

BIG BROTHER WATCH

Big Brother Watch Briefing on “the rule of 6”: Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020 for the House of Lords

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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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INTRODUCTION

We welcome the opportunity to provide this briefing to the House of Lords ahead of the motion on The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020 on 6th October 2020.

RECOMMENDATIONS

- No clear evidence base has been provided for this limitation on the family and social lives of the English population. Evidence of the necessity and proportionality for this restriction must be provided if parliamentarians are to be assured it is not a finger-in-the-air approach that breaches rights.
- Absent an evidence base to the contrary, children should be exempt from the rule of six to bring key English restrictions into harmony with the nations of the UK.
- These Regulations should have been debated prior to their implementation. 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.
- Restrictions on 'mingling' are excessive, unclear and risk criminalising normal, safe behaviour. They should be revoked.
- Political protests should be exempt from restrictions altogether. The requirement for a protest organiser to complete a risk assessment and implement health and safety measures should be changed to guidance, supported by online resources, rather than a legal requirement to avoid criminalising organic democratic participation and political dissent.

Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020, in force since 14th September, amend the most recent set of 'lockdown' Regulations in England, which contain restrictions on gatherings, business openings and give the Health Secretary powers to restrict access to public places. **The main effect of these Regulations is to impose the 'rule of six'**, reducing the maximum size of gatherings from 30 to 6 albeit with a significant number of exemptions.

Irrational?

The logic of this new restriction was criticised by Baroness Barker, Liberal Democrat Peer:

"The rule of six is a nonsense, and I think that people have worked out for themselves that it is arbitrary nonsense. Six individuals from different households meeting up every day, and six other individuals the next day—there is no way in which it makes sense, particularly in the absence of effective and timely test and trace data."¹

Furthermore, the inclusion of children in the rule of six contradicts the restrictions in the rest of the UK. No evidence base has been provided to explain why it is necessary to include children in the rule of 6 in England but not Wales or Scotland. The Children's Commissioner for England has called on the Government to exempt children under 12 from the rule of six.²

These new Regulations are also the subject of a legal challenge by Simon Dolan, who argues that the restrictions are irrational, disproportionate and ultra vires of the Public Health (Control of Infectious Diseases) Act 1984, with lawyer Steven Gardiner arguing:

"How can 500 people who don't know each other be allowed to cram into train carriages when more than six people who know each other are breaking the law if they meet in a garden. It doesn't make any rational sense."³

RECOMMENDATION 1: No clear evidence base has been provided for this limitation on the family and social lives of the English population. Evidence of the necessity and proportionality for this restriction must be provided if parliamentarians are to be assured it is not a finger-in-the-air approach that breaches rights.

RECOMMENDATION 2: Absent an evidence base to the contrary, children should be exempt from the rule of six to bring key English restrictions into harmony with the nations of the UK.

Penalties

An offence under these Regulations could initially result in a Fixed Penalty Notice of £100, rising to £3,200 for repeat offences. However, the most recent amendment to the principle Regulations, in force

¹ HL Deb, 18th September 2020, vol. 805, col. 1584: [https://hansard.parliament.uk/lords/2020-09-18/debates/1ED373BA-17A3-410A-A463-97E34EC17D6C/HealthProtection\(CoronavirusWearingOfFaceCoveringsInARElevantPlace\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-09-18/debates/1ED373BA-17A3-410A-A463-97E34EC17D6C/HealthProtection(CoronavirusWearingOfFaceCoveringsInARElevantPlace)(England)Regulations2020)

² Childhood in the time of Covid – Children's Commissioner, September 2020: <https://www.childrenscommissioner.gov.uk/report/childhood-in-the-time-of-covid/>

³ 'Rule of six' restrictions already facing legal challenge – Charles Hymas, the Telegraph, 10th September 2020: <https://www.telegraph.co.uk/politics/2020/09/10/coming-rule-six-restrictions-already-facing-legal-challenge/>

since 23rd September but not yet scheduled for debate, has doubled these fines.⁴ A relevant person, including a police officer, PCSO or even a council official, “may take such action as is necessary to enforce” the restrictions on gatherings. This can include directing a gathering to disperse, directing any person in the gathering to return to the place where they are living, or removing a person from the gathering even with the use of “reasonable force.”⁵

Complex exemptions

Although Ministers announced that this new restriction had been introduced in order to simplify the rules on gatherings, the Regulations contain complicated exceptions to the ‘rule of six’ which require close reading and careful analysis – they are not immediately evident. Human rights barrister Adam Wagner said that the new restrictions were “the most complex and convoluted set of lockdown Regulations in England yet” and that “[he didn’t] see how these are enforceable in any real sense” since there are “so many complex exceptions.”⁶ Analysis from the School of Law at Queen Mary University of London noted that “this ‘simple’ rule is deceptively complex” and that “tracking the changes to the 2020 Regulations is a protracted and exacting process.”⁷ The analysis concludes: “The public appear to remain confused, and those tasked with enforcing the regulations are asking for guidance and clarification. Who can blame them?”

The restrictions do not apply to households of more 6, linked households, if the gathering is reasonably necessary for work purposes, voluntary or charity services, for the purpose of education or training, for childcare, to provide emergency assistance, to avoid illness or escape the risk of harm, to provide care, for parental visits, to fulfil a legal obligation, or to support groups.⁸ Gatherings of up to 30 are permitted for funerals, weddings and wedding receptions under these Regulations; however the latest amendment to the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 limits wedding to 15 people.⁹

There are also exceptions for gatherings organised by a business, a charitable, benevolent or philanthropic institution, or a public body as long as they carry out a risk assessment and undertake “all reasonable measures to limit the risk of transmission of the coronavirus.”¹⁰ Exemptions for gatherings organised by political bodies have been removed, except if the gathering is an organised protest.¹¹ This is an important and welcome exemption. However, the requirement that an organiser carries out a risk assessment and takes all reasonable measures to limit the risk of transmission sets a high bar for compliance. Protests without a central organiser, the resources to complete this type of assessment or the power to implement sets of measures across a group of protesters remain banned and subject to harsh penalties.

⁴ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020, Regulations 1(2), 2(7)(c)(ii)

⁵ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, Regulation 7(1)

⁶ Adam Wagner, Twitter, 13th September 2020: <https://twitter.com/AdamWagner1/status/1305287499250630656?s=20>

⁷ ‘Mingling’ and the ‘Rule of Six’ – School of Law, Queen Mary University of London, 16th September 2020: <https://www.qmul.ac.uk/law/research/centres-institutes/dol/cjc/responding-to-covid-19/items/mingling-and-the-rule-of-six.html>

⁸ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020, Regulation 2(3)(b)

⁹ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 5) (England) Regulations 2020, Regulation 2(4)(a)(ii)

¹⁰ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020, Regulation 2(3)(e)

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

Undervaluing democratic scrutiny

The Government's repeated use of the made affirmative procedure and the excuse of 'urgency' to bypass Parliamentary scrutiny has severely undermined both public and parliamentary trust in the Regulations, the health of our democracy and the rule of law.

Neither the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, nor any of its other amendments, have been debated or voted on in the House of Commons until the debate scheduled for 6th October 2020. At best, the Regulations and amendments have been debated in the House of Lords and by delegated legislation committees with serious delays. The last debate in the House of Commons on any lockdown regulations was 15th June 2020 – almost 4 months ago. The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020 were laid 22 days before they are due to face scrutiny in the House of Commons and Lords. It is unacceptable that laws with such profound impact on our liberties are not facing the full scrutiny and approval of Parliament.

This approach means that elements of these Regulations have already been significantly altered by the time they face Parliament. Weddings and receptions are now limited to 15 people, instead of the 30 people allowed in this law. Exceptions to the 'rule of six' for 'significant life events' have also been removed. Fines have drastically increased. Parliamentarians will not be able to debate these changes, or the new curfews on pubs and restaurants until a later, unknown, date.

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

It is not only Parliament but the public and police forces that have also been afforded little chance to see and understand new laws they will be subject to. The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020 were not published until less than half an hour before they came into force, at around 11:35pm on 13th September, despite the fact that they had been first reported in the media on 8th September¹² and announced by the Prime Minister at a press conference on 9th September.¹³ The Speaker of the House, Sir Lindsey Hoyle, rebuked the Prime Minister for informing the media of the changes before informing Parliament:

"It is really not good enough for the Government to make decisions of this kind in a way that shows insufficient regard to the importance of major policy announcements being made first to this House and to Members of this House wherever possible."

"I have already sent a letter to the Secretary of State. I think the total disregard for this Chamber is not acceptable. (...) What I would take on board is the fact that it was all over Twitter as this was going on. Obviously, somebody decided to tell the media rather than this House."¹⁴

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

¹² Number 10 set to reduce the size of legal gatherings – Robert Peston, Spectator, 8th September 2020: <https://www.spectator.co.uk/article/number-10-set-to-reduce-the-size-of-legal-gatherings>

¹³ Prime Minister's press conference – GOV.UK, 9th September 2020: <https://www.gov.uk/government/speeches/pm-press-conference-statement-9-september-2020>

¹⁴ HC Points of Order, 9th September 2020, vol. 679, col. 619-20: <https://hansard.parliament.uk/commons/2020-09-09/debates/OCEEB81E-F31C-4447-B0F4-E7E3EE8D2F4C/PointsOfOrder>

this will not become routine practice, it has become precisely that. 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.’”¹⁵

Justin Madders MP, shadow Health Minister, warned Parliament:

“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.”¹⁶

Although vague promises have been made by the Health Secretary that “wherever possible, we will hold votes before such regulations come into force,”¹⁷ this provides no concrete assurances and is little more than, as characterised by Rebecca Long-Bailey MP, a “gentleman’s agreement.”¹⁸ This is merely the default constitutional role of Parliament and does nothing to admit or address the problem of the abuse of “urgent” procedures. We will continue to demand proper prior Parliamentary scrutiny of planned laws and policies that impact rights for as long as Government Ministers insist on ruling by diktat.

RECOMMENDATION 3: These Regulations should have been debated prior to their implementation. 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.

Mingling

If a household, a group of 6, or two linked households attend a large gathering permitted under an exception to the ‘rule of six’, they are not permitted to “mingle with any person who is participating in the gathering but is not a member of the same qualifying group as them.”¹⁹ ‘Mingling’ is not defined, either in the Regulations or in any other piece of legislation. Home Secretary Priti Patel told the Today program that mingling meant “people coming together” and when asked if two families bumping into each other and stopping to talk briefly constituted mingling, she answered that it was “definitely” mingling, and therefore illegal.²⁰ This definition is extraordinarily broad and provides little clarity about the levels of social contact that are permitted under the Regulations. Queen Mary University’s School of Law noted:

¹⁵ 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)

¹⁶ HC Deb (15th June 2020) vol. 677, col. 587-8: <https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>

¹⁷ HC Deb (30th September 2020) vol. 681, col. 388: [https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020\(ReviewOfTemporaryProvisions\)](https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020(ReviewOfTemporaryProvisions))

¹⁸ HC Deb (30th September 2020) vol. 681, col. 411: [https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020\(ReviewOfTemporaryProvisions\)](https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020(ReviewOfTemporaryProvisions))

¹⁹ The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020, Regulation 3(a)

²⁰ Coronavirus restrictions outlaw ‘mingling’ - but what does it mean? - ITV News, 15th September 2020: <https://www.itv.com/news/2020-09-15/coronavirus-restrictions-outlaw-mingling-but-what-does-it-mean>

“But for the fact that financial penalties attach to a breach of the 2020 regulations, such questions might amuse a class of law students for a long time. Alas, the reality is rather more serious.”²¹

It is plainly absurd to prohibit ‘mingling’ and is virtually impossible to enforce without excessive and intrusive policing. Threats from a Government Minister that speaking to friends in the street could result in a fine of up to £6,400 should serve as a sharp reflection of how extreme, impractical and punitive the Government’s approach to legislating has become over the last 6 months.²² While it is to be expected that our behaviour will have to change in public health crisis, the Government’s approach to managing this pandemic has become increasingly draconian and nonsensical.

RECOMMENDATION 4: Restrictions on ‘mingling’ are excessive, unclear and risk criminalising normal, safe behaviour. They should be revoked.

Impact on freedom of expression and assembly

We welcome the explicit exemption for ‘protests’ to the restrictions on gatherings that are introduced by these Regulations.²³ This is the first time in this period of emergency law that the right to protest has been acknowledged in Health Protection Regulations. However, this amendment does not constitute a full restoration of freedom of expression and assembly.

Protests can only be organised by a business, a charitable, benevolent or philanthropic institution, a public body, or a political body. These groups must also carry out a risk assessment and to take “all reasonable measures to limit the risk of transmission of the coronavirus”, which includes taking account of “any guidance issued by the government which is relevant to the gathering.”²⁴ Fines for unauthorised gatherings of more than 30 people still carry a £10,000 fine. This is an extreme and authoritarian approach to public health and chills freedom of assembly and expression, as people may be unwilling to risk organising a lawful protest due the vast potential fines.

The requirement to carry out risk assessments means that groups have had to submit documents to police officers for approval. Police officers are not public health officials and are not qualified to make such significant decisions. The requirement for a risk assessment also means that spontaneous protests or demonstrations are prohibited.

Many protesters have faced restrictions, bans and even prosecutions under the Regulations, despite exemptions for protests on the restrictions on gatherings. Prior to this amendment to the Regulations which specifically allows protests, political groups were able to organise gatherings with similar requirements. However, police appeared to be making arbitrary decisions about which groups were able to protest.

²¹ ‘Mingling’ and the ‘Rule of Six’ – School of Law, Queen Mary University of London, 16th September 2020: <https://www.qmul.ac.uk/law/research/centres-institutes/dol/cjc/responding-to-covid-19/items/mingling-and-the-rule-of-six.html>

²² The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020, Regulations 1(2), 2(7)(c)(ii)

²³ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020, Regulation 2(3)(b)(ii)

²⁴ The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment) (No. 4) (England) Regulations 2020, Regulation 2(30)(e)

CASE STUDY

A protest against the Coronavirus Act and the lockdown measures led to the arrest and £10,000 fine of its organiser Piers Corbyn on 29th August. Mr Corbyn told the Guardian that he and the other organisers had carried out the appropriate risk assessment and plans the challenge the fine in court. A week later, Mr Corbyn was fined another £10,000 for the same offence in Sheffield.

CASE STUDY

Trans Rights Collective UK was forced to cancel their planned protest, after the Metropolitan Police “informed [them] that there is a likelihood that [they], any participants, stewards and even BSL interpreters of the Trans Rights Protest will be arrested on 5th September.” The group had previously received assurances from police that they would not face enforcement action and the reason for the sudden reversal was not explained.

Other groups, including Extinction Rebellion, Resist the Government, Move One Million, have also faced enforcement action, with the Metropolitan Police handing out twenty £10,000 fines to protest organisers.²⁵ In the conditions imposed by the Metropolitan Police on Extinction Rebellion’s protest action, it states “participating in any gathering of over 30 persons outdoors in an offence contrary to Regulation 7 [of the Regulations],” making no mention of the exemptions for political bodies.²⁶

Since the new amendment came into force on 14th September, protesters have been facing similar police interventions.

The right to protest is now contingent on police approval. Police decisions as to who can protest and under what terms appear to have been made in an arbitrary fashion.

RECOMMENDATION 5: Political protests should be exempt from restrictions altogether. The requirement for a protest organiser to complete a risk assessment and implement health and safety measures should be changed to guidance, supported by online resources, rather than a legal requirement to avoid criminalising organic democratic participation and political dissent.

²⁵ Twenty protest organisers face £10,000 fines following Extinction Rebellion demonstrations in central London – Imogen Braddick, Evening Standard, 5th September 2020: <https://www.standard.co.uk/news/uk/protest-organisers-fines-extinction-rebellion-protests-london-a4541081.html>

²⁶ Conditions imposed on an assembly by Extinction Rebellion - 3 September 2020 – Metropolitan Police Service, 2nd September 2020: <http://news.met.police.uk/documents/conditions-imposed-on-an-assembly-by-extinction-rebellion-3-september-2020-99589>