

# **BIG BROTHER WATCH**

**Big Brother Watch Briefing on Health  
Protection (Coronavirus, Restrictions)  
(No. 3) (England) Regulations 2020 for  
the House of Lords**

**September 2020**

## **About Big Brother Watch**

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

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

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## **CONTENTS**

<b>INTRODUCTION.....</b>	<b>4</b>
<b>RECOMMENDATIONS .....</b>	<b>4</b>
<i>Effect of the new Regulations .....</i>	<i>4</i>
<i>New powers for local authorities .....</i>	<i>5</i>
<i>Undervaluing democratic scrutiny.....</i>	<i>6</i>
<i>Prior debates on Regulations .....</i>	<i>8</i>
<i>House of Commons .....</i>	<i>8</i>
<i>House of Lords.....</i>	<i>9</i>
<i>Freedom of expression and assembly .....</i>	<i>9</i>
<i>Criminalisation of protests.....</i>	<i>11</i>

## **INTRODUCTION**

We welcome the opportunity to provide this briefing to the House of Lords ahead of the debate on the Health Protection (Coronavirus, Restrictions) (No. 3) (England) Regulations 2020, ahead of the debate on 3<sup>rd</sup> September 2020.

## **RECOMMENDATIONS**

- **These Regulations should have been debated two months ago. We urge parliamentarians to increase pressure on Government to respect the sovereignty of parliament and prevent the misuse of “urgency” to avoid democratic procedures in future.**
- **The Regulations should specifically exempt political demonstrations from any restrictions on gatherings to avoid the criminalisation of protestors.**

### **Effect of the new Regulations**

The Health Protection (Coronavirus, Restrictions) (No. 3) (England) Regulations 2020 came into force on 18<sup>th</sup> July, following announcements made by the Prime Minister the day before.<sup>1</sup> These Regulations give local authorities the power to close premises,<sup>2</sup> prohibit the holding of events effectively banning protests,<sup>3</sup> and restrict access to public outdoor land.<sup>4</sup>

The Regulations also give the Health Secretary the power to direct local authorities to order said restrictions.<sup>5</sup> This is alongside the power granted<sup>5</sup> by The Health Protection

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1 Prime Minister's statement on coronavirus (COVID-19), 17th July 2020:  
<https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-17-july-2020>

2 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 4(1)

3 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 5(1)

4 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 6(1)

5 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 3(1)

(Coronavirus, Restrictions) (England) (No. 2) Regulations, which allow the Health Secretary to restrict access to public outdoor land.<sup>6</sup>

### **New powers for local authorities**

The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020 give local authorities and the Health Secretary the power to cancel either a specific event or a certain type of event.<sup>7</sup> Police officers can direct the event to stop, direct a person to leave the event and remove a person from the event, using reasonable force if the officer considers it is necessary.<sup>8</sup> Event organisers or the owner of a premises where the event takes place can also receive a £100 Fixed Penalty Notice.<sup>9</sup> 'Event' is not defined, meaning protests would likely fall under this new power (though on most readings, they are already prohibited).

A local authority may use this power if it considers there is a "serious and imminent threat to public health" and that is a necessary and proportionate response.<sup>10</sup> It must have "due regard to any advice given to it by its director of public health" before imposing any restriction.<sup>11</sup> This is a weaker requirement than that imposed on the Health Secretary – if he wishes direct a local authority to impose a restriction under these Regulations, he "must consult the Chief Medical Officer."<sup>12</sup> Any restriction imposed must be reviewed by the local authority every 7 days.<sup>13</sup>

Since this restriction can be made through a direction of the Health Secretary or a local authority, without the need for new legislation, decisions cannot be scrutinised or rejected by Parliament. The power to shut down or re-open vast parts of the country are at the discretion of local authorities and the Health Secretary, with very few safeguards. While the right to appeal does exist, it must be through a magistrates' court, a route that

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6 Health Protection (Coronavirus, Restrictions) (England) (No. 2) Regulations 2020, Regulation 6(1)

7 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 5(1)

8 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 12(3),(5)

9 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 14(1)

10 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 2(1)

11 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 2(4)

12 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 3(5)

13 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 2(2)(b)

will not be accessible to everyone impacted by restrictions and that only provides retroactive relief.

These powers have already been used by local authorities<sup>14,15</sup> across the country. However, there is no centralised list of how and where these powers have been used. Regardless of the merits of each decision, these significant powers are being used before they have received parliamentary scrutiny or approval.

### **Undervaluing democratic scrutiny**

This debate is taking place almost seven weeks after the Regulations were enforced. It is important to note that the most recent amendment to these Regulations – which increases the penalty for organising a gathering of more than 30 people from a £100 Fixed Penalty Notice to £10,000<sup>16</sup> (one such FPN has already been issued to a protest organiser) – is not scheduled for debate alongside these Regulations.

The last debate in the House of Lords relating to the (prior) Health Protection Regulations was on 24<sup>th</sup> July, where parliamentarians expressed their frustration at the obstructively slow pace at which the Regulations were being presented for debate. At that point, the superseding Regulations being discussed in this debate had been in force for a week already – but were not scrutinised.

Prior to the debate on 24<sup>th</sup> July, the House of Lords has had been given only two other opportunities to debate the swathes of significant Health Protection (“lockdown”) Regulations and their subsequent amendments: on 12<sup>th</sup> May and 15<sup>th</sup> June. The scheduling of these debates has meant that these highly restrictive new laws were retrospectively accepted, despite them being either being so widely exercised or indeed superseded as to render the approval pointless. As Baroness Jolly pointed out, “We are in strange times,

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14 City centre bar allowed to reopen 48 hours after being shut down for 'complete breakdown in social distancing' – Steve Robson, Manchester Evening News, 15<sup>th</sup> August 2020: <https://www.manchestereveningnews.co.uk/whats-on/food-drink-news/viadux-allowed-to-reopen-manchester-18775081>

15 Blackburn hairdressers shut by council over coronavirus social distancing fears – Robert Kelly, Lancashire Telegraph, 27<sup>th</sup> August 2020: <https://www.lancashiretelegraph.co.uk/news/18680906.blackburn-hairdressers-shut-council-coronavirus-social-distancing-fears/>

16 The Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020, Regulation 2

but we do live in a parliamentary democracy, and that should not mean that we have to accept a loss of parliamentary oversight.”<sup>17</sup>

Worse still, the House of Commons has not debated any of the Health Protection Regulations since 15<sup>th</sup> June, despite significant amendments to the lockdown measures and new vast new executive powers granted to Ministers.

**It remains the case that the various iterations of the “lockdown” have never been in place with full parliamentary approval.**

Not only has Parliament not been engaged in scrutinising these new laws, but also members of the public and police forces have been given little chance to see and understand new laws they will be subject to. These new Regulations were laid before parliament on 17<sup>th</sup> July – the same day the Prime Minister announced the new powers and the night before the Regulations came into force.

As has been the case with the original Regulations and every subsequent amendment, Parliamentary scrutiny has been delayed and devalued. Despite repeated insistence from Government ministers that this will not become routine practice, it has become precisely that: these Regulations are being debated in the House of Lords twenty days after they were made, with no sign of any debate scheduled in the Commons. Debating earlier Health Protection Regulations, Baroness Jenny Jones said of the delay:

“The Minister at the start used words such as ‘exceptional’ and said that it would not be an inappropriate precedent. That is complete nonsense, because it is already a precedent. (The Government) have evaded timely parliamentary scrutiny on every occasion (...) This makes a mockery of the term ‘democratic process.’”<sup>18</sup>

As the lockdown restrictions ease in line with the Government’s previously published roadmap, it becomes increasingly unjustifiable to bypass parliamentary scrutiny by claiming that the situation is too ‘urgent’ to be debated. As Liberal Democrat peer Lord Scriven said in an earlier lockdown debate:

“My Lords, this debate is nothing more than a charade—a mere illusion of scrutiny and accountability of government. (...)”

“It stretches matters too far to say that these changes have to be introduced as a matter of urgency. They were not issues that crept upon the Government within

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17 HL Deb (24th June 2020) vol. 804, col. 2478:  
[https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection\(CoronavirusRestrictions\)\(No2\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-07-24/debates/3BAA97BA-06CC-45DC-972E-6C95FA1AFDD4/HealthProtection(CoronavirusRestrictions)(No2)(England)Regulations2020)

18 HL Deb (15th June 2020) vol. 803, col. 2013-4:  
[https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection\(CoronavirusRestrictions\)\(England\)\(Amendment\)\(No2\)Regulations2020](https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection(CoronavirusRestrictions)(England)(Amendment)(No2)Regulations2020)

a few days. These executive orders, decided behind closed Whitehall doors, have serious implications for citizens' movements and freedoms. This has to stop. It makes a mockery of Parliament and our civil liberties, and is a power grab by Ministers trying to avoid in-depth parliamentary scrutiny."<sup>19</sup>

### **Prior debates on Regulations**

Members across the House of Lords and Commons have rightly protested the Government's repeated and deliberate evasion of meaningful parliamentary scrutiny.

#### *House of Commons*

Debating an earlier version of the Health Protection Regulations, Shadow Health Minister Justin Madders said:

"They affect millions of people's lives, and we know that if we get it wrong, the consequences will be devastating."

"Debating them weeks after the event, and in some cases when they have been superseded by the next set of Regulations, demeans parliamentary democracy. (...) We are not merely a rubber-stamping exercise to create the veneer of a democratic process."<sup>20</sup>

Criticism also came from the Government's own benches. Conservative MP Mark Harper said:

"I do not see what would have prevented a draft of those regulations being laid for debate on Thursday, so that the House could have taken a decision on them before

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19 HL Deb (15<sup>th</sup> June 2020) vol. 803, col. 2015: [https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection\(CoronavirusRestrictions\)\(England\)\(Amendment\)\(No2\)Regulations2020](https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection(CoronavirusRestrictions)(England)(Amendment)(No2)Regulations2020)

20 HC Deb (15<sup>th</sup> June 2020) vol. 677, col. 587-8:  
<https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>



they came into force. (...) That would have been better for our legislative process.”<sup>21</sup>

### *House of Lords*

The House of Lords debates have been similarly dominated by exasperation at the Government’s devaluing of parliamentary scrutiny.

Shadow Health Minister Baroness Thornton said:

“Debating [the Regulations] weeks after the event, when they have already been superseded, as we have heard, is frankly a bit of an insult to Parliament, and yet further evidence that the Government are not doing things in a timely fashion. There is no excuse for this.”<sup>22</sup>

The gravity of these statements cannot be overlooked. Parliamentarians are warning that Ministers are treating Parliament as a “rubber-stamping exercise”, that parliamentary debates are a mere “veneer of a democratic process”, a “charade” and an “illusion of scrutiny”; that Ministers have “evaded”, “insulted” and “made a mockery” of Parliament in a “power grab” with “no excuse”. Parliamentary democracy has been undermined, evaded and damaged by the executive during this crisis. This requires urgent attention and remedy.

**Recommendation: These Regulations should have been debated two months ago. We urge parliamentarians to increase pressure on Government to respect the sovereignty of parliament and prevent the misuse of “urgency” to avoid democratic procedures in future.**

### **Freedom of expression and assembly**

A major human rights issue arising from the current Regulations and the ongoing restriction on gatherings is that the right to protest is de facto suspended.

The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 place an upper limit of 30 people gathering indoors or outdoors. Whilst exceptions are

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21 HC Deb (15th June 2020) vol. 677, col. 584:  
<https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>

22 HL Deb (15th June 2020) vol. 803, col. 2024: [https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection\(CoronavirusRestrictions\)\(England\)\(Amendment\)\(No2\)Regulations2020](https://hansard.parliament.uk/lords/2020-06-15/debates/852C6EE6-D006-4059-905B-8BAEE20975FB/HealthProtection(CoronavirusRestrictions)(England)(Amendment)(No2)Regulations2020)

made in the Regulations for gatherings organised by “a business, a charitable, benevolent or philanthropic institution, a public body, or a political body,” where the organiser has carried out a risk assessment and takes all reasonable measures to limit the risk of coronavirus transmission, this does not constitute the restoration of the right to protest. Protests organised by campaigning organisations, community groups or spontaneous demonstrations (that would constitute more than 30 people) are not allowed. It is worth noting that the most recent amendment to these Regulations – which, absurdly, is not scheduled for debate alongside these Regulations – increases the penalty for organising a gathering of more than 30 people from a £100 Fixed Penalty Notice to a £10,000 Fixed Penalty Notice.<sup>23</sup> This is an extraordinary and unjustified attack on the right to protest, and has already been used against protesters.<sup>24</sup>

The Regulations in question increase possible restrictions on protests even more significantly. Not only are gatherings of more than 30 people prohibited across the country, but these Regulations empower local authorities to impose “prohibitions, requirements or restrictions in relation to the holding of an event in its area” – covering any event, or type of event, with very little oversight.<sup>25</sup> Although local authorities must review any restrictions every 7 days, there is no limit on how long such restrictions can last.<sup>26</sup>

We have documented over the past five months how the Regulations have been used to criminalise peaceful protestors and we have recommended that the right to protest is restored as a matter of urgency. With £10,000 FPNs now being issued to protest organisers, and social movements expanding, the restoration of freedom of assembly is more urgent now than ever.

We firmly believe that the Civil Contingencies Act should have been used to govern this period. The Civil Contingencies Act provides for more temporary powers, more parliamentary oversight, and has more robust protections for freedom of assembly, prohibiting restrictions on strikes and industrial action.<sup>27</sup> In the context of authoritarian measures, we believe the right to freedom of expression is one of the most important rights to defend and better protections should be in the emergency laws. This has proved even more pressing in light of the wave of protests that have been held across the

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23 The Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020, Regulation 2

24 Piers Corbyn, 73, arrested and handed £10k fine over Trafalgar Square 'anti-lockdown protests' – Harriet Brewis, the Independent, 31<sup>st</sup> August 2020:  
<https://www.standard.co.uk/news/london/trafalgar-square-antilockdown-man-73-handed-10000-fine-a4536441.html>

25 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 5(1)

26 Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, Regulation 2(2)(b)

27 Civil Contingencies Act 2004 s.23(3)(b):  
<https://www.legislation.gov.uk/ukpga/2004/36/section/23>

country, primarily the Black Lives Matter protests against police brutality following the death of George Floyd at the hands of police in the US.

### *Criminalisation of protests*

On 16<sup>th</sup> May, as protests were organised across the UK against the lockdown measures, journalist James Delingpole was threatened with arrest for covering a protest. At the same protest, nineteen people were arrested and ten fines were issued.<sup>28</sup>

On 30<sup>th</sup> May, Extinction Rebellion activists staged silent, physically-distanced demonstrations across the country. The Metropolitan Police confirmed that a number of the demonstrators were arrested or issued with Fixed Penalty Notices (FPNs). Affected individuals who made contact with Big Brother Watch confirmed that FPNs were issued under (then) Regulation 7, the prohibition on gatherings.<sup>29</sup>

On 31<sup>st</sup> May, there were solidarity rallies across London, Cardiff and Manchester following the death of George Floyd at the hands of police in the US. Although the demonstrations were peaceful, police made 23 arrests in London including a number under (then) Regulation 7 (the restriction on gatherings).<sup>30</sup> All 23 individuals were taken into custody. The use of coronavirus restrictions to pick off demonstrators in attempt to chill others is deeply wrong and a waste of police time.

A black community activist was threatened with arrest by the Metropolitan Police after he contacted them, asking for support in organising an anti-racism march.<sup>31</sup> After threats of legal action, the event was allowed to take place, although there is little clarity over what protests and events are permitted.

It would appear that in some cases, the restriction on gatherings has been used to prevent or punish ordinary democratic behaviour. On 24<sup>th</sup> June, a Twitter user reported that police tried to disperse a crowd watching and filming the arrest and restraint of a black teenage boy by six police officers by threatening to issue "tickets for violating COVID 19

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28 19 arrested as anti-lockdown protests take place across country – Faye Brown, Metro, 16th May 2020:

<https://metro.co.uk/2020/05/16/19-arrested-anti-lockdown-protests-take-place-across-country-12715038/>

29 Extinction Rebellion protestors are hauled away by police after hundreds stage silent socially-distanced climate change rallies across Britain – Jemma Carr, MailOnline, 30th May 2020:

<https://www.dailymail.co.uk/news/article-8372119/Extinction-Rebellion-stage-silent-socially-distancedclimate-protests-Britain.html>

30 Metropolitan Police, Twitter, 31st May 2020:

<https://twitter.com/metpoliceuk/status/1267211890612219904?s=20>

31 Black organiser of UK anti-racism rally threatened with arrest – Damien Gayle, the Guardian, 25<sup>th</sup> August 2020: <https://www.theguardian.com/world/2020/aug/25/black-organiser-of-uk-anti-racism-rally-threatened-with-arrest>

regulation.”<sup>32</sup> Neighbours had gathered to observe and question police who had handcuffed the teenager, tied his legs and carried him into a police van. Threatening to use the restrictions on gatherings to prevent observation and intervention by members of the public during a forceful arrest is an attempt to utilise the Regulations to avoid essential public scrutiny of police actions. It demonstrates how these restrictions can easily creep into preventing any kind of unwanted acts of public democracy.

The right to protest is an essential part of democracy and cannot be restricted unless absolutely strictly necessary. During the House of Commons debate on the amendments to the Health Protection Regulations, Sir Charles Walker said:

“I find it rather wonderful that people in this country believe that the right to protest belongs to them and not Ministers.

“Whatever the rights and wrongs of protesting while there is a lockdown, looking ahead to the strength of the democratic right in this country, the fact that people believe the right to protest belongs to them and not Ministers should, in future, give us all hope for our democracy.”<sup>33</sup>

**Recommendation : The Regulations should specifically exempt political demonstrations from any restrictions on gatherings to avoid the criminalisation of protestors.**

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32 Twitter, 24th June 2020:  
<https://twitter.com/saucealgxrienne/status/1275880741868429312?s=20>

33 HC Deb (15th June 2020) vol. 677 col. 600: <https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>