

BIG BROTHER WATCH

Big Brother Watch Briefing on the Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021 for the House of Commons

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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 Commons ahead of the debate on the Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021 on 6th January 2021.

RECOMMENDATIONS

RECOMMENDATION 1: In the absence of any meaningful scrutiny or the possibility of amending the Regulations, we urge Members of Parliament to vote against the Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021.

RECOMMENDATION 2: The Government has treated the rule of law and democratic process with contempt. Parliamentarians must urge the Government to respect their vital role in scrutinising and approving legislation.

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

RECOMMENDATION 4: The right to protest must be restored as a matter of urgency. Peaceful protests are critical to the preservation of democracy and human rights.

EFFECT OF THE REGULATIONS

The Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021 prohibit the entire population from “leav[ing] or be[ing] outside of the place where they are living without a reasonable excuse.”¹ The Amendment places all of England into a de facto ‘lockdown’, by expanding the application and increasing the severity of Tier 4 of the tier system.

The Tier system was reintroduced on 2nd December via The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020. Tier 4 was imposed on 21st December 2020, during recess, via The Health Protection (Coronavirus, Restrictions) (All Tiers and Obligations of Undertakings) (England) (Amendment) Regulations 2020; and amended on 26th December 2020 via The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) (Amendment) (No. 3) Regulations 2020.

Read together with these preceding Regulations, the new Amendment being debated today entails a complex list of exemptions to the requirement to stay at home, including to buy goods for any business of service permitted to open, to obtain money from or deposit money to a business permitted to open, for exercise outside, to attend a place of worship, to undertake an activity related to the purchase or letting of a house, to visit a member of a linked household, to collect food, drink or other goods that have been ordered from a business, to visit a waste disposal centre, for the purpose of work (if it is “not reasonably possible” to work from home), to provide care or emergency assistance, to access critical public services, for competition or training if the person is an elite athlete, for medical need, to attend a support group, to visit a dying person, to attend a funeral or wedding, for children to move between households, for animal welfare, if returning home from a holiday which began before the Regulations came into force, for prison or immigration detention visits, to vote, to take part in an outdoor sports gathering if the person has a disability, for students to move between their family homes and student accommodation and for picketing.² This is a non-exhaustive list.

People are no longer permitted to leave their homes for “open air recreation,” although exercise is still permitted.³ This will undoubtedly lead to police officers attempting to regulate what counts as ‘exercise’ and attempts to prevent people from resting, as was seen extensively during England’s first lockdown in March 2020. This policing disproportionately impacts those with disabilities.

Gatherings of two or more people are prohibited unless they are members of the same or linked household, for work purposes, for educational purposes, to provide emergency assistance, to enable a person to escape harm, to provide care, to facilitate a house move, to fulfil a legal obligation, if the gathering takes place in criminal justice accommodation, for support groups of no more than 15 people, to provide respite care, to attend a birth, to attend a funeral with no more than 30 people in attendance or a marriage ceremony with no more than 6 people in attendance,

¹ Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021, para 3(13)(b)

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

³ The Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021, Para 3(4)(a)

to visit a dying person (indoors), for the purpose of training or competition for elite sportspeople, for children to move between households, for students to move between accommodation, for communal worship, or for picketing.⁴

All businesses are required to close, unless listed in Part 3 of Schedule 3A to the primary Regulations.

Regulation 2 of the Amendment also expands the powers of Police Community Support Officers (PCSOs) to enforce the restrictions, by expanding Regulation 12 of the coronavirus restrictions imposed on 18th July (The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020). This means that relevant person, including a police officer, PCSO or even a council official, may "direct a person to return to the place where they are living", and may disperse a gathering.⁵ Police officers may remove a person from the gathering using "reasonable force."⁶ Furthermore, a relevant person ""may issue a fixed penalty notice to anyone that the authorised person reasonably believes— has committed an offence under these Regulations, and is aged 18 or over."⁷

An offence under these Regulations could initially result in a Fixed Penalty Notice of £200, rising to £6,400 for repeat offences.⁸ An individual found to be the organiser of a gathering of more than 30 people could also face a Fixed Penalty Notice of £10,000.⁹

These Regulations expire on 31st March, almost 3 months after they came into force.¹⁰ This is an extraordinary length of time for emergency laws and far longer than the seven weeks the Prime Minister suggested when announcing the third national lockdown.¹¹

RECOMMENDATION 1: In the absence of any meaningful scrutiny or the possibility of amending the Regulations, we urge Members of Parliament to vote against the Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021.

UNDERVALUING DEMOCRATIC SCRUTINY

The substance of The Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021 was announced by the Prime Minister via a televised

⁴ The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Schedule 3A, para 6(1)

⁵ The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Regulation 9(2A), (3)(a)

⁶ Regulation 9(4)

⁷ Regulation 11(1)

⁸ Regulation 12 (1)(a)(ii), (1)(b)(v)

⁹ Regulation 12(4)

¹⁰ The Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021, para 3(2)

¹¹ Prime Minister's address to the nation: 4 January 2021 – GOV.UK, 4th January 2021: <https://www.gov.uk/government/speeches/prime-ministers-address-to-the-nation-4-january-2021>

address on 4th January. The Regulations came into force at 00:01 on 6th January, after being published less than seven hours before, at 5:30pm on 5th January.

Today's debate on the Regulations occurs after the Prime Minister has already announced to the nation that "the Government is once again instructing you to stay at home. You may only leave home for limited reasons permitted in law."¹² The Regulations came into force while Parliament was on recess (as has been the case with every major enforcement of restrictions since and including March 2020) without even the paltry scrutiny of a press conference, instead being announced by the Prime Minister in a televised address.

This authoritarian approach deliberately evaded parliamentary democracy and undermined the rule of law, yet again, treating parliamentary process as a mere formality. In September, the Health Secretary pledged to MPs that they would have votes on all "significant national measures" before they came into force. Even this thin promise now lies in tatters. Lockdown measures have simply been dictated

These Regulations represent a highly draconian response to a public health threat and deserve close and careful scrutiny. Instead, a vote will be held on laws that have already come into force, rendering it ultimately meaningless. Additionally, there is no opportunity for parliamentarians to amend and improve the Regulations. A binary yes/no vote is clearly inappropriate for Regulations of such constitutional significance.

RECOMMENDATION 2: The Government has treated the rule of law and democratic process with contempt. Parliamentarians must urge the Government to respect their vital role in scrutinising and approving legislation.

CONFUSED IMPLEMENTATION AND COMPLEX RESTRICTIONS

The continued contempt the Government has shown for proper parliamentary scrutiny not only damages the rule of law and trust in democracy, but also makes complex rules harder to understand and follow. This ultimately undermines public health efforts. Publishing these Regulations just seven hours before they come into force, without any form of scrutiny, makes it virtually impossible for the public to understand and digest these complex laws and unlikely that police forces will enforce them correctly.

This is the seventh set of restrictions imposed in England in less than a year, following the first lockdown, the easing of restrictions over summer, local restrictions, the introduction of the tier system, a second national lockdown, and the second iteration of the tier system. Lurching from lockdown to tiered restrictions to lockdown is no way to manage a public health crisis and only increases confusion and frustration. Understanding restrictions has become an elusive academic exercise.

¹² Prime Minister's address to the nation: 4 January 2021 – GOV.UK, 4th January 2021: <https://www.gov.uk/government/speeches/prime-ministers-address-to-the-nation-4-january-2021>

A key tenet of the rule of law is that laws are accessible and foreseeable – without clarity, enforcement and punishment become arbitrary. As Dr Ronan Cormacain from the Bingham Centre for the Rule of Law wrote, “Even during a pandemic, the Rule of Law matters. Citizens are entitled to legal certainty.”¹³ Given that a breach of the Regulations can carry a life-changing £10,000 fine, it is unacceptable that the communication and implementation of these Regulations has been so confused.

There continues to be variation between the Regulations and the guidance published by the Government. Guidance states that students “who do not study these courses should remain where they are wherever possible, and start their term online”,¹⁴ despite the legal exemption in place for students to return to their accommodation.¹⁵ Guidance also states that exercise “should be limited to once per day, and you should not travel outside your local area.” However, these restrictions are not contained within law. Guidance states that people may only shop for “basic necessities,” whereas the law places no restrictions on what a person may purchase. It also states that individuals must “always stay local - unless it is necessary to go further (...) Stay local means stay in the village, town, or part of the city where you live.” The requirement, and the definition of ‘local’, has no legal basis. However, Big Brother Watch frequently sees reports of police attempting to enforce ‘stay local’ guidance.

This confusion between law and guidance damages the rule of law and is directly responsible for unlawful fines and prosecutions.

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

FREEDOM OF ASSEMBLY AND EXPRESSION

A major, continuing human rights issue arising from the Regulations is the constraint on, and now removal of, the right to protest.

The right to protest is fundamental in a democracy – particularly during a time of serious expansion of state powers, unprecedented restrictions and a public health crisis. It is protected by the Human Rights Act 1998 and may only be restricted if strictly necessary and proportionate.

In Tiers 1-3, protests organised by “a business, a charitable, benevolent or philanthropic institution, a public body or a political body” which take place on a vessel or a “public outdoor

¹³ Can I go to the park please Dad? Everyday lessons in legal certainty in the English Coronavirus Regulations – Ronan Cormacain, Bingham Centre for the Rule of Law, 19th May 2020: <https://binghamcentre.biicl.org/comments/92/can-i-go-to-the-park-please-dad-everyday-lessons-in-legal-certainty-in-the-english-coronavirus-regulations>

¹⁴ National lockdown: Stay at Home – GOV.UK, 4th January 2021: <https://www.gov.uk/guidance/national-lockdown-stay-at-home?priority-taxon=774cee22-d896-44c1-a611-e3109cce8eae#universities>

¹⁵ The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Schedule 3A, para 2(22)

place” were permitted.¹⁶ In Tier 4, this exemption does not exist. This Amendment, which places the entire country in a more severely restricted Tier 4, outlaws peaceful protests more explicitly than before. Nine months on from the initial lockdown, the continued curtailment of this essential right cannot be justified.

This ban on protests is particularly absurd when an exemption to the restrictions on gatherings remains for picketing.¹⁷ There is little meaningful difference in the risk of coronavirus transmission between a picket and a protest – distinguishing between the two is merely political and casts serious doubt on the proportionality of such a prohibition.

CASE STUDY: SPEAKERS' CORNER

On Saturday 2nd January 2021, a small protest against lockdown measures took place at Speakers' Corner in London, an area of great historical importance for free expression and dissent. The protest was violently broken up by large groups of police officers marching in formation and wielding batons.¹⁸ 17 people were arrested under the Health Protection Regulations.¹⁹ One individual, a young black girl who was alone in Hyde Park, was randomly picked out, forcibly arrested, pinned to the ground by a group of police officers and carried into a police van.

On Sunday 3rd January 2021, police marched in formation around Speakers' Corner, dispersing park-goers in a militaristic fashion.²⁰

These scenes are a stain on our democracy.

RECOMMENDATION 4: The right to protest must be restored as a matter of urgency. Peaceful protests are critical to the preservation of democracy and human rights.

¹⁶ The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Schedule 1, para 3(20); Schedule 2, para 4(20); Schedule 3, para 4(18)

¹⁷ The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, Schedule 3A, para 6(25)

¹⁸ Big Brother Watch, Twitter, 4th January 2021:
<https://twitter.com/BigBrotherWatch/status/1346135332245397505?s=20>

¹⁹ Metropolitan Police Events, Twitter, 2nd January 2021:
<https://twitter.com/MetPoliceEvents/status/1345409565249196034?s=20>

²⁰ Squads of Police Patrol Hyde Park, Speakers Corner - 3rd January 2021:
https://www.youtube.com/watch?v=Hei6WfowtNQ&feature=emb_logo