

LIBERTY

LIBERTY'S BRIEFING ON THE HEALTH PROTECTION (CORONAVIRUS, RESTRICTIONS) (ENGLAND) (NO.4) REGULATIONS 2020

NOVEMBER 2020

ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy.

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INTRODUCTION

1. On 4 November 2020 Parliament will have the opportunity to debate, but not amend, a set of regulations which establish new national restrictions to combat the spread of COVID-19, due to come in to force on 5 November 2020 (the Coronavirus Regulations). Parliament will debate these regulations eight months into this public health crisis. The second wave of the virus we now face was predictable. We regret that the Government did not use the respite presented by the summer months to prepare a response that preserves our civil liberties to the greatest extent possible, safeguards public health and protects at-risk groups.¹ Liberty has supported proportionate measures to protect public health since the start of the pandemic, and safeguarding human rights and civil liberties is clearly integral to achieving this aim. Liberty urges Parliamentarians **to vote against these significant new restrictions, unless and until the Government commits to making the changes outlined in this briefing.**

PARLIAMENTARY SCRUTINY

2. Section 23 provides that the Coronavirus Regulations will expire 28 days after they come in to force i.e. 2 December 2020. Liberty welcomes this. It is also a positive development that Parliamentarians have the opportunity to debate the new restrictions before they come in to force. We regret, however, that these new regulations were only published the afternoon before they were due to be debated and that Parliamentarians have no opportunity to amend them. This does not constitute robust Parliamentary scrutiny.
3. The normal processes of democratic scrutiny have been repeatedly circumvented during the pandemic. Over the last six months the Government has laid over 50 coronavirus related statutory instruments via the “made affirmative” procedure² and have had to write to the Speaker at least twenty-five times to explain why legislation has come into force before it has even been laid before Parliament.³ This is an erosion of normal democratic processes that serves to further minimise the ability of Parliament to scrutinise and hold Government accountable in its handling of the pandemic. Should the Government consider, on the basis of the available evidence, that these restrictions should be extended or fresh restrictions should

¹ In a briefing sent to all MPs in June 2020, Liberty recommended that the summer recess be used to “reach consensus on the measures that remain necessary and proportionate in fighting the pandemic, and in identifying policies that will facilitate compliance with test and trace and better protect at-risk groups than the current approach”, see: <https://www.libertyhumanrights.org.uk/wp-content/uploads/2020/03/Libertys-Abridged-Briefing-on-Protecting-Civil-Liberties-in-a-Pandemic.pdf>

² For a full list of coronavirus related statutory instruments see Hansard Society, *Statutory Instrument Dashboard*, <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>

³ Joint Committee on Human Rights, *The Government's response to COVID-19: human rights implications*, Seventh Report of Session 2019–21, September 2020: <https://committees.parliament.uk/publications/2649/documents/26914/default/>

be imposed, **Liberty recommends they bring forward primary legislation, with a firm sunset clause, in sufficient time for Parliamentarians to robustly scrutinise it.**

HOUSING SUPPORT

4. While the Government is again instructing people to stay at home, it must recognise that this is not possible for everyone. We welcome that section 5 (3) of the Coronavirus Regulations explicitly excludes homeless people from the prohibition on leaving one's home absent a reasonable excuse. However, we are concerned that the absence of a clear and encompassing definition, the authorities may rely on an inconsistent or narrow interpretation of what homelessness is, which risks criminalising people who cannot comply with the Coronavirus Regulations because they do not have a safe or appropriate place to return to. During the last lockdown, the Crown Prosecution Service found that at least four people were unlawfully prosecuted during lockdown.⁴ Moreover, homeless people are not exempt from Section 9 of the Coronavirus Regulations, which bans gatherings of more than two people, running the risk that homeless people may be criminalised for gathering together for their own safety.
5. Homeless should be defined in a broad and open-ended manner, to include anyone who could be classified as homeless under the statutory definition, as well as the "hidden homeless" and those with no recourse to public funds who cannot access state-funded housing benefits.⁵ The definition should therefore encompass anyone who is sleeping rough or with nowhere to live, has a home but cannot access it, cannot reasonably continue to occupy their accommodation, is threatened with homelessness, is sofa-surfing, is staying with friends, or is staying in a hostel. **Liberty recommends homeless people, broadly defined, should be explicitly exempt from the regulations in their entirety to avoid people being unfairly subject to enforcement powers.**
6. Nobody should have to weather these new short-term restrictions or the pandemic as a whole without safe and suitable accommodation. While Liberty welcomed the 'Everyone In' hotel and emergency accommodation operation, in practice there were barriers that undermined these measures, including local authorities failing to provide rough sleepers with emergency accommodation, people being deterred from or denied seeking help because they have No Recourse to Public Funds, worries about data being shared with the Home Office for immigration purposes, and concerns about local authorities continuing to apply the 'connection to local area' test.⁶ **Liberty recommends that future measures continue to ensure sufficient**

⁴ Dearden, L. 2020. *Coronavirus: At least four homeless people unlawfully prosecuted for 'being outside'*, June 2020: <https://www.independent.co.uk/news/uk/home-news/coronavirus-homeless-prosecution-lockdown-england-wales-cps-a9567336.html>

⁵ The statutory definition is contained in sections 175-177 of the Housing Act 1996 as amended by the Homelessness Reduction Act 2018.

⁶ Taylor, D., 2020. *Homeless Migrants Still Sleeping Rough Despite PM's Pledge, Say Charities*, April 2020: <https://www.theguardian.com/society/2020/apr/16/homeless-migrants-still-sleeping-rough-despite-pms-pledge-say-charities>

funding for local authorities and homelessness services to ensure that homeless people can access safe and suitable accommodation, regardless of their immigration status.

PROTEST

7. Section 9 of the Coronavirus Regulations bans gatherings of more than two people in public outdoor places. Since September, all regulations restricting gatherings contained an explicit exception for protests.⁷ We regret that exception has been removed from these regulations and are extremely concerned by reports that the Home Secretary has briefed police leaders that she expects the rule to be enforced against protesters.⁸ Liberty considers that a blanket ban on protest would not be a necessary or proportionate interference with the rights to freedom of assembly and expression, particularly when the Government has provided no evidence that outdoor, socially distanced protests pose a risk to public health.⁹ People must not be criminalised *en masse* for voicing opposition to state practices, even in the context of a pandemic.¹⁰ **Liberty strongly recommends restrictions on gatherings include an explicit exception for protest.**

ENFORCEMENT

8. Sections 19-21 of the Coronavirus Regulations provide for broad police powers to enforce the regulations. Fixed Penalty Notices can be issued, starting at £100 and rising to £6,400. Organisers of unlawful gatherings can be fined £10,000. Liberty considers this to be disproportionate. We are also concerned that these provisions afford the police broad discretion, which invites uneven policing. Two investigations by Liberty's editorially independent journalism unit, Liberty Investigates, and the Guardian have revealed marked ethnic disparities in how similar powers were used in the first national lockdown. An initial analysis of national-level data illustrated that people of colour were 54% more likely to be fined than white people.¹¹ Further analysis of force-level data from 25 police forces, disclosed following Freedom of Information requests, revealed that 18 police forces had statistically significant race disproportionality between FPNs issued to people of colour and white people.¹² The most racially disproportionate issuing of fines was by Cumbria Police,

⁷ See, for example, The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020.

⁸ Hamilton, F. 2020. *Coronavirus lockdown: Priti Patel wants police to stop protests of more than two*, November 2020: <https://www.thetimes.co.uk/article/coronavirus-lockdown-priti-patel-wants-police-to-stop-protests-of-more-than-two-zdpv3xczx>

⁹As protected by articles 10 and 11 of the European Convention on Human Rights (ECHR).

¹⁰ Liberty, *Our right to protest is more important than ever during lockdown*, June 2020,

<https://www.libertyhumanrights.org.uk/issue/our-right-to-protest-is-more-important-than-ever-during-lockdown/>

¹¹ Busby, M. & Gidda, M. 2020. *BAME people fined more than white population under coronavirus laws*, May 2020:

<https://www.theguardian.com/world/2020/may/26/bame-people-fined-more-than-white-population-under-coronavirus-laws>

¹² Gidda, M. 2020. *Police Forces in England and Wales up to seven times more likely to fine BAME people in lockdown*, June 2020: <https://libertyinvestigates.org.uk/articles/police-forces-in-england-and-wales-up-to-seven-times-more-likely-to-fine-bame-people-in-lockdown/>

where people of colour were 6.8 times more likely to be fined than white people. Liberty recommends that police **discretion is narrowed to state that a breach of the restrictions on movement and gatherings is only a criminal offence where it causes another person immediate harm.**

9. It is essential that people have the opportunity to challenge fines they believe are unfairly levied. A review of charges under the Regulations conducted by the Crown Prosecution Service revealed that a number of cases were wrongly charged.¹³ And, as the Chair of the Joint Committee on Human Rights has noted, the incidence of wrongly issuing of fines under the Regulations is likely to be higher, given they have fewer safeguards and do not require the involvement of a prosecutor or a judge.¹⁴ We regret that the Coronavirus Regulations do not provide people issued with FPNs a statutory right of appeal – the only formal route open to them to challenge a fine is to refuse to pay and risk prosecution, including a criminal record and all the attendant, potentially life-altering, consequences that carries. **Liberty recommends a statutory right of appeal against FPNs issued under the Coronavirus Regulations is established and urges police forces to institute a wholesale review of all fines issued to date.**

SUPPORTING PEOPLE TO COMPLY

10. Ensuring health and safety in open workplaces, and income support for workers who need to self-isolate, is highly likely to increase compliance with COVID-secure guidelines and any further restrictions, protecting public health. To that end, Liberty recommends that:
 - a. **All workers should receive full sick pay in the event that they have to self-isolate due to their own health status or that of someone they live with.**
 - b. **At a minimum, all workers who are on the ‘clinically extremely vulnerable’ list should receive full sick pay if they cannot fulfil their duties from home.**
 - c. **Funds in addition to the furlough scheme should be made available to ensure that low-paid workers do not fall below the real living wage.¹⁵**
 - d. **No Recourse to Public Funds conditions should be lifted for the duration of the restrictions to ensure that everyone has access to the social safety net, and to minimise the need for people to continue potentially unsafe and exploitative work.¹⁶**

¹³The review concluded that 6% of charges under the Health Protection Regulations (the Regulations) and every single charge under the Coronavirus Act 2020, were unlawful. See <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

¹⁴ Joint Committee on Human Rights (2020), Chair’s Briefing on Health Protection (Coronavirus Restrictions) 2020, <https://committees.parliament.uk/writtenevidence/5454/default/>

¹⁵ As defined by the Living Wage Foundation: <https://www.livingwage.org.uk/what-real-living-wage>

¹⁶ For further information, see JCWI’s briefing on No Recourse to Public Funds <https://www.jcwi.org.uk/westminster-hall-debate-nrpf>

HEALTH AND SOCIAL CARE

11. The Government is missing an important opportunity to make specific provision for groups of people most likely to be at risk of illness and other human rights abuses in the context of the pandemic. Liberty regrets that these regulations do not seek to remedy that by addressing the now well-documented differentiated impact of the pandemic.
12. Migrants face significant barriers to accessing healthcare through NHS charging,¹⁷ and data sharing between NHS Trusts and the Home Office.¹⁸ Coronavirus is rightly exempted from the list of chargeable conditions. However, as noted by Doctors of the World UK,¹⁹ the wider charging infrastructure acts as a deterrent to migrants seeking healthcare. In the context of your stated strategy to test, trace, and isolate people with coronavirus, this is harmful for individuals, and for public health more broadly. **Liberty recommends that all charging of migrants for NHS services, including the Immigration Health Surcharge, should be suspended, as well as all data-sharing for charging and immigration enforcement purposes between public health authorities and the Home Office.**
13. Finally, the Coronavirus Act allows care providers to vary, reduce, or stop care services to people with care needs, stripping away vital safeguards they benefit from in ordinary times. These provisions disproportionately impact people experiencing mental health problems, disabled people and older people: groups already experiencing the sharp end of the pandemic and lockdown.²⁰ Future measures should serve to shore up – not weaken – support for at risk-groups during this pandemic. **Liberty recommends that local authorities are provided sufficient funding to maintain and if necessary enhance social care provision to protect the dignity, health and wellbeing of people with care needs.**

¹⁷ The exemption for COVID-19 only applies up until a person receives a negative diagnosis, at which point charging commences for any other condition they may have that does not meet another exemption.

¹⁸ The Department of Health and Social Care has given no assurance that NHS data will not be shared with the Home Office and used for immigration enforcement, including for those people with a confirmed coronavirus diagnosis.

¹⁹ See: *Hands Up for our Health*, Doctors of the World UK <https://www.handsupforourhealth.org.uk/>

²⁰ The Guardian, *Stop using coronavirus powers to neglect care duties, UK councils told*, May 2020 <https://www.theguardian.com/society/2020/may/07/stop-using-coronavirus-powers-to-neglect-care-duties-uk-councils-told>