

BIG BROTHER WATCH

**Written evidence to the
Justice Committee's Inquiry:
Covid-19 and the criminal law**

April 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.

Contact

Silkie Carlo

Director

Direct line: 020 8075 8478

Email: silkie.carlo@bigbrotherwatch.org.uk

Madeleine Stone

Legal & Policy Officer

Direct line: 020 8075 8479

Email: madeleine.stone@bigbrotherwatch.org.uk

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We welcome the opportunity to submit written evidence to this important inquiry.

Since the onset of the pandemic, we have been scrutinising emergency powers, providing policy analysis and emphasising the importance of close parliamentary scrutiny. We have been producing monthly reports on the Government's response to Covid-19, emergency powers and their impact on human rights and civil liberties and have circulated these reports to parliamentarians.¹

The process by which covid-19 criminal offences have been created, including the role of the made affirmative procedure and the consultation process inside and outside Government.

We have continuously expressed our grave concern at the rushed and unaccountable process of law-making that has become the norm since March 2020. In the initial period of an unprecedented public health crisis, rapid decision making is to be expected. This does not, however, excuse the erosion of parliamentary scrutiny of some of the most draconian legislation ever enacted in modern legal history.

Since March 2020, 418 coronavirus-related statutory instruments have been laid before Parliament. These instruments have made significant impact on every area of public life, yet only 24 of these (5.7%) used the draft affirmative procedure, requiring parliamentary approval before an instrument becomes law.² To date, 293, or 70.1%, of instruments have been subject to the made affirmative procedure, meaning the bulk of pandemic related law-making have come into force through the signature of a Minister.

Timely parliamentary scrutiny of emergency legislation is essential. Serious delays and use of the made affirmative procedure have become an unjustified norm with politicians, judges, and commentators from across the political spectrum pouring scorn on the Government's continued determination to rule by diktat.

Lady Hale, the former President of the Supreme Court, wrote that Parliament had "surrender[ed] control to the government at a crucial time (...) My plea is that we get back to a properly functioning constitution as soon as we possibly can."³

Former Speaker John Bercow told BBC Radio 4 in September 2020:

"Debate, scrutiny and votes are the lifeblood of a pluralist system.

"Without them – and they are tremendously important safeguards – what you have is Government by executive fiat and it seems to me that there is a world of difference between the situation six months ago and that which pertains today.

¹Emergency Powers and Civil Liberties Reports (April 2020 – February 2021) – Big Brother Watch: <https://bigbrotherwatch.org.uk/campaigns/emergency-powers/>

² Coronavirus Statutory Instruments Dashboard — Hansard Society (updated 9th April 2021): <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>

³ Parliament surrendered role over Covid emergency laws, says Lady Hale - Owen Bowcott, Heather Stewart and Andrew Sparrow, the Guardian, 20th September 2020: <https://www.theguardian.com/world/2020/sep/20/parliament-surrendered-role-over-covid-emergency-laws-says-lady-hale>

“If governments feel that they can bypass or circumvent or stymie the voice of Parliament, if they don’t really feel the need to consult the legislature anymore, well then they will just do things their own.”⁴

In September 2020, during the debate on the renewal of the Coronavirus Act 2020, the Health Secretary gave a loose promise that prior votes will be offered only on “significant” national laws “where possible”, merely restating the default role of parliament. It is no surprise that this promise was reneged on as soon as it became inconvenient – with the third national lockdown coming into force yet again without a vote in January 2021. The thin excuse which the Government relied on early last year, that unprecedented times call for swiftness, is not acceptable mode of law-making a year into a public health crisis.

All new measures which restrict the public’s rights and liberties must be debated prior to their implementation, with ample time given for each debate.

The design of covid-19 criminal offences, including the use of Fixed Penalty Notices and relationship between these new offences and existing criminal offences.

The Government’s approach to preventing the spread of coronavirus has increasingly relied on criminal sanctions and constant threats of ‘tougher enforcement’ of the rules. This is disproportionate, unjustified and inappropriate.

Currently, an average of 7 new pieces of coronavirus legislation have been laid each week since March 2020.⁵ Rules are found in a wide range of statutory instruments, most of which have been amended multiple times. Without checking the Government’s website daily, it would be impossible for members of the public to remain up to date on new restrictions, many of which carry serious financial penalties and potential criminal convictions. Public confusion over the nature of restrictions at any given time has been widely documented,⁶ with police chiefs⁷ and ministers⁸ also admitting that they did not know the details of restrictions.

Throughout the pandemic, the National Police Chief’s Council (NPCC) has emphasised its ‘4 Es’ approach (engage, explain, encourage, enforce), which it introduced in acknowledgement that the novel, complex and changing regulations were widely misunderstood by the public.⁹ However, increasing emphasis has been placed on enforcement and the issuing of FPNs as case numbers have risen, with senior police

⁴ MPs must share decision making burden on draconian coronavirus laws – Tory rebel – Express & Star, 27th September 2020: <https://www.expressandstar.com/news/uk-news/2020/09/27/mps-must-share-decision-making-burden-on-draconian-coronavirus-laws-tory-rebel/>

⁵ Ibid.

⁶ Most British adults clueless when it comes to coronavirus restrictions, poll finds — Adrian Hearn, the Independent, 19th October 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-restrictions-lockdown-tiers-borisjohnson-covid-b1153523.html>

⁷ Oral evidence: Home Office preparedness for Covid-19 (Coronavirus), HC 232, Home Affairs Committee, 21st October 2020, Q784-6: <https://committees.parliament.uk/oralevidence/1097/pdf/>

⁸ Minister admits even she doesn’t know details of north-east lockdown pub meet ban – Imogen Braddick, Evening Standard, 29th September 2020: <https://www.msn.com/en-gb/news/newslondon/minister-admits-even-she-doesntknow-whether-north-east-local-lockdown-rules-apply-to-pub-gardens/ar-BB19wReJ>

officers stating forces would not “waste time” explaining regulations.¹⁰ This approach, which has led to an increase in FPNs being issued, has only exacerbated confusion between law and guidance from the public and police officers. The perceived need to “crack down” on non-compliance has led to many instances of police enforcing guidance rather than the law.

Guidance has been put into legislation, creating a myriad of new criminal offences which carry huge fines and resulting in controversy and disillusionment for many. Since March 2020, in England there have been three sets of national ‘lockdown’ regulations, a patchwork of local regulations, two sets of tier regulations and the most recent ‘steps’ regulations, all of which have been amended multiple times and which contain a myriad of complicated restrictions and exemptions. The requirement to self-isolate has been introduced¹¹, as have significant restrictions on businesses, which include the requirement for hospitality venues to prevent singing and dancing, ensure social distancing and display posters about face covering requirements.¹² Contact tracing requirements have been made law across the United Kingdom, with fines for venues that fail to collect details or even to display QR codes.¹³ There have been 16 statutory instruments relating to face coverings in England and Northern Ireland alone, while Wales and Scotland have placed masses of restrictions in single statutory instruments, meaning that devolved governments are unable to vote against specific requirements without voting against the entire piece of legislation.

FPNs under the Health Protection Regulations start at £200 and can increase to £6,400 for repeat offences. Breaches of the Self-Isolation Regulations and organising a gathering of more than 30 people can result in an instant £10,000 FPN – a fine of this magnitude would be life-changing for most individuals. Fines issued by a court are often means tested but result in a criminal record, leaving people to choose between a £10,000 FPN or the risk of a criminal conviction. Given the justifiable confusion around the legal restrictions, a fine of this amount is disproportionate.

This obsession with using criminal law to manage public health seeks to shift the blame for the spread of coronavirus onto individuals, rather than Government failures – but we cannot police our way out of a pandemic. A public health crisis requires a public health response, not a public order response. Criminalising ordinary behaviour only leads to

⁹ Engage, Explain, Encourage, Enforce – applying the four ‘E’s – National Police Chief’s Council:

<https://www.college.police.uk/What-we-do/COVID-19/Documents/Engage-Explain-Encourage-Enforce-guidance.pdf>

¹⁰ More Fixed Penalty Notices issued since national Coronavirus restrictions were reintroduced, with crime 9 per cent lower

than last year – National Police Chief’s Council, 30 November 2020: <https://news.npcc.police.uk/releases/more-fixedpenalty-notices-issued-since-national-coronavirus-restrictions-were-reintroduced-with-crime-9-per-cent-lower-than-lastyear>; Met announces stricter Covid enforcement approach – Metropolitan Police, 6 January 2021: <https://news.met.police.uk/news/met-announces-stricter-covid-enforcement-approach-418519>

¹¹ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020

¹² The Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) Regulations 2020

¹³ The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements)

Regulations 2020; The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 5) Regulations 2020, Regulation 2(2)(b); The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020, Regulation 6; The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 5) Regulations (Northern Ireland) 2020, Regulation 3(2)

frustration and mistrust, and decreased willingness to follow rules. It is important to note that around 50% of fixed penalty notices have been unpaid across England and Wales, leading to a pending prosecution crisis.¹⁴

Government guidance has been adhered to by the vast majority of people and effective guidance should be relied on to protect public health, instead of excessive and draconian fines and criminalisation.

The checks and balances in place to review the way that these offences are being policed and prosecuted, including the role of the Crown Prosecution Service in reviewing cases.

We have welcomed the Crown Prosecution Service's commitment to reviewing charges brought under the Health Protection Regulations and the Coronavirus Act 2020. These reviews have uncovered a staggering rate of unlawful charges and prosecutions: a total of 465 to date, or almost a third of all charges under these pieces of legislation. Under the Coronavirus Act alone, 100% of charges and prosecutions have been unlawful. They provide further evidence of a significant and sustained justice crisis in relation to coronavirus-related legislation.

However, we are extremely concerned that many more charges and prosecutions are going unreviewed, likely resulting in a significantly increased number of unlawful prosecutions. An investigation by Big Brother Watch and Fair Trials has revealed that the CPS review does not include any charges under the Health Protection Regulations or Coronavirus Act heard under the single justice procedure ('SJP'), if the individual does not return a plea or pleads guilty. In response to a written parliamentary question, the Ministry of Justice revealed that on average 88% of people who received SJP notices in relation to charges under the Health Protection Regulations did not enter a plea, out of 1,084 cases from July to September 2020.¹⁵ Information regarding charges from September 2020 are not yet available, but a rapid increase from 23 cases in July to 929 cases in September suggests that thousands more cases under the SJP may have been heard, presumably the majority of which have not entered plea from the defendant. Given that the SJP is subject to even less scrutiny than a magistrate's hearing, we believe it is highly likely that hundreds more unlawful prosecutions have occurred under the SJP, with no intervention from the CPS.

We know of at least two unlawful prosecutions under the Coronavirus Act heard under the SJP. Data from the Ministry of Justice showed that two people had been convicted in England and Wales under Schedule 22, a Schedule that has not been activated and so could not be used for prosecutions.¹⁶ These convictions are undoubtedly unlawful. It is

¹⁴ Majority flout coronavirus fines: More than three in five penalties handed out to Covid rule breakers by police have gone UNPAID in parts of England and Wales, figures show – Henry Martin, MailOnline, 18th November 2020: <https://www.dailymail.co.uk/news/article-8960057/Majority-coronavirus-fines-unpaid-parts-England-data-suggests.html>

¹⁵ Written answer: Chris Philip to Alex Cunningham, UIN 143756, 1st February 2021: <https://questionsstatements.parliament.uk/written-questions/detail/2021-01-26/143756>

¹⁶ Ibid.

extremely concerning that the Ministry of Justice has uncritically published this information and has not indicated that these cases have been investigated. These prosecutions were not overturned by the CPS review as they occurred under the SJP.

The role of the courts in dealing with covid-19 cases, including the use of the single justice procedure and the way in which covid-19 offences and Fixed Penalty Notices can be appealed, challenged or contested in court.

Single Justice Procedure

The Single Justice Procedure allows people to be convicted in their absence, with a magistrate deciding the case on the basis of the evidence provided to them. The accused can instead enter a plea in response to a 'Single Justice Procedure Notice' sent to them by post.

Arguably as a result of this lack of openness, many prosecutions have been unlawful. Reporter Tristan Kirk found two people who had been both convicted and fined under the Welsh coronavirus regulations for offences in London, a man who was charged under the Coronavirus Act for "drinking beer on the street" and ignoring a police direction to go home, as well as other unlawful prosecutions under the Coronavirus Act.¹⁷ He also found instances where people received convictions for offences they were not prosecuted for, vast fines which exceed the legal maximum and police being allowed to resubmit evidence where "paperwork is botched."¹⁸

We have also gathered evidence of people being fined varied and excessive amounts under the Single Justice Procedure. Under the Health Protection Regulations 2020 (which the majority of these incidents are charged under), a Fixed Penalty Notice for an offence was £60 or £100. If the individual was convicted at court, the maximum fine was £960. However, under the Single Justice Procedure, many people are facing high fines for offences which should have received a £60 FPN, and which have exceeded even the £960 cap proscribed in law.

In Somerset, three people were fined £1,110 for a breach of the Regulations in November.¹⁹ In December, five people were fined £1,760 each for offences under the Health Protection Regulations, while on the same day, a man was fined £660 and a woman £200 for similar offences.²⁰ £1,760 is a staggering amount, almost double the £960 cap written into the Regulations.

Tristan Kirk also reported that in London:

"On 18/4, a 23yo was out & about when he shouldn't have been. £100 fine + costs

¹⁷ Covid rule breakers targeted in secret London prosecutions – Tristan Kirk, the Evening Standard, 16th October 2020: <https://www.standard.co.uk/news/london/covid-rule-breakers-secret-london-prosecutions-a4571843.html>

¹⁸ Tristan Kirk, Twitter, 11th November 2020: <https://twitter.com/kirkkorner/status/1326470321180987392?s=20>

¹⁹ The 15 people fined by Somerset court for breaking COVID-19 restrictions – Imogen McGuckin, Somerset Live, 22nd November 2020: <https://www.somersetlive.co.uk/news/local-news/15-people-fined-somerset-court-4721649>

²⁰ The seven people punished by Somerset court for flouting coronavirus rules – Emma Elgee, Somerset Live, 13th December 2020: <https://www.somersetlive.co.uk/news/somerset-news/sevenpeople-punished-somerset-court-4783558>

“Same day, different part of London, 21yo committed the same offence. £1100 + costs”

In Derbyshire, a man was charged £1,100 for travelling to the area in April and refusing to leave.²¹

It is likely that there are hundreds more undocumented cases of people being fined considerably more than the £960 cap.

Appeals of Fixed Penalty Notices

Although we have raised concerns with the SJP, FPNs contain even fewer safeguards.

We have seen countless incidents of FPNs being issued unlawfully – from individuals being fined for sitting on benches to doing the ‘wrong’ kind of exercise, from driving to open spaces for walks to visiting relatives in care homes. In some cases, public pressure has seen police forces rescind FPNs. However, it is likely that many more unlawfully issued FPNs have gone unchallenged, with the individual not realising the fine had been unlawfully issued due to general public confusion over restrictions or being unwilling to risk a criminal record by challenging the FPN in court.

FPNs do not have the safeguards of subsequent review by prosecutions lawyers and/or magistrates. Big Brother Watch, and many of the groups and lawyers we work with, have been contacted by individuals who have been wrongly issued with FPNs. Some have proceeded to pay them due to a lack of resources to legally challenge them, a loss of trust in the system and the fear of a criminal prosecution. If only 16% of the 94,368 FPNs recorded in England and Wales were unlawfully issued, a percentage which is in line with unlawful prosecutions under the Regulations, this would account for over 15,000 unlawfully issued FPNs. The number is likely to be higher however, given the lack of safeguards around issuing FPNs.

We continue to call for an urgent review of all FPNs issued under the Health Protection Regulations, given the thousands of people have been issued with them unlawfully.

Madeleine Stone

²¹ London camper refused to leave Derbyshire during Covid-19 lock-down – Martin Naylor, Derbyshire Live, 5th December 2020: <https://www.derbytelegraph.co.uk/news/local-news/london-camperrefused-leave-derbyshire-4769635>