

BIG BROTHER WATCH

Big Brother Watch Briefing on the Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 for the House of Commons

March 2021

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) (Steps) (England) Regulations 2021 on 24th March 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) (Steps) (England) Regulations 2021.

RECOMMENDATION 2: 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.

RECOMMENDATION 3: Prohibiting individuals from leaving the country is an unnecessary interference with the right to freedom of movement, particularly given the stringent self-isolation requirements. The Government should remove restrictions on leaving the United Kingdom from the Regulations.

RECOMMENDATION 4: The right to protest must be fully restored. If health and safety measures are deemed strictly necessary, the Regulations should include an objective framework for assessing and mitigating risks, as well as a time-limited process for risk assessments to be authorised.

EFFECT OF THE REGULATIONS

The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 brings the Government's roadmap, as was announced on 22nd February, into law. It contains restrictions for the three 'steps', which the Government has announced will occur on 29th March, 12th April and 17th May, although aside from Step 1, which comes into force with the Regulations on 29th March, there is no guarantee in the Regulations that these dates will be in line with the Government's roadmap. The Steps see limits of social interactions gradually reduced and the reopening of businesses which have been required to close. Step 4, which the Prime Minister announced would see the lifting of "all legal limits on social contact" is not contained within the Regulations. Instead, the Regulations expire on 30th June 2021 – a week later than the date the Prime Minister announced restrictions would be lifted.¹

The significant delay between the Prime Minister's public address and the appearance of the Regulations, over a month, is unacceptable. It allows the Government to present these new restrictions to the public as a fact of law, rather than Regulations that must be scrutinised and approved by Parliament. This approach to law-making is corrosive to parliamentary democracy.

The Regulations are broadly similar to restrictions that have been introduced at different periods over the past year, with Step 1 allowing for gatherings of 6 people outdoors and prohibiting gatherings indoors, Step 2 allowing retail and outdoor hospitality to re-open and Step 3 allowing outdoor gatherings of up to 30 people and indoor gatherings of 6 people. Each step contains detailed definitions of ordinary activities and complex exemptions and attempts to legislate for every area of human life with the threat of vast fines for those who do not comply. An offence under these Regulations could initially result in a Fixed Penalty Notice of £200, rising to £6,400 for repeat offences. 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.

The Secretary of State must review the need for the restrictions imposed by the Regulations every 35 days.² The period during which restrictions must be reviewed has gradually increased – when the first set of Health Protection Regulations were made in March 2020, a review was required every 21 days.³ This was increased to 28 days in July 2020.⁴ The requirement, present in previous iterations of the Health Protection Regulations, for the Secretary of State to "publish a direction terminating that restriction or requirement" that he no longer deems necessary for the prevention or control of

¹The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, reg. 21(1)

²The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, reg. 20(1)

³The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg. 3 (2)

⁴The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, reg. 3(2)

coronavirus, is absent from these Regulations. The obligation for the Secretary of State to review restrictions is a thin safeguard, given that the contents of these reviews have never been published. However, the gradual weakening of even this safeguard is alarming – revealing the Government’s reluctance to commit to full accountability and transparency over its use of emergency restrictions.

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TRAVEL PROHIBITION

Regulation 8 of the Regulations introduces two new offences - “leav[ing] England to travel to a destination outside the United Kingdom” and “travel[ling] to, or be[ing] present at, an embarkation point for the purpose of travelling from there to a destination outside the United Kingdom” without a “reasonable excuse.” An individual leaving the United Kingdom must complete a “travel declaration form” which contains their full name, date of birth, passport number, home address, destination, their reason for leaving the country, a statement that the information provided is true and the date that the form was completed.⁵ Leaving the UK or travelling to an embarkation point without a reasonable excuse will result in a £5,000 fine. Failing to correctly fill out the travel declaration form will result in a £200 fine.⁶

A reasonable excuse includes for work of volunteering, where it cannot be done from a location inside the United Kingdom, where a person is enrolled in a course at an institution, where the person is an elite sportsperson (or their coach or parent) and they need to travel for training or competition, where it is necessary to fulfil a legal obligation or to participate in legal proceedings, to undertake any of the following activities in connection with the purchase, sale, letting or rental of a residential property (including visiting an estate agent), to seek medical assistance, to attend a clinical appointment, to avoid illness, injury or to escape a risk of harm, to attend an expectant mother giving birth, to visit a person receiving treatment in hospital, to provide care or assistance, to visit a person who is dying, to get married or attend the wedding of a close family member, to vote in an election, for childcare, or where a person is only in the United Kingdom on a temporary basis, and is not resident in the United Kingdom.⁷

The right to leave a country is protected under international law. Article 12(2) of the International Covenant of Civil and Political Rights states that “everyone shall be free to leave any country, including his own” and Article 2(2) of the Protocol n°4 of the European

⁵Regulation 8(5)(a)

⁶Regulation 15(1)

⁷Schedule 5

Convention on Human Rights states that “everyone shall be free to leave any country, including his own.” This is qualified right, meaning it can be restricted on the grounds of public health. However, interferences with rights must be strictly necessary and proportionate. Exemptions for those wishing to visit a travel agent or visit potential properties suggest that this highly restrictive new prohibition of leaving the country is not strictly necessary.

Human rights barrister Adam Wagner pointed out the uneven nature of the restrictions:

“you can travel for work, to volunteer, or for a family wedding, but not for a holiday. A parent or sibling can reunite with a child (a person under 18) if they do not live together, but an adult who lives separately from their spouse cannot travel to see them – unless they are dying.”

(...)

“But as with the lockdown laws, these new rules suggest a strange disregard for people who do not live with their partners, or adults who have not seen their families for a year.”⁸

The Regulations do not specify who will assess the travel declaration form, but Government guidance notes that an individual should “Keep this form with you – police may ask to see it but will not collect it from you.”⁹ The Regulations do not require an individual to carry evidence or prove their reasonable excuse for travel, but Government guidance contains lists of “recommended evidence” for each reasonable excuse – such as a professional card for work, letter or proof of membership of an academic institution for education.¹⁰ For medical or compassionate grounds, the requirement for evidence is far more onerous and intrusive. It suggests:

“medical evidence describing the situation of the member of your household or close family member or a friend who is receiving treatment in hospital or whose condition is life-threatening, proof of scheduled treatment, letter from social services, proof of hospital admission, proof of family relationship”

For many people this will not be possible to obtain, particularly given likely time pressures.

⁸The travel ban means spouses are kept apart but friends can visit an estate agent in Florida – Adam Wagner, the Telegraph, 23rd March 2021: <https://www.telegraph.co.uk/travel/comment/travel-ban-means-spouses-kept-apart-friends-can-visit-estate/>

⁹Coronavirus (COVID-19): declaration form for international travel from England from 29 March 2021 – GOV.UK: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/971445/declaration-form-for-international-travel-from-29-march-2021.pdf

¹⁰Coronavirus (COVID-19): declaration form for international travel – GOV.UK: <https://www.gov.uk/guidance/coronavirus-covid-19-declaration-form-for-international-travel#permitted-reasons-for-international-travel>

RECOMMENDATION 3: Prohibiting individuals from leaving the country is an unnecessary interference with the right to freedom of movement, particularly given the stringent self-isolation requirements. The Government should remove restrictions on leaving the United Kingdom from the Regulations.

COMPLEX RESTRICTIONS AND UNLAWFUL PROSECUTIONS

This is the eighth set of restrictions imposed on England in the course of a year, following the first lockdown, the easing of restrictions over summer, local restrictions, the introduction of the tier system, a second national lockdown, the second iteration of the tier system and a third national lockdown. Lurching from lockdown to tier system to lockdown to 'steps' is no way to manage public health. Understanding restrictions has become an academic exercise rather than a viable approach to public health.

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."¹¹ 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.

A recent survey of front-line police officers found that even amongst those tasked with enforcing restrictions, confusion is rife. 9 in 10 officers felt that Covid-19 rules and regulations have not been clear over the past year¹² and reviews into prosecutions under the Health Protection Regulations have uncovered 213 unlawful prosecutions. Our analysis has found that 16% of all prosecutions under the Health Protection Regulations assessed by the Crown Prosecution Service have been unlawful since March 2020. The true number of unlawful prosecution is likely to be higher, given that the CPS does not review charges that are heard under the Single Justice Procedure.¹³

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

¹¹ 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.biccl.org/comments/92/can-i-go-to-the-park-please-dad-everyday-lessons-in-legal-certainty-in-the-english-coronavirus-regulations>

¹² Nine in ten police officers question the clarity of Covid rules – Charles Hymas, the Telegraph, 22nd February 2021: <https://www.telegraph.co.uk/news/2021/02/22/nine-ten-police-officers-question-clarity-covid-rules/>

¹³ Wrongful convictions under Covid lockdown laws may be slipping through net – Farha Karim, the Times, 28th February 2021: <https://www.thetimes.co.uk/article/wrongful-convictions-under-covid-lockdown-laws-may-be-slipping-through-net-slv3nb6m>

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.

FREEDOM OF ASSEMBLY AND EXPRESSION

A major and continuing human rights issue arising from the Regulations is the constraints on 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.

We welcome the re-introduction of the explicit exemption for protests in the Regulations, but note that freedom of assembly has always been protected under the Human Rights Act 1998, meaning that a blanket ban of protests has never been lawful. This was affirmed in the recent judgement from the High Court, which found that “a policy which imposes a blanket prohibition on protest irrespective of the specific circumstances and irrespective of the application of Articles 10 and 11 (...) would be unlawful.”¹⁴ However, conditions imposed by these Regulations are onerous enough to significantly chill freedom of assembly.

In Steps 1-3, protests may only be organised by “a business, a charitable, benevolent or philanthropic institution, a public body or a political body.”¹⁵ We have previously received reports from protest organisers who have been told by police forces that they do not qualify as a ‘political body’¹⁶ - despite the Regulations defining a political body as “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.” Clearly police officers are either unaware of this definition or are deliberately misleading would-be protesters.

Protests are also required to take the “required precautions” which include the “gathering organiser or manager” undertaking a risk assessment “that would satisfy the requirements of regulation 3 of the Management of Health and Safety at Work Regulations

¹⁴ *Jessica Leigh et al and The COMMISSIONER OF THE POLICE OF THE METROPOLIS [2021] EWHC 661 (Admin)*

¹⁵ The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, Schedule 1, para 4(27)(a); Schedule 2, para 4(27)(a); Schedule 3, para 3(15)(a)

¹⁶ See Big Brother Watch’s October Emergency powers and Civil Liberties Report, p. 45-6: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/11/Emergency-Powers-and-Civil-Liberties-Report-OCT-2020.pdf>

1999” and taking “all reasonable measures to limit the risk of transmission of coronavirus” including “any guidance issued by the government which is relevant to the gathering.”¹⁷ These requirements mean that spontaneous protests or demonstrations are prohibited. The introduction in these Regulations of a protest ‘manager’ seems to be aimed at criminalising anyone who appears to play a role in facilitating the protest, rather than just the individual who has ‘organised’ the protest.

Big Brother Watch made Freedom of Information requests to police forces across the country to assess how these same requirements have previously been managed. These have revealed ways in which, even before organising and participating in protests was effectively made illegal, police forces made the regulations so hard to comply with as to essentially become unworkable. Every police force that responded to the FOI request reported protests that had been cancelled or postponed by organisers, even when protest was exempted from the ban on gatherings. According to Gloucestershire Constabulary and West Midlands Police, this was as high as 60% and 57% respectively of all planned protests between 23rd March and 15th December last year. Kent Police said that 43% did not go ahead in the same period. It is difficult to imagine that these forces even tried to adequately fulfil their duty to facilitate the public right to protest.

The Regulations are silent on who is to monitor and assess these risk assessments. Freedom of Information responses revealed that there did not appear to be a standard procedure for reviewing risk assessments within each force across the country and at different times. Some forces stated that assessing risk assessments is “not a police role or function,” some passed the risk assessments onto local authorities, some allowed police officers to assess the documents, despite having no medical or public health training and others stated they “do not look” at the risk assessments.¹⁸

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.

CASE STUDY: SPEAKER’S CORNER

On 2nd January 2021, a small protest against lockdown measures was organised at Speaker’s Corner in London, an area of great historical importance for free expression and dissenting opinions. The protest was violently broken up with large groups of police

¹⁷The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, reg. 6

¹⁸See Big Brother Watch’s February Emergency Powers and Civil Liberties Report, p. 51:
<https://bigbrotherwatch.org.uk/wp-content/uploads/2021/03/Emergency-Powers-and-Civil-Liberties-Report-FEB-2021.pdf>

officers marching in formation and wielding batons.¹⁹ 17 people were arrested under the Health Protection Regulations.²⁰ We have been contacted by one individual, a young girl who was alone in Hyde Park, who was forcibly arrested, pinned to the ground by a group of police officers and carried into a police van. The symbolism of these arrests is stark.

CASE STUDY: VIGIL FOR SARAH EVERARD

On 13th March 2021, a vigil held to commemorate the life of Sarah Everard and protest against street harassment and violence on Clapham Common was brutally dispersed by police officers. Despite a court ruling that protests are not unlawful just the day before, the Metropolitan Police Force refused to facilitate the vigil organised by Reclaim These Streets and the Government advised police forces across that country that such gatherings were unlawful.²¹ Four young women were pinned to the ground and arrested and crowds of peaceful attendees were aggressively broken up by scores of police officers.

RECOMMENDATION 4: The right to protest must be fully restored. If health and safety measures are deemed strictly necessary, the Regulations should include an objective framework for assessing and mitigating risks, as well as a time-limited process for risk assessments to be authorised.

¹⁹ Big Brother Watch, Twitter, 4th January 2021:

<https://twitter.com/BigBrotherWatch/status/1346135332245397505?s=20>

²⁰ Metropolitan Police Events, Twitter, 2nd January 2021:

<https://twitter.com/MetPoliceEvents/status/1345409565249196034?s=20>

²¹ Priti Patel wanted police to stop people gathering at Sarah Everard vigil - Vikram Dodd and Jamie Grierson, the Guardian, 19th March 2021: <https://www.theguardian.com/uk-news/2021/mar/19/priti-patel-wanted-police-stop-people-gathering-sarah-everard-vigil>