

# **BIG BROTHER WATCH**

**Big Brother Watch Briefing on Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 for the House of Commons**

December 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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## **INTRODUCTION**

We welcome the opportunity to provide this briefing to the House of Commons ahead of the debate on the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, ahead of the debate on 1<sup>st</sup> December 2020.

The onerous restrictions on the right to protest, the vast fines, the complexities and contradictions of the Regulations cannot be amended due to the Government's insistence on using statutory instruments under the Public Health (Control of Disease) Act 1984 to introduce these measures. As such, we urge Members of Parliament to vote against these Regulations and demand the Government reworks any strictly necessary and proportionate restrictions to ensure that our rights and liberties are better protected.

The alternative to these Regulations is not, as some Government Ministers have characterised, 'letting the virus rip.' We support proportionate, time-limited measures which are easy to understand and follow and which do not criminalise safe, ordinary activities. The Government must set out a long-term, consistent approach to combating the spread of coronavirus, rather than oscillating between changing lockdowns, local restrictions and tier systems. This is not a sustainable, proportionate or democratic solution.

## **RECOMMENDATIONS**

**RECOMMENDATION 1:** We urge Members of Parliament to vote against the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020.

**RECOMMENDATION 2:** Given the lack of scrutiny required for such regulations made under the Public Health Act, any health protection restrictions should in future be made under the Civil Contingencies Act, which contains greater safeguards and requires meaningful parliamentary scrutiny.

**RECOMMENDATION 3:** The Government must stop relying on complex and ever-changing criminal sanctions as public health measures. Instead, clear, widely publicised and easily accessible guidance should be made widely available.

**RECOMMENDATION 4:** The Secretary of State should issue written and oral statements in the House of Commons (or, during recess, online) following each review of the necessity of the Health Protection (Coronavirus, Restrictions) (All Tiers) Regulations 2020 to foster transparency and to open subsequent measures to democratic scrutiny.

**RECOMMENDATION 5:** Political protests should be exempt from restrictions altogether. The legal requirement for a protest organiser to complete a risk assessment and implement health and safety measures does not reflect the way in which many protest movements function and should be changed to guidance supported by resources, to avoid criminalising organic democratic participation and political dissent.

## **EFFECT OF THE REGULATIONS**

The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 reintroduce the 'tier system' of restrictions across England. The entire country is automatically a 'Tier 1' area, unless the Regulations place an area into Tier 2 or 3. These Regulations place 99% of the country in one of these higher tiers.<sup>1</sup>

The Regulations contain complex restrictions and requirements for businesses. Exemptions for the restrictions on gatherings run to seven pages for each tier and are subtly different, with narrowly worded definitions of new legal categories such as 'outdoor sports gatherings', 'alternative wedding ceremonies', and 'support groups.' They are complex and convoluted at a time when simplicity and clarity is essential. During the first set of tier regulations, 66% of people said they didn't understand the tier system and 19% of people didn't even know what tier they were living in.<sup>2</sup> Given that the new tier system is different again, it seems likely that this level of confusion will only grow, hampering public health efforts and unnecessarily resulting in fines and criminalisation.

No one can participate in a gathering of more than 6 people in a Tier 1 area, in a gathering of more than 6 outdoors or of 2 or more people indoors in a Tier 2 area or any gathering in a Tier 3 area, unless the gathering falls under one of the exemptions.<sup>3</sup> The exemptions are different for each tier, many of which are complex, and come with convoluted definitions.

Nightclubs, dance halls, discos, sexual entertainment venues and shisha bars must close at all tiers,<sup>4</sup> while a 11pm-5am curfew applies to restaurants, pubs, casinos, bowling alleys, cinemas, theatres, amusement arcades or other indoor leisure centres, funfairs, theme and adventure parks, bingo halls, concert halls and sports grounds which can open in Tiers 1 and 2. <sup>5</sup> In Tier 3 areas, all of these businesses must close, as well as indoor play areas, snooker and pool halls, arcades, laser quest and escape rooms, cinemas, theatres, concert halls, indoor skating rinks, circuses and indoor attractions at water parks, theme parks, aquariums and zoos, botanical gardens, stately homes, museums (except where the art is for sale), sculpture parks, landmarks, model villages and conference centres.<sup>6</sup>

## **UNDERVALUING DEMOCRATIC SCRUTINY**

The publication of these Regulations has been rushed and disordered, published less than 24 hours before they are due on be debated on 1<sup>st</sup> December. This has very real implications for people's lives and livelihoods. These Regulations represent a draconian response to a public health threat and deserve close and careful scrutiny. A debate less than one day after Regulations have been published does not represent meaningful scrutiny considering their severe implications for the population.

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- 1 COVID-19 tiers: 99% of England placed in Tiers 2 and 3 as new system revealed – Alan McGuinness, Sky News, 27<sup>th</sup> November 2020: <https://news.sky.com/story/covid-19-tiers-99-of-england-placed-in-tiers-2-and-3-as-new-system-revealed-12142827>
  - 2 Most British adults clueless when it comes to coronavirus restrictions, poll finds — Adrian Hearn, the Independent, 19<sup>th</sup> October 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-restrictions-lockdown-tiers-boris-johnson-covid-b1153523.html>
  - 3 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Schedule 1, Part 1, para 1(2); Schedule 2, Part 1, para 1; Schedule 3 Part 1, para 1(1), para 2(1)
  - 4 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Schedule 1, Part 2, para 6(1)
  - 5 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Schedule 1, Part 2, para 8(1)
  - 6 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Schedule 3, Part 2, para 13(7)

Further, there is no opportunity for parliamentarians to amend and improve the Regulations. Barrister Tom Hickman QC argues that the ability to amend Regulations may well have led to fairer and more logical restrictions:

“the inclusion of young children in the “rule of six”, the broad nature of police enforcement powers and the very high level of the Fixed Penalty Notices for example are topics that Parliament might well have scrutinised with rigour and possibly changed if it had not been presented with the regulations on a take-it-or-leave-it basis.”<sup>7</sup>

A binary yes/no vote is clearly inappropriate for Regulations of such significance. Under the Civil Contingencies Act 2004, it is possible for Members of Parliament to amend Regulations, which would be preferable for both scrutiny and to ensure that unnecessary or draconian restrictions can be removed.<sup>8</sup>

**RECOMMENDATION 2: Given the lack of scrutiny required for such regulations made under the Public Health Act, any health protection restrictions should in future be made under the Civil Contingencies Act, which contains greater safeguards and requires meaningful parliamentary scrutiny.**

### **CONFUSED IMPLEMENTATION AND COMPLEX RESTRICTIONS**

The Government has drawn criticism from MPs, legal experts, police chiefs and behavioural scientists for its reliance on complex and rapidly changing legal restrictions to respond to the public health crisis. Key principles of the rule of law are accessibility and foreseeability — if it becomes impossible for people to know and understand the rules governing their lives, they should not face criminal sanctions. Without checking the Government’s website daily, it would be impossible for members of the public to remain up to date on constantly changing restrictions, many of which carry serious financial penalties and potential criminal convictions.

The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 is the sixth national system of restrictions since the end of March 2020 – following the initial national lockdown (The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020), which was amended 4 times; the more eased restrictions of the summer (The Health Protection (Coronavirus, Restrictions) (England) (No. 2) Regulations) which were amended 6 times; a patchworks of local restrictions across the north of England (introduced by over 25 separate pieces of legislation); the initial tier system, which was amended 3 times; and the second national lockdown (The Health Protection (No. 4) Regulations), which was amended twice. This is no way to manage a national crisis.

The Regulations themselves are also highly complex.

One exemption to restrictions on gatherings is if it consists of members from the same or linked household. Linked households are a well-intentioned introduction but have become so complicated they are unworkable and unenforceable. They must consist of two households, one of which may comprise of either one adult, one or more children and no adults, one adult and an unlimited number of children under the age of 18 or who were under that age on 12<sup>th</sup> June 2020, one or more adults and a child who is

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7 Responding to the Covid-19 Crisis: The Case for Primary Legislation – Tim Hickman, Blackstone Chambers, 30<sup>th</sup> November 2020: <https://coronavirus.blackstonechambers.com/responding-covid-19-crisis-case-primary-legislation/>

8 Civil Contingencies Act 2004, s.27(3)

under the age of 1 or was on 2<sup>nd</sup> December 2020, one or more adults and a child who has a disability and is under the age of 5 or was on 2<sup>nd</sup> December 2020 or one or more persons who have a disability and who require continuous care, either on their own or with one adult who does not have a disability.<sup>9</sup> There are 6 different types of linked households, with additional requirements that neither household has formed a linked household with any other household in the last 14 days. There are also 'linked Christmas households' and 'linked childcare households.'<sup>10</sup> It is unacceptable that families risk a maximum fine of £10,000 for misunderstanding these complicated rules.

If a household, a group of 6, or two linked households attend a large gathering permitted under an exemption 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."<sup>11</sup> 'Mingling' is not defined, either in the Regulations or in any other piece of legislation. Queen Mary University's School of Law remarked on 'mingling':

"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."<sup>12</sup>

It is plainly absurd to prohibit 'mingling' and is virtually impossible to enforce without excessive and intrusive policing.

There have also been farcical debates over what constitutes a 'main meal', given that pubs and restaurants in Tier 2 areas are only permitted to serve alcohol alongside a meal which might be "expected to be served as breakfast, the main midday or main evening meal, or as a main course at such a meal."<sup>13</sup> Housing Minister Robert Jenrick said a pasty by itself was not a substantial meal, but if it was served with a salad then it was.<sup>14</sup> Environment Minister George Eustice suggested that scotch eggs would "probably" count.<sup>15</sup> Given that venues could face vast fines for a breach of the Regulations, such ambiguity over law is unacceptable. It has also led to absurd and unnecessary policing – in Liverpool (during the first set of tier restrictions) police visited pubs to check that main meals were being eaten alongside drinks, with one bar manager sharing a video where "6 police officers (...) swoop in to check people are having a pie with their pint. More police in there than customers."<sup>16</sup>

This micro-managing of people's lives only serves to frustrate and confuse people. As the restrictions become more arbitrary, people are less inclined to follow or trust them.

**RECOMMENDATION 3: The Government must stop relying on complex and ever-changing criminal sanctions as public health measures. Instead, clear, widely publicised and easily accessible guidance should be made widely available.**

9 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Reg 3

10 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Reg 4,5

11 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020; Schedule 1, Part 1, para 4(1)(b) ; Schedule 2, Part 1, para 7(1)(b); Schedule 3, Part 1, para (1)(b)

12 'Mingling' and the 'Rule of Six' – School of Law, Queen Mary University of London, 16 th 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>

13 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Schedule 2, Part 3, para 14(1)

14 Coronavirus restrictions: Is a pasty enough to keep a pub open? – BBC News, 13<sup>th</sup> October 2020: <https://www.bbc.co.uk/news/newsbeat-54523232>

15 Covid-19: Drinkers in tier two 'could order Scotch egg' as substantial meal – BBC News, 30<sup>th</sup> November 2020: <https://www.bbc.co.uk/news/uk-55129828>

16 Twitter, 20 th October 2020: [https://twitter.com/\\_Gillespie\\_/status/1318632894022156289](https://twitter.com/_Gillespie_/status/1318632894022156289)

## **REVIEWS OF RESTRICTIONS**

The Prime Minister wrote to MPs that the Regulations will be subject to “ongoing reviews”, as part of his pledge that the measures would face meaningful scrutiny.<sup>17</sup> These reviews have been legally required since the first set of lockdown Regulations came in force on 26<sup>th</sup> March 2020, yet despite repeated requests including via written parliamentary questions, these reviews have **never once** been published.

The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 require the Secretary of State to review whether an area should remain in Tier 2 or 3 every 14 days. The Secretary of State must also review the need of each of the Tier 1, 2 and 3 restrictions every 28 days.<sup>18</sup>

We have been calling on the Health Minister to publish required reviews for regional and national restrictions since April, along with MPs across all benches. In a Commons debate on the Regulations on 15<sup>th</sup> June, Shadow Health Minister Justin Madders suggested:

“The reviews, which are legally required to happen under the Regulations, took place on 16 April, 7 May and 28 May. I ask the Minister: where are they? (...)I find this absolutely incredible. Here we have the most far-reaching impositions into everyday life in this country, yet we have no idea what the Government’s own reviews of them say.”<sup>19</sup>

Conservative MP Mark Harper also made the case for more transparency around reviews:

“with each of the review periods, it is not for others to justify the regulations going away; the Government must rejustify why they have to remain in place so we do not consider that they become the new norm.”<sup>20</sup>

The enormous restrictions placed on our liberties cannot be imposed on the promise of reviews which neither the public nor parliament are given sight of. It is essential for evidence-based policy making, Government transparency and public trust that these critical reviews are published.

**RECOMMENDATION 4: The Secretary of State should issue written and oral statements in the House of Commons (or, during recess, online) following each review of the necessity of the Health Protection (Coronavirus, Restrictions) (All Tiers) Regulations 2020 to foster transparency and to open subsequent measures to democratic scrutiny.**

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17 Sebastian Payne, Twitter, 29<sup>th</sup> November 2020:  
<https://twitter.com/SebastianEPayne/status/1333004154705424384?s=20>

18 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Reg 14(1)

19 HC Deb (15 June 2020) vol. 677, col. 588: <https://hansard.parliament.uk/commons/2020-06-15/debates/D38A42EF-77BA-410E-9E46-0382DD500705/PublicHealth>

20 HC Deb (4 May 2020) vol. 675, col. 462: <https://hansard.parliament.uk/Commons/2020-05-04/debates/A046C16C-8CA8-42D7-BEFE-75684DAF6B8D/PublicHealth>

## **FREEDOM OF ASSEMBLY AND EXPRESSION**

A major human rights issue arising from the Regulations is the continued constraint on the right to protest.

We welcome the explicit exemption for 'protests' to the restrictions on gatherings that are introduced by these Regulations.<sup>21</sup> However, this does not constitute a full restoration of freedom of expression and assembly.

Protests can be organised by a business, a charitable, benevolent or philanthropic institution, a public body, or a political body. Regulation 2 defines a 'political body' as "a political campaigning organisation within the meaning of regulation 2 of the Health and Social Care (Financial Assistance) Regulations 2009" — which is "any person carrying on, or proposing to carry on activities to promote, or oppose, changes in any law applicable in the United Kingdom or elsewhere or any policy of a governmental or public authority". This encapsulates protests.

Regulation 7 requires that the organiser of a gathering has carried out a risk assessment that would satisfy the requirements of regulation 3 of the Management of Health and Safety at Work Regulations 1999, and that the organiser has taken 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."<sup>22</sup> It is meeting this onerous requirement that currently determines whether a protest is safe and lawful. Fines for unauthorised gatherings of more than 30 people still carry a £10,000 fine. This is an 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 automatically criminalised.

Despite extraordinary police statements to the contrary<sup>23</sup>, the current second 'lockdown' Regulations permit the lawful organisation of a protest. The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020, Regulation 10, Paragraph 6, makes a clear exemption for the organisation of gatherings by "a business, a charitable, benevolent or philanthropic institution, a public body or a political body" so long as the required precautions are followed. Prior to these Regulations, an explicit exemption for protests had been in law since 14<sup>th</sup> September 2020, introduced by the Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020. Prior to this, the Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020 introduced an exemption for 'political bodies' to organise gatherings on 28<sup>th</sup> August, which would similarly cover protests. However, protesters have still faced criminalisation and arbitrary enforcement.

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21 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Schedule 1, Part 1, para 3(20); Schedule 2, Part 1 para 4(20); Schedule 3, Part 1, para 4(18)

22 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Schedule 1, Part 1, para 3(20); Schedule 2, Part 1 para 4(20); Schedule 3, Part 1, para 4(18)

23 See our urgent joint letter with Liberty to the Metropolitan Police, 28<sup>th</sup> November 2020: <https://twitter.com/BigBrotherWatch/status/1332666964305715201?s=20>



## Case studies

Protests against the Coronavirus Act and lockdown measures have consistently faced aggressive police interventions and vast fines. Piers Corbyn, an anti-lockdown campaigner, has faced multiple £10,000 fines after for organising protests of more than 30 producing risk assessments. One anti-lockdown protest, which occurred whilst protests were explicitly permitted, was aggressively dispersed by police after police alleged they "voided their risk assessment", resulting in 18 arrests.<sup>24</sup>

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 over just five days.<sup>25</sup>

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. The group, supported by Liberty, is now challenging this decision.<sup>26</sup>

Similarly, a protest outside the Polish Embassy against the new restrictions on abortion in country was cancelled after the Metropolitan Police refused permission for the protest to go ahead.<sup>27</sup> Activists from Polish Migrants Organise for Change had previously safely organised a protest on 24<sup>th</sup> October, but plans to host further protests were leant on heavily by police officers. Organisers told us that police officers contacted them over the phone regarding a protest planned on 30<sup>th</sup> October and warned that "exemptions were granted to formal political organisations such as political parties only." When organisers asked if they would be exempt if members of a political party (for example, the Labour party) were to organise the protest, they were told they "would still need to comply with a very complex risk assessment that would have to include a track and trace system of how people are travelling to and from the protest."<sup>28</sup> Organisers also reported to us that police officers told them people were neither allowed to travel from outside London to attend the protest, nor to use public transport for non-essential reasons. None of these requirements have any basis in law.

**RECOMMENDATION 5: Political protests should be exempt from restrictions altogether. The legal requirement for a protest organiser to complete a risk assessment and implement health and safety measures does not reflect the way in which many protest movements function and should be changed to guidance supported by resources, to avoid criminalising organic democratic participation and political dissent.**

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24 Coronavirus: Arrests as police officers injured at anti-lockdown protests in central London – Sky News, 24<sup>th</sup> October 2020: <https://uk.news.yahoo.com/coronavirus-arrests-police-officers-injured-180800894.html>

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

26 Liberty challenges police on cancelled trans rights protest – Liberty, 11<sup>th</sup> November 2020: <https://www.libertyhumanrights.org.uk/issue/liberty-challenges-police-on-cancelled-trans-rights-protest/>

27 Twitter, Netpol, 26<sup>th</sup> October 2020: <https://twitter.com/netpol/status/1320825354097991682?s=20>

28 Comment from Polish Migrants Organise for Change, via correspondence