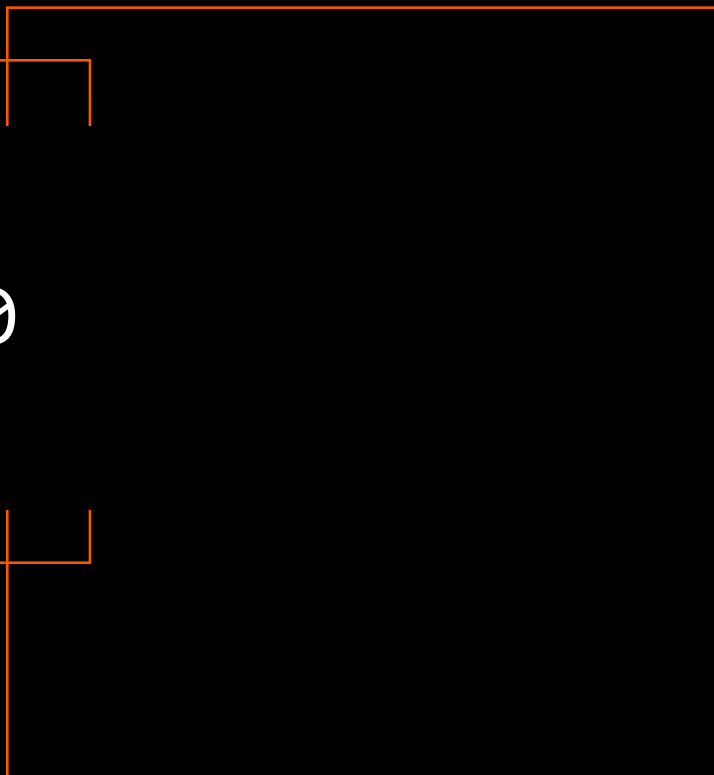
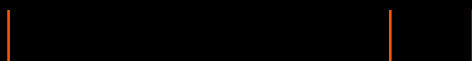


# BIG BROTHER WATCH BRIEFING ON THE CORONAVIRUS BILL



MARCH 2020



# About Big Brother Watch

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

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

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## Introduction

Our country faces great challenges in the weeks, months and years to come.

It is right that Government takes action to protect public health in the COVID-19 pandemic and that the State is equipped with the powers and resources it needs to steer us safely through this difficult time. Extraordinary times require extraordinary measures, from the public and the Government alike. The emergency Coronavirus Bill, laid before Parliament on Thursday 19<sup>th</sup> March 2020, contains many such measures.

However, some of the powers in the Bill are extreme, unexplained and simply unjustified.

We, along with Amnesty International UK, have publicly described the Bill as containing “the most draconian powers ever proposed in peace-time Britain”.<sup>1</sup> Even the Government has described the powers it is requesting as draconian.

Leading human rights lawyer Kirsty Brimelow QC has warned that “this Bill lacks basic human rights safeguards and so is open to abuse in implementation.”<sup>2</sup>

Even journalists have been taken aback by the Bill, with ITV’s Robert Peston observing “There has never in my lifetime been a law that so encroached on our civil liberties and basic rights as the Coronavirus Bill, scheduled to become law by end of month (...) the transfer of unchallengeable power to the state for two years is huge.”<sup>3</sup> Ian Dunt of politics.co.uk similarly described the Bill as, “the biggest expansion in executive power we've seen in our lifetime”.<sup>4</sup>

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1 <https://bigbrotherwatch.org.uk/coronavirusbill/>

2 [https://twitter.com/Kirsty\\_Brimelow/status/1240914539287392256](https://twitter.com/Kirsty_Brimelow/status/1240914539287392256)

3 <https://twitter.com/Peston/status/1240042142678089730>

4 <https://www.politics.co.uk/blogs/2020/03/18/coronavirus-bill-the-biggest-expansion-in-executive-power-we>

The greater the powers a Government requests, the greater scrutiny, caution and safeguards the powers require. However, this Government is seeking to rush a 321 page Bill, with a range of new offences and unprecedented powers that will last up to 2.5 years, through Parliament in three days.

History teaches us that good laws are rarely made in haste and rights are too often the casualty of crisis. Even with the best of intentions, tipping the scales of power further towards the state and away from the people often endures and rarely rebalances. Author Yuval Noah Harari warned last week, “Many short-term emergency measures will become a fixture of life. That is the nature of emergencies.”<sup>5</sup> Crises are successive, and if met with successive extensions of authority, the power of the state over citizens inflates and risks suffocating the liberties it is tasked to protect.

This crisis cannot be fought by the State alone. It requires the courage, co-operation and community spirit of a willing and well-informed British public. We are concerned that this Bill paves the way for a criminalisation approach to the crisis that we believe is as counter-productive as it is draconian.

The extraordinary powers in this Bill demand close scrutiny, some require major amendments and significant limitation, and some – in absence of further justification or explanation – should simply be removed.

In the following briefing, we analyse:

- **Duration:** the duration of the Bill and proposed powers within
- **Detention:** the powers to detain, isolate and forcibly test individuals; reduced safeguards for detention under Mental Health Act
- **Dispersal:** powers relating to events, gatherings and premises
- **Surveillance:** relaxation of safeguards

We conclude by recommending:

- The Civil Contingencies Act 2004 would preferably be used as the appropriate mechanism for emergency powers
- If the Act passes, powers exercised under the Act should be subjected to a strict sunset clause – ideally monthly, as per the Civil Contingencies Act 2004 - to ensure prompt review of the necessity and proportionality of such extreme measures;
- Powers to detain, isolate and forcibly test individuals on threat of criminal sanction must be removed;
- Powers prohibiting events and gatherings, and enforcing removal from or detention within premises, must include an exception for strikes and industrial action, as per the Civil Contingencies Act 2004

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<https://www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75?segmentid=acee4131-99c2-09d3-a635-873e61754ec6>

- The Investigatory Powers Commissioner should be able to appoint temporary Judicial Commissioners only after consultation with senior judges and Scottish Ministers, if practicable, rather than simply notifying them by default
- The extension on the time limit for urgent surveillance warrants is unjustified and should be removed.

## Duration

The Coronavirus Bill has been drafted with a two-year duration. Powers exercised under the Act can last for six further months (s.76(3)), meaning the Act could last 2.5 years; whilst s.74 of the Bill would give far-reaching powers to ministers to extend the Act beyond two years simply by regulation. This is an extraordinary expansion of ministerial power and an unacceptably long time for exceptional, emergency powers to be at the disposal of Government.

To maintain the presumption *against* exercise of emergency powers, they should not be open to use for such a long period of time.

**Following a campaign by Big Brother Watch and senior parliamentarians of all parties, the Government is set to concede to a six-month review in the Bill.** We welcome this concession, but note that this is still significantly out of step with the existing procedure and duration of emergency powers.

### *The Civil Contingencies Act 2004*

The Civil Contingencies Act 2004 (CCA) is permanent legislation designed precisely to provide a mechanism by which regulations can be introduced in times of national emergencies. The COVID-19 pandemic evidently meets the criteria of ‘emergency’ as set out in the CCA (s.19(1)(a)). Under the CCA, emergency regulations must be considered by Parliament within 7 days of being laid, and lapse no longer than 30 days after they are made (CCA s.26(1)(a)). This is right – emergency powers require emergency time limits.

The CCA allows ministers to make emergency regulations if there is an emergency “which threatens serious damage to human welfare”, including “loss of human life... human illness or injury” in the UK.<sup>6</sup>

The powers to make emergency regulations are broad, allowing for the making of “any provision which the person making the regulations is satisfied is appropriate for the purpose of...protecting human life, health or safety”, among others.<sup>7</sup>

The emergency regulations allowed under the Civil Contingencies Act include measures which:

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<sup>6</sup>Part 1, section 1

<sup>7</sup>Section 22

- prohibit, or enable the prohibition of, movement to or from a specified place;
- require, or enable the requirement of, movement to or from a specified place
- prohibit, or enable the prohibition of, assemblies of specified kinds, at specified places or at specified times;
- prohibit, or enable the prohibition of, travel at specified times;
- prohibit, or enable the prohibition of, other specified activities;

as well as the ability to create offences of failing to comply with any of the above regulations.<sup>8</sup>

When questioned by Conservative Adam Afriyie MP, “is there a particular reason why the Civil Contingencies Act 2004 was not used? It already contains many of the safeguards that I suspect the House will wish to see”, the Leader of the House Jacob Rees-Mogg explained it could not be used as, “the problem was known about early enough for it not to qualify as an emergency under the terms of that Act.”<sup>9</sup>

This is plainly wrong.

David Davis MP requested on a Point of Order the opinion of the Speaker’s Counsel as to whether the CCA could have been relied on for emergency regulations for the present crisis.<sup>10</sup> The Speaker’s Counsel was unequivocal:

“The 2004 Act (which I wrote), including the powers to make emergency provisions under Part 2, is clearly capable of being applied to take measures in relation to coronavirus.”<sup>11</sup>

By pushing a new Bill onto the statute books rather than laying regulations under the CCA, the Government will be endowed with extreme powers on executive decree and minimise parliamentary scrutiny of them. This creates the real risk of a perpetual and unchallengeable state of emergency.

## Recommendations

- **The Civil Contingencies Act 2004 should be used as the appropriate mechanism for emergency powers**
- **If the Act passes, powers exercised under the Act should be subjected to a strict sunset clause – ideally monthly, as per the Civil Contingencies Act 2004 - to ensure prompt review of the necessity and proportionality of such extreme measures.**

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<sup>8</sup>Section 22

<sup>9</sup><https://hansard.parliament.uk/Commons/2020-03-19/debates/073B7E0C-31AF-424A-95AD-89B1F8F54EFE/BusinessOfTheHouse>

<sup>10</sup><https://hansard.parliament.uk/Commons/2020-03-19/debates/71E712D1-F20F-414D-AA69-DDE7124167B4/PointsOfOrder>

<sup>11</sup><https://twitter.com/DavidDavisMP/status/1242005618581483523/photo/1>

# Detention

The Coronavirus Bill proposes to give unprecedented, almost arbitrary powers to the police, immigration officers and public health officials to detain members of the public, including children, potentially indefinitely. This is one of the most extraordinary powers proposed in a Western democratic nation in peacetime.

Schedule 20 of the Bill states that, if the Secretary of State (or Scottish Ministers (para. 25) Welsh Ministers (para. 48), or Department of Health in Northern Ireland (para. 69) respectively) is of the view that the transmission of coronavirus constitutes a serious and imminent threat to public health (para. 4) and declares a “transmission control period”, police, public health officers and immigration officers can detain anyone they have reasonable grounds to suspect is “potentially infectious” (paragraphs 6(1), 7(1), 27(1), 28(1), 50(1), 51(1), 72(1), 73(1)).

## *Removal of potentially any member of the public*

A person is “potentially infectious” if “the person is, or may be, infected or contaminated with coronavirus, and there is a risk that the person might infect or contaminate others with coronavirus” (paragraph 2(1)(a)). Given that the UK Government estimates up to 80% of the UK population could be infected with Coronavirus<sup>12</sup> in the months ahead, the entire population easily classifies as “potentially infectious” and therefore vulnerable to detention should a transmission control period be announced, which seems likely.

A person can be forcibly removed and detained for screening and assessment by a public health official for up to 48 hours (paragraph 9), during which failure to comply is an offence (paragraph 9(2)(c)). The person can be forced to provide a biological sample (paragraph 10(2)(a)), provide health, travel and social contact information (paragraph 10(2)(b)), personal contact details and any personal documentation to assist the assessment (paragraph 10(4)).

A person can also be forcibly removed and detained by an immigration officer (for up to 3 hours) or constable (for up to 24 hours, paragraphs 13(3)) to await a public health officer to exercise the above functions. These waiting periods can be renewed for a further 6 hours for immigration officers and 24 hours by a constable if approved by officials at least as senior as a senior immigration officer or superintendent (paragraph 13(4)). An immigration officer or constable must consult a public health officer before exercising these powers, but only “to the extent that it is practicable to do so” (paragraph 13(8)) – a hollow and insufficient safeguard.

## *Potentially indefinite detention*

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<sup>12</sup><https://www.independent.co.uk/news/health/coronavirus-news-latest-deaths-uk-infection-flu-a9360271.html>

A “potentially infectious” person (paragraph 14(1)) which, as discussed, can be anyone, can be detained or isolated for up to 14 days (paragraph 15(1)), after which they must be assessed again within 48 hours (paragraph 15(2)(a)) and further restrictions can be imposed (paragraph 15(3)(b)), or the same restrictions re-imposed (paragraph 15(4)), or the isolation extended for a further specified period (paragraph 15(5)) which can exceed 14 days without upper limit (paragraph 15(6)) as long as the restriction is reviewed daily (paragraph 15(7)). If a person attempts to abscond from isolation, they can be forcibly returned to isolation (paragraph 16(c)).

### *Inaccessible appeal*

Restrictions imposed under paragraph 14 can be appealed to a magistrates’ court (paragraph 17) - although this may be impractical or impossible depending on the nature of the isolation restrictions imposed. There is no mention of access to a lawyer – the absence of legal rights alongside unprecedented detention powers is shocking and unacceptable.

### *Removal of children*

These powers of forcible removal, detention, isolation and testing can also be exercised in relation to children and should be exercised in the presence of a responsible individual, or failing that, an adult considered to be appropriate (paragraph 18(4)). There are no safeguards set out for the detention of children or the conditions in which they may be held. The absence of such basic safeguards is dangerous and bordering on the despotic.

### *Punishment*

If a person fails without reasonable excuse to comply with any direction, instruction, requirement or restriction conferred on them or their children; if a person attempts to abscond from isolation; if a person provides “misleading information”; or if a person obstructs an attempt to exercise any of the powers under the Schedule, they are guilty of an offence incurring a fine of up to £1,000 (paragraph 23(2)).

Allowing the detention of people who “may be” infectious, without clear and objective justification, or medical opinion, could allow for unprecedented infringement of the most basic human rights on any member of the public or their children.

The open-ended nature of the detention and isolation powers is a matter of grave concern.

### *Are these powers necessary?*

There are already significant and extensive powers for authorities to detain people or to enable the detention of people for public health protection, or to make regulations in this regard.



## *Public Health (Control of Diseases) Act 1984 & Health and Social Care Act 2008*

The Health and Social Care Act 2008<sup>13</sup> gives a justice of the peace (magistrate) the power to order people who are believed to be infected or contaminated to:

- submit to medical examination
- be removed to a hospital or other suitable establishment
- be kept in isolation or quarantine
- be disinfected or decontaminated (but not subjected to unconsented medical treatment such as vaccination)
- be subject to restrictions on where they go or who they have contact with

In order to reduce any significant risk to harm to human health.<sup>14</sup>

The Health and Social Care Act also gives police officers powers to return people to custody, if they are subject to a requirement that they should be detained or kept in isolation or quarantine.<sup>15</sup>

The authorisation of a magistrate, present in the Health and Social Care Act but absent from the Coronavirus Bill, it is a vital safeguard.

### *Mental Health detentions*

The Coronavirus Bill allows the Government to significantly reduce protections around forced detention and treatment under the Mental Health Act if staffing levels are stretched. This is a concern, particularly at a time when the public is under unprecedented psychological pressures.

As the mental health charity Mind noted in its briefing, “Being sectioned is one of the most serious things that can happen to somebody experiencing a mental health problem and it is vital that we protect the rights and safety of those being detained.”<sup>16</sup> Under the Bill, the Government could:

- permit an Approved Mental Health Professional to section an individual for up to six months on the advice of one doctor rather than two
- allow clinicians to continue forced treatment of a patient beyond the three month limit without a second opinion
- extend time limits on emergency holding powers to keep people in hospital, from 3 days to 5 days

**We echo Mind’s call for these changes in particular to be reconsidered or removed.**

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13Which amended the Public Health (Control of Disease) Act 1984

14Health and Social Care Act 2008, section 45G

<http://www.legislation.gov.uk/ukpga/2008/14/section/129>

15Health and Social Care Act 2008, section 45O

<http://www.legislation.gov.uk/ukpga/2008/14/section/129>

16 Parliamentary briefing on Coronavirus Bill from Mind March 2020, p.2

## Recommendations

- **Schedule 20 powers to detain, isolate and forcibly test individuals on threat of criminal sanction must be removed.**

## Dispersal

Schedule 21 of the Coronavirus Bill confers powers to issue directions in relation to events, gathering and premises. Under this Schedule the Secretary of State (or Scottish Ministers, Welsh Ministers, or the Northern Ireland Executive Office respectively) may declare a “public health response period” if the transmission of coronavirus constitutes a “serious and imminent threat to public health” and the powers conferred would prevent, delay or control the transmission of the virus (Sch. 21, para. 3). Declaration of such a period, which seems likely, empowers the Secretary of State to “issue a direction prohibiting (...) the holding of an event or gathering” which may be a specific event or “events or gathering of a specified description” (Sch. 21, para. 5). It also confers powers to stop people entering premises, or force people to remain in them (Sch. 21, para. 6), allowing the Secretary of State to “issue a direction imposing prohibitions, requirements or restrictions in relation to the entry into, departure from, or location of persons in premises”.

Safeguards on this extraordinary executive power are threadbare. Before issuing a direction, the Secretary of State “must have regard” to any relevant advice from the Chief Medical Officer, which means such advice need not actually be followed and is not required to endorse a direction made (Sch. 21, para. 8).

The Bill makes it an offence to fail, without reasonable excuse, to comply with a prohibition, requirement or restriction imposed under the Schedule. The offence can result in a fine – which in Northern Ireland, can be up to £100,000.

### *No protection for protest*

Schedule 21 contains no protection for political assemblies, gatherings, demonstrations or protests. At a time when the Government is vastly expanding executive power and adopting some of the most authoritarian powers in a generation, this omission is dangerous. It means that the potential of the public to stage any protest against these extraordinary measures could be easily thwarted. This rebalancing of the power of the state over citizens erodes basic democratic rights.

Importantly, even the CCA (s.23(3)(b)) sets out that emergency regulations made under the Act may not enable the prohibition of strikes, industrial action or connected activities. This is a well-recognised safeguard for extreme, emergency powers.

## Recommendations

- **Powers prohibiting events and gatherings, and enforcing removal from or detainment within premises, must include an exception for strikes and industrial action, as per the Civil Contingencies Act 2004, at minimum.**

## Surveillance

The Coronavirus Bill permits a weakening of safeguards on the exercise of surveillance powers under the Investigatory Powers Act 2016 (IPA).

### *Temporary Judicial Commissioners*

In particular, it would permit (via a statutory instrument) the Investigatory Powers Commissioner (IPC) to unilaterally appoint temporary Judicial Commissioners (JCs) to authorise and oversee warrants if coronavirus leads to a shortage of JCs (s.21). Usually, appointment of a Judicial Commissioner is by the Prime Minister and must be recommended jointly by the Lord Chancellor, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland, and the Investigatory Powers Commissioner; and the Prime Minister must consult Scottish Ministers (IPA s.227). However, under these regulations the IPC may unilaterally appoint temporary JCs themselves for up to 12 months only by notifying the people above who would normally be required to jointly recommend an appointment. Furthermore, under the IPA, a JC must have held a high judicial office (within the meaning of Part 3 of the Constitutional Reform Act 2005) – but there is no such requirement set out in the Coronavirus Bill for a temporary JC.

It is sensible to allow provision for temporary JCs in the circumstances. However, it is unclear why the process should become a unilateral one, or why those who would ordinarily jointly recommend a JC would be unable to jointly recommend a temporary JC. The appointment process under the IPA is not perfect – we believe JCs should be appointed by the Lord Chancellor on the recommendation of the Judicial Appointments Commission. But this is all the more reason not to water down the existing procedure any further than absolutely necessary. As a minimum, the IPC should be required to appoint temporary JCs only after consultation with senior judges and Scottish Ministers as above if practicable, rather than simply notifying them by default.

### *Extended time limit on urgent warrants*

Urgent surveillance warrants can be issued under the IPA, requiring a JC's authorisation within three working days. We believe this is already a permissive regime for such significant powers, as 48 hours is a more reasonable standard (see *Zakharov*)<sup>17</sup> and was the recommended limit by the Intelligence and Security Committee.

However, if coronavirus affects the capacity of JCs, the Coronavirus Bill would allow this time limit (via statutory instrument) to be extended to 12 working days. This could amount to 18 calendar days in total. Given the Bill's provision for temporary JCs to assist with any capacity issues, it is unclear why the important safeguards on urgent warrants need to also be so significantly relaxed. Given the powers at stake – to intercept communications up to a population level, amass databases and even to hack devices in bulk – strict safeguards are a necessity. Weaknesses in the existing urgent warrant procedures, such as the ability to retain data unlawfully collected (deletion is a discretionary matter for a JC) mean there is a risk of urgent warrants being used inappropriately and thus a real need for a prompt, thorough, independent review of such warrants. We cannot see justification for the urgent review period extension and recommend it is removed.

## **Recommendations**

- **The IPC should be required to appoint temporary JCs only after consultation with senior judges and Scottish Ministers as above if practicable, rather than simply notifying them by default**
- **The extension on the time limit for urgent surveillance warrants is unjustified and should be removed.**

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<sup>17</sup> Roman Zakharov v. Russia, 4th December 2015, (Application no. 47143/06) - <http://hudoc.echr.coe.int/eng?i=001-159324>