

LIBERTY'S ABRIDGED BRIEFING ON THE CORONAVIRUS ACT 2020: PROTECTING CIVIL LIBERTIES IN A PANDEMIC

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INTRODUCTION

1. On 25 March 2020, in the context of the global coronavirus pandemic and faced with significant risk to life, Parliament nodded through without a division the greatest restrictions on civil liberties in at least a generation. The Act was scrutinised and passed in a single day, with scarcely any amendment, and without a firm sunset clause. **This abridged briefing sets out why Liberty recommends that MPs vote against renewal of the Coronavirus Act this Autumn.**
2. In scrutinising the Act, MPs of all parties recognised that it contained powers which were “*unprecedented*”,¹ “*extraordinary*”,² “*alarming*”,³ and “*unspeakable in any situation outside wartime*”.⁴ Health Secretary Matt Hancock MP admitted that the Bill’s provisions were “*measures of a kind never seen before in peacetime*”.⁵ Liberty at the time briefed all Parliamentarians to recommend a firm three-month sunset clause on the grounds that the cumulative civil liberties implications of the Act were too grave for it to simply remain in force indefinitely.⁶
3. At the same time, rather than including a statutory basis for lockdown in the Act, Government chose to introduce alongside it a succession of statutory instruments implemented under the Public Health (Control of Disease) Act 1984 (the lockdown regulations). These regulations have been made with ever-decreasing justification under emergency scrutiny procedure, which delays Parliamentary debate on such measures until several weeks after their entry into force. The impact is to further minimise the ability of Parliament to scrutinise and hold Government accountable in its handling of the pandemic.
4. The six-month review and vote clause, Section 98, appears thanks to a cross-party campaign for MPs to have the opportunity to vote on the renewal of the powers in the Act no later than six months after its entry into force; i.e. by 3rd October 2020. It is regrettably not possible to amend the Act through this procedure: the powers stand or fall together as a package. As the lockdown eases and Government moves towards more targeted and localised responses to the pandemic, while preparing for a potential second wave this winter, the justification for many of the blunt, rushed and exceptional powers in this Act is increasingly diminished. **Liberty urges Parliamentarians to use the summer recess to identify measures that are likely to be necessary over the next phase of the pandemic, including legislation to replace the Coronavirus Act.** It is vital for public health and the healthy functioning of our democracy that further infection control measures are effective and proportionate, respect civil liberties, and facilitate public compliance rather than prioritising coercion and control.

THE MOST DRASTIC RESTRICTIONS ON CIVIL LIBERTY IN AT LEAST A GENERATION

Powers to detain, test, interrogate and quarantine

5. Section 51 and Schedule 21 of the Act confer significant new powers on police and immigration officials to detain people they deem “potentially infectious” for testing, with “potentially infectious” being so broadly defined as to capture large parts of the population at any given moment.⁷ This Schedule also allows public health officers to demand that people provide biological samples⁸ and other personal data relating to their

health, personal relationships, and travel history.⁹ It further allows a public health officer to require a person remain indefinitely in isolation in a specified place, without a firm upper time limit.¹⁰

6. The Government has not provided adequate justification to support the maintenance of these coercive powers, given that the majority of police enforcement under lockdown has taken place under the lockdown regulations. Moreover, quarantine powers are already available to local authorities under the Public Health Act 1984, with the added safeguard of requiring judicial authorisation. A Crown Prosecution Service review found that every single charge under Schedule 21 was unlawful.¹¹ These powers are so open to misuse as to be arbitrary and unjustified.
7. There is a specific risk of arbitrary and racially uneven enforcement should Schedule 21 be used more widely in conjunction with the test and trace scheme, as has been the case in police use of sweeping powers handed to them under the lockdown regulations. The first person to be wrongly convicted under Schedule 21 was Marie Dinou, a black woman.¹² An investigation by Liberty Investigates and the Guardian of national-level data revealed that under the lockdown regulations, people of colour were 54% more likely to be fined than white people.¹³
8. As we move from a nationwide lockdown to a reliance on ‘test and trace’ and localised measures, there is an increasing risk that the coercive powers contained in Schedule 21 may be used to force people to be tested, self-isolate, or share travel histories and contacts. The threat of criminalisation for non-compliance may have the perverse effect of deterring people from getting tested or sharing their contacts with the scheme, ultimately undermining public health. As Dr Agoritsa Baka, chief expert on emergency preparedness at the European Centre for Disease Prevention and Control said in relation to proposed measures to criminalise people who do not wear face masks in shops, *“In public health we don’t like very much the mandatory stuff. We want to persuade people to do something to change their behaviour.”*¹⁴ Similarly, in March 2020, 800 public health officials and lawyers wrote to US political leaders, stating that:

“[V]oluntary self-isolation measures are more likely to induce cooperation and protect public trust than coercive measures and are more likely to prevent attempts to avoid contact with the healthcare system.”¹⁵
9. An overreliance on criminalisation is especially harmful where measures are not in place to facilitate compliance, such as ensuring that people can still meet housing and food costs while self-isolating; are not penalised by their employers for self-isolating; have suitable accommodation in which to self-isolate, and are reassured that it is safe to share data with state agencies without fear that it may be shared with the Home Office for immigration enforcement purposes. Given the disproportionate vulnerability of people living in socio-economic deprivation to the virus, as demonstrated by the experience of exploited factory workers in Leicester,¹⁶ and agricultural workers in Herefordshire,¹⁷ it is clear that those who are most at risk from falling ill are also those most in need of support to comply with test and trace. There is a significant risk that without targeted support, it is people who are already marginalised in society who will disproportionately face the triple threat of illness, criminalisation, and restrictions on their liberty in the form of local lockdowns.

Power to ban protests and other gatherings

10. Section 52 and Schedule 22 of the Act empower the Secretary of State for Health to prohibit either specific events or gatherings, or those of a specified description.
11. Crucially, this Schedule does not include any explicit protections for the fundamental rights to freedom of expression, and freedom of assembly and association, protected by articles 10 and 11 of the European Convention on Human Rights (ECHR). Even the Civil Contingencies Act 2004 makes an allowance for strikes.¹⁸ While necessary and proportionate restrictions on protest are permissible under human rights law, it is concerning that no explicit protection at all is made for protest in the Coronavirus Act, and indeed, the Home Secretary has recently made the very concerning claim in response to the Black Lives Matter movement that protest is illegal.¹⁹ People must not be criminalised *en masse* for voicing opposition to state practices, even in the context of a pandemic.²⁰

Power to postpone elections

12. Sections 59-62 of the Act not only postponed for a year the local, Policing and Crime Commissioner and mayoral elections that were due to be held in May, but also vested in the Minister for the Cabinet Office the power to make further changes to the timing and “manner” of an election by statutory instrument.²¹
13. While local elections were postponed for a month in 2001 due to a foot-and-mouth outbreak,²² and have been moved a number of times to coincide with European elections,²³ this year-long delay represents the longest period elections have been postponed for in the UK since World War Two.²⁴

Power to close borders

14. Section 50 and Schedule 20 of the Act empowers the Secretary of State to direct the operator of any airport, port, hover-port or channel tunnel port to suspend operations wholly or in part where there is a real and significant risk that there are insufficient resources to adequately secure the border as a result of coronavirus. Borders can be closed for six hours in the first instance, and then on a renewable basis with no upper time limit. Failure to comply with a port direction or supplementary direction without reasonable cause would constitute a criminal offence. This power is wholly distinct from powers to require new arrivals to the UK to be tested or self-isolate for a specified time period.
15. Even in a public health emergency, this is an extraordinary measure, which if exercised continuously for an extended period of time could have a significant impact on the right to private and family life under Article 8 ECHR.

LEAVING NO ONE BEHIND

Reinstating safeguards in mental health and social care

16. The rush to protect the NHS, and to legislate for blanket and coercive State powers left the Government and State agencies ill-equipped to respond to the differentiated impact of the pandemic.²⁵ In some instances people were left more exposed to infringements of their civil liberties through the stripping away of vital safeguards than they would have been in more ordinary times.
17. Section 10, in combination with Schedules 8-10 of the Act make provision for significant changes to be made to the Mental Health Act 1983, rescinding a number of important safeguards for people experiencing mental health problems. This includes allowing a single doctor, rather than two, to authorise detention; suspending reviews of detention, and extending the period for which people may be detained, and even indefinitely in the cases of people accused of crimes who are detained pending an assessment or on remand.
18. Section 15, in combination with Schedule 12 of the Act allows local authorities to apply easements under the Care Act 2014, weakening protections for those in need of care at a time when informal social support is restricted by the need for social distancing, and increasing pressure on local authority and NHS services by only allowing people access to support once conditions have reached a minimum threshold of severity. Of the eight councils that have implemented the easements, many of them have done so without providing transparent evidence that thresholds have been met. This has caused significant concern among disability rights groups. Liberty is concerned that Government guidelines are not rigorous enough to prevent abuse of the power. It should be removed altogether, or at the very least suspended using the powers set out at section 88 of the Act.

Protecting migrants' rights, homeless people, and domestic abuse victims

19. The Government missed an important opportunity in passing the Coronavirus Act 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.

20. First, the continuing hostile environment means that undocumented migrants are left at the mercy of unscrupulous landlords and employers, without access to welfare benefits or banking, potentially barred from work or forced to work in unsafe conditions to survive. Crucially, migrants face significant barriers to accessing healthcare through NHS charging,²⁶ and data sharing between NHS Trusts and the Home Office.²⁷ Documented migrants also suffer because, like undocumented migrants, many are excluded from welfare benefits due to the No Recourse to Public Funds (NRPF) condition, leaving people with no safety net of social housing, emergency homelessness accommodation,²⁸ or welfare benefits to fall back on should they need or be forced to stop working.
21. Furthermore, hundreds of people continue to be held in immigration detention, reportedly without access to adequate sanitation or the ability to socially distance, despite the fact that removal to many countries remains unlikely given restrictions on international travel.²⁹
22. Second, while Liberty welcomes the ‘Everyone In’ hotel and emergency accommodation operation, in practice there are barriers that undermine 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.³⁰
23. Third, when it passed, the Coronavirus Act was criticised for containing no provisions for victims and survivors of domestic abuse who would be isolated with their abuser.³¹ By April, domestic abuse support charity Refuge saw a 700% rise in visits to their National Domestic Abuse Helpline website,³² and the Metropolitan Police said they were arresting 100 people a day for domestic violence offences.³³ Despite this, the lockdown regulations failed to include those fleeing abuse in the definition of homeless, so that while escaping harm was a ‘reasonable excuse’ for leaving home, there was no provision made for those without a safe home to return to.
24. Liberty strongly recommends that Parliamentarians use the breathing space afforded by the current reduction in transmission of the virus to identify and if necessary prepare a replacement for the Coronavirus Act which includes measures that would better protect at-risk groups in the context of the pandemic, and in any potential second wave, such as:
 - Suspending the hostile environment;
 - Ensuring everyone has access to welfare benefits;
 - Releasing people from immigration detention;
 - Removing barriers to, and ensuring ongoing funding for, the ‘Everyone In’ scheme; and
 - Ensuring safe, suitable housing and access to welfare benefits for all victims of domestic violence, including migrant women.

CONCLUSION

25. Emergency situations necessitate quick and decisive action, and Liberty has always supported proportionate action to protect lives. Yet the Government’s response to the pandemic thus far risks normalising the concentration of enormous power in the hands of the Executive and the police, and setting a precedent for untrammelled restrictions on the civil liberty of the general population in response to any future situation that could be construed as a crisis. Prioritising criminal justice over public health does not simply undermine attempts to bring the pandemic under control; it also undermines the health of the UK’s democracy, while sending a signal to authoritarian governments the world over that a pandemic is legitimate cover to implement repressive measures indefinitely.
26. Liberty therefore urges Parliamentarians to use summer recess 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. If the Coronavirus Act remains on the statute books beyond October, far more will be jeopardised than the population’s physical health – it is the spirit of our democracy that will be imperilled.

CONTACT

Gracie Bradley, Policy and Campaigns Manager / gracieb@libertyhumanrights.org.uk / 07399 896 298

Sam Grant, Policy and Campaigns Manager / samg@libertyhumanrights.org.uk

¹ Rt Hon Ian Blackford MP, HC Deb 23 March 2020, vol 674, col. 71.

² Rt Hon Theresa Villiers MP, HC Deb 23 March 2020, vol 674, col. 72.

³ Rt Hon Sir Edward Davey MP, HC Deb 23 March 2020, vol 674, col. 79.

⁴ Imran Hussain MP, HC Deb 23 March 2020, vol 674, col. 95.

⁵ Rt Hon Matt Hancock MP, HC Deb 23 March 2020, vol 674, col. 35.

⁶ Liberty, *Briefing on the Coronavirus Bill*, March 2020: <https://www.libertyhumanrights.org.uk/wp-content/uploads/2020/03/Liberty-Briefing-on-the-Coronavirus-Bill.pdf> para 5

⁷ Coronavirus Act 2020, Schedule 21, Part 1, paragraph 2

⁸ Coronavirus Act 2020, Schedule 21, Part 1, paragraph 10(2)

⁹ Coronavirus Act 2020, Schedule 21, Part 1, paragraph 14(3)

¹⁰ Coronavirus Act 2020, Schedule 21, *ibid.*

¹¹ Crown Prosecution Service, *CPS announces review findings for first 200 cases under coronavirus laws*, May 2020:

<https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

¹² Karim, F., *Wrongly convicted woman didn't speak for three days*, April 2020: <https://www.thetimes.co.uk/article/woman-wrongly-convicted-under-new-coronavirus-law-did-not-speak-a-single-word-to-police-or-in-court-0kjg9zrhj>

¹³ Busby, M. and Gidda, M., *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>

¹⁴ Boffey, D., *Coronavirus: England's face mask law could backfire, says EU expert*, July 2020:

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¹⁵ Gregg S. Gonsalves et al., *Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State and Local Leaders from Public Health and Legal Experts in the United States*, March 2020,

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¹⁶ Carpani, J., *10,000 people could be working in slave-like conditions in Leicester's textile factories*, July 2020

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¹⁷ Smyth, C., *Coronavirus: Three workers flee quarantined farm in Herefordshire*, July 2020 <https://www.thetimes.co.uk/article/coronavirus-three-workers-flee-quarantined-farm-in-herefordshire-kx3rht328>

¹⁸ Civil Contingencies Act 2004, Section 23(3)(b)

¹⁹ Parliament UK, *Priti Patel makes statement on Black Lives Matter protests*, June 2020

<https://www.parliament.uk/business/news/2020/june/priti-patel-makes-statement-on-black-lives-matter-protests/>

²⁰ 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/>

²¹ Coronavirus Act 2020, Sections 61 and 63

²² BBC News, *Blair confirms election delay*, April 2001 http://news.bbc.co.uk/1/hi/uk_politics/1255703.stm

²³ Kevin Larkin, *Holding European Parliament Elections concurrently with local elections increase turnout and benefits certain parties*, April 2014 <http://eprints.lse.ac.uk/81568/1/democraticaudit.com-Holding%20European%20Parliament%20elections%20concurrently%20with%20local%20elections%20increases%20turnout%20and%20benefit.pdf>

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²⁴ Serhan, Y., *The Coronavirus's Real and Immediate Threat to Democracy*, March 2020

<https://www.theatlantic.com/international/archive/2020/03/london-mayoral-election-coronavirus-covid19/607924/>

²⁵ For example, people of colour are people are disproportionately affected by Covid-19. Analysis using data by the NHS and the Office of National Statistics shows that of 12,593 patients who died in hospital up to 19 April, 19% were BAME even though these groups make up only 15% of the general population in England. These statistics should be seen in the wider context of race inequality in the UK, including differences in income, education, employment and living conditions.

²⁶ 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.

²⁷ 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.

²⁸ Liberty Investigates, *HOMELESS MAN LEFT ON A BUS WITH COVID-19*, April 2020: <https://libertyinvestigates.org.uk/articles/homeless-man-left-on-a-bus-with-covid-19/>

²⁹ Following legal action by Detention Action in response to the COVID-19 crisis, the Government released more than 350 people, committed to system-wide case reviews and put a bar on many new detentions <https://detentionaction.org.uk/stories/Covid-19-in-immigration-removal-centres-info-pack/>. More have been released since: <https://www.bbc.co.uk/news/uk-52560093>.

³⁰ Taylor, D., 2020. *Homeless Migrants Still Sleeping Rough Despite PM's Pledge, Say Charities*, April 2020:

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³¹ Sophie Gallagher, *This is why the Coronavirus Bill will hit women hardest according to experts*, 26 March 2020:

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³² Refuge, *Refuge sees online traffic to its National Domestic Abuse Helpline website rise by 700%*, April 2020:

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