into the civil liberties of everyone in the country.
14. The Government has used the ‘emergency procedure’ under s.45R(2) of the Public Health (Control of Disease) Act 1984 (‘1984 Act’) which requires the “made affirmative” procedure. This “made affirmative” emergency procedure allows an instrument to be made without a draft having first been laid and approved by Parliament if the instrument “contains a declaration that the person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved”. Parliament then has 28 sitting days to vote to approve the Statutory Instrument or else it ceases to have effect after 28 days. This procedure has been used three times, on 23 March when the Regulations were first laid, and then on 22 April and 13 May when amendment Regulations were laid. A quirk of timing (that the Regulations were initially laid on the day before the Easter recess) meant that they could remain in place without an affirmative vote for seven weeks (as this was only 28 sitting days due to the Easter recess). The Regulations were ultimately affirmatively voted in by both Houses.
15. A further safeguard contained in the Regulations is that the Secretary of State must review them every 21 days²² to consider whether they remain necessary for public health reasons. There have supposed to have been two such reviews to date, on 16 April and 7 May, with the next review due by 28 May. The Health Secretary has, as far as we know, made one statement to Parliament in relation to these reviews, on 28 April when the result of the 16 April review was announced.²³ Mr Hancock said:

“In this review it was agreed that no change would be made to the existing restrictions and that they would remain in place for at least three more weeks. Recognising the potential for harm to public health and the economy if measures were relaxed too soon, it was agreed that five conditions would need to be met before the measures are eased. These conditions are:

- 1) Evidence that NHS critical care capacity across the UK will not be breached;*
- 2) there is a sustained and consistent fall in the daily death rate;*
- 3) infection rates decrease to an acceptable level;*

²² Regulation 3 requires that the Secretary of State must review the need for restrictions and requirements at least once every 21 days, with the first review being carried out by 16th April 2020, and as soon as the Secretary of State considers that any restrictions or requirements are no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus, he must publish a direction terminating that restriction or requirement.

²³ [https://hansard.parliament.uk/Commons/2020-04-28/debates/20042818000013/HealthProtection\(CoronavirusRestrictions\)\(England\)\(Amendment\)Regulations2020#contribution-29328C33-1F9C-4072-9542-C5BFA76A98C5](https://hansard.parliament.uk/Commons/2020-04-28/debates/20042818000013/HealthProtection(CoronavirusRestrictions)(England)(Amendment)Regulations2020#contribution-29328C33-1F9C-4072-9542-C5BFA76A98C5)

4) supplies of PPE and testing meets future demand;

5) clear evidence that changes won't risk a second peak in the virus.

However, a small number of minor amendments are required to clarify the regulations and ease the operation of the regulations. They relate to enforcement of the measures, and businesses and venues affected. ”

16. It is understandable that there was significant urgency in passing the original regulations and therefore the emergency procedure under the 1984 Act was used. However, the following matters are of concern:

- a. The Secretary of State has only given one statement to Parliament in relation to the mandatory 21-day reviews. It was given 12 days after the review was due to be completed.
- b. Although the 28 April statement contained five conditions which had to be met before measures were eased, it did not explain how these factors had been applied to the current context, whether the restrictions were working, whether they were having a disproportionate impact on any particular group (such as people with mental health issues or BAME men – see below) or what rationale would apply to partial lifting of the regulations.
- c. The Public Health (Control of Disease) Act 1984, under which the Regulations are made, requires that the Minister consider whether any restriction is proportionate to what is sought to be achieved by imposing it.²⁴ In this regard, the Welsh Assembly has amended the Welsh lockdown regulations²⁵ to include a proportionality assessment as part of the 21-day reviews. It is of concern that the English Regulations only refer to a requirement for 'necessity' to be considered in the 21-day review. This may explain why the Secretary of State's five conditions only explain the criteria for maintaining *some* restrictions, however, they do not suffice for the type of analysis required by the Human Rights Act 1998²⁶ or the 1984 Act itself. It is required that each interference with human rights by the restrictions is justified, necessary, proportionate and non-discriminatory.
- d. Moreover, given the paucity of information on the reviews supplied to Parliament, it is in any event not possible for Parliament to ascertain whether or not the Health Secretary has undertaken that analysis as a part of his reviews.
- e. There has been no statement in relation to the second review which was due on 7 May and no explanation has been provided as to its absence.

17. In addition, the Prime Minister announced the changes to the regulations on a Sunday evening to the press and public before making the announcement to Parliament. As the Commons Speaker, Sir Lindsay Hoyle, has said, regretting

²⁴ See s.45D(1) of the Public Health (Control of Disease) Act 1984 which prohibit regulations imposing any restriction or requirement unless the Minister “considers, when making the regulations, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it”.

²⁵ See Regulation 3(2) as amended: <https://gov.wales/sites/default/files/publications/2020-05/the-health-protection-coronavirus-restrictions-wales-regulations-2020-as-amended-21-may-2020.pdf>

²⁶ Section 6

this move, “*major government announcements should be made first in the House and this is more important than ever during this time of crisis*”. Tom Hickman Q.C. has observed²⁷ that such a practice is contrary to the constitutional principle embodied in the Ministerial Code²⁸ which requires that when Parliament is in session, the most important announcements of Government policy should be made in the first instance, in Parliament.²⁹

18. In any event, it is of concern that there has been an almost complete absence of meaningful engagement by the Government with Parliament in relation to these Regulations. This is highly likely to have an impact on the quality of the legislation, as the Regulations have been laid without warning and therefore without debate. It seems likely that these Regulations or a version of them will remain in force for the duration of the Covid-19 pandemic, or will be brought back if the incidence of the virus increases. In those circumstances, the Government should introduce a method of making regulations which allows for more timely and stringent Parliamentary scrutiny which is proportionate to the significant restrictions on human rights which the regulations impose.

19. In this regard, it is recommended that:

- a. Any new regulations or amendments to regulations should be announced to Parliament before they are laid.
- b. Time should be allowed for debate and a vote held on any amending Regulations as soon as possible given the significant implications for human rights.
- c. The Regulations should be amended so as to require a proportionality review every 21 days, as required by the equivalent Welsh regulations, and each review should be published.

²⁷ <https://ukconstitutionallaw.org/2020/05/14/tom-hickman-a-very-english-lockdown-relaxation/>

²⁸ Paragraph 9.1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf

²⁹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf