



House of Commons

House of Lords

Joint Committee on Human  
Rights

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**The Government's  
response to COVID-19:  
human rights  
implications**

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**Seventh Report of Session 2019–21**





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**Seventh Report of Session 2019–21**

*Report, together with formal minutes relating  
to the report*

*Ordered by the House of Commons  
to be printed 14 September 2020*

*Ordered by the House of Lords  
to be printed 14 September 2020*

## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

### Current membership

#### House of Commons

[Ms Harriet Harman QC MP](#) (*Labour, Camberwell and Peckham*) (Chair)

[Fiona Bruce MP](#) (*Conservative, Congleton*)

[Ms Karen Buck MP](#) (*Labour, Westminster North*)

[Joanna Cherry QC MP](#) (*Scottish National Party, Edinburgh South West*)

[Mrs Pauline Latham MP](#) (*Conservative, Mid Derbyshire*)

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[Lord Singh of Wimbledon](#) (*Crossbench*)

[Lord Trimble](#) (*Conservative*)

### Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

### Publication

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You can follow the Committee on Twitter using [@HumanRightsCtte](https://twitter.com/HumanRightsCtte)

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## Summary

The central aim of the Government's response to the Covid-19 outbreak in the UK has been to protect lives. The right to life is protected in law in Article 2 of the European Convention on Human Rights. This requires the state to take appropriate steps to safeguard lives. However, inevitably, attempts to save lives through government actions including the restriction of movements, gatherings, and school closures have engaged numerous other rights. Many have experienced the widest and deepest set of government interferences with their rights in their lifetimes.

Some groups have been particularly at risk from Covid-19. In order to ensure respect for the right to life it is crucial to ask whether the steps taken have done enough to protect the lives of those most vulnerable to the disease. The death rates for older people and those from black, Asian and ethnic minority groups amongst others have been startlingly high in comparison to other groups. The allocation and prioritisation decisions for personal protective equipment (PPE) have been, and will continue to be, crucial, in order to protect those most at risk. These decisions must be evidence-based and non-discriminatory. Blanket use of Do Not Attempt Cardiopulmonary Resuscitation (DNACPR) notices in care homes constitutes a systematic violation of individuals' rights. The Government must ensure that their blanket use is not allowed.

There has been a disproportionate impact of some of the measures taken to stop the spread of the disease on certain people in our society, such as children whose right to education was engaged by school closures and those in detention with autism and/or learning difficulties who were denied family visits during this time. This balancing act is a difficult one, but it is vital that the Government can justify the steps it has taken including the necessity and proportionality of interferences with rights through the measures taken. Assessments of the proportionality of measures must be up-to-date, based on the latest scientific evidence, and formulated as a result of a precautionary approach to minimising overall loss to life. Importantly, the Government must be transparent in justifying its decision-making, including in explaining how it has balanced competing interests and the evidence on which the balancing decision has been made.

This committee has long been concerned about the rights of people in various types of detention. In this report we consider those held in prison and young offenders' institutions, those held in immigration detention settings, and young people with autism and/or learning difficulties who are detained in assessment and treatment units or other settings. Lockdown restrictions in these settings should be subject to a reasoned and transparent proportionality assessment. The use of solitary confinement breaches the rights of children in detention, and where it is prolonged, the rights of adults. There are risks the measures taken during lockdown and beyond have breached the right to family life of both those detained and of their loved ones. We heard distressing evidence of the impact of this on the children of mothers in prison in particular. As soon as it is safe to do so, prison visiting must resume as a matter of priority.

The lockdown regulations have had a huge impact on the rights of millions of people across the country. There has been confusion over the status and interpretation of guidance, and the relationship between guidance and the law. There have been additional

questions about the type of policing that is most appropriate in a health crisis, and the disproportionate impact of policing decisions on young men from black, Asian and minority ethnic backgrounds. Lessons must be learnt urgently from this period of lockdown in order to avoid the worst elements of confusion and disproportionality before any second wave and any further lockdowns either at a local or national level. This is all the more important given the speed and frequency with which national and local lockdown laws change and the consequent difficulty for people to keep on top of what is legally required and what is reasonably expected of them—indeed many lockdown laws have been announced and passed even between drafting, consideration and publication of this Report.

This Committee has reported before on privacy concerns in relation to the Government's plans for a contact tracing app using a centralised model of data collection. The move to a decentralised app means these issues have diminished but not vanished. In addition, we have raised concerns around privacy, data protection and discrimination in the test, track and trace element of the Government's approach. The Committee recommends that specific tailored legislation should be introduced to protect people whose data is collected as part of the Government's contact tracing programme.

The right to a fair trial and right to liberty have been engaged by measures taken by the Government with regards access to justice and the operation of the Courts. The Committee welcomes the use of live link technology as a mechanism of avoiding delays to justice, but the Government must ensure those who are digitally excluded or otherwise vulnerable are not disadvantaged and that the principle of open justice continues to apply.

The closure of schools engages the rights of the child including children's right to education. Closures will have had different impacts on different children and the Government must ensure that existing inequalities are not made worse during this period. School closures have particularly impacted the rights of those with Special Educational Needs and Disabilities (SEND). The Government must address any barriers that children with SEND may experience regarding their return to school.

The right to life includes, in cases where state actions may have contributed to a death, procedural obligations on the state to find out why someone has died as well as to learn any lessons to avoid unnecessary deaths in the future. It is crucial that some form of swift lessons-learned review is undertaken as soon as possible, in order to learn lessons to help to prevent future unnecessary deaths. The findings should be incorporated into the Government's planning and response to any further waves of infection. Moreover, in order to fulfil the UK's obligations to consider structural issues contributing to Covid-19 deaths, it is very likely that a public inquiry will be needed. Such an inquiry should be timely, have focused objectives and be time-limited. This inquiry must consider, at least, deaths in detention settings; deaths of healthcare and care workers and the availability of PPE; deaths in care homes due to early releases from hospitals; and deaths of transport workers, police and security guards due to inadequate PPE.

The Government must be transparent in justifying the timings of its decisions to go into, and out of, lockdown. It is incumbent on the Government to ensure it can justify its decisions as necessary and proportionate, and based on relevant scientific evidence with a precautionary approach to minimising the overall risks to life.

Parliament is the right place for the Government to announce its decisions, and this is particularly so where emergency powers are being used. Whilst the use of emergency procedures such as fast-tracked legislation and made affirmative statutory instruments may be justified in the exceptional circumstances in which the nation found itself in March, the use of emergency procedures must be limited to what is absolutely necessary. This is especially the case when human rights are at stake.

# 1 Introduction

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## Protecting the right to life during the Covid-19 pandemic

1. The right to life (Article 2 European Convention on Human Rights (ECHR)) has been, and must remain, central to the Government's response to Covid-19. The Government has a positive duty to take appropriate steps to safeguard the lives of those within its jurisdiction (Article 2 ECHR).<sup>1</sup> During this crisis, it has emerged that some groups in our society have been at greater risk and therefore needed greater protection—for example, residents in care homes and some members of black, Asian and minority ethnic communities. Many of the measures taken by the Government to halt the spread of Covid-19 have been taken with the duty to protect life in mind. Sadly, a large number of people have died from Covid-19 in the UK and our sympathies go to those who have lost loved ones to the disease.

2. In the course of tackling Covid-19, some of the actions taken by the Government to preserve lives (as required by Article 2 of the ECHR) have interfered with numerous other human rights. The level of interference with rights was for most people, the greatest they will have experienced in their lifetime. It is vitally important that checks and balances are in place to ensure that human rights remain fully protected.

## The Joint Committee on Human Rights' work on the Government's response to Covid-19 and human rights

3. We launched our inquiry into the Government's response to Covid-19 on 19 March 2020.<sup>2</sup> In our call for evidence we asked for views on:

- The steps that needed to be taken to ensure that measures taken by the Government to address the Covid-19 pandemic are human rights compliant.
- The impact of specific measures taken by Government to address the Covid-19 pandemic on human rights in the UK.
- How different groups would be disproportionately affected by measures taken by the Government to address the Covid-19 pandemic.

4. The Government introduced its Coronavirus Bill to the House of Commons on the day that we launched our inquiry. We published a Chair's briefing note on the Government's response to Covid-19 to inform debate on that Bill.<sup>3</sup> We published a further Chair's briefing note on the Coronavirus Regulations and lockdown on 9 April 2020.<sup>4</sup>

5. We took oral evidence during the Easter recess from the Lord Chancellor, Robert Buckland MP. We then followed this by hearing evidence and publishing reports on:

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1 Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania [2014] ECHR 972

2 "[COVID-19 response scrutinised to ensure human rights are upheld](#)", Joint Committee on Human Rights, 19 March 2020

3 Joint Committee on Human Rights, [Background paper: COVID-19](#), 19 March 2020

4 Joint Committee on Human Rights, Chair's Briefing Paper: [Coronavirus Restrictions Regulations and Lockdown](#), 9 April 2020

- Human Rights and the Government's Response to Covid-19: Digital Contact Tracing;<sup>5</sup>
- Human Rights and the Government's response to Covid-19: the detention of young people who are autistic and/or have learning disabilities;<sup>6</sup>
- Human Rights and the Government's response to Covid-19: children whose mothers are in prison.<sup>7</sup>

6. We have received 256 pieces of written evidence from a wide range of organisations and individuals in response to our call for evidence and are grateful for all those who contributed. We have also been assisted in our work by two specialist advisers: the barristers Adam Wagner and Alex Ruck Keene, and by Terry McGuinness from the House of Commons Library and Klara Banaszak and Daniel Greenberg from the Office of Speaker's Counsel.<sup>8</sup>

## This report

7. This report seeks to inform the six-month review of the Coronavirus legislation required by the Coronavirus Act 2020 along with any future response to a "second wave" of the virus later this year. The report begins by setting out the legislative framework in play, then focuses on the following themes and rights:

- Human rights impact of the lockdown (Articles 8, 9, 10 and 11 ECHR)
- The right to life, including both the substantive and procedural duties on government (Articles 2 and 3 ECHR) and the right to health which has been (partially) incorporated within the positive obligation to secure the right to life.
- Issues in relation to detention settings (Articles 5, 8, 3 and 2 ECHR)
- Contact tracing and privacy rights (Articles 8 and 14 ECHR)
- Access to justice (Articles 6 and 2 ECHR)
- Children's rights<sup>9</sup> —the right to education (Article 2 of Protocol 1 ECHR) and the right to family life (Article 8 ECHR)<sup>10</sup>

5 Joint Committee on Human Rights, Third Report of Session 2019–21, [Human Rights and the government's Response to Covid-19: Digital Contact Tracing](#), HC 343/ HL Paper 59

6 Joint Committee on Human Rights, Fifth Report of Session 2019–21, [Human Rights and the Government's response to COVID-19: The detention of young people who are autistic and/or have learning disabilities](#), HC 395/ HL Paper 72

7 Joint Committee on Human Rights, Sixth Report of Session 2019–21, [Human Rights and the Government's response to COVID-19: children whose mothers are in prison](#), HC 518/ HL Paper 90

8 See the Joint Committee on Human Rights, [Formal Minutes 2019–21](#)

9 Children are defined as those under the age of 18

10 As well as children's rights as set out in the UN Convention on the Rights of the child (UNCRC) which includes the principle of non-discrimination (Article 2 UNCRC), that the best interest of the child shall be a primary consideration (Article 3 UNCRC), the right to life, survival and development (Article 6 UNCRC), the right to freedom of expression (Article 13 UNCRC), the right to freedom of association (Article 15 UNCRC), the right to protection from violence, abuse and neglect (Article 19 UNCRC), the rights of disabled children (Article 23 UNCRC), the right to health and health services (Article 24 UNCRC), the right to education, including the broad goals of education (Articles 28 and 29 UNCRC), the right to leisure, play and culture (Article 31 UNCRC), protection from sexual exploitation (Article 34 UNCRC)

The report also reflects on the challenge of ensuring the emergency legislation required in response to the outbreak was subject to appropriate parliamentary scrutiny and review.

8. There are, of course, a great deal of other issues raised that we are not able to fully cover in this report. They are none-the-less important and we include references to them where we can. These include, for example:

- impact on the right to family life of the restrictions including the ability to attend funerals, and be with loved ones when they are sick or dying;
- impact on freedom of religion or belief of the restrictions on attending religious ceremonies;
- democratic rights engaged by the postponement of certain elections (for example, local elections that had been due to take place in England in 2020 were delayed until 2021 under s60 of the Coronavirus Act 2020);
- the right to peaceful enjoyment of property engaged by business closures.

9. This report focuses on the UK Government's response, and the response in England in respect of matters which are devolved to Northern Ireland, Wales and Scotland.

## 2 The legal framework

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### The necessity to act and the human rights framework

10. The human rights framework plays a central role in much of the decision-making as part of the Government's response to Covid-19. In order to ensure compliance with human rights law, it is crucial that the Government can justify the steps it has taken to protect the right to life under Article 2 ECHR as well as justifying the proportionality and necessity of interferences with other rights through the measures taken to control the pandemic. Importantly, the Government must be transparent in justifying its decision-making, including in explaining how it has balanced competing interests and the evidence on which the balancing decision has been made. This applies, for instance in relation to the right to family life (Article 8 ECHR) for partners or families who could not see each other during lockdown, or the right to peaceful enjoyment of one's possessions for businesses who could not operate during lockdown (Article 1 of Protocol 1 ECHR) or the freedom of religion for those who could no longer attend religious services during lockdown (Article 9 ECHR). Any interferences with human rights in the Government's response to Covid-19 need to be justified, along with decisions to act (or not to act) to take protective measures to protect life.

11. It is important for the Government to keep under review the potential implications of other policies on human rights during the pandemic and to take action as appropriate—for example in considering whether workers' right to life (Article 2 ECHR) is sufficiently protected if they—or their colleagues—are incentivised (or forced) to attend work even when ill with Covid-19.

12. On 20 July our Chair wrote to the Secretary of State for Business, Energy and Industrial Strategy to raise continued concerns about the abuse and exploitation of workers in the textile industry in Leicester and the impact this was having on workers.<sup>11</sup> The letter highlighted the recommendations the Committee made in our 2017 Report on "Human Rights and Business: Promoting Responsibility and Ensuring Accountability".<sup>12</sup> We made several recommendations to address the human rights abuses and violations of work and employment regulations by businesses. In particular, we recommended that the Government should bring forward legislative proposals to give powers to local authorities to close down premises which were found to exploit workers through underpayment of wages, lack of employment contracts or significant disregard of health and safety regulations. We also recommended that the Gangmasters and Labour Abuse Authority should have extended licensing powers in respect of garment manufacturing. Both of these recommendations were rejected at the time by the Government. In his reply to the Committee's letter, Alok Sharma, the Secretary of State of Business, Energy and Industrial Strategy, noted that the Government was "deeply concerned by the appalling reports of illegal and unsafe working conditions".<sup>13</sup> He noted that a multi-agency taskforce, led by the Gangmasters and Labour Abuse Authority was responding to these allegations and that the Health and Safety Executive was undertaking increased spot inspections in

11 Letter to Rt Hon Alok Sharma MP, Secretary of State for Business, Energy and Industrial Strategy, [regarding abuse and exploitation of workers in the textile industry in Leicester](#), dated 20 July 2020

12 Joint Committee on Human Rights, Sixth Report of Session 2017–19, [Human Rights and Business 2017: Promoting responsibility and ensuring accountability](#), HC 443/ HL Paper 153

13 Letter to Rt Hon Alok Sharma MP, Secretary of State for Business, Energy and Industrial Strategy, [regarding the allegations of exploitation in the textile industry in Leicester](#), dated 2 September 2020



Leicester. He also noted Government plans to create a new Single Enforcement Body for employment rights and that they would “consider the powers of the new body in light of the activity in Leicester”. However, the Government has not engaged with our call for them to implement the recommendations of our Report. The recommendations from that report remain vital, and should be implemented in full.

13. It is incumbent on the Government to ensure it sets out clearly and transparently how it is protecting human rights during the pandemic. It must ensure that its assessments as to the proportionality and necessity of measures are up-to-date and based on the latest scientific evidence as well as a precautionary approach to minimising the overall risks to life. Importantly, the Government must be transparent in justifying its decision-making, including in explaining how it has balanced competing interests and the evidence on which the balancing decision has been made.

14. It is welcome that a derogation from the UK's human rights obligations has not been necessary so far in the pandemic, since the current UK measures in response to the crisis are capable of being compatible with Convention rights, so the question of derogation does not arise. It is important that the Government and Parliament remain vigilant to ensure that if the criteria for a derogation are met and if a derogation becomes necessary, that the correct procedures are followed.

## **The domestic legislative framework pre-Covid-19**

15. Before the introduction of the Coronavirus Act 2020 (CA 2020), the main legislative framework to tackle public disease outbreaks was contained in the Public Health (Control of Disease) Act 1984 and related secondary legislation; and the Civil Contingencies Act 2004.

### ***Public Health (Control of Disease) Act 1984***

16. The Public Health (Control of Disease) Act 1984 (PHA)<sup>14</sup> provides that the appropriate Minister may by regulations make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere).<sup>15</sup> The following Regulations place certain obligations on healthcare providers to notify the authorities of certain diseases and provide local authorities with wide powers to deal with incidents or emergencies where infection or contamination presents, or could present, a significant risk to human health:

- a) The Health Protection (Notification) Regulations 2010: these Regulations place obligations on various persons to notify specified third parties for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination. The Government, by Statutory Instrument, made Covid-19 a notifiable disease under the Health Protection (Notification) Regulations 2010 on 5 March 2020. Once a disease

14 Together with the [Health Protection \(Local Authority Powers\) Regulations 2010](#) and the [Health Protection \(Part 2A Orders\) Regulations 2010](#)

15 Public Health (Control of Disease) Act 1984 (PHA), [Section 45C](#)



has become 'notifiable', this places a statutory duty on registered medical practitioners to notify the 'proper officer' at their local council or local health protection team of suspected cases of certain infectious diseases.

- b) The Health Protection (Local Authority Powers) Regulations 2010: These Regulations provide for local authorities to exercise certain powers without judicial oversight. These powers allow local authorities to: require that a child is kept away from school; require a headteacher to provide a list of contact details of pupils attending their school; disinfect/decontaminate premises or articles on request; request (but not require) individuals or groups to co-operate for health protection purposes; and restrict contact with, or relocate, a dead body for health protection purposes.
- c) The Health Protection (Part 2A Orders) Regulations 2010: In some circumstances, a local authority must apply to a justice of the peace (JP) for a 'Part 2A order', which imposes restrictions or requirements on a person(s) or in relation to a thing(s), a body or human remains, or premises. If the JP is satisfied that the relevant criteria are met,<sup>16</sup> an order can be made for the purposes of protecting against infection or contamination that presents, or could present, significant harm to human health. A person's right to liberty (under Article 5 ECHR) can only be restricted by a Part 2A order, subject to the criteria laid down in the PHA being satisfied, in order to prevent the spread of infection or contamination presenting significant harm to human health. The exercise of powers may also engage a person's qualified rights (e.g. Article 8, the right to respect for private and family life). These rights can be restricted in the interests of public safety, or for the protection of health, but restrictions must be proportionate.

### ***Health Protection (Coronavirus) Regulations 2020 (now revoked)***

17. On 10 February, the Health Protection (Coronavirus) Regulations 2020 were laid before Parliament. These Regulations supplemented the health protection regime in Part 2A of the Public Health (Control of Disease) Act 1984. The Regulations entered into force immediately and imposed restrictions (including detention, isolation and restricting contact, for example) on individuals where the Secretary of State or a registered public health consultant have reasonable grounds to suspect that the individual is, or may be, contaminated with the coronavirus. These Regulations were revoked by the Coronavirus Act 2020 which largely made equivalent provision.

### ***The Civil Contingencies Act 2004 & Part 2 Regulations***

18. The Civil Contingencies Act 2004 (CCA) applies in circumstances of "emergency", defined as an event or situation which threatens serious damage to human welfare or the environment, as well as war or terrorism.<sup>17</sup> An event or situation does not cause serious damage to human welfare unless it causes (amongst other things) loss of human life, human illness or injury, or disruption to healthcare services. The coronavirus outbreak clearly qualifies as an emergency based on that definition.

16 Based on requisite evidence set out in [Regulation 4](#) of the Health Protection (Part 2A Orders) Regulations 2010.

17 Civil Contingencies Act 2004 (CCA), [Section 1](#) and [Section 19](#)

19. Part 2 of the CCA confers power on the Crown to make regulations (by Order in Council, or made by a senior Minister of the Crown if there is insufficient time for an Order in Council). Regulations may be made only if:

- a) An emergency has occurred, is occurring or is about to occur;
- b) It is necessary and urgent to make provision for the purposes of preventing, controlling or mitigating an aspect or effect of the emergency.

20. If the conditions are satisfied, regulations may make any provision for the purpose of, among other things, protecting human life, health or safety, treating human illness or injury, or protecting or restoring health services. They may make provision of any kind that could be made by Act of Parliament or by Royal Prerogative (though they may not amend Part 2 of the CCA or the Human Rights Act 1998 (the HRA)).<sup>18</sup>

21. However, emergency regulations made under the CCA must (1) be compatible with Convention rights within the meaning of the HRA; and (2) be appropriate and proportionate to the emergency. Section 20(5) CCA requires that emergency regulations must be prefaced by a statement by the person making the regulations.

22. Such emergency regulations must be laid before Parliament “as soon as is reasonably practicable” and if they are not approved within seven days of laying, the regulations lapse.<sup>19</sup> Moreover, the regulations are amendable if a resolution of each House is passed to amend them. The emergency regulations lapse automatically at the end of the period of 30 days, beginning with the date on which they are made (but new regulations can be made).<sup>20</sup> Any person making emergency regulations must have regard to the importance of ensuring that Parliament, the High Court and the court of Session are able to conduct proceedings in connection with the regulations, or action taken under the regulations.<sup>21</sup> The intention is therefore to ensure that there is adequate parliamentary and judicial oversight of both the content of the regulations and of action taken under them.

## Coronavirus Act 2020 – overview

23. The Coronavirus Act 2020 is emergency legislation which was subject to the fast-track procedure through Parliament. It contains wide, sweeping powers to enable the Government and the NHS to deal with the Coronavirus pandemic. These powers supplement existing powers available under the Public Health (Control of Diseases) Act 1984 (and regulations made under this Act) and the Civil Contingencies Act 2004.

24. Parliamentary scrutiny of the Bill was carried out at pace (see Chapter 10 below) despite the fact it included some of the most sweeping powers seen in modern times, and interferes with human rights on an unprecedented scale. The powers contained within this Act broadly cover:

- a) Modification of duties relating to health and social care in light of reprioritisation of NHS resources;

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18 CCA, [Section 23\(5\)](#)

19 CCA, [Section 27](#). There are also special provisions requiring parliament to meet if it is prorogued or adjourned when the regulations are laid.

20 CCA, [Section 26](#)

21 CCA, [Section 22\(5\)](#)

- b) Treatment of the deceased;
- c) Access to education and child care;
- d) Sick pay: The situation for self-employment;
- e) Port suspensions;
- f) Powers of the Secretary of State, police and immigration officers as concerns potentially infectious persons;
- g) Restrictions on events and gatherings;
- h) Court proceedings and access to justice.

25. The Act includes powers to make further provision by statutory instrument, and other measures such as directions which can have profound effects on rights. It also includes a sunset clause of 2 years. In addition, during the passage of the Bill, provision for a six-month review by the House of Commons was added to its provisions.

### **The Lockdown Regulations – overview**

26. The Health Protection (Coronavirus Restrictions) (England) Regulations 2020 gave legal effect to the nationwide ‘lockdown’ announced by the Prime Minister on Monday 23 March. These lockdown Regulations were made under the Public Health (Control of Disease) Act 1984 (“the 1984 Act”),<sup>22</sup> which allows regulations to include provision “imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health”.<sup>23</sup>

27. The lockdown Regulations were made on Thursday 26 March 2020. They became legally enforceable at 1pm on the same day. Equivalent measures were made in respect of Wales, Scotland and Northern Ireland. These Regulations were amended numerous times since they were first enacted and have subsequently been repealed and replaced by further regulations. (Full details are set out in Chapter 3 below.)

28. The various sets of lockdown Regulations have provided for restrictions on movements and gatherings, and requirements as to the closure of businesses and premises during the ‘emergency period’. The severity of these restrictions and requirements has eased during the past six months although in some areas local lockdowns have been put in place (see Chapter 3).

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22 PHA, [Section 45C](#), [Section 45F](#), and [Section 45P](#)

23 PHA, [Section 45C\(3\)\(c\)](#)

### 3 The Lockdown Regulations

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29. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 imposed the most wide-ranging restrictions on individual liberties, affecting the greatest number of people, since the Defence Regulations made during the Second World War. It has been reported that the Health Secretary referred to the lockdown regulations as 'Napoleonic' as they reversed the usual presumption that people are free to do what they like unless the law prohibits it; in lockdown people would be forbidden from doing anything not explicitly mentioned in the legislation.<sup>24</sup> Lord Justice Hikenbottom has described the regulations as "possibly the most restrictive regime on the public life of persons and businesses ever".<sup>25</sup>

30. The lockdown regulations impose swingeing restrictions on everyday life, potentially interfering with a number of human rights as protected by the Human Rights Act 1998. This includes:

- a) Article 6 (the right to a fair trial): Courts have been shut or running at reduced capacity during the lockdown. Many hearings have also taken place by video conferencing rather than in person. This has severely limited access to justice, with an increasing number of outstanding cases, and potentially impacted the fairness of hearings where courts have had to adapt in a short period to remote hearings.<sup>26</sup>
- b) Article 8 (the right to respect for private and family life): The lockdown has severely limited social interactions including between families. It is difficult to imagine, save for imprisonment, a more stringent limit on family and private life than preventing gatherings of 2 or more people in private dwellings and public places.
- c) Article 9 (freedom of religion): Almost all communal religious activity has been prohibited or restricted during the lockdown. At the time of writing there has been some limited communal worship permitted however the local lockdowns in, for example, the North of England have again in effect banned communal religious activities.
- d) Article 11 (freedom of association): The right to protest has not been included as a listed 'reasonable excuse' in any of the rules prohibiting gatherings. This caused significant confusion during the Black Lives Matter protests in June.
- e) Article 1 of Protocol 1 (the right to peaceful enjoyment of property): All 'non-essential' businesses were forced to close from the end of March until mid-May when the prohibitions were progressively lifted. Significant restrictions still remain and will do so indefinitely, such as requirements for customers to wear facemasks. Local authorities have been given powers to close businesses or

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24 [Sick man: transcript](#), Tortoise Media, Matt d'Ancona, 19 June

25 Decision on permission to appeal from the decision in [Dolan & Ors v Secretary of State for Health And Social Care & Anor](#) [2020] EWHC 1786 (Admin), 4 August 2020, for the actual decision please see: Court of Appeals Order, [4 August 2020](#)

26 See the Summary from the Justice Select Committee, Sixth Report of Session 2019–21, [Coronavirus \(COVID-19\): The impact on courts](#), HC 519

categories of businesses without warning. The full impact on businesses is still to be seen, however it is clear that the lockdown has resulted in large-scale reduction in employment levels and many businesses have shut down permanently.<sup>27</sup>

31. The Regulations were made under of the Public Health (Control of Disease) Act 1984. This was despite provision for regulations to be made under the Coronavirus Act 2020 which was passed using emergency procedures in order to give the government powers in relation to controlling and responding to the outbreak.

32. Initially, the Secretary of State for Health and Social Care was mandated to review the need for restrictions and requirements imposed by the Regulations at least once every 21 days; this was later extended to 28 days.<sup>28</sup> As soon as the restrictions or requirements are no longer necessary, the Secretary of State must publish a direction terminating that restriction or requirement.<sup>29</sup> No such directions have been published as all of the changes have been brought in by new sets of regulations.<sup>30</sup>

33. From July onwards a number of 'local lockdown' regulations have also come into force, adding additional restrictions in particular areas. It appears that both the lockdown itself, and the government's method of imposing it through emergency regulations, is likely to continue indefinitely, subject to an effective Covid-19 vaccine being developed and distributed. It is therefore important that the Government learns from previous lockdowns and ensures that lockdowns only interfere with human rights to the minimum extent necessary. It is also vitally important that the Government does not discriminate unlawfully in relation to lockdown measures. As such, any lockdown impacts that, for example, particularly affect Eid or particularly affect Leicester, must be evidence based, necessary and proportionate—this includes consideration of what lesser alternatives could achieve the Government's aims or could alleviate the negative impact on certain groups.

34. The national lockdown regulations which are the focus of this chapter apply to everyone in England (there are separate regulations for each of Northern Ireland, Scotland and Wales). The local regulations apply to defined areas of England which are considered to be at particular risk of an outbreak of Covid-19.

35. There have also been related regulations mandating the wearing of face coverings<sup>31</sup> and requiring<sup>32</sup> people who people arriving in England from outside the 'common travel area'<sup>33</sup> to self-isolate for 14 days in conditions which are significantly stricter than the national and local lockdown regulations.<sup>34</sup> If they are to respect the right to liberty and the right to family and private life, such restrictions must be sufficiently proportionate bearing in mind the types of risk posed by different travellers and the severity of the measures imposed on certain individuals.

27 Bank of England, [Monetary Policy Report and Financial Stability Report](#), 6 August 2020

28 Compare [Regulation 3\(2\)](#) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and [Regulation 3\(2\)](#) The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020

29 See for example, [Regulation 3\(3\)](#) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020

30 See Annex.

31 The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 ([S.I 2020/592](#)) and the Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 ([S.I 2020/791](#))

32 The Health Protection (Coronavirus, International Travel) (England) Regulations 2020 ([S.I 2020/568](#))

33 The United Kingdom, the Republic of Ireland, the Isle of Man, and the Channel Islands.

34 For example, the travel quarantine regulations include a very limited, exhaustive number of reasons why someone may leave the place they are self-isolating and probably do not allow for exercise or physical recreation except where it is to "avoid injury or illness".

36. It is difficult to do justice to the large numbers of human rights issues which have arisen. In broad terms, interferences can be justified if they are proportionate means of protecting public health.<sup>35</sup> However, the devil has been in the detail, and there are concerns that the way in which the Government has legislated and communicated those regulations may itself have implications for human rights.

### The England-wide lockdown regulations

37. The restrictions and requirements during the 'emergency period'<sup>36</sup> imposed by the lockdown regulations made on 26 March, which have subsequently been revoked and replaced, included:

- Closure of business and premises during the emergency (including holiday accommodation, places of worship, community centres, crematorium, and burial grounds);
- Restrictions on movement: Regulation 6 provided that during the emergency period, no person may leave the place where they are living without reasonable excuse. The Regulations contain a non-exhaustive list of reasonable excuses. They stated that a "reasonable excuse includes" various reasons such as obtaining basic necessities, taking exercise, seeking medical assistance, providing care and assistance to a vulnerable person, traveling for work, attending a funeral or escaping the risk of harm.
- Restrictions on gatherings: Regulation 7 provided that, during the emergency period, no person may participate in a gathering in a public place of more than two people, again with certain limited exceptions.

38. The list of "reasonable excuses" in Regulation 6 (restrictions on movement) was not exhaustive. Any person leaving their place of residence for a reason not listed above was required to rely on the defence of having an unlisted "reasonable excuse". This inevitably created some confusion.

39. Unlike Regulation 6, the list of exemptions in Regulation 7 (restrictions on gatherings) was exhaustive. However, the 'offences and penalties' regulation (Regulation 9) provided that an offence could only be committed for contravening a requirement in Regulation 7 if a person did not have a "reasonable excuse"—yet in relation to Regulation 7 there was no exemption or defence of reasonable excuse.

40. The national lockdown regulations were subsequently amended a number of times and then replaced by new regulations:

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35 A Judicial Review challenge to the lockdown regulations in England, which raised a number of human rights arguments amongst others, was refused permission to proceed to a substantive hearing on 6 July 2020: see [Dolan & Ors v Secretary of State for Health And Social Care & Anor](#) [2020] EWHC 1786 (Admin) (06 July 2020). At the time of writing it has been listed for a 'rolled up' appeal hearing against the refusal of permission in September.

36 The emergency period is defined in Reg 3 as starting when the Regulations come into force, and ending on the day and at the time specified in a direction published by the Secretary of State terminating the requirement or restriction.



- On 22 April 2020 amendments were made including adding items to the list of “reasonable excuses under Regulation 6 (restrictions of movement).<sup>37</sup>
- On 13 May 2020<sup>38</sup> the national regulations were amended to allow various kinds of holiday accommodation to be used to accommodate ‘critical workers’, to permit outdoor sports courts and garden centres to open and to add a number of further ‘reasonable excuses’ to Regulation 6, including to take exercise with one member of another household visit a public open space for the purposes of open-air recreation to promote their physical or mental health or ‘emotional wellbeing’.<sup>39</sup>
- On 1 June 2020 the national regulations were amended to permit certain businesses to open for the training of elite athletes, to replace Regulation 6 (the prohibition on leaving or being outside of the place a person lives without a reasonable excuse) with a new regulation prohibiting staying overnight at any place other than the place where they were living and to replace Regulation 7 (the restriction on outdoor gatherings of two or more people not from a person’s household) with a restriction on outdoor gatherings of more than six people and indoor gatherings of two or more people, save for in certain circumstances. It was pointed out at the time that the new Regulation 7 appeared to prohibit, perhaps for the first time in English legal history, sex between people who were not part of the same household, on any view an extraordinarily intrusive restriction on private life.<sup>40</sup>
- On 12 June 2020 the national regulations were amended to permit the opening of certain retail business and outdoor attractions and to enable places of worship to open for private prayer by individuals, and to introduce the concept of ‘linked households’ whereby a household comprising one adult, or one adult and one more person under the age of 18, the adult may choose to be linked with one other household.
- On 3 July 2020 the national regulations were replaced entirely (rather than being amended as previously) with The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020. These new regulations required the closing of certain businesses (though a far smaller number than in the first set of national regulations), prohibited gatherings consisting of more than 30 persons in a private dwelling or on public land save for certain exceptions and gave the Secretary of State power by direction to restrict access to specific public outdoor places.
- On 16 July 2020 The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020 were made, coming into force on 18 July 2020. The No. 3 regulations supplemented but did not replace the No. 2 regulations. The No. 3 Regulations gave local authorities powers to give directions imposing prohibitions and requirements in relation to premises, events and public outdoor places in its area and gave the Secretary of State the power to require a local authority to give such a direction.

37 The Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 ([S.I. 2020/447](#))

38 The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020 ([S.I. 2020/500](#))

39 Public open space is non-exhaustively defined

40 [“British government faces mockery over coronavirus ‘sex ban’”](#), Reuters, 2 June 2020

- On 25 July and 15 August the No. 2 regulations were amended to permit more businesses to open.
- On 28 August the Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020 amended national lockdown regulations to introduce a £10,000 fixed penalty notice for a person who holds or is involved in the holding of (a) a rave or (b) a gathering in a private dwelling or public land of more than 30 people which does not fall under various exceptions.
- Between the time of writing and consideration of the Report, the Government has announced further amendments to the national lockdown rules, essentially to extend the above prohibition of gatherings from 'more than 30 people' to 'more than 6 people'. This will inevitably have a profound effect on people's ability to maintain normal social relationships with close friends and families—especially those with young children. The proportionality of the exemptions, enforcement and penalties for such offences will be crucial.

## The local lockdown regulations

41. At the time of writing there have been three sets of local lockdown regulations, affecting Leicester<sup>41</sup> (from 4 July), Blackburn with Darwen and Bradford (from 1 August)<sup>42</sup> and parts of the North of England including Greater Manchester (from 5 August).<sup>43</sup> The local lockdown regulations have re-imposed restrictions which had been a feature of the first few months of the national lockdown, such as closing non-essential businesses, restricting movement and gatherings.

## Ambiguity and mixed messaging

42. There is a requirement under Article 7 ECHR,<sup>44</sup> reflected in the common law principle of legality that a criminal offence must be both foreseeable and accessible, meaning an individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him or her liable.<sup>45</sup> It is therefore essential that criminal offences are (a) clear in their wording and (b) clearly and consistently communicated so that citizens can understand what behaviour puts them at risk of criminal sanctions. Importantly, any enforcement guidance should only reflect what is provided for in the law—it should not seek to expand upon what is unlawful beyond what is unlawful on the face of the law.

43. The communication challenge is particularly acute where laws are wide-ranging, introduced at the same time as they come into force, change substantively every few weeks

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41 The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 ([S.I 2020/685](#))

42 The Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) Regulations 2020 ([S.I 2020/822](#))

43 Between the time of writing and consideration of this Report, the Government has announced its intention to impose further local lockdown measures in relation to Bolton and Bradford. It is highly likely that this list will grow and restrictions will continue to vary, so this list will inevitably continue to develop and change

44 Also contained in the 'in accordance with the law' requirement in Articles 8 (right to privacy and family life), 9 (freedom of religion), 10 (freedom of speech) and 11 (freedom of association/right to protest)

45 See e.g. *Kafkaris v Cyprus* [2011] ECHR 2123; *Kokkinakis v. Greece* Judgment of 25 May 1993 (Series A no. 260-A, p. 22) at [34]



and can be overlaid by stricter local restrictions. Although we recognise the challenge involved in responding to Covid-19, we believe the government could have done much better in this regard.

44. Each set of regulations has been accompanied by government 'guidance' which has been published online. This has been supplemented, and sometimes preceded, by ministerial statements and interviews. The communications of the guidance and laws has at times been confusing leading to widespread misunderstanding as to what people are and are not permitted to do. There have been a number of causes of this, including (i) guidance usually being stricter than restrictions imposed by accompanying legal regulations, (ii) regulations being made and published a substantial time after a new lockdown had been announced,<sup>46</sup> (iii) regulations being widely and often ambiguously worded and (iv) ministers not being clear as to whether they were stating activities were illegal or simply advising against them.

### ***Discrepancy between guidance and regulations***

45. The Prime Minister's statement of 23 March 2020 referred only to four "very limited purposes" which were stated to be "the only reasons you should leave your home". Those reasons were later expanded upon on the gov.uk website by a number of 'frequently asked questions'. However, the regulations which came into force three days later provided a list of "reasonable excuses" for which people were legally permitted to leave the house. Not only was this list non-exhaustive, but it also included reasons which were not mentioned in the Government guidance, such as to access social services, for children of two parents who live apart to travel between homes and to fulfil a legal obligation.

46. The Government guidance and regulations underpinning it have often been different in material respects. One key example were the rules on how often individuals could take exercise outside of their homes. This was an important question for tens of millions of people. The guidance stated that "you can [ ... ] still go outside *once a day* for a walk, run, cycle" (original emphasis in guidance)<sup>47</sup> and "you can still go to the park for outdoor exercise once a day". The regulations for England (as well as Northern Ireland<sup>48</sup> and Scotland<sup>49</sup>) allowed for a person to leave the house for a "reasonable excuse", which explicitly includes for taking exercise with no limit on the number of times a person can take exercise.<sup>50</sup> The guidance issued in May after the lockdown rules were amended referred to being able to "exercise outdoors as often as you wish" as something which people could do but could not before, although there was never a legal prohibition in England against exercising more than once per day.

### ***Restrictions announced before legislation in force***

47. On 23 March, 3 days before the national lockdown regulations came into force, the Prime Minister said that from "this evening" he was giving "the British people a very simple instruction—you must stay at home", that people "will be allowed to leave their

46 For example, the North of England local lockdown was announced on 30 July but regulations underpinning it were not made until 4 August and did not come into force until 5 August.

47 Cabinet Office, [Guidance - Coronavirus outbreak FAQs: what you can and can't do](#), updated 13 August 2020

48 The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 ([S.I. 2020/55](#))

49 The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 ([S.I. 2020/103](#))

50 The Welsh regulations did specify that individuals can only take exercise "no more than once a day", The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, [Regulation 8\(2\)\(b\)](#)

home” only for very limited purposes and that “if you don't follow the rules police will have powers to enforce them”. This generated a significant risk of Article 7 breaches if enforcement occurred prior to the laws being in place.

### ***Lack of clarity from ministers***

48. Ministers sometimes gave public statements in response to questions from the media about the rules which seemed to blur advice or guidance with legal requirements. On 31 March, the Secretary of State for Transport, Grant Shapps said on the Today Programme “People know the rules that have been set. Try and shop just once a week—just, you know, just do the essentials not everything else.” There was, however, no guidance or regulation which restricts the number of times a person may shop. The statement was later corrected by a spokesman for the Prime Minister.<sup>51</sup> On the morning after the Prime Minister's announcement on 10 May that the lockdown regulations were to be relaxed (but before the regulations were amended), the Foreign Secretary Dominic Raab told the Today programme that someone could meet both their parents at the same time if they are 2m apart.<sup>52</sup> This was later contradicted by a Government statement.

### ***Difference between parts of the UK***

49. The restrictions imposed by the national lockdown regulations have diverged significantly in different parts of the United Kingdom. For example, the requirement in law to impose social distancing applies in Wales but not England. It is notable that in the Crown Prosecution Service's review of prosecutions under the Regulations in England and Wales, errors found “usually involved Welsh regulations being applied in England or vice versa” which suggests there has been confusion amongst police leading to wrongful charges being brought.<sup>53</sup>

### ***Public understanding***

50. Although it might be expected that as the public become more used to the lockdown regime public understanding would increase, it appears that the opposite has been the case. University College London reported at the end of July that under half (45%) of people in England report having a ‘broad understanding’ of the current lockdown rules, compared to 90% across the UK during the strict lockdown period.<sup>54</sup> A factor in this is likely to be the very regular changes to regulations.

51. As can be seen in the Annex, there have been over 25 variations in the lockdown regulations since March, an average of a new set of regulations each week. Whilst the Committee understands that the coronavirus pandemic requires regular changes to guidance and law, more can be done to make those laws clear and accessible. For example, whilst the guidance on the gov.uk website is clearly laid out, it is voluminous and does not make clear what the current law is (as opposed to guidance), which set of lockdown

51 [“No 10 corrects ‘shop once a week’ comment by Shapps”](#), The Guardian, 31 March 2020

52 [“Coronavirus: Use common sense to see loved ones outdoors – Dominic Raab”](#), BBC News, 11 May 2020

53 [“CPS announces review findings for first 200 cases under coronavirus laws”](#), Crown Prosecution Service, 15 May 2020

54 [Covid-19 Social Study Results Release 17](#), Dr Daisy Fancourt, Dr Feifei Bu, Dr Hei Wan Mak, Prof Andrew Steptoe. The accompanying [media release](#) stated: “The general drop-off in understanding could be due to unclear messaging from the government, or a reduction in interest and engagement from people, especially with the cessation of the daily Downing Street coronavirus briefing in late June.”

regulations are the most up to date, or how an individual can navigate the complex changes to understand how the law affects them. It is also not always clear what is meant by “the rules” as the terms seems to imply the law but is often used to mean guidance—it would be preferable not to blur these terms and instead to be clear about the law.

**52. *It is important that there is clarity for the public in relation to any criminal laws, and particularly laws relating to the lockdown. Information must be accessible to disabled people, especially those with cognitive impairments.***

**53. *More care must be taken by the Government to distinguish between advice, guidance and the law, in media announcements as well as in official online sources. There must be certainty—for Government, the public as well as lawyers and the police—as to what is prohibited by the criminal law. In particular, more must be done to make the up to date regulations themselves (not only guidance) clearly accessible online, particularly as the law has changed, on average, once a week. It ought to be straightforward for a member of the public to find out what the current criminal law is, nationally and in their local area, without having to trawl through multiple sets of confusingly named regulations.***

## **Policing and prosecution issues**

54. A number of prominent incidents were reported in the first weeks of the lockdown, in which police forces confused guidance and law, attempted to enforce aspects of the guidance which were not included in the accompanying regulations, and even attempted to enforce ‘rules’ which were contained in neither guidance or law. It is possible that this was an inevitable result of the problems of messaging and consistency identified above, and/or that it arose from the fact that the police were given a national public health enforcement role which was both unexpected and novel.

55. For example, at the outset of the national lockdown, a number of police forces appeared to believe the lockdown regulations prevented non-essential travel, despite this not forming part either of the guidance or the Regulations themselves. Cumbria Police tweeted on 30 March: “Non-essential reasons for travel, Pitlochry to Wakefield via Cumbria to pick up a puppy. One of many stop checks this morning to check the necessity of travel.”<sup>55</sup> On 1 April, Glossop Police issued guidance on their Facebook page stating that “we have all been instructed to avoid all UNNECESSARY TRAVEL” and are “entitled to exercise once daily” (there was no mention of whether this applied to the home or outside or both). There was, however, no restriction requiring only essential travel in either the Government guidance or the Regulations. The police guidance was removed later in the day. A number of police forces set up roadblocks to question motorists as to whether their journey was “essential”.<sup>56</sup> The Derbyshire Police force defended its use of drones to highlight people exercising away from their homes in the Peak District by saying that the “emergency laws were unclear”.<sup>57</sup>

56. The National Police Chief's Council (‘NPCC’) and the College of Policing (‘CoP’) assisted by producing guidance. For example, in the early days of the national lockdown, on 31 March, the guidance was updated seemingly in response to reported concerns over police enforcement to make clear “we don’t want the public sanctioned for travelling a

55 [“Picking up a puppy is NOT essential travel”](#), News & Star, 30 March 2020

56 [“Police set up roadblock to check drivers are on essential journeys”](#), Wokingham Today, 1 April 2020

57 [“Derbyshire police chief defends force’s reaction to lockdown”](#), The Guardian, 31 March 2020

reasonable distance to exercise. Road checks on every vehicle is equally disproportionate". The NPCC and CoP guidance played an important role, particularly in the early weeks of the lockdown, in providing timely updates to police where complex changes to the lockdown regime were instituted with almost no warning.

57. It is in the nature of a pandemic that outbreaks need to be contained quickly and emergency regulations are the inevitable result. **Nonetheless, it is imperative that Government provide sufficient warning of changes to the law, and coordinate with appropriate bodies, so that police forces and bodies such as the NPCC and CoP have time to understand and explain those changes.**<sup>58</sup>

## Use of Fixed Penalty Notices

58. The Committee has had significant concerns about the Fixed Penalty Notices ('FPNs') given out under the lockdown regulations. The NPCC has reported on FPNs given from 27 March to 25 May 17,039 FPNs were issued across England and Wales.<sup>59</sup> Young men received the biggest proportion of FPNs by far. The report also showed that black, Asian and minority ethnic people were issued with an FPN at a rate of 1.6 times higher than white people, which suggests a disproportionate approach to enforcement and the issuing of FPNs to black, Asian and minority ethnic people. There appears to have been a slight decrease in the number of FPNs issued in the later part of that period. On 28 August a new FPN of £10,000 was introduced for organising raves or certain gatherings of more than 30 people. This represents a dramatic increase in the potential penalty for a person found to be breaching a lockdown rule. At the time of writing it is unclear whether such fines will also attach to the announcement to prohibit gatherings of more than 6 people (rather than 30 people), but the proportionality of such a measure will need to be very carefully scrutinised.

59. The Crown Prosecution Service ('CPS') has reviewed the first 200 cases prosecuted under both the lockdown regulations and the Coronavirus Act. It found that 12 of 187 prosecutions under the Regulations (6%) and all 44 of 44 prosecutions under the Coronavirus Act were wrongly charged.<sup>60</sup> A further CPS review of those prosecutions completed in June found that all 36 prosecutions under the Coronavirus Act and 6 out of the 105 (again 6%) prosecuted under the regulations were wrongly charged.<sup>61</sup>

60. If around 6% of prosecutions under the lockdown Regulations have been wrongfully charged, it may be assumed that a significant number of FPNs have been wrongly given. Moreover, it is worth noting that the figure of 6% wrongly charged relates to cases where people have been found guilty—i.e. where both the prosecutor and the judge have agreed with the police that an offence has been committed. The figures for incorrect application of the law governing FPNs, which have fewer safeguards and do not require the involvement of a prosecutor or a judge, are likely to be even higher. We note there is no right of appeal

58 These matters were also raised in [correspondence](#) between the Chair and the Lord Chancellor, and the Chair and the Commissioner of the Metropolitan Police

59 National Police Chief's Council, [Analysis of Coronavirus fines published](#), 27 July 2020

60 "[CPS announces review findings for first 200 cases under coronavirus laws](#)", Crown Prosecution Service, 15 May 2020

61 "[Latest findings for CPS coronavirus review](#)", Crown Prosecution Service, 16 July 2020

or review against the FPNs and the vast majority of people will probably be unwilling to risk a criminal conviction by refusing to accept the FPN, which is currently the only way to challenge the FPNs under the Regulations.

**61. It is unacceptable that many thousands of people are being fined in circumstances where (a) the lockdown regulations contain unclear and ambiguous language, (b) there is evidence that the police do not fully understand their powers, (c) a significant percentage of prosecutions have been shown to be wrongly charged, (d) there has been no systematic review of FPNs and (e) there is no appeal or review provided for under the Regulations.**

**62. There is currently no realistic way for people to challenge FPNs which can now result in fines of over £10,000 in some cases. This will invariably lead to injustice as members of the public who have been unfairly targeted with an FPN have no means of redress and police will know that their actions are unlikely to be scrutinised. *The Government should introduce a means of challenging FPNs by way of administrative review or appeal.***

## **Demonstrations and lockdown**

63. The lockdown Regulations prohibited gatherings, thus effectively prohibiting all forms of protest for the very lengthy period of lockdown. It is not clear that this was a proportionate interference with Articles 10 and 11 ECHR or whether alternatives could/should have been explored to ensure that reasonable protest was allowed and facilitated safely. The police did allow and facilitate some demonstrations, however, there have been questions as to whether the prohibitions on demonstrations were impartially and proportionately policed. The key examples here relate to the Black Lives Matter movement and protests to “protect monuments”. The 28 August regulations which introduced a £10,000 fine will undoubtedly apply to some protests, particularly those organised by individuals or organisations which are not a charity, business, public authority or political body and/or where they do not comply with government social safety guidance. **It is important that the rules also allow for reasonable flexibility to ensure that any interference with the right to protest under Article 10 and 11 is only to the extent necessary and proportionate. It is important that there is a consistent approach taken to preventing gatherings whether they be VE Day celebrations or Black Lives Matter protests.**

## 4 Health and Care

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### The Right to Life, and the Right to Health

64. An obligation on the State to secure the right to life is imposed by Article 2 ECHR. It has two aspects: the substantive obligation to take appropriate steps to safeguard the lives of those within the state's jurisdiction;<sup>62</sup> and the procedural obligation to carry out an effective investigation into alleged breaches of the substantive obligation. It is primarily the substantive obligation that we are concerned with in this chapter. The procedural requirements are considered in chapter 9 below.

65. Although the right to health is not, as such, among the rights guaranteed under the ECHR, the European Court of Human Rights (ECtHR) at Strasbourg has (partially) incorporated it within the positive obligation to secure the right to life.<sup>63</sup> The ECtHR has made clear that, in general, "the allocation of public funds in the area of health care is not a matter on which [it] should take a stand."<sup>64</sup> It has rather emphasised that the primary obligation is the duty to provide an effective framework. However, it has identified that in two "very exceptional circumstances,"<sup>65</sup> the responsibility of the State under the substantive limb of Article 2 of the Convention may be engaged in respect of the acts and omissions of a health-care provider:

- where an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment;<sup>66</sup> and
- where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger.

### Other human rights instruments

66. The right to life is also protected by Article 6 of the UN International Covenant and Civil Political Rights; in the context of those with disabilities, Article 10 of the UN Convention on the Rights of Persons with Disabilities; and, in relation to children, Article 6 of the UN Convention on the Rights of Children.

67. The right to health appears also in different forms in international conventions that the United Kingdom has ratified, including Article 12 of the International Convention on Economic and Social Rights,<sup>67</sup> Article 12 of the UN Convention on the Elimination

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62 The case that Strasbourg most routinely cites now is the Grand Chamber decision in *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [2014] ECHR 972.

63 *Lopes de Sousa Fernandes v Portugal* [2017] ECHR 1174 at paragraph 166.

64 *Lopes de Sousa Fernandes v Portugal* [2017] ECHR 1174 at paragraph 166.

65 This paragraph and the paragraph below summarises paragraphs 186–196 of *Lopes de Sousa Fernandes v Portugal* [2017] ECHR 1174. They have been considered in the domestic context by the Court of Appeal in *R (Maguire) v HM Senior Coroner for Blackpool & Fylde & Ors* [2020] EWCA Civ 738.

66 For a recent example, where the diabetic individual in question was denied insulin, see *Aftanache v Romania* [2020] ECHR 339. A denial of treatment that is a medical necessity could also amount to a breach of Article 3 ECHR: *D v UK* [1997] 24 EHRR 42.

67 Amplified in UN Committee on Economic, Social and Cultural Rights (CESCR), [General Comment No. 14: The Right to the Highest Attainable Standard of Health](#), 11 August 2020



of Discrimination Against Women (which stipulates the right to health care of women); Article 24 of the UN Convention on the Rights of the Child, and Article 5(e)(iv) of the Convention on the Elimination of Racial Discrimination.

## Personal Protective Equipment (PPE) and protection for workers

68. Whilst the State is not under a duty to take steps which would pose an impossible or disproportionate burden, it is under a duty to take appropriate steps to protect life where there is a known risk to life (or the risk at least ought to be known). In the context of the Covid-19 pandemic it is arguable that this duty included prioritising the provision of available PPE to healthcare staff, other frontline workers, and persons most vulnerable to the virus such as those in care homes, older people, or those with specified underlying health conditions.

69. It is also arguable that when it became clear that black, Asian and minority ethnic communities were suffering disproportionately from the effects of Covid-19, the right to life (Article 2 ECHR) read together with the right to non-discrimination in the enjoyment of the substantive ECHR rights (Article 14 ECHR) should have required the prioritisation of the allocation of PPE to (for instance) BAME doctors and nurses. We have received evidence that in some cases the reverse has in fact been the case.<sup>68</sup>

70. Particularly at the outset of the pandemic there were widespread reports of shortages of PPE for healthcare workers.<sup>69</sup> Care homes and other social care settings also reported lacking the necessary equipment. In late March, one Shared Lives scheme manager reported that, “[w]e haven’t even had a first delivery yet. [ ... ] this has now been escalated to the complex case team as apparently they have no record of our service on their delivery list.”<sup>70</sup> Individual disabled people who use personalised independence payments (PIP) to employ personal assistants have also struggled to access PPE, as they were not recognised as needing it.<sup>71</sup>

71. Whether or not the failure to provide adequate PPE to all those who needed it during the early stages of the pandemic was so serious as to constitute a breach of Article 2 ECHR might be a matter for the inquiry that is required to meet the Government’s procedural obligations under Article 2 ECHR (see Chapter 9 below). What is clear at this stage, is that very difficult decisions had to be made about who should be prioritised to receive PPE and that many who required equipment did not receive it in a timely manner.

***72. In order to prepare for further waves of Covid-19 or future pandemics, the Government must take steps to ensure that the allocation and prioritisation decisions and policies relating to the provision of PPE are evidence-based and non-discriminatory.***

## Advance care planning and Do Not Attempt Cardio-Pulmonary Resuscitation Notices

73. DNACPR (Do not attempt cardiopulmonary resuscitation) notices record recommendations by professionals that, if a person goes into cardiac arrest, CPR should

68 Stonewall ([COV0249](#)); Relatives & Residents Association ([COV0210](#))

69 Professor Merris Amos ([COV0026](#))

70 Shared Lives Plus ([COV0202](#))

71 Greater Manchester Disabled People’s Panel ([COV0206](#))

not be attempted as it would either be futile, or it would not be in the best interests of the person concerned. The use of DNACPR notices engages Articles 2 (right to life) and 8 (right to private life) both in isolation and together with Article 14 (the right to non-discrimination in the enjoyment of substantive ECHR rights). Article 8 includes respect for personal autonomy, which encompasses the right to make decisions about medical treatment, as well as to have involvement in decisions made by others about that treatment. The ECHR requires that a patient-specific decision must be made and that there is always a presumption in favour of patient involvement. Further, decisions must be made in accordance with a clear and accessible policy in order to comply with Article 8(2).<sup>72</sup> Where a patient does not have capacity to participate in discussions about DNACPR, consultation must take place with those interested in their welfare if practicable and appropriate to do so.<sup>73</sup>

74. We have received deeply troubling evidence from numerous sources that during the Covid-19 pandemic DNACPR notices have been applied in a blanket fashion to some categories of person by some care providers, without any involvement of the individuals or their families.<sup>74</sup> It is discriminatory and contrary to both the ECHR and the Equality Act 2010 to apply DNACPR notices in a blanket manner to groups on the basis of a particular type of impairment, such as a learning disability; or on the grounds of age alone. There have been longstanding concerns about the discriminatory application of DNACPR notices to older and disabled people<sup>75</sup> and the way that they have been administered in some instances. The Covid-19 pandemic has brought these concerns sharply into focus.<sup>76</sup>

75. We note the statement made by the Department for Health and Social Care (DHSC) on 15 April 2020 which states that “it is unacceptable for advance care plans, including Do Not Attempt Resuscitation orders, to be applied in a blanket fashion to any group of people.”<sup>77</sup> Whilst this statement was welcome, it does not, in our view, go far enough in ensuring that blanket DNACPR notices are not used. We also note that the Secretary of State for Health and Social Care has said that he will publish two documents on the NHS website to ensure patients and families understand how DNACPR decisions are made in light of the current coronavirus pandemic.<sup>78</sup> We understand that one document will be for patients and their families setting out matters such as right to be involved in the decision and how to request a review, the other for all NHS staff. Again, this is very welcome, but without sight of these documents, and in particular the document for NHS staff, it is not possible to say whether these go far enough to allay our concerns.

72 Tracey v Cambridge University Hospital NHS Foundation Trust and another [2014] EWCA Civ 822, [2014] All ER (D) 138 (Jun)

73 Winspear v City Hospitals Sunderland NHS Foundation Trust [2015] EWHC 3250 (QB).

74 Ms Sarah Deason ([COV0089](#)), Neurodivergent Labour ([COV0097](#)), Scottish Independent Advocacy Alliance ([COV0207](#)), POhWER ([COV0152](#))

75 See for example, Equality and Human Rights Commission, [Being Disabled in Britain](#), 2017 p96. Following a systematic review of DNAR decisions and documents, the Resuscitation Council developed the [ReSPECT process](#). It promotes more advance planning, good communication, shared decision-making, and good documentation. It is currently being rolled out across the NHS.

76 Age UK ([COV0116](#)), POhWER ([COV0152](#)), Royal College of Nursing ([COV0166](#)), Inclusion Scotland ([COV0177](#)), Inclusion London ([COV0196](#)), The Oxford University Disability Law and Policy Project, The Bonavero Institute of Human Rights ([COV0209](#)), Mason Institute for Medicine Life Sciences and the Law, the university of Edinburgh, School of Law ([COV0115](#))

77 Department of Health and Social Care, [Coronavirus \(COVID-19\): adult social care action plan](#), 15 April 2020

78 [“Government agrees to issue guidance to ensure patients and families are involved in DNR decisions”](#), Leigh Day, 14 July 2020



76. **The blanket imposition of DNACPR notices without proper patient involvement is unlawful. The evidence suggests that the use of them in the context of the Covid-19 pandemic has been widespread. The Court of Appeal has previously held that there is no legal requirement for the Government to implement a national DNACPR policy. However, the evidence suggests that the absence of such a policy has, in the context of the pandemic, led to systematic violation of the rights of patients under Articles 2 and 8 ECHR. The systematic nature of this violation means that it is now arguable that the Government is under such an obligation. Whether or not the events of the pandemic have changed the nature of the Government's legal obligation, we consider it would assist in the protection of patients' Article 2 and 8 rights if the Government did now set out such a policy. Such a policy should make clear, amongst other things, that DNACPR notices must never be imposed in a blanket fashion by care providers; the individuals must always be involved in the decision-making process, or where the individual does not have capacity, consultation must take place with persons with an interest in the welfare of the patient. It is not clear whether the documents promised by the Secretary of State will meet these requirements.**

## Healthcare decision-making

77. In the course of the Covid-19 pandemic difficult decisions have had to be made regarding the prioritisation of healthcare resources to avoid services being overwhelmed. Such decisions have included, for example, converting hospital beds to ICU beds and discharging other patients to create space for Covid-19 patients, and the suspension of elective procedures. Some of these decisions have been governed by national policies, and others have been made at the level of Trusts and local NHS bodies.

78. Decisions relating to the provision of health care engage the responsibility of the State under Article 2 in certain circumstances. We do not believe there to be Strasbourg case-law that specifically addresses the question of what Article 2 requires in the context of a public health emergency which overwhelms the resources of the State. However, given the approach taken by Strasbourg more generally in relation to healthcare provision (see para 65), it seems unlikely that it would find that the mere fact that the State<sup>79</sup> is unable to meet the particular demands of the pandemic will give rise to a breach of Article 2.<sup>80</sup> However, Article 2 and Article 14 (the right not to be discriminated against in the enjoyment of substantive ECHR rights) together will be engaged in the question of *how* decisions about provision are made and that the State would need to be able to demonstrate that these were taken in a rational and non-discriminatory way.

79. There is a significant body of evidence about the serious and life-shortening health inequalities faced by disabled people and those with learning disabilities in particular.<sup>81</sup> It is against this backdrop that disabled people and their families have expressed alarm and distress about the potential for clinical decision-making in the context of the Covid-19 pandemic to discriminate against them.<sup>82</sup>

79 Directly in NHS facilities, or indirectly (in the latter case by commissioning private facilities).

80 This is also suggested by the decision in *University College London Hospitals NHS Foundation Trust v MB* [2020] EWHC 882 (QB)

81 See for example, Mencap, [Learning disability explained](#)

82 "[Covid 19 and the rights of disabled people](#)" Disability Rights UK, 7 April 2020, see also Inclusion London ([COV0196](#)), Oxford University Disability Law and Policy Project and the Bonavero Institute of Human Rights ([COV0209](#)), People First (Self Advocacy) ([COV0223](#)) National Autistic Society ([COV0155](#))

80. These concerns were apparently borne out by guidance issued by the National Institute for Clinical Excellence (NICE) about critical care for adults with Covid-19, published on 20 March 2020. The guidance recommended that all adults should be assessed for frailty on admission to hospital using the Clinical Frailty Scale (CFS). Organisations representing disabled people quickly sounded the alarm that use of the CFS was not appropriate for those with learning disabilities and other neuro-developmental conditions such as autism and could result in them being denied treatment.<sup>83</sup> In response, NICE amended the guidance to clarify when and how to use the CFS as part of a holistic assessment, issuing updated guidance on 31 March 2020. NHS England also wrote to health providers highlighting this change to the guidance and emphasising that clinical decisions should be made on an individual basis.

81. Older people's organisations underline in their evidence that unjustified discrimination on the basis of age is unlawful and unacceptable. Independent Age drew our attention to a critical care decision support tool, which was reportedly circulated in April 2020 to healthcare professionals for use in Covid-cases, which placed undue emphasis on age in decision making.<sup>84</sup> It is unclear what status this document had (although we do not understand it to have been an official NHS document), or how widely it was circulated. Furthermore, Age UK told us:

“While there is a well understood relationship between advancing age, frailty, and comorbidity, which reduces the chance of surviving intensive medical intervention, age alone should never be a criterion for medical triage.”<sup>85</sup>

82. Decisions about how to prioritise resources have not just impacted upon those with Covid-19, but also upon those with serious clinical needs who do not have Covid-19.<sup>86</sup> The number of people in England starting treatment for cancer following urgent GP referral for suspected cancer dropped to 8,564 in May 2020; 5,000 fewer than would normally be expected, representing a drop of 38%.<sup>87</sup> Macmillan Cancer Support told us that:

“[It] accepts it may have been appropriate to delay or alter normal treatment protocols [for people with cancer]. However, these decisions should be agreed on an individual basis and determined by clinical and practical considerations about the risks and benefits of treatment for each patient and not through blanket suspensions due to concerns about system capacity.”<sup>88</sup>

**83. *We are concerned that decision-making relating to admission to hospital, in particular critical care, for adults with Covid-19 has discriminated against older and disabled people. We are also concerned that decisions made to support the capacity of the NHS to provide care for patients with Covid-19 have been made without adequate consideration of the impact on particular groups of others whose treatments have been***

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83 See for example comments made by Jon Spiers, Chair of the Embracing Complexity coalition of leading neurodevelopmental and mental health charities to Nursing Times, [Avoid frailty score in Covid-19 guidance when assessing LD patients](#), 24 March 2020

84 Independent Age ([COV0214](#))

85 Age UK ([COV0116](#))

86 Relatives & Residents Association ([COV0210](#)), Age UK ([COV0116](#)), Children's Commissioner for England ([COV0143](#))

87 Macmillan Cancer Support ([COV0216](#))

88 Macmillan Cancer Support ([COV0216](#))

*cancelled or postponed in consequence. The Government must ensure both that clear national and local policies are in place to govern prioritisation of healthcare provision during a pandemic, and that those policies do not discriminate unlawfully.*

## Changes to social care legislation in the Coronavirus Act 2020

### Care Act 2014

84. The Coronavirus Act 2020 introduced what the Government described as ‘easements’ to the governing legislation relating to social care provision.<sup>89</sup> These powers came into force shortly after the CA 2020 was passed and permit local authorities in England to suspend specific duties under the Care Act 2014. The CA 2020 also suspended with immediate effect the duty on the NHS in England to carry out assessments of whether a person is in need of continuing healthcare.<sup>90</sup>

85. Guidance provided that, in order to take advantage of the easements, local authorities had to be facing resource constraints such that they could no longer comply with their duties under the Care Act, the likely result of which would potentially risk life. The Guidance also made clear that it was possible to exercise the easements in the Care Act in different ways, only the highest level allowing a suspension of the duty to meet unmet needs.

86. Importantly, the CA 2020 expressly required local authorities—even under the highest level of easement—to continue to meet the needs of individuals where required in order to avoid a breach of their rights under the ECHR. However, many contributors to this inquiry have told us that they have reservations about whether frontline local authority staff have the requisite knowledge to assess when this threshold has been crossed.<sup>91</sup> In a survey carried out by the British Institute of Human Rights among those working in health and care, 76% of respondents said that during Covid-19 they were not provided with legal training or clear information about upholding human rights law.<sup>92</sup>

87. These easements have not to date been widely triggered by local authorities, and we understand that no local authorities formally reported that they were operating at the highest level of easement.<sup>93</sup> Despite this, we have received evidence that local social care provision has significantly reduced, including in areas where the easement provisions have not been used.<sup>94</sup> In research conducted by the British Institute of Human Rights 68% of respondents said that their care and support (or that of their loved one) had got

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89 The regulations also permit local authorities in Wales to suspend duties under the Social Services and Well-Being (Wales) Act 2014.

90 The impact of the CHC assessment duty removal was in part offset by automatic NHS funding for existing packages of care and support for patients discharged from hospital or who would otherwise have been admitted to hospital. From [1 September 2020](#), social care needs assessments and NHS Continuing Healthcare (CHC) assessments of eligibility have recommenced in England.

91 Law Society of England and Wales ([COV0120](#))

92 The British Institute of Human Rights ([COV0236](#))

93 [“Eight councils have triggered Care Act duty moratorium in month since emergency law came into force”](#) Community Care, 30 April 2020

94 Equality and Human Rights Commission ([COV0159](#)), York Human Rights City Network ([COV0163](#)), Inclusion London ([COV0196](#)), Age UK ([COV0116](#)), National Autistic Society ([COV0155](#))

worse during Covid-19.<sup>95</sup> This has implications for human rights including the right to life (Article 2 ECHR), the right to respect for private and family life (Article 8 ECHR) and the right to freedom from inhuman and degrading treatment (Article 3 ECHR).

88. The Local Government and Social Care Ombudsman (LGSCO) has now resumed its work and has begun to receive complaints about services provided during the pandemic.<sup>96</sup> Its assessment as to whether local authorities were able to protect the human rights of those in need of care during this period—whether or not the local authorities in question were at any stage operating under easements—will be important.

89. *The decision to reduce care provision to certain individuals is a very serious matter, particularly in circumstances where care needs may have increased during the pandemic. The Government must justify its reasoning for the continuation of the powers to trigger easements to social care provision, and they must only continue if absolutely necessary and proportionate.*

90. *If this power (which has barely been used thus far) is to continue beyond the six-month review period, the Government should issue specific guidance about meeting human rights standards in the discharge of obligations under the Care Act 2014 and develop guidance as to the content required of human rights assessments.*

91. *The Government must ensure that local authorities and care providers are able to meet increased care and support needs during and resulting from the pandemic.*

### **Children's social care**

92. The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 introduced a raft of changes to children's social care regulations. These include make significant changes to statutory visits and statutory reviews for looked after children, fostering and adoption panels, adoption agencies, fostering agencies, private fostering, children's homes, complaints and representations. Children's charities and other stakeholders have expressed alarm at the potentially harmful impact of these measures on children's human rights.<sup>97</sup> For example, Just for Kids Law (JfKL), the Children's Rights Alliance for England (CRAE) and the Youth Justice Legal Centre (YJLC) told us:

“These changes, [ ... ], remove vital safeguards and legal protections for children in care at a time when they need more support not less due to the pandemic. They also put many children at greater risk of harm as many will be having less contact with children's services or are not in school where safeguarding concerns would normally be raised.”<sup>98</sup>

93. In correspondence, the Children's Commissioner for England has told us that these regulations are of major concern and that she views them “as unnecessary, detrimental for children's, rights and a distraction from the much more fundamental issues about how to keep children protected during Covid-19.”<sup>99</sup> Her office was not consulted about the regulations prior to their publication, and while they were informed of the regulations

95 The British Institute of Human Rights ([COV0236](#))

96 Local Government and Social Care Ombudsman ([COV0162](#))

97 NYAS (National Youth Advocacy Service) ([COV0149](#))

98 Children's Rights Alliance for England/Just for Kids Law ([COV0148](#)), Article 39 ([COV0175](#))

99 Children's Commissioner for England ([COV0143](#))

two days before they were published, they did not have an opportunity to make changes to them. After publication, they shared their concerns with the DfE, but for the most part these have not been acted on.<sup>100</sup>

**94. *We question whether removing vital protections for children was a proportionate response to the challenges posed to the children's social care system by Covid-19. The Government must justify its reasoning for the continuation of these powers, and they must only continue if they can be shown to be absolutely necessary and proportionate.***

## Care homes

95. Overall, there were 57,588 deaths in care homes during the period from 2 March to 12 June 2020 which represents approximately 26,230 'excess' deaths compared with previous years. The Covid-19 mortality rate for care home residents was significantly higher than for other people of the same age and data indicates a disproportionate impact on those from ethnic minorities.<sup>101</sup>

96. In evidence submitted to this inquiry, and elsewhere, it has been suggested that decisions about hospital discharge to care homes, testing for staff and residents, the supply of PPE and a lack of transparent accurate data, may have contributed to the very high death toll in care homes.<sup>102</sup> The implications for the engagement of the Article 2 ECHR operational duty to secure life, arising from decisions about hospital discharge, are discussed below at paragraph 99.

**97. *The very high number of deaths from Covid-19 in care homes is a matter of deepest concern to us and engages the operational duty to secure life (Article 2 ECHR). The causes behind it are complex and we have not been able to devote the necessary time and attention to address them fully in the context of this report. It is, however, imperative that they be interrogated thoroughly in order to meet the state's procedural obligations under Article 2. We urge the Government to ensure that addressing the issue of Covid-19 related deaths in care homes is dealt with as a priority in any inquiry or review they undertake (see chapter 9 below).***

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100 Children's Commissioner for England ([COV0143](#))

101 Equality and Human Rights Commission ([COV0251](#))

102 Relatives & Residents Association ([COV0210](#)), Lord Alton of Liverpool David Alton ([COV0095](#)), Dr Oliver Lewis and Dr Andrew Kirby ([COV0043](#)) ([COV0043](#)), Age UK ([COV0116](#)), Royal College of Nursing ([COV0166](#))

## 5 Detention

98. The Covid-19 pandemic poses significant risks to people in detention and otherwise deprived of their liberty. Places of detention are often overcrowded, and social distancing is difficult to maintain when detainees live in close proximity to one another. These inherent risks are recognised by the World Health Organisation in its guidance on preparing for, preventing and controlling the outbreak of Covid-19 in places of detention, which states that “people in prisons and other places of detention are not only likely to be more vulnerable to infection with Covid-19, they are also especially vulnerable to human rights violations.”<sup>103</sup>

99. Under the right to life (Article 2 ECHR) the state is under a substantive (or operational) duty to protect life in relation to vulnerable people under the care of the state, such as those detained by the state in prisons, psychiatric detention and immigration detention facilities. The position of care homes is more nuanced,<sup>104</sup> but it is arguable that at least some of the steps taken in the context of the Covid-19 pandemic have given rise to sufficient state involvement so as to trigger its operational duty to secure the right to life of those subject to Deprivation of Liberty Safeguards (DoLS) within care homes.<sup>105</sup> In the circumstances, it is right that the Government's response to Covid-19 in detention settings should receive particular scrutiny from a human rights perspective.

### Prisons, young offender institutions and secure training centres

#### *Lockdown conditions and solitary confinement*

100. On 12 March 2020 the Prisons Minister Lucy Frazer MP, released a statement setting out the measures being taken to keep prisoners and prison staff safe and preventing the spread of Covid-19 within prisons.<sup>106</sup> Guidance accompanying the statement sets out that the usual regime in prisons had been suspended temporarily to apply social distancing.<sup>107</sup> On 24 March 2020 all prison visits ceased.<sup>108</sup> These changes were formalised in the Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules 2020 which came into force on 15 May 2020<sup>109</sup> and the Secure Training Centre (Coronavirus) (Amendment) Rules 2020 which came into force on 2 July 2020.<sup>110</sup>

103 World Health Organisation [Preparedness, prevention and control of COVID-19 in prisons and other places of detention](#), 15 March 2020

104 *In the decision in R (Maguire) v HM Senior Coroner for Blackpool & Fylde & Ors [2020] EWCA Civ 738*, decided before the pandemic, the Court of Appeal found that the fact of deprivation of liberty in a care home pursuant to the Deprivation of Liberty Safeguards (DoLS) does not automatically trigger the operational duty to secure life that arises in relation to those detained by the State in the paradigmatic context of prisons or psychiatric detention.

105 The clearest example is the publication of guidance leading to the discharge of untested patients from hospital into care homes, which appears to have led to introduction of COVID-19 into those care homes.

106 [“Coronavirus \(COVID-19\) prison preparedness: Lucy Frazer statement”](#), Ministry of Justice, Her Majesty's Prison and Probation Service, and Lucy Frazer QC MP, 12 March 2020

107 Ministry of Justice and Her Majesty's Prison and Probation Service, [Guidance - Coronavirus \(COVID-19\) and prisons](#), 13 March 2020

108 [“Prison visits cancelled, Ministry of Justice”](#), Ministry of Justice, 24 March 2020

109 The Prison and Young Offender Institution (Coronavirus) (Amendment) (No. 2) Rules 2020 ([S.I. 2020/508](#))

110 The Secure Training Centre (Coronavirus) (Amendment) Rules 2020 ([S.I. 2020/664](#))



101. These measures have resulted in extreme restrictions on prisoners' lives, leading to conditions which the Prison Reform Trust assesses as falling "far below a humane standard."<sup>111</sup> In a report on short scrutiny visits to three local prisons carried out in April 2020, the prisons inspectorate reported that:

"The vast majority [of prisoners] were locked up for nearly the whole day with usually no more than half an hour out of their cells. We found some examples of even greater restrictions. In one prison, a small number of symptomatic prisoners had been isolated in their cells without any opportunity to come out for a shower or exercise for up to 14 days."<sup>112</sup>

102. The lockdown restrictions also apply in Young Offenders Institutions (YOIs) and Secure Training Centres (STCs) where children serving custodial sentences are held.<sup>113</sup> In written evidence the Children's Commissioner for England described the regime for children as 'draconian' and 'likely to have long-term effects on the children incarcerated.'<sup>114</sup> These concerns are shared by Dame Anne Owers, National Chair of the Independent Monitoring Boards (IMBs), who has highlighted the variation in levels of restrictions between different YOIs, noting that in some, 'time out of cell' for some children remains as little as 40 minutes a day.<sup>115</sup>

103. Solitary confinement, defined as the physical isolation of individuals who are confined to their cells for 22–24 hours a day, breaches the rights of children in detention and, where it is prolonged, the rights of adults in detention.<sup>116</sup> In our view the restrictive lockdown regimes in prisons, YOIs and STCs have left prisoners in solitary confinement for long periods in conditions likely to engage the right to freedom from inhuman and degrading treatment (Article 3 ECHR). This is especially concerning where it affects children. This Committee's 2018 report on the use of solitary confinement and restraint noted the harmful effects of these practices on children.<sup>117</sup> The impact on older prisoners, including for those with dementia, will have also been particularly severe.<sup>118</sup>

111 Prison Reform Trust ([COV0179](#)), see also UK National Preventive Mechanism (NPM) ([COV0145](#)); Quakers in Britain ([COV0134](#)); Independent Advisory Panel on Deaths in Custody ([COV0253](#))

112 HM Inspectorate of Prisons, [Local prisons short scrutiny visit](#), 18 May 2020

113 Concerns have also been raised about children spending long periods in isolation in secure children's homes. See for example UK National Preventive Mechanism (NPM) ([COV0145](#))

114 Children's Commissioner for England ([COV0143](#)), see also Independent Advisory Panel on Deaths in Custody ([COV0253](#))

115 Letter from Dame Anne Owers, National Chair, Independent Monitoring Boards, to Rt Hon Sir Bob Neill MP, Chair, Justice Select Committee, [regarding update on Independent Monitoring Board findings](#), dated 3 June 2020

116 The Istanbul Statement on the Use and Effects of Solitary Confinement provides the following definition: "Solitary confinement is the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions, prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic." This definition is adopted in the UN Standard Minimum Rules for the Treatment of Prisoners ('Mandela Rules'), that also define "prolonged" solitary confinement as being "for a time period in excess of 15 consecutive days." These parameters of 22 hours and 15 days are also used by a UN Special Rapporteur of the Human Rights Council and the UK Supreme Court in the case of *Bourgass*.

117 Joint Committee on Human Rights, Nineteenth Report of Session 2017–19, [Youth Detention: solitary confinement and restraint](#), HC 994 / HL Paper 343

118 Age UK ([COV0116](#))

104. The charity INQUEST has drawn the Committee's attention to the high number of self-inflicted deaths in prisons; 28 deaths between March and 16 July 2020.<sup>119</sup> Despite early indications of possible reduction in the incidence of self-harm, HMIP reports in some instances that the opposite is the case.<sup>120</sup>

### **Proportionality**

105. The decision to suspend the normal regime in prisons in England and Wales was taken in response to an assessment from Public Health England (PHE), in the early days of the pandemic, that between 2,500 and 3,500 prisoners were at risk of dying from Covid-19.<sup>121</sup> In the event, in the period to 17 July 2020, 23 prisoners have died, with no deaths of children in custody and 9 members of prison staff.<sup>122</sup> While every individual death is a tragedy, the fact that the number of deaths was far below PHE's projected figures indicates that the measures taken did have a positive impact on limiting the spread of the virus and met the policy objective of saving lives. However, legitimate questions remain as to whether the severe restrictions on prisoners' human rights were proportionate and whether lives could have been protected by other, less restrictive means.

106. The strategy set out by the Government, for containing the virus in prisons not only included suspension of the normal regime and visiting rights but also introduced other policies such as early release for low risk prisoners near the end of their sentence,<sup>123</sup> and the introduction of temporary accommodation to reduce the number of prisoners sharing a cell. These measures have not been used as much as the Government initially estimated they would be. For example, it was originally said that up to 4,000 prisoners would be released early.<sup>124</sup> As of 17 July 2020, the number of early releases under Covid-19 temporary release schemes was only 242, of whom 50 were compassionate releases of vulnerable prisoners, pregnant women and mothers with babies.<sup>125</sup> It is possible that greater use of the schemes would have reduced overcrowding in prison and made it possible to reduce some of the most extreme restrictions placed on prisoners.

107. It is also noteworthy that the Government's strategy for responding to Covid-19 in prisons has applied across the whole custodial estate without differentiation for the youth custodial estate nor any apparent consideration of the impact of the restrictions on children's rights.<sup>126</sup> As the Children's Commissioner highlighted when she gave evidence to the Justice Select Committee, "[y]oung people and children have been at much less risk from health concerns in the crisis, but possibly at greater risk in terms of mental health, and there could have been different decisions made around lockdown."<sup>127</sup>

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119 INQUEST ([COV0234](#))

120 INQUEST ([COV0234](#))

121 [Q39](#) [Lucy Frazer, MP]

122 Ministry of Justice, [HM Prison and Probation Service COVID-19 Official Statistics Data to 17 July 2020](#), 24 July 2020

123 "[Measures announced to protect NHS from coronavirus risk in prisons](#)", Ministry of Justice, 4 April 2020

124 Oral evidence taken before the Justice Select Committee on Tuesday 14 April 2020, HC (2019–21) 299, [Q38](#)

125 Ministry of Justice, [HM Prison and Probation Service COVID-19 Official Statistics Data to 17 July 2020](#), 24 July 2020

126 Article 39 ([COV0175](#))

127 Oral evidence taken before the Justice Select Committee on Tuesday 14 July 2020, HC (2019–20) 306, [Q202](#) [Anne Longfield]



108. Stakeholders are concerned that lockdown restrictions in prisons are being lifted too slowly.<sup>128</sup> There have been no Covid-19 suspected deaths of prisoners since the week ending 29 May and on 2 June the Government set out its 'roadmap' for how it will take decisions about the easing of coronavirus restrictions in prisons.<sup>129</sup> Despite this, progress towards restoring activity and improving conditions for prisoners appears to be slow. When HMIP visited two YOIs at the beginning of July, inspectors reported that:

“Children at both sites told us they initially understood and largely accepted the need for the restrictions, but after 15 weeks of being locked up for more than 22 hours a day some were understandably frustrated about the slow progress in implementing activity, particularly as they saw restrictions easing in the community.”<sup>130</sup>

109. ***Lockdown restrictions in prisons must be subject to a reasoned and transparent human rights proportionality assessment and only used for the minimum time necessary. Children should not under any circumstances be subject to lockdown restrictions which amount to solitary confinement.***

110. ***Given the risk of further waves of the pandemic, the Ministry of Justice should carry out a full evaluation of its Covid-19 policy in prisons, young offender institutions and secure training centres as a matter of urgency and issue guidance on how to respond to future outbreaks.***

## ***Inspections***

111. On 17 March 2020, Peter Clarke, HM Chief Inspector of Prisons, announced that all HMI Prisons' scheduled inspection work involving visits to prisons or other places of detention had been suspended.<sup>131</sup> However, in order to meet the UK's obligations under the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)<sup>132</sup> and the Chief Inspector's ongoing statutory duty to report on treatment and conditions for those detained, the inspectorate undertook to continue making short scrutiny visits to establishments based on risk or to a group of establishments based on establishment type. These scrutiny visits and the introduction of a confidential hotline by the Independent Monitoring Board to receive calls from prisoners, and the subsequent publication of findings by its National Chair, Dame Anne Owers, have been important mechanisms for understanding how the measures taken to address Covid-19 have impacted on prisoners' human rights.

112. ***While short scrutiny visits by the prisons' inspectorate have proved an important source of information on what has been happening inside detention settings during the pandemic, continuing restrictions on inspections mean that human rights abuses may be going undetected in these settings. It is imperative that full inspections resume, safely, as soon as possible.***

128 See for example Prisoner Learning Alliance ([COV0211](#))

129 Ministry of Justice and Her Majesty's Prison and Probation Service, [COVID-19: National Framework for Prison Regimes and Services](#), 2 June 2020

130 HM Chief Inspector of Prisons, [Report on short scrutiny visits to Young offender institutions holding children](#), 7 July 2020

131 HM Inspectorate of Prisons, [17 March 2020: A statement from HM Chief Inspector of Prisons, Peter Clarke](#)

132 Under OPCAT member states are required to ensure that that all places of detention are visited regularly by independent bodies.

## Visiting

113. The suspension of all prison visiting is a serious interference with the right of prisoners and their families to respect for private and family life (Article 8 ECHR) and should not be imposed in a blanket fashion.<sup>133</sup> The impact of the lack of visits on prisoners and their families has been significant. Dr. Shona Minson, University of Oxford, carried out interviews during lockdown with parents and carers looking after children who have a parent in prison:

“Almost all of the children included in the research have had increased anxiety about their parents ...

The new behaviours among children since the cessation of contact include but are not limited to: disrupted sleep; self-harm; co-sleeping; panic attacks; weight loss; development of an eating disorder; withdrawal from the family; nightmares; anger; clinginess; physical aggression towards others in their household. Almost all of the children have been reported as experiencing sadness, anxiety and crying.”<sup>134</sup>

114. Evidence compiled by the Prison Reform Trust reveals a gap between what was promised by the Government in terms of measures to make up for the loss of social visits and what has so far been delivered on the ground. For example, despite a commitment that video calls would begin to be introduced in prisons, so far, they have been rolled out to just 40 of the 120 establishments on the prison estate in England and Wales.<sup>135</sup>

**115. Blanket visiting bans in prisons are incompatible with the right to family life (Article 8 ECHR). Any restriction on visiting rights must be shown to be necessary and proportionate in each individual case. As soon as it is safe to do so, prison visiting must resume as a matter of priority in all prisons.**

**116. In accordance with the Government's commitments, in-cell telephones and facilities to make video calls must be installed in all prisons and young offenders institutions without delay, so that in the event that it is necessary to restrict prison visits again in the future, the technology is available to allow prisoners to maintain contact with their families and loved ones.**

## Mothers in prison

117. Last year we reported on the harmful effect a mother being sent to prison has on her dependent children.<sup>136</sup> In July this year we published a further report on the issue in the context of the Covid-19 outbreak.<sup>137</sup> Restrictions on visits, and the seeming inability of the Government's early release programme to reunite a large number of mothers with their children, have put at risk the right to family life of up to an estimated 17,000 children of mothers in prison.

133 [Khoroshenko v Russia \[2015\] ECHR 637](#) at paragraph 126, citing *Trosin v Ukraine*

134 Dr Shona Minson ([COV0151](#))

135 Ministry of Justice and Her Majesty's Prison and Probation Service, [Secure video calls with prisoners](#), updated 23 July 2020

136 Joint Committee on Human Rights, Twenty-Second Report of Session 2017–19, [The right to family life: children whose mothers are in prison](#), HC 1610 / HL Paper 411

137 Joint Committee on Human Rights, Sixth Report of Session 2019–21, [Human Rights and the Government's response to COVID-19: children whose mothers are in prison](#), HC 518 / HL Paper 90

118. We recommended that children must be allowed to visit their mothers in prison on a socially distanced basis, where it is safe for them to do so. Restrictions on visiting rights, where they do exist, must be both necessary and proportionate in each individual case. The Government's early release schemes have not gone far or fast enough in reuniting children with their mothers; just 16 women from Mother and Baby Units and seven pregnant women had been released at that point. We called on the Government to immediately temporarily release from prison all remaining pregnant women and those in mother and baby units and to consider an extension of their current policy to all mothers of dependent children where those mothers have been individually risk-assessed as posing no, or low, risk to public safety. The report also made recommendations to improve the availability of data, and for arrangements to be made for prisoners to be able to attend funerals remotely.

119. On 20 July we wrote to the Prisons' Minister.<sup>138</sup> We asked her to provide information about the lack of appropriate accommodation for women leaving prison under the temporary release scheme and explain what further efforts have been made to secure such accommodation. In her response the Minister told us that exceptional funding to provide accommodation had been extended to 31 August 2020.<sup>139</sup> We welcome this, along with the news that progress is being made to improve the available data on the number of mothers who have been sent to prison during the lockdown period.<sup>140</sup> We were pleased to hear that video calling technology has now been rolled out across the entire Women's Estate.<sup>141</sup>

**120. At the time of writing the Government had not yet responded to our July 2020 report "Human Rights and the Government's response to COVID-19: children whose mothers are in prison". We urge them to commit to implementing our recommendations from this report in full at the earliest opportunity.**

## **Detention of young people who are autistic and/or have learning disabilities**

121. Last year, the Committee published a report on the detention of young people with learning disabilities and/or autism in Assessment and Treatment Units (ATUs) and other mental health hospitals which concluded that young people's human rights are being abused; they are detained unlawfully contrary to their right to liberty, subjected to solitary confinement, more prone to self-harm and abuse and deprived of the right to family life.<sup>142</sup>

122. As a result of the Covid-19 pandemic, these institutions where young people who are autistic and/or have learning disabilities are detained, were closed to the outside world, making the risk of human rights abuses even greater. Unlawful blanket bans on visits were put in place. This, along with the suspension of routine inspections, the increased

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138 Letter to Lucy Frazer QC MP, Minister of State for Justice, [requesting further information on the number of women release from prison](#), dated 22 July 2020

139 Letter from Lucy Frazer QC MP, Minister of State for Justice, [regarding impact of COVID-19 on children whose mothers are in prison](#), dated 5 August 2020

140 Letter from Lucy Frazer QC MP, Minister of State for Justice, [regarding summary report of review of operational policy on mother and baby units and pregnancy and mothers in prison](#), dated 30 July 2020

141 Letter from Lucy Frazer QC MP, Minister of State for Justice, [regarding impact of COVID-19 on children whose mothers are in prison](#), dated 5 August 2020

142 Joint Committee on Human Rights, Second Report of Session 2019, [The detention of young people with learning disabilities and/or autism](#), HC 121 / HL Paper 10

use of restraint and solitary confinement, and the vulnerability of those in detention to infection with Covid-19 (due to underlying health conditions and the infeasibility of social distancing), created a severe crisis.<sup>143</sup>

123. In our report on the Government's response to COVID-19 and the detention of young people who are autistic and/or have learning disabilities, published on 12 June 2020, we recommended that NHS England must write immediately to all hospitals, including private ones in which it commissions placements.<sup>144</sup> This letter should state that hospitals must allow families to visit their loved ones, unless a risk assessment has been carried out relating to the individual's circumstances which demonstrates that there are clear reasons specific to the individual's circumstances why it would not be safe to do so.

124. Since that report was published, we have continued to be made aware of families who face restrictions in visiting their loved ones being held in mental health detention, potentially in breach of their right to family life.<sup>145</sup> It is also of the gravest concern that the Care Quality Commission's evidence to this inquiry, submitted in July, notes that "mental health services are under pressure and ratings deteriorating."<sup>146</sup> We welcome the CQC's commitment, set out in its written evidence that: "[w]e have continued and will continue to cross the threshold [of care settings] through inspections where we have significant concerns, including serious concerns about people's care and where there are human rights breaches."<sup>147</sup> (emphasis in original).

*125. We are currently awaiting the Government's response to both our previous reports on the detention of young people who are autistic and/or have a learning disability. Those reports exposed that young people in these settings were subjected to significant and frequent violations of their human rights. Our recommendations in these reports must be implemented in full as matter of urgency to bring these human rights violations to an end.*

## Mental Health Detention

### *The Coronavirus Act amendments to the Mental Health Act*

126. The CA 2020 provided for changes to the procedures within the Mental Health Act 1983 (MHA) which would allow people to be admitted to hospital and treated under the MHA should there be extreme staffing shortages, particularly of doctors, due to Covid-19. These include a requirement for only a single medical recommendation for 'sectioning' instead of the usual two medical opinions; and the extension of doctors' holding powers, under which a person can be deprived of their liberty without safeguards, from 72 hours to five days. These provisions have not been brought into force but, if enacted, would significantly reduce the safeguards that exist to prevent arbitrary detention under Article 5 EHCR. The provisions would also enable significant watering down of the protections

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143 Joint Committee on Human Rights, Fifth Report of Session 2019–21, [Human Rights and the Government's response to COVID-19: The detention of young people who are autistic and/or have learning disabilities](#), HC 395 / HL Paper 72

144 Joint Committee on Human Rights, Fifth Report of Session 2019–21, [Human Rights and the Government's response to COVID-19: The detention of young people who are autistic and/or have learning disabilities](#), HC 395 / HL Paper 72

145 Evidence seen by the Committee, provided on a confidential basis by #Right2Home.

146 Care Quality Commission ([COV0254](#))

147 Care Quality Commission ([COV0254](#))

available in relation to compulsory medical treatment for mental disorder. Mental health stakeholders, including the Royal College of Nursing and the National Survivor User Network, have expressed grave concerns about these measures<sup>148</sup> and in its evidence, the mental health charity, Mind, expressed doubt as to whether it would be human rights compliant to enact them.<sup>149</sup>

127. The need to maintain robust safeguards to ensure that mental health patients are only detained where it is necessary and proportionate to do so, is heightened by the fact that those in detention are likely to be at higher risk of infection from Covid-19. Monitoring by the charity INQUEST shows that between 1 March and 5 June 2020 there were over four times as many Covid-related deaths of people detained under the MHA (78) as Covid-related deaths in prisons (19), which hold around four times as many people as those detained under the MHA.<sup>150</sup>

**128. *The continued ability of the DHSC to bring changes to the Mental Health Act 1983 into force after the first six months of the CV Act must be justified or the powers repealed. If the powers are maintained in any way, the DHSC must publish the guidance to accompany them so that it is possible for there to be scrutiny of their provisions. The Government should also make clear what steps it is taking to bring forward the White Paper promised to respond to the Independent Review of the Mental Health Act 1983.***

### ***The Mental Health Tribunal***

129. Changes to the procedures of the Mental Health Tribunal in England, in response to Covid-19 have led to most hearings being held remotely and, at least for a period of time, hearings being conducted by a single Tribunal judge rather than three (i.e. a legal, psychiatric and specialist lay member),<sup>151</sup> with the pre-hearing examination by the psychiatric member being dispensed with in all cases, and (separately) an increased ability to dispose of matters without a hearing at all.<sup>152</sup> Concerns have been raised about the impact of these changes on individuals' ability to challenge their detention and treatment in accordance with their right to a fair trial (Article 6 ECHR).<sup>153</sup>

**130. *The Mental Health Tribunal should be supported to be able to discharge its functions with hearings conducted by three member panels, by video, wherever possible, and to enable the return of pre-hearing examinations, to minimise the impact of what has been a substantial diminution in the safeguards provided by the Tribunal.***

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148 National Survivor User Network ([COV0233](#)) and Royal College of Nursing ([COV0166](#))

149 Mind ([COV0227](#))

150 INQUEST ([COV0234](#)). INQUEST also highlight that there have been an additional 105 non-Covid deaths of people detained under the MHA between 1 March and 3 July 2020.

151 In England under a Pilot Practice Direction (to run for 6 months from 19 March 2020): Courts and Tribunals Judiciary, [Pilot Practice Direction: Health, Education and Social Care Chamber of the First-Tier Tribunal \(Mental Health\)](#), 19 March 2020

152 Under Rule 5A of the Tribunal Procedure Rules, inserted, temporarily, by the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 (2020 No. 416), which allows for a matter to be determined without a hearing if (a) the matter is urgent; (b) it is not reasonably practicable for there to be a hearing (including a hearing where the proceedings would be conducted wholly or partly as video proceedings or audio proceedings); and (c) it is in the interests of justice to do so. Broadly similar provisions were included (for Wales) in Schedule 8 to the CA 2020 (paragraph 12).

153 The Advocacy People ([COV0089](#)), Equality and Human Rights Commission ([COV0159](#))



## Deprivation of Liberty under the Mental Capacity Act 2005

131. The CA 2020 does not amend the Mental Capacity Act 2005, however, the Department of Health and Social Care has issued emergency guidance which affects the operation of procedures for depriving persons of their liberty on the basis of mental incapacity.<sup>154</sup> This guidance recognises that during the pandemic additional pressures will be placed on care providers and supervisory bodies that may limit their ability to operate the Deprivation of Liberty Safeguards (DoLS) system as they would under normal circumstances. In light of, this it goes on to state:

“Fundamentally, it is the department’s view that as long as providers can demonstrate that they are providing good-quality care and treatment for individuals, and they are following the principles of the MCA and Code of Practice, then they have done everything that can be reasonably expected in the circumstances to protect the person’s human rights.”<sup>155</sup>

132. There is concern in some quarters that this guidance can be interpreted as signalling that DoLS should be given low priority during the pandemic and result in even more people being deprived of their liberty unlawfully.<sup>156</sup> The Vice-President of the Court of Protection has written to the Association of Directors of Social Services in these terms:

“The deprivation of the liberty of any individual in a democratic society, holding fast to the rule of law, will always require appropriate authorisation. Nothing has changed. The Mental Capacity Act 2005, the Court of Protection Rules and the fundamental rights and freedoms which underpin them are indispensable safeguards to the frail and vulnerable.”<sup>157</sup>

**133. We agree with Mr Justice Hayden that Deprivation of Liberty Safeguards (DoLS) provide ‘indispensable safeguards’ for those who are subject to them. Indeed, DoLS are more important than ever when those who lack capacity to consent to new restrictions on their freedoms may be subjected to such new restrictions intended to protect their right to life. DoLS provide a framework for verifying that such restrictions are necessary and proportionate. It is vital that DoLS authorisations are in place to ensure persons deprived of their liberty on the ground of mental incapacity have safeguards in place and the means to challenge their deprivation of liberty.**

134. The Joint Committee on Human Rights has previously made recommendations on the importance of making progress towards the implementation of Liberty Protection Safeguards (LPS) which are being brought in to replacing DoLS due to problem in the way that the DoLS system operates. The Government announced on 16 July 2020 that LPS would come into force in April 2022, rather than 1 October 2020 as originally planned.<sup>158</sup> We regret this delay, although we accept it is inevitable given the unprecedented circumstances. ***It is essential that Liberty Protection Safeguards are introduced in April***

154 Department of Health and Social Care, [The Mental Capacity Act \(2005\) \(MCA\) and deprivation of liberty safeguards \(DoLS\) during the coronavirus \(COVID-19\) pandemic](#), updated 15 June 2020

155 Department of Health and Social Care, [The Mental Capacity Act \(2005\) \(MCA\) and deprivation of liberty safeguards \(DoLS\) during the coronavirus \(COVID-19\) pandemic](#), updated 15 June 2020

156 VoiceAbility ([COV0246](#))

157 Judiciary of England and Wales, [Letter from Mr Justice Hayden, Vice President of the Court of Protection](#), dated 4 May 2020.

158 HC Deb, 16 July 2020, [col 377WS](#)

*2022 and that there is no further delay. Resources must be allocated to ensuring that the new safeguards are implemented effectively, and that all those involved are properly trained, within the new timetable.*

## Visiting in care homes

135. The impact of visiting restrictions on care home residents during the pandemic has been profound.<sup>159</sup> In the recent case of *BP v Surrey County Council* Hayden J noted that:

“All agree that BP has struggled to cope with or understand the social distancing policy which it has been necessary to implement. FP said that she believes her father thinks that he is being punished in some way. [ ... ] It is thought that the deprivation of contact with his family has triggered a depression.”<sup>160</sup>

136. We are very concerned about the impact of lack of visiting on those living in care homes. We consider that blanket visiting bans for those deprived of their liberty are contrary to the rights of residents and their families under the ECHR.<sup>161</sup> We therefore welcome the guidance on visiting care homes, published on 22 July which sets out a framework for local area policies, guided by the relevant Public Health England Director for the area, in accordance with which individual policies for care homes can be developed.<sup>162</sup> **We hope that future DHSC guidance on visiting in care homes will allow for a more proportionate approach to visiting which minimises any necessary interference with residents’ right to family life (Article 8 ECHR). The Government must ensure that care homes are not implementing blanket bans on visiting. Restrictions on visiting rights must only be implemented on the basis of an individualised risk assessment and such risk assessment must take into account the risks to the person’s emotional wellbeing and mental health of not having visits.**

## Immigration detention

### *Releasing individuals from immigration detention*

137. In this Committee’s work on immigration detention in the last Parliament, we set out the legal framework which applies to immigration detention in the UK.<sup>163</sup> We discussed the important constraints on the state’s powers to detain for immigration purposes set out by the Hardial Singh principles, which apply where the immigration authorities are seeking to remove a person from the UK. These set out the principle that if it becomes apparent that the Home Secretary will not be able to effect deportation within a reasonable period, she should not seek to exercise the power of detention. In our report we also highlighted

159 Relatives & Residents Association ([COV0210](#)), Dr Sue Parker ([COV0150](#)), National Autistic Society ([COV0155](#))

160 *BP v Surrey County Council* [2020] EWCOP 22

161 Joint Committee on Human Rights, Fifth Report of Session 2019–21, [Human Rights and the Government’s response to COVID-19: The detention of young people who are autistic and/or have learning disabilities](#), HC 395 / HL Paper 72, Chapter 2. For ECHR caselaw see *Khoroshenko v Russia* [2015] ECHR 637 at paragraph 126, citing *Trosin v Ukraine* [2012] ECHR Application No. 39758/05. See also *Munjaz v United Kingdom* [2012] ECHR 1704 at paragraph 79 on the importance for mental health patients of any restrictions on rights other than the right to liberty being justified on an individual basis.

162 Department of Health and Social Care, [Update on policies for visiting arrangements in care homes](#), 22 July 2020

163 Joint Committee on Human Rights, Sixteenth Report of Session 2017–19, [Immigration detention](#), HC 1484 / HL Paper 278



the importance of using detention only when necessary and proportionate and ensuring alternatives to detention are always explored. In our report we also called for a maximum cumulative time limit for immigration detention of twenty-eight days.

138. In light of Covid-19, the heightened level of risk to health of detainees and the closure of borders, civil society and international organisations such as the Council of Europe's Commissioner for Human Rights called for the release of immigration detainees.<sup>164</sup> Legal action was initiated by Detention Action against the Government in March 2020 which challenged the "on-going detention of all immigration detainees, in particular those with pre-existing conditions which increase vulnerability to Covid-19 ...[and] ... the absence of an effective system for protecting immigration detainees from Covid-19." By the time of the hearing, the Secretary of State had taken a number of steps to address the possible effect of Covid-19 in immigration detention centres, including:

- Reducing the number of people already in immigration detention from 1,200 on 1 January to 736 by 24 March 2020;
- Issuing guidance on the prevention and control of outbreaks of Covid-19 in places of detention; and
- Giving instructions about circumstances in which the Secretary of State will exercise her power to detain.<sup>165</sup>

139. The High Court dismissed the challenge brought by Detention Action on 25 March and highlighted the actions of the Secretary of State to reduce the numbers of those in detention, and the measures put in place to protect those that remain in detention."<sup>166</sup>

140. The latest statistics from the Home Office published on 27 August 2020 suggest that the number of people held under immigration powers on the detention estate fell by 939 between the end of December 2019 and the end of June 2020. However, hundreds of individuals remained in detention. At the end of March 2020 895 individuals were in detention and at the end of June 2020 698 individuals were in detention."<sup>167</sup> For most of these individuals, there would have been little or no prospect of imminent removal given the suspension of most international travel. This raises questions around the legality of detaining individuals during a pandemic. **Where there is no reasonable prospect of removal within a reasonable timeframe, immigration detention ceases to be lawful. The Home Office should keep cases under review to ensure that individuals are not detained unlawfully.**

164 Detention Action ([COV0218](#)); Medical Justice ([COV0244](#)); Commissioner for Human Rights, [Commissioner calls for release of immigration detainees while Covid-19 crisis continues](#), 26 March 2020

165 According to the Detention Action judgement, the Secretary of State decided that she will not exercise her power to bring into detention persons liable to removal from the UK to countries where removal is not possible by reason of Covid-19, unless the person concerned is considered to present a high risk of harm to the public. See, [Detention Action v SSHD \[2020\] EWHC 732 \(Admin\)](#) and [Ministry of Justice, Guidance: Preventing and controlling outbreaks of COVID-19 in prisons and places of detention](#), updated 4 August 2020.

166 [Detention Action v SSHD \[2020\] EWHC 732 \(Admin\)](#)

167 See Gov UK, National Statistics: How many people are detained or returned? See, Det\_D02, [Immigration detention – Det\\_D01, Det\\_D02 and Det\\_D03](#), published 27 August 2020.

### ***Conditions in immigration detention***

141. A report by HM Inspectorate of Prisons following short scrutiny visits to Immigration Removal Centres found that “processes for supporting and reviewing the detention of the most vulnerable detainees were in place” and that the reduction of detainees allowed managers to provide “reasonably safe and open regimes.”<sup>168</sup> However, evidence from Detention Action and Medical Justice to our inquiry expressed concern about the management of detention facilities. Detention Action told us that clients have reported “unsanitary conditions in detention, including lack of soap and hand sanitiser, insufficient cleaning materials, rats, and lack of ventilation” and Medical Justice said that they have “seen cases of detainees with Covid-19 comorbidities that have not being detected by the Home Office.”<sup>169</sup> There was further concern about the level of testing of infections in IRCs.<sup>170</sup> ***For those individuals in immigration detention, as in other detention settings, steps taken to prevent the spread of the disease into and within detention settings should be reviewed at regular intervals and particular care should be taken in respect of individuals who are considered to be especially vulnerable to Covid-19.***

142. Individuals have continued to be detained during the pandemic although the vast majority of people detained were held for a short period of time.<sup>171</sup> **The JCHR's previous report on immigration detention highlighted the importance of making detention decisions independent of the Home Office to ensure that the initial decision to deprive a person of their liberty is robust and fully justified. The Committee recommended that “in cases where detention is planned there should be properly independent decision-making” and that detention “decisions should be pre-authorised by a person or body fully independent of the Home Office.” We urge the Government to implement this recommendation: in the context of the pandemic it is more important than ever, given the risk to immigration detainees' health.**

### **Powers Relating to Potentially Infectious Persons**

143. The CA 2020 provides public health officers, constables and immigration officers with various powers to detain, screen, assess, and isolate individuals who are “potentially infectious”, subject to time limits. A person is “potentially infectious” at any time if: the person is, or may be, infected or contaminated with coronavirus, and there is a risk that the person might infect or contaminate others with coronavirus, or the person has been in an infected area within the 14 days preceding that time.<sup>172</sup> There are also powers to require persons to provide biological samples, contact details, documents and to restrict travel and contact with certain people. Specific powers relate to potentially infectious children. Failure to adhere to restrictions imposed by officers is a criminal offence.

144. These powers inevitably engage Article 5 as they allow for deprivation of liberty of persons who fall within the definition of “potentially infectious”. Article 5(1)(e) allows for deprivation of liberty in accordance with a procedure prescribed by law for the purposes of

168 HM Chief Inspector of Prisons, [Report on short scrutiny visits to Immigration removal centres](#), 12 May 2020

169 Detention Action ([COV0218](#)); Medical Justice ([COV0244](#))

170 Detention Action ([COV0218](#)); Medical Justice ([COV0244](#))

171 The May 2020 update from the Home Office states that between 23 March and 30 April 2020 295 people entered detention, 231 of which were clandestine entrants held by UKVI for processing. Those being held for processing can only be held for a maximum of seven days.

172 The Coronavirus Act 2020, [Schedule 20](#)

the prevention of the spreading of infectious diseases. Any interference must be necessary and proportionate. The powers also engage Article 8 (the right to private and family life) and Article 11 (freedom of association).

145. There have been serious problems with the implementation of these powers relating to “potential infectious persons”. We note, for example, the case of Marie Dinou, who was charged under these powers instead of the Coronavirus ‘lockdown’ Regulations,<sup>173</sup> despite the fact she was not considered to be “potentially infectious” and therefore did not fall within these powers.<sup>174</sup> On 15 May 2020, the CPS published its findings following a review of 44 prosecutions brought under the Coronavirus Act. Alarming, all 44 cases brought under the Act were found to have been incorrectly charged as there was no evidence the individuals concerned were “potentially infectious”.<sup>175</sup> Although we hope that such misuse of power will not happen again, the definition of a “potentially infected person” is very wide and as such, the powers remain subject to abuse.

### **Safeguards**

146. There are some safeguards built into these provisions. The powers can only be used once there has been a declaration of a serious and imminent risk to public health, and only for as long as the controls are reasonably considered to prevent the spread of the Coronavirus. Further, the powers can only be exercised if the officer considers that it is necessary and proportionate to do so in the interests of the person; for the protection of other people, or for the maintenance of public health.

147. In theory, this test aligns with the requirements of human rights law, which provides that any interference with liberty must be justified in accordance with a specified purpose (including public health), necessary to achieve the aim, and proportionate. However, there may be a risk that officers with no experience in, or guidance on, assessing necessity and proportionality will not be able to apply these tests effectively, with the risk they become arbitrary. Police and immigration officers must consult a public health officer if practicable, which may help, but there is no guarantee that this consultation will be possible.<sup>176</sup>

148. Further, there is no minimum qualification for appointment as a “public health officer”. As well as public health consultants, the Secretary of State can designate a “public health officer”. Whilst this power may be reasonable in order to ensure there is sufficient capacity of public health officers, there should be minimum requirements for designation of public health officers, given the strong powers of detention they will have under the Act. There are also requirements on persons to provide biological samples, contact details, and documents, where requested by a public health officer.<sup>177</sup> **There is no safeguard as to the length of storage of the biological information collected under powers relating to potentially infectious persons, nor safeguards relating to its destruction, and future use. *The Coronavirus Act should be amended to ensure this medical data is subject to adequate safeguards.***

173 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ([SI 2020/350](#))

174 “Coronavirus: woman ‘wrongly charged under new law’”, *BBC News*, 3 April 2020

175 [CPS announces review findings for first 200 cases under coronavirus laws](#), 15 May 2020

176 CA 2020, Schedule 21, [Para 7\(5\)](#)

177 CA 2020, Schedule 21, [Para 10\(2\) and 10\(4\)](#)

149. When exercising powers after screening has taken place, as a safeguard, the public health officer must “have regard to a person’s wellbeing and personal circumstances”.<sup>178</sup> Further, the specified period for imposing restrictions must not exceed 14 days. The public health officer must assess the person within 48 hours of restrictions being imposed and consider whether they are necessary and proportionate.<sup>179</sup> The specified period can be extended, but must not exceed a further 14 days. This therefore allows for a maximum of 28 days of detention following screening.<sup>180</sup> This is a significant period of detention.

150. There is no right of appeal against the exercise of powers before screening and assessment have taken place. Once screening and assessment have taken place, a person on whom a requirement or restriction is imposed may appeal against it (or against any variation of it or any extension of the period to which it relates) to a magistrates’ court.<sup>181</sup>

### ***New offences***

151. New offences have been created in relation to these powers under the CA 2020. Where a public health officer exercises the powers to detain, screen, assess and isolate potentially infectious persons, the officer must inform that person of the reason they are directing or removing them, and that it is an offence in a case where a person is directed, to fail without reasonable excuse to comply with the direction, or in a case where a person is removed (by the officer or by a constable), to abscond.

152. Once a person is at a place for screening/assessment, a public health officer may also require the person referred to in paragraph 8<sup>182</sup> to remain at the place for screening and assessment purposes for a period not exceeding 48 hours. When exercising this power, the public health officer must inform that person: of the reason for imposing the requirement; of the maximum period the person may be required to remain there, and that it is an offence to fail to comply with the requirement.

153. A number of new offences are created by Schedule 21 paragraph 23. This includes making it an offence if a person fails, without a reasonable excuse, to comply with any direction, instruction, requirement or restriction given to or imposed on them, or absconds or attempts to abscond while being removed to or taken to a screening or assessment centre.<sup>183</sup>

**154. It is hoped that the vast majority of “potentially infectious” people will comply with public health advice, and that legal enforcement will not be necessary in such cases. In such circumstances, the Government must justify the continued need for an executive power to deprive a wide cohort of persons of their liberty. Article 5(1)(e) ECHR allows states to detain individuals “for the prevention of the spreading of infectious diseases ... “. Although the case law on Article 5(1)(e) is very limited in this context, it is clear that the courts will consider whether less severe measures have been considered and found to be insufficient to safeguard the public interest, before using detention as a last resort.<sup>184</sup> *The Government must justify why it is necessary and proportionate for***

178 CA 2020, Schedule 21, [Para 14\(6\)](#)

179 CA 2020, Schedule 21, [Para 15\(2\)](#)

180 CA 2020, Schedule 21, [Para 15 \(5\) and \(6\)](#)

181 CA 2020, Schedule 21, [Para 17](#)

182 CA 2020, Schedule 21, [Para 8](#)

183 CA 2020, Schedule 21, [Para 23](#)

184 *Enhorn v. Sweden*, no. 56529/00, ECHR 2005-I

*these extraordinary powers to remain law. In particular, the Government must provide evidence to Parliament that these powers are necessary for the prevention of the spread of Covid-19 and that the power to prosecute is not being misapplied. In the absence of any clear evidence to support the retention of these powers, they ought to be repealed.*

155. *In order to allow Parliament to assess the Government's use of these significant powers, the Government must publish data setting out the number of individuals who have been subject to these powers, the number of individuals who have been charged under the new offences, and any successful appeals there have been against the use of these powers.*

156. *There are some safeguards built into the powers, but if these powers are to be retained beyond the six-month review, these safeguards should be strengthened:*

- a) *The definition of "potentially infectious person" should be reviewed to ensure that its scope is not too wide and the powers are not open to abuse.*
- b) *The Act provides that these powers may only be exercised where necessary and proportionate in the interests of the person, for the protection of other people, or the maintenance of public health. The Government should ensure its guidance is up to date and available for officers regarding the application of this test.*
- c) *There should be minimum requirements for the designation of a "public health officer" to ensure only experienced and qualified persons are able to exercise such powers.*
- d) *There should be robust safeguards as to the length of storage of the biological information collected, its destruction and future use.*
- e) *The only right of appeal provided for is in relation to powers exercisable post-screening and assessment. Individuals should be given a right of appeal to the Magistrates Court in relation to all powers, particularly given the option of judicial review is not an immediate and effective remedy for detained persons.*
- f) *Guidance from the Department for Health should be incorporated into the Act to state that if someone lacks the capacity to make an appeal, it can be made by someone on their behalf even if the person is not objecting or does not understand they can make a challenge.*

## 6 Contact Tracing

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### The context of the contact tracing system

157. The Government announced on 12 March 2020 that it planned to develop a contact tracing app which would alert users if they were in close contact with a confirmed case of coronavirus, indicating that they should self-isolate. More details were released over the following weeks, including that data would be “centralised”, meaning stored on a central database. This contrasts with the “decentralised” model, where contacts are stored on, and notified from, users’ phones. Matthew Gould, CEO of NHSX, the body in charge of developing the app, argued in evidence to the Committee that centralised data could be studied to learn about Covid-19 and the pandemic.<sup>185</sup> However, oral evidence from Dr Orla Lynskey and Dr Michael Veale,<sup>186</sup> and evidence in written submissions to this inquiry urged the Government to move to the decentralised model, as it was more secure in terms of privacy.<sup>187</sup> The app’s roll-out was delayed and, after trials on the Isle of Wight, the Government announced that it would not be ready until “winter”, and would move to the decentralised model developed by Apple and Google.<sup>188</sup>

158. On 13 August, after several contradictory reports, the Government announced that a version of the app was being tested.<sup>189</sup> There are reportedly still issues with recording contacts but, the app will have some additional features, such as personalised risk scores.

159. Whilst development of the app progresses, contact tracing carried out by staff employed on a national and local basis continues. There has been less discussion around privacy concerns of this method, but the concerns are broadly similar.

### The Committee’s work on the contact tracing app

160. The Committee released a report in May 2020, *Human Rights and the Government’s Response to Covid-19: Digital Contact Tracing*,<sup>190</sup> which identified issues with privacy and human rights around the first iteration of the app. The report called for privacy safeguards to be put into legislation and a proposed bill was produced to that effect.<sup>191</sup> This proposed legislation set out: limitations on what data could be used for; how long it could be stored; a requirement for it to be deleted; prohibitions on it being shared; and arrangements for an independent oversight body. Despite other countries, such as Australia,<sup>192</sup> passing similar

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185 [Q19](#) [Matthew Gould]

186 [Qq10–14](#) [Dr Michael Veale and Dr Orla Lynskey]

187 Supplementary written evidence from Dr Orla Lynskey, Department of Law, London School of Economics, and Dr Michael Veale, Faculty of Laws, University College London ([COV0093](#)); Liberty ([COV0092](#))

188 [“Coronavirus: Health minister says app should roll out by winter”](#), BBC News, 17 June 2020

189 [“Coronavirus: England’s contact tracing app trial gets under way”](#), BBC News, 13 August 2020

190 Joint Committee on Human Rights, Third Report of Session 2019–21, [Human Rights and the Government’s Response to Covid-19: Digital Contact Tracing](#), HC 343/ HL Paper 59

191 Letter to Rt Hon Matt Hancock MP, Secretary of State for Health and Social Care, Department of Health and Social Care, [regarding Contact Tracing App legislation](#), 7 May 2020

192 [“Government releases draft legislation for Covidsafe tracing app to allay privacy concerns”](#), The Guardian, 4 May 2020



legislation, the Government rejected our proposals stating “that existing legislation and our commitment to transparency, security and privacy provide sufficient protection and clarity to the public”.<sup>193</sup>

161. We are surprised by the Government's position given that the evidence submitted to our inquiry showed there were concerns about privacy.<sup>194</sup> This lack of trust was exacerbated by high profile data breaches in the contact tracing system.<sup>195</sup> The Government admitted that it did not follow the GDPR when it tested the app in the Isle of Wight before conducting a Data Protection Impact Assessment.<sup>196</sup> Users' trust will affect uptake and therefore the effectiveness of the app; Matthew Gould stated that the app would be “optimal” with 80 percent of smartphone users installing it.<sup>197</sup> The Government cannot afford to alienate those who are concerned about privacy if it hopes to use the app to prevent increases in infection rates. In whatever form, the app constitutes an interference with an individual's Article 8 ECHR right to private and family life and if the app is not effective at reducing the spread of Covid-19, and if privacy protections are not adequate then this interference will not be proportionate.

## Privacy and discrimination concerns

### *Manual contact tracing*

162. There has been little public debate of the privacy implications of manual contact tracing, but in some ways, the information gathered is more personal. Rather than simply recording that two phones were within two metres for 15 minutes, information gathered by a human contact tracer could feasibly be names of the people who were in contact, how long the contact was for and where they met. Additionally, this data is still processed and stored digitally, with most people being asked to fill in an online form.<sup>198</sup> All of this means that privacy concerns similar to those for digital contact tracing still exist and that data safeguards need to be put in place.

163. There is also a risk around information gathered by businesses as part of track and trace. There have been reports of customers being harassed after people obtained their numbers from sign-in books left on display in pubs and restaurants.<sup>199</sup> These businesses must comply with the GDPR and the Government has provided guidance,<sup>200</sup> but concerns remain over whether this data is being properly handled.

164. The same test applies here as to data collected through an app: data collection and storage can only be proportionate if sufficient safeguards are in place and if the overall justification to collecting that data remains valid - i.e. the test and trace system

193 Letter from the Lord Bethell, Parliamentary Under Secretary of State for Innovation, Department of Health and Social Care, [regarding Human Rights and the Government's Response to COVID-19: Digital Contact Tracing](#), dated 16 July 2020

194 Open Rights Group, Big Brother Watch, Privacy International, Deighton Pierce Glyn ([COV0221](#)), Open Rights Group ([COV0240](#))

195 *“Coronavirus: Serco apologises for sharing contact tracers' email addresses”*, BBC News, 20 May 2020

196 *“Coronavirus: England's test and trace programme 'breaks GDPR data law”*, BBC News, 20 July 2020

197 Oral evidence taken before the Science and Technology Committee on 15 October 2013, HC (2019–21) 136, [Q377](#) [Matthew Gould]

198 Department of Health and Social Care, [Guidance - NHS Test and Trace: how it works](#), 27 May 2020

199 *“Test and trace is being used to harass women - already”*, The Telegraph, 15 July 2020

200 Department of Health and Social Care, [Guidance - Maintaining records of staff, customers and visitors to support NHS Test and Trace](#), 2 July 2020



is an effective and proportionate means of helping to combat Coronavirus. Adequate safeguards must be in place to protect the right to privacy and to protect people's data; if such safeguards are not in place or are not working in practice, then these interferences will not be proportionate.

### ***Digital contact tracing***

165. It is welcome that the Government is now developing a decentralised app as the evidence we received confirmed that this model alleviates some of the privacy concerns. However, the majority of privacy concerns persist with this model and we continue to believe legislation would provide security for users and increase uptake. Evidence to our inquiry showed that there is concern information is being shared with private companies.<sup>201</sup> For example, there were reports of a Government contract with McKinsey, which would have allowed the company to keep personal data for seven years.<sup>202</sup> DHSC clarified that the contract ruled out any personal data being shared without the Department's consent. However, this response failed to explain why it would ever be considered appropriate to allow private companies to keep personal information for seven years without a public health justification. Ambiguities such as this would be dealt with by a legal requirement that any personal information shared with the private sector can only be used and stored for defined purposes directly relating to the public health emergency and a limited duration. Similar legal provisions should prohibit sharing within the public sector for purposes unrelated to combating Coronavirus. Further, the type of data that will be gathered should be defined, as evidence in submissions has raised concerns about 'mission creep'.<sup>203</sup> Indeed, Matthew Gould's comment about future versions of the app being able to gather location data lends credence to these concerns.<sup>204</sup>

166. Various evidence submissions raised concerns about the risks of digital exclusion, particularly for older and disabled people.<sup>205</sup> The Government assured us the app would not be made compulsory, but if it becomes a condition for admission to certain venues, or places of employment, then it risks being de-facto compulsory and raising discrimination and equality concerns, particularly if certain groups are disproportionately affected by such measures. This would risk discriminating against those without phones or with limited digital skills. The latest version of the app would give people a risk score. It is important that the Government ensures that measures are in place so that those who do not have access to the app are not discriminated against in accessing services. Measures should also be put in place so that those who do not have access to the app can also receive information in respect of their risk of infection from contact with others with Covid-19 as part of a multi-faceted test and trace system.

**167. It is welcome that the Government decided to stop the development of the centralised model for their contact tracing and is now working on a decentralised model instead. However, privacy issues remain. To build trust with users, which has been shaken by high-profile missteps, the Government should introduce legislation**

201 Member of the public ([COV0118](#))

202 See "[McKinsey banks £560,000 consulting on "vision, purpose and narrative" for new test and trace body](#)", Civil Service World, 18 August 2020

203 Professor Lorna McGregor et al ([COV0090](#))

204 [Q17](#) [Matthew Gould]

205 Greater Manchester Disabled People's Panel ([COV0206](#)); Just Fair ([COV0228](#)); Professor Lorna McGregor et al ([COV0090](#)); Equally Ours ([COV0257](#))

*which defines what data will be collected, how long it can be held, when it will be deleted. Such legislation should include a ban on contact tracing data being shared for any purpose other than combating the spread of Coronavirus.*

168. Manual contact tracing is the main component of the UK's test, track and trace system. This still involves data being collected; indeed, that data is arguably more sensitive than that collected by the app. *Whether that data is gathered digitally or manually, the legislation should limit how long manually gathered data can be held, define what type of information can be gathered, confirm when it will be deleted, and restrict it from being shared for any purpose other than combating the spread of Coronavirus.*

## 7 Children and the right to education

### School closures and the right to education

169. As part of the country's response to Covid-19, on 18 March 2020, the Government announced the closure of schools for all except "children of key workers and vulnerable children."<sup>206</sup> Schools remained closed from 23 March until 1 June, when some primary and secondary school children returned to school.<sup>207</sup> The closure of schools to the majority of children and the consequent loss of learning engages the rights of the child and in particular children's right to education. These rights are protected notably by Article 2 of Protocol 1 of the European Convention on Human Rights; Articles 2, 3, 6, 13, 15, 19, 23, 24, 28, 29, 31 and 34 of the UN Convention on the Rights of the Child; Article 7 and 24 of the UN Convention on the Rights of Persons with Disabilities; and the 1960 UNESCO Convention against discrimination in education.<sup>208</sup>

170. A decision to close schools has the potential to affect, and interfere with, children's right to education. Any interference with human rights must be justified, done lawfully and transparently and only be done to the extent necessary. Education is not just about academic performance, important though that is, indeed children's rights have been affected in many varied ways:

- Children have been denied the right to socialise and to receive other forms of education in sport and the arts, for example. An expert group at the Centre for Sport and Human Rights has produced a paper<sup>209</sup> (June 2020) which points out that the lack of sport impinges on mental health, socialisation and character building.
- Schools are often an important source of nutrition for many children. Free school meals form part of a diet necessary for health and survival. The Government conceded to demands for free school meals to continue during the holiday period during the COVID pandemic. Demands are coming forward for this to be repeated during all school holidays.
- The Children's Society<sup>210</sup> and others have pointed out the negative impacts on families during COVID lockdowns and the perception from parents that there will be long term negative impacts on family finance and happiness.

206 ["Schools, colleges and early years settings to close"](#), Department for Education, 18 March 2020. The press notice described "vulnerable children" as "those who have a social worker and those with Education, Health and Care Plans."

207 From 1 June, particular year groups in primary schools were allowed to return to school and from 15 June, secondary schools pupils in years 10 and 12 were allowed to return to spend some time in school in small groups. From 15 June, primary schools were also allowed to bring back other pupils if they had the capacity to do so. See, Department for Education, [Guidance for full opening: schools](#), 2 July 2020.

208 [Article 2 Right to education](#), Protocol 1, ECHR; [UN Convention on the Rights of the Child](#); [UN Convention on the Rights of Persons with Disabilities](#); [UNESCO Convention Against Discrimination in Education](#).

209 Centre for Sport and Human Rights, [An Overview of the Sport-Related Impacts of the COVID-19 Pandemic on Children](#), June 2020. p. 9

210 The Children's Society, Briefing paper: [The impact of COVID-19 on children and young people](#)

- A significant number of referrals to children's services come from schools.<sup>211</sup> Such referrals have decreased during lockdown as a result of which children are likely to have experienced mental health difficulties, violence, including experience of domestic violence and isolation.
- A great deal of stress was placed on children by confusion and delays over examination and assessment systems.
- Children's Commissioners across Europe have expressed concerns about child poverty, stress, children with disabilities and children in institutions.<sup>212</sup> The Children and Young People's Commissioner for Scotland is planning to carry out a Child Rights Impact Assessment on all aspects of the COVID-19 legislations and policies in Scotland.<sup>213</sup>
- The Early Years Alliance (a consortium of fourteen children's charities) has pointed out that undetected needs of very young children will emerge and that the current level of support is unlikely to meet demand.<sup>214</sup> They recommend that, in the light of the impact of COVID, priorities for young children should be reconsidered explicitly and transparently.
- The voice of the child is recognised as important in all major conventions. Academics from the School of Health and Society, at the University of Salford expressed surprise that the submission rules for members of the public to submit questions to the COVID-19 press briefings have specifically prohibited questions from children under 18.<sup>215</sup> A question from Baroness Lister in the House of Lords on June 15 received the reply that "alternative options" were being "actively" considered.<sup>216</sup> There is no evidence that this is so. The Government needs to develop a coherent and sustainable policy on listening to children

171. Urgent measures are needed by schools, communities and children's services to repair harm done. This will require adequate resourcing from Government.

172. There are specific provisions in the CA 2020 to allow the Government to direct the closure of schools where certain circumstances are met. However, whilst the Government's messaging was indeed that schools had been closed, upon probing, the Government had not used its powers to close schools. Instead of issuing a direction under the CA 2020 to close educational establishments, and properly justifying the need to close schools, the Government, through communications and press announcements, encouraged schools not to allow pupils to attend except for certain groups and encouraged parents not to send their children to school.<sup>217</sup> We consider that measures which are likely to affect human rights should have a proper legal basis and be properly justified, rather than

211 Department of Education, [Characteristics of children in need: 2018 to 2019 England](#), 31 October 2019. p.10

212 European Network of Ombudspersons for Children and UNICEF Survey, [The Ombudspersons and Commissioners for Children's Challenges and Responses to COVID-19](#), May 2020

213 Scottish Government, [Coronavirus \(Scotland\) Bill: child rights and wellbeing impact assessment](#), 31 March 2020

214 Early Years Alliance "[Early Years Recovery Briefing](#)", 2020

215 "[Unlocking children's voices during SARS-CoV-2 coronavirus \(COVID-19\) pandemic lockdown](#)", 1Arch Dis Child Month 2020 Vol 0 No 0

216 HL Deb, 15 June 2020, [cols 5693](#)

217 In addition, Notices were issued under section 38(1) of, and paragraph 5 of Schedule 17 to, the Coronavirus Act 2020, disapplying section 444(1) and (1A) of the Education Act 1996, which create offences relating to the failure of parents to secure regular attendance at school of a registered pupil. Notices were issued on [30 April](#), [1 June](#) and [30 June](#) and [30 July](#) 2020.

being announced through a press notice. The legal status of such measures should also be properly communicated so that parents and children know on what legal basis they are being denied access to schools. To do otherwise raises real rule of law and human rights concerns.

173. The measures taken to combat the virus have had a huge impact on children's right to an education. Children have been impacted, in many different ways, often depending on their individual situations. In this section we discuss some of the issues of concern which were raised in written evidence.

### ***Widening inequalities***

174. While the closure of schools disrupted all children's education, there was a "huge disparity" in the amount of education accessed during the lockdown, with particular differences noted between those in deprived communities and those attending private schools.<sup>218</sup> Despite the various approaches to distance learning adopted by schools, there were significant barriers to home learning for disadvantaged children including poor internet access, insufficient access to devices or study spaces and limited or no parental support.<sup>219</sup> Surveys have shown that school closures have had a more damaging impact for already disadvantaged children. Research by the Sutton Trust found that in the first month of lockdown 60% of private schools and 37% of schools in the most affluent areas had an online platform to receive work, compared to 23% in the most deprived schools. Another survey of 4,000 parents in England between 29 April and 12 May by the Institute of Fiscal Studies found that children from better-off families spent 30% more time on home learning than those from poorer families.<sup>220</sup>

### ***Children with special educational needs and disabilities***

175. In response to Covid-19, the Government also made significant changes to Education, Health and Care (EHC) plans. An EHC plan is a document that the local authority is obliged by law to prepare and maintain, and which sets out an individual child's special educational needs and the support they require.<sup>221</sup> On 30 April the Secretary of State for Education issued a Notice, under the Coronavirus Act 2020, modifying section 42 of the Children and Families Act 2014.<sup>222</sup> Under section 42 of the 2014 Act, local authorities had a duty to secure special educational provision in accordance with EHC plans.<sup>223</sup> Pursuant to the Notice, local authorities were deemed to have met this duty if they used their

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218 Children's Commissioner for England ([COV0143](#))

219 Children's Commissioner for England ([COV0143](#)); The Children and Young People's Commissioner Scotland ([COV0088](#)); UNICEF UK ([COV0188](#))

220 Institute of Fiscal Studies, [Learning during the lockdown: real-time data on children's experiences during home learning](#), 18 May 2020; Written evidence submitted to the Education Select Committee: The Children's Commissioner's Office ([CIE0150](#))

221 An Education, Health and Care Plan is required under s. 37 of the Children and Families Act 2014 after an Education, Health and Care needs assessment has been made under s. 36 of the Children and Families Act 2014.

222 Three such notices were issued for the months of May, June and July: The Gazette, [Coronavirus - Temporary continuity directions etc: education, training and childcare, Coronavirus Act 2020 Modification of Section 42 of the Children and Families Act 2014 \(England\) Notice 2020](#), published on 30 April 2020; The Gazette, [Coronavirus - Temporary continuity directions etc: education, training and childcare, Coronavirus Act 2020 Modification of Section 42 of the Children and Families Act 2014 \(England\) \(NO. 2\) Notice 2020](#), published on 1 June 2020; The Gazette, [Coronavirus - Temporary continuity directions etc: education, training and childcare, Coronavirus Act 2020 Modification of Section 42 of the Children and Families Act 2014 \(England\) \(NO. 3\) Notice 2020](#), published on 30 June 2020.

223 See Children and Families Act 2014, [Section 42](#)

“reasonable endeavours” to secure the provision.<sup>224</sup> Further notices were issued for the months of June and July. The Secretary of State announced that these temporary legal changes to the standard of the duty were not expected to be extended nationally beyond the end of July.<sup>225</sup>

176. The change in duties towards children with special educational needs and disabilities (SEND) during this period, combined with the wider “closure” of schools, had a significant impact on many children with SEND.<sup>226</sup> The vast majority of these children were not able to attend school during the lockdown and consequently missed out on specialist support that comes with being at school. The Children’s Commissioner for England told us that there had been instances where there were “serious breaches of a child’s right to education” such as a school telling a child they could not attend school during the lockdown despite being in receipt of an EHC Plan.<sup>227</sup> This is despite the DfE press release specifying that children in receipt of an EHC Plan were classed as “vulnerable” children who could continue to attend school during lockdown.<sup>228</sup>

**177. The Government has obligations to ensure that all children have access to education and that the best interests of the child are a primary consideration in decision-making. Thus, the provision of education and the best interests of the child should be at the forefront of policy and decision making.**

**178. Our evidence suggests that whilst school closures have affected all children, these closures have had different impacts for different groups of children. The effects of these different impacts - and how best to mitigate against unwanted impacts - should be factored into the Government’s policy and decision-making. The disparity in education accessed by different groups of children suggests that there should have been better guidance to schools from the Government around continuity of education. The unequal access to education for disadvantaged children is of real concern and the Government must ensure that it does not lead to wider inequality in society.**

**179. In particular, school closures have created specific barriers to children with SEND’s access to their right to education. This is really concerning. We urge the Government to look into the effect that school closures have had on young people with SEND and to address any barriers to them returning to schools and accessing education. Where it is not in the best interests of the child to be in school, for example if they are shielding, appropriate support should be provided to them so that they can learn from home.**

224 From 1 May to 31 July 2020, section 42 of the Children and Families Act 2014 (duty to secure special educational and health care provision in accordance with EHC plan) was modified by a notice from the Secretary of State for Education issued under the Coronavirus Act 2020.

225 Department for Education, [Education, health and care needs assessments and plans: guidance on temporary legislative changes relating to coronavirus \(COVID-19\)](#), updated 6 July 2020. It is worth noting though that there are also other relevant changes to the law. For example, the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 (S.I. 2020/471) amend the Special Education Needs and Disability Regulations and related Regulations to ease deadline requirements for various actions in relation to a EHC plans and assessments, often replacing a firm deadline with an obligation to do an action as soon as is “reasonably practicable”.

226 Children’s Commissioner for England ([COV0143](#)); [Greater Manchester Disabled People’s Panel \(COV0206\)](#); Scottish Alliance for Children’s Rights ([COV0075](#)); Scottish Commission for People with Learning Disabilities ([COV0126](#)) Children’s Rights Alliance for England/Just for Kids Law ([COV0148](#)); Alliance for Inclusive Education ([COV0160](#))

227 Children’s Commissioner for England ([COV0143](#))

228 [“Schools, colleges and early years settings to close”](#), Department for Education, 18 March 2020. The press notice described “vulnerable children” as “those who have a social worker and those with Education, Health and Care Plans.”

180. Some of these changes to children's right to education were made through press announcements alone or through the use of Notices or Directions issued under powers in the Coronavirus Act. *The Government should not interfere with human rights without a clear legal base and should be clear as to whether it has legally changed children's rights or is merely changing messaging—such differences have been obscured during the Coronavirus crisis communications and this makes it difficult for parents and children to understand their rights. Whilst Government explanations, comments and press notices can be useful tools to explain legal changes, the Government must make it clear as to whether a new announcement, such as one purporting to “close schools” is made under legal powers to direct the closure of schools or is merely advisory—the rule of law is threatened if the Government obscures the legal status of its announcements. Further, legal documents—including Notices and Directions—which may interfere with human rights should be easily accessible. This is crucial for compliance with both the rule of law and human rights. The Government must ensure that all Notices and Directions interfering with human rights are published and readily available or signposted on gov.uk.*



## 8 Access to Justice

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### Investigatory Powers

181. The CA 2020 creates regulation-making powers which allow for the appointment of temporary judicial commissioners (to operate under the Investigatory Powers Act 2016) and for variation of the time limits for judicial approval of urgent warrants issued under the Investigatory Powers Act (IPA).

182. The Investigatory Powers Commissioner (IPC) is the independent overseer of almost all investigatory powers. He is supported in this role by 15 Judicial Commissioners (JCs), all of whom have held, or currently hold, high judicial office. The CA 2020 allows temporary JCs to be appointed at the request of the IPC, in the event that there are insufficient JCs available to operate the system under the IPA. To exercise this power, the IPC must notify the Secretary of State that there are too few JCs available to carry out their functions effectively, and that this is a result of coronavirus. Appointments are limited to a duration of no more than six months (and must not exceed 12 months in total).<sup>229</sup>

183. Under the IPA, a warrant has to be issued by the relevant Secretary of State and then approved by a JC for it to be lawful (other than urgent warrants, which are valid for only short periods of time). The CA 2020 allows the Secretary of State, at the request of the IPC, to vary the time allowed for urgent warrants to be approved.<sup>230</sup> The power allows for the maximum time limit for approving an urgent warrant to be increased from three days to 12 days and the lifespan of the urgent warrant to increase from five days to 12 days.<sup>231</sup> Following the end of the time limit, the urgent warrant must be approved by an independent judge.

**184. The judicial approval of warrants is a necessary safeguard against unjustified interference with private and family life (Article 8). Extending the period of time before judicial approval of an urgent warrant is required could prolong any unjustified interferences with Article 8. As part of the review process, the Government should provide to Parliament data on how many urgent warrants have been used during the emergency period, and the timeframe within which judicial approval was obtained. The Government should also inform Parliament whether the Investigatory Powers Commissioner has made a request that the Secretary of State vary the time allowed for urgent warrants, and the outcome of this request.**

### Expansion of live link technology in court proceedings

185. The CA 2020 expands the availability of video and audio link in court proceedings.<sup>232</sup> This allows “eligible criminal proceedings” to take place by phone or by video.<sup>233</sup> There are important limitations, for example: no criminal trial may be conducted solely by audio link and only summary trials can be heard solely by video link and only where the

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229 CA 2020, [Section 22\(2\)](#)

230 CA 2020, [Section 22\(1\)](#)

231 CA 2020, [Section 22\(4\)](#)

232 CA 2020, [Sections 51–53](#), [Schedules 22–26](#)

233 This includes hearings in the Magistrates Court, Crown Court or Court of Appeal

parties agree;<sup>234</sup> any person may participate by live link apart from a juror;<sup>235</sup> the court must be satisfied on the balance of probabilities that it is “in the interests of justice” for the person participating by live link to do so;<sup>236</sup> parties to the proceedings must have an opportunity to make representations before the decision is taken, as well as the “relevant youth offending team” where the defendant is under 18 or being treated as being under 18.<sup>237</sup>

186. Further, the CA 2020 seeks to ensure open justice is preserved by providing for public participation by video link. However, Transform Justice states that they have experienced difficulties in accessing hearings digitally: “We have contacted the court, been asked why we want to “observe” cases and been told that the judge concerned needs to explicitly give his/her permission. This has not been forthcoming.”<sup>238</sup>

***187. Whilst we welcome the expansion of technology to overcome the severe challenges facing the justice system, we are concerned to hear of these barriers to the public accessing court hearings. Virtual public galleries must be implemented to ensure scrutiny of criminal proceedings and respect for the principle of open justice. Public access should not be subject to the permission of judges. This is an important safeguard to ensure the right to a fair trial is being upheld.***

188. There are also ongoing concerns regarding the availability of technology, the quality of technology, and accessibility for those who may not be able to use the technology (for example, older and disabled people).<sup>239</sup> It is not clear whether special measures are being implemented for such persons. It is essential that persons with learning and communication impairments, particularly children, can participate effectively in the trial process. Effective participation is a key component of the right to a fair trial. The Justice Committee has recommended that the Ministry of Justice conduct an urgent review to evaluate the effect of Covid-19 measures in the Magistrates’ Courts and the Crown Court.<sup>240</sup> In the same report, the Justice Committee recommends that HMCTS set out a policy to ensure that court users, particularly those who may be vulnerable, are able to follow and participate in the virtual process.<sup>241</sup>

189. In written evidence, the UK National Preventative Mechanism notes that video remand hearings and virtual courts are having an impact on the time detainees spend in police custody: both the Independent Custody Visiting Association (ICVA) (England and Wales) and the Northern Ireland Policing Board Independent Custody Visiting Scheme have reported an increased length of stay in custody for some detainees.<sup>242</sup> The ICVA has also reported concerns regarding detainees giving informed consent for video link legal advice and, in particular, the ability of Appropriate Adults to be present to support effective informed consent for vulnerable detainees.<sup>243</sup>

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234 CA 2020, [Schedule 22\(8\)](#)

235 CA 2020, [Schedule 22\(2\)](#)

236 CA 2020, [Schedule 22\(4\)](#)

237 CA 2020, [Schedule 22\(4\)](#)

238 Transform Justice ([COV0013](#))

239 Equality and Human Rights Commission, [Inclusive justice: a system designed for all](#), April 2020

240 Justice Select Committee, Sixth Report of Session 2019–21, [Coronavirus \(COVID-19\): The impact on courts](#), HC 519, 30 July 2020, para 65

241 Justice Select Committee, Sixth Report of Session 2019–21, [Coronavirus \(COVID-19\): The impact on courts](#), HC 519, 30 July 2020, para 74

242 UK National Preventive Mechanism (NPM) ([COV0145](#))

243 The Independent Custody Visiting Association, [Scheme Feedback Summary](#), May 2020

190. *The expansion of live link technology in courts is to be welcomed as a means of avoiding delays in the criminal justice system. However, if such measures are to continue, the Government must ensure that digitally excluded persons, or those who are vulnerable, can participate effectively and are not disadvantaged. The technology must also be of sufficient quality to ensure a fair trial. It is crucial that defendants are provided with a direct and confidential line of communication with their representatives, just as they would have in person in court. The public must also be able to attend virtually to ensure the principle of open justice is preserved and to allow for scrutiny of proceedings.*

191. There have also been significant delays within the criminal justice system. Since the imposition of the lockdown, there has been a drastic reduction in in-person hearings and jury trials. This has served to exacerbate the backlog of criminal cases that predated the pandemic. This is particularly problematic where people may be remanded into custody. The CPS has issued a Covid-19 protocol concerning custody time limits (CTLs) to accommodate the inevitable delays, which sets out a temporary framework for handling cases during the pandemic.<sup>244</sup> CTLs safeguard defendants by preventing them from being held in pre-trial custody for an excessive period of time. The Prosecution of Offences Act and Regulations governing CTLs require the prosecution to progress cases to trial diligently and expeditiously.<sup>245</sup> The pre-Covid limit for summary and either-way offences was 56 days, and for indictable offences, 182 days, subject to applications for extension if there is “good and sufficient cause” and the prosecution has acted with all due diligence and expedition.<sup>246</sup> Extensions of CTLs are therefore possible on the grounds that the pandemic constitutes a good and sufficient cause. Given the significant reduction in the number of jury trials, the length of pre-trial detention for defendants remanded in custody is therefore likely to be much longer than the current time limits.

192. The Children's Commissioner for England is concerned that children who are remanded to custodial institutions are effectively serving time in prison without a sentence. She notes particular concern for children awaiting trial who are close to turning 18: “If they are not tried before their 18th birthday they will be tried as adults. These children will not benefit from the youth justice system, which is more rehabilitative. They will be given adult sentences (which are much longer) despite having committed the crimes as children. They will also lose their right to anonymity.”<sup>247</sup> Just Kids for Law reports that they are aware of many cases where children, both on remand and on bail, have had their hearing dates adjourned to late 2021.<sup>248</sup> The Justice Committee has also raised these concerns and has recommended that the Ministry of Justice should set out how many young defendants find themselves in this position and what is being done to address the issue.<sup>249</sup> ***Given these significant delays, where children turn 18 between the commission of the offence and their sentencing, they should be dealt with as children in the youth courts.***

193. On 7 September, the Government laid before Parliament the Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020, which are due to

244 Courts and Tribunals Judiciary, [Coronavirus Crisis Protocol for the Effective Handling of CTL Cases in the Magistrates' and Crown Court](#), 27 March 2020

245 Prosecution of Offences Act 1985 [Section 22](#), [Prosecution of Offences \(CTL\) Regulations 1987](#)

246 Prosecution of Offences Act 1985, [Section 22\(3\)](#)

247 Children's Commissioner for England ([COV0143](#))

248 Children's Rights Alliance for England/Just for Kids Law ([COV0148](#)), p7

249 Justice Select Committee, Sixth Report of Session 2019–21, [Coronavirus \(COVID-19\): The impact on courts](#), HC 519, 30 July 2020, para 23

enter into force on 28 September. The new Regulations extend the existing custody time limits for cases awaiting trial in the Crown Court from 182 days to 238 days. This means accused persons may now be held in pre-trial detention for almost 8 months.<sup>250</sup>

194. Various proposals have been considered to address the backlog; restricting the right to a jury trial to the most serious offences; replacing juries with a bench composed of a Crown Court judge and two magistrates;<sup>251</sup> reducing jury numbers; and opening new venues for trials.<sup>252</sup> So far, some courts have reopened on the basis of social distancing measures, and ten 'nightingale courts' have been established, which may ease the backlog slightly.

195. The backlog will continue to increase as arrests continue and individuals are charged with offences. Just for Kids Law, CRAE and the Youth Justice Legal Centre note that they are continuing to see many children arrested for minor offences and being held for long periods in police cells.<sup>253</sup> They suggest that officers must ensure that children are detained only where absolutely necessary or as a last resort, in line with the UN Convention on the Rights of the Child.<sup>254</sup>

196. These issues engage Articles 5 (right to liberty) and 6 (right to a fair trial) ECHR. Article 5(3) ECHR provides that "everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power". Article 5(3) is aimed at ensuring prompt and automatic judicial control of police or administrative detention. Article 5(3) provides that "everyone arrested or detained ... shall be entitled to trial within a reasonable time or to release pending trial ...". Article 6 provides that, "in the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time."

197. Whether a period of time spent in pre-trial detention is reasonable must be assessed on the facts of each case and according to its specific features. Continued detention therefore can be justified only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the respect for individual liberty. What constitutes a fair trial for the purpose of Article 6 must also depend on the circumstances of the particular case. Public interest concerns cannot justify measures which extinguish the very essence of a defendant's rights.<sup>255</sup>

**198. Whilst it is clear that the European Convention provides that defendants are entitled to appear before court within a reasonable time period, determining what is "reasonable" in the midst of a public health emergency is difficult. Delays are inevitable, and the margin of appreciation afforded to states during the pandemic is likely to allow for significant leeway given the exigencies of the situation, but prolonged pre-trial detention must be avoided. As trials are being adjourned for significant periods of time, extensions to custody time limits must be reviewed to ensure that persons who**

250 [Prosecution of Offences \(Custody Time Limits\) \(Coronavirus\) \(Amendment\) Regulations 2020](#)

251 "[Legislation to abolish some jury trials could be passed within weeks](#)", The Law Society Gazette, 23 June 2020

252 "[10 'Nightingale Courts' unveiled](#)", HM Courts & Tribunals Service, Ministry of Justice, and The Rt Hon Robert Buckland QC MP, 19 July 2020

253 Children's Rights Alliance for England/Just for Kids Law ([COV0148](#)), p6

254 Children's Rights Alliance for England/Just for Kids Law ([COV0148](#)), p6

255 [Ibrahim and Others v. the United Kingdom](#), [2014] ECHR 1392

***have not been convicted are not being held in detention for lengthy periods of time. All defendants have the right to a timely trial before an independent and impartial tribunal and this right must be respected and provided for as speedily as possible.***

## 9 Procedural obligations to protect the right to life

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### How the right to life is protected in the UK: the procedural obligations

199. The right to life (Article 2 ECHR)—including duties to protect the right to life—is at the centre of the Government's response to Covid-19. Alongside the substantive obligations which are discussed in more detail in chapter 3, are the procedural—or investigative—obligations under Article 2 ECHR which are engaged by the response to Coronavirus. The procedural Article 2 duty aims to find out why someone died as well as to identify any lessons to be learned from structural and institutional failings so as to avoid unnecessary deaths in the future.

200. Much has been said about concerns of both over and under reporting of Covid-19 related deaths.<sup>256</sup> Others will be better placed to consider issues around the collection and publication of data. For us, the concern is that any confusion or uncertainty will not help the Government in complying with its procedural Article 2 duties. Whilst these Article 2 procedural obligations will not be engaged by all Covid-related deaths, they will be engaged by some deaths from Covid-19, such as those in detention or some care settings or those that may have been due to structural or systemic failings such as a lack of PPE.

201. In the UK the procedural Article 2 obligations are met by a complex mesh of criminal investigations, coronial investigations, internal lessons learned reviews and inquiries. These tools have different focuses and are reliant on different sorts of legal powers and processes. Not all of these tools will be needed in order for the UK to discharge its article 2 duty in any given case. It is therefore not surprising that it can be difficult for individuals (and indeed institutions) to navigate these processes. The confusion between when these different sorts of inquiry and review are needed can lead to the UK failing adequately to fulfil its Article 2 investigative obligations (or else having unduly complicated or expensive processes).

202. There are a number of different ideas as to how to improve the navigation of the complex mesh of inquiries, inquests and reviews that can be required in order for the State to fulfil its procedural Article 2 obligations in a given case. One suggestion is that there should be some form of functional oversight role (e.g. a Commissioner or Office), such as the recent calls for an “office of Article 2 compliance” (e.g. in the Angiolini Review into deaths in custody).<sup>257</sup> The role of such a Commissioner or Office could ensure that the correct processes were undertaken where a case so required, and could take the burden off bereaved families so that they know that someone is tasked with ensuring that the

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256 A number of changes have been made to the statistics on recording deaths since the outbreak began. See for example, Full Fact, [What we know, and what we don't, about the true coronavirus death toll](#), 1 May 2020. More recently, the DHSC Press Release, [New UK-wide methodology agreed to record COVID-19 deaths](#) (12 August 2020) announced changes made to death from Covid-19 statistics following a review by Public Health England (PHE) of the methodology used to calculate the figures.

257 See in particular paragraphs 17.22–17.36 and the recommendations of the [Report of the Independent Review of Deaths and Serious Incidents in Policy Custody](#), Rt Hon Dame Elish Angiolini DBE QC, January 2017



correct procedures are followed. This role could also ensure that lessons are learned and best practice disseminated across the relevant bodies to help prevent future unnecessary deaths.

**203. The Government should give serious thought to establishing a Commissioner or Office of Article 2 compliance, to ensure that the correct processes are followed in cases requiring Article 2 investigations, without relying on bereaved families for ensuring appropriate follow-up. Such a body could ensure that lessons are learned, and that best practice is disseminated to relevant bodies to prevent future unnecessary deaths.**

### *Inquests*

204. A coronial inquest with a jury is not required for every Covid-19 death as Covid-19 is not a notifiable disease for that purpose. However, an inquest will be required as part of the State's duty in discharging its Article 2 obligations where there are certain questions arising from the death, for example if there are questions as to whether the deceased contracted Covid-19 due to inadequate protections in a hospital or a detention setting.

205. Importantly, an inquest must keep to the facts of the particular death under investigation. This focus on individual cases prevents coroners taking a wider view. For example, coroners cannot draw on the findings of previous inquests, which limits the preventative potential of their investigations. Coronial inquests are thus primarily aimed at looking at local issues surrounding an individual death, rather than State-wide or larger structural issues that may be contributing to deaths—in order to address those issues an Article 2 compliant inquiry would be needed.

**206. The absence of any imminent inquiry into Covid-19 deaths means that in England and Wales, and in Northern Ireland, inquests will be the principal means of discharging the UK's procedural duties under Article 2. Coronial courts will have to progress as best as they can all matters requiring a procedural Article 2 investigation in a given case.**

### **Interim lessons learned review to save lives**

207. The most urgent of these procedural Article 2 obligations in the Covid-19 context is to ensure that lessons are being learned as soon as possible so as to avoid unnecessary deaths in the future—including the near future. It is therefore crucial that some form of swift lessons learned review is undertaken as soon as feasible and incorporated into Government thinking in preparing for, and responding to, any second (or third) wave. In due course there will additionally be an inevitable need to ensure that coronial inquests and any eventual Government inquiry meet the procedural requirements of Article 2.

208. On 28 July 2020 the Chair wrote to the Secretary of State for Health and Social Care to ask what the Government was doing to fulfil the procedural and investigative requirements of Article 2 ECHR to investigate and learn lessons from deaths that have occurred during the Covid-19 outbreak, and in particular what steps he was taking to learn lessons to prevent future unnecessary deaths.<sup>258</sup>

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258 Letter to Rt Hon Matt Hancock MP, Secretary of State for Health and Social Care, Department of Health and Social Care, [regarding the right to life \(Article 2 ECHR\)](#), dated 28 July 2020



209. The Secretary of State replied on 19 August 2020 recognising the “essential role of continuous lesson learning both because of the scale and seriousness of the pandemic but also because COVID-19 is a new disease and the most effective ways of dealing with it are subject to emerging and rapidly developing evidence”.<sup>259</sup> He noted that there were various independent bodies, including Parliament that “secure accountability and enhance lesson-learning for Government policy and decision-making as well as operations”. He went on to list specific processes at places such as the Healthcare Safety Investigation Branch in relation to standards of NHS care, the Care Quality Commission in relation to those in care settings and the Health and Safety Executive in relation to deaths occurring in the workplace. He also referenced death certification and the coronial inquest process. He stated:

“We have built upon this well-established framework in light of the particular threat posed by COVID-19 to understand transmission and which groups of people are most at risk from this new disease, working closely with scientific colleagues in SAGE and NERVTAG to adapt our response as evidence evolves. We considered WHO recommendations and reviewed international best practice to inform our approach”.

**210. The most urgent of the procedural obligations in the Covid-19 context is to ensure that lessons are being learned as soon as possible so as to avoid unnecessary deaths. It is therefore crucial that some form of swift lessons learned review is undertaken as soon as feasible and incorporated in the Government's planning and response to any further waves of the pandemic.**

**211. Although it is reassuring to know that the Government values lesson learning and that there are a number of systems in place for regular investigations into deaths in health and care settings, this is not a sufficient response to their duties under Article 2. The systems referred to by the Government are not designed to review a complex and wide-ranging response to a pandemic. The response to the Coronavirus outbreak has necessarily not been equivalent to a standard response to an individual death in NHS care. The response has affected the entire population in profound (and profoundly different) ways. Therefore, the reviews and processes in place for individual deaths are obviously ill-adapted to the sort of review required in relation to a complex and wide-ranging response to a pandemic.**

***212. The Government should immediately organise a quick, interim review into deaths from Coronavirus to ensure that key lessons are learned as soon as possible, and in advance of any second peak in the Autumn/Winter. This review should be swift, independent and must be published.***

## **The need for an Article 2 compliant inquiry**

213. Those instigating an internal lessons learned review, a criminal investigation or a coronial investigation have clearly established processes and criteria for instigating such procedures, however such a clear procedure for inquiries is lacking. “Inquiries Act” inquiries can be established by a Minister where there is a matter of “public concern”. Relying on such Ministerial discretion to launch inquiries risks blurring the very focussed

<sup>259</sup> Response from Rt Hon Matt Hancock MP, Secretary of State for Health and Social Care, Department of Health and Social Care, [regarding the right to life \(Article 2 ECHR\)](#), dated 19 August 2020

inquiries that would be required to fulfil Article 2 obligations with the process and architecture suited to much wider political inquiries.<sup>260</sup> Broad inquiries also unhelpfully tend to be beset with requests to extend their scope, meaning that they land up costing more, taking more time and often not usefully fulfilling their narrower Article 2 purpose. This in turn can deter Ministers from launching an inquiry even where it is clear that one is needed to fulfil Article 2 obligations.

214. We welcome the Prime Minister's announcement that there will be an inquiry, although it is not yet clear when that will be, nor what its terms of reference may be.<sup>261</sup> The Prime Minister told the House of Commons that the Government would "seek to learn the lessons of the pandemic in the future, and certainly we will have an independent inquiry into what happened". He said, that he did not believe "that now, in the middle of combating the pandemic as we are, is the right moment to devote huge amounts of official time to an inquiry". We also note the work that the Public Administration and Constitutional Affairs Committee is doing on the specific form that such an inquiry should take.<sup>262</sup>

**215. It is very likely that an inquiry will be needed in order to fulfil the State's obligations under Article 2 ECHR to investigate structural issues affecting Covid deaths. We welcome the Prime Minister's announcement that there will be an inquiry. If such an inquiry is to be effective in learning lessons in time to save lives, it would ideally have clear, focussed objectives and be time-limited. *Such an inquiry should include consideration of (i) Covid-19 deaths in a detention setting; (ii) Covid-19 deaths of healthcare/care workers and PPE; (iii) Covid-19 deaths in care homes due to early releases from hospitals; (iv) deaths where the person has been denied access to critical care; (v) Covid-19 deaths of transport workers, the police and security guards due to inadequate PPE.***

**216. *The Government should consider whether there is a need for a more targeted and automated Article 2 inquiry process to enable a more cost-effective, depoliticised and focussed means for the UK to swiftly learn lessons from unnecessary deaths and discharge its right to life obligations.***

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260 Other inquiry models also exist, such as the Parliamentary Commission on Banking Standards. Although none are specifically geared to the needs of Article 2 inquiries.

261 HC Deb, 15 July 2020, [c1514](#)

262 Public Administration and Constitutional Affairs Committee "[What form should a Covid-19 public inquiry take?](#)", 21 July 2020

## 10 Accountability and scrutiny

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217. The CA 2020 and secondary legislation relevant to the Government's response to Coronavirus have had a far-reaching impact on our human rights yet have been subject to minimal debate and scrutiny by Parliament before coming into force.

### The Coronavirus Act 2020

218. The CA 2020 was fast-tracked through both Houses of Parliament. It was introduced in the House of Commons on 19 March 2020 and received Royal Assent less than a week later, on 25 March. It was debated for a single day in the House of Commons.

219. The importance of parliamentary scrutiny of the provisions was made evident by the concession the Government gave to introduce the 6-month review period in response to pressure from parliamentarians, including this committee. Section 98 of the Act requires the House of Commons to agree the motion that "That the temporary provisions of the Coronavirus Act 2020 should not yet expire" every six months after the Act was passed. It is not possible for individual provisions within the Act to be amended or struck out under this process. JUSTICE told us they were not convinced that this was "sufficient": "There is a risk that this form of review would lead to rubber stamping of the legislation in its entirety, if it is thought that there is continuing necessity for any amongst the emergency powers".<sup>263</sup>

220. Along with the 6-month review, the 2020 Act includes a so-called "sunset clause" of 2 years when provisions will automatically lapse. However, the Government may by regulation suspend (and revive) the operation of any provision of the Act,<sup>264</sup> or, by Regulations, shorten or extend (by up to 6 months at a time) the expiry date of provisions of the Act if necessary.<sup>265</sup>

221. Unusually, Ministers can use either the draft affirmative or the made affirmative to extend the CA 2020 provisions (including statutory provisions) beyond the point at which they would otherwise expire. Section 93(5) of the CA 2020 provides that changes to lengthen the application of a provision of the Act can be made using the "made affirmative" procedure for statutory instruments. Under the 'made affirmative' procedure, a statutory instrument becomes law when it is first made, but lapses if it is not approved by Parliament within a set time limit. Section 93(6) of the Act, however, also provides that the regular affirmative procedure, whereby parliamentary approval is required before the instrument becomes law, can be used. **We expect any extension to the expiry date of the Coronavirus Act provisions to be subject to parliamentary debate and approval before, not after, any extension comes into effect. The made affirmative should be avoided for such purposes.**

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263 JUSTICE ([COV0008](#))

264 See Coronavirus Act 2020, [Section 88](#)

265 See s. 90(1) Coronavirus Act in respect of Regulations to shorten the application of a provision of the Coronavirus Act. Such Regulations are subject to the affirmative procedure (see s. 93(1) CA). See s. 90(2) CA in respect of Regulations to lengthen (by a maximum of 6 months at a time) the application of a provision of the Coronavirus Act. Such Regulations are subject to the made affirmative procedure (see s. 93(6) CA) but may also be made under the regular affirmative procedure (see s. 93(5) CA). The Government may also, by Regulations, make transitional or savings provisions which could have the effect of prolonging the impact of a provision of the Act under Section 89 (3)

222. The important safeguards about review and sunseting in the CA 2020, do not apply to many of the most significant interferences with human rights, such as the lockdown measures. Similarly, the safeguards in the Civil Contingencies Act 2004 are not applicable. This is because rather than using the 2020 Act (including the opportunity to take time-limited and constrained powers under it) the Government has relied on the 1984 Public Health (Control of Disease) Act. **It is unfortunate that the Government has chosen not to use the powers within the Civil Contingencies Act 2004 or the Coronavirus Act 2020 to legislate. These pieces of legislation were designed to be used in emergencies, and contain specific safeguards to ensure that while the Government can act, its actions are subject to Parliamentary monitoring and approval. These safeguards, along with the opportunity for proper parliamentary scrutiny, are particularly important when human rights are engaged on such a massive scale. The Government must explain why it used the 1984 Act power for legislating rather than the Coronavirus Act 2020 or the Civil Contingencies Act 2004 with all the safeguards that these measures contain.**

### Use of statutory instruments

223. As we have said, the detailed law dealing with the pandemic is set out in delegated legislation, in this case regulations. The way in which Ministers can make delegated legislation is set out in the relevant act. Broadly speaking, regulations can either be laid before Parliament in draft, and take effect only on approval (“draft affirmative”), or be made by the Minister and be subject to either subsequent approval by Parliament (“made affirmative”) or continue in force unless Parliament votes against them (“negative”). Delegated legislation need not come into effect immediately after it is made, and indeed there is a convention (“the 21 day rule”) that negative procedure statutory instruments should not normally come into force for 21 days after they have been laid before Parliament. This both allows scrutiny, and gives those affected time to prepare.<sup>266</sup>

224. Given the context of emergency powers, most of the powers to make delegated legislation in the relevant acts are under the made affirmative or the negative procedure. On 28 July 2020 the Hansard Society noted that of the 158 Coronavirus-related statutory instruments laid before Parliament to date, 130 were subject to what it termed the ‘made negative’ procedure and 21 were subject to the ‘made affirmative’ procedure.<sup>267</sup> In our view, Ministers need to exercise the powers they are given in a way which allows the highest level of control and scrutiny possible. For example, they should only breach the 21-day rule when it is necessary to do so.

225. Yet the according to the Hansard Society, 97 of the 130 coronavirus related statutory instruments laid before Parliament breached the 21-day convention. For example, the Explanatory Notes to the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 explained that waiting 21 days would have imposed “extraordinary pressure” on local authorities, providers and services and that it was not possible to produce the instruments any sooner.<sup>268</sup> However, not all witnesses agreed with this analysis. The charity, Mind, noted in their evidence to this inquiry that “These changes and more were introduced overnight via statutory instrument, posing a real risk to the rights of children in care

266 Erskine May 25th edition, 31.16; Statutory Instrument Practice, para 2.11.4

267 Hansard Society, [Coronavirus Statutory Instruments Dashboard](#), updated 18 August 2020

268 Explanatory Memorandum (Supplementary) to the Adoption and Children (Coronavirus) (Amendment) Regulations 2020, [No. 445](#)

and a threat to their wellbeing.”<sup>269</sup> The National Youth Advocacy Service noted that the decision to by-pass the 21 day waiting period was taken even though “these changes affect the rights and entitlements of over 78,000 vulnerable children”.<sup>270</sup>

226. The decision to make face coverings compulsory in shops in England was first announced by the Government on 13 July. A statement to Parliament was made by the Secretary of State for Health and Social Care the next day. The Regulations were made and then laid on 23 July. This was the day after the House of Commons rose for summer recess.<sup>271</sup> They came into force the following day. The Regulations need to be approved within 28 sitting days or else they cease to have effect at the end of that period. However, as the instruments were not laid until the start of recess the clock did not start on those 28 days until 1 September. The Regulations themselves, however, are temporary and are due to expire 12 months after they came into force.

227. Even more concerning is the amount of legislation coming into force before it has even been laid before Parliament, which is now high in volume and becoming routine. The Government has had to write to the Speaker at least twenty-five times since March to explain why legislation has come into force before it has been laid before Parliament. The increased use of such an approach creates risks for the rule of law and the separation of powers.

**228. The use of emergency procedures for passing laws should be exceptional, limited to situations where the nature of the emergency itself requires the use of emergency procedures, and should require explicit justification, especially when human rights are at stake. The Government must consider whether a better balance could be struck between the flexibility of urgent legislation and the need for scrutiny by Parliament when legislating to respond to a public health crisis such as this.**

## Statements to Parliament

229. The Prime Minister announced the changes to the lockdown regulations on a Sunday evening to the press and public before making the announcement to Parliament. Sir Lindsay Hoyle, the Speaker of the House of Commons, has said, “major government announcements should be made first in the House and this is more important than ever during this time of crisis”. This reflects the requirement set out in the Ministerial Code that “When Parliament is in session, the most important announcements of Government policy should be made in the first instance, in Parliament”.<sup>272</sup> As Tom Hickman Q.C. has observed, the Government’s use of press conferences to make major announcements would seem to be contrary to the Code.<sup>273</sup>

230. Good scrutiny ensures good government, and good scrutiny requires information to be made available to Parliament in sufficient time for questions to be asked and Ministers to be held to account. **Major announcements should be made to Parliament rather than through news channels or other press briefings, especially when human rights of so many are to be engaged in so many ways.**

269 Mind ([COV0227](#))

270 NYAS (National Youth Advocacy Service) ([COV0149](#))

271 The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 ([SI 2020/791](#))

272 Cabinet Office, [Ministerial Code](#), August 2019, para 9.1

273 UK Constitution Law Association, [Tom Hickman: A very English lockdown relaxation](#), 14 May 2020

## Conclusions and recommendations

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### The Lockdown Regulations

1. *It is important that there is clarity for the public in relation to any criminal laws, and particularly laws relating to the lockdown. Information must be accessible to disabled people, especially those with cognitive impairments. (Paragraph 52)*
2. *More care must be taken by the Government to distinguish between advice, guidance and the law, in media announcements as well as in official online sources. There must be certainty—for Government, the public as well as lawyers and the police—as to what is prohibited by the criminal law. In particular, more must be done to make the up to date regulations themselves (not only guidance) clearly accessible online, particularly as the law has changed, on average, once a week. It ought to be straightforward for a member of the public to find out what the current criminal law is, nationally and in their local area, without having to trawl through multiple sets of confusingly named regulations. (Paragraph 53)*
3. Nonetheless, it is imperative that Government provide sufficient warning of changes to the law, and coordinate with appropriate bodies, so that police forces and bodies such as the NPCC and CoP have time to understand and explain those changes (Paragraph 57)
4. It is unacceptable that many thousands of people are being fined in circumstances where (a) the lockdown regulations contain unclear and ambiguous language, (b) there is evidence that the police do not fully understand their powers, (c) a significant percentage of prosecutions have been shown to be wrongly charged, (d) there has been no systematic review of FPNs and (e) there is no appeal or review provided for under the Regulations. (Paragraph 61)
5. There is currently no realistic way for people to challenge FPNs which can now result in fines of over £10,000 in some cases. This will invariably lead to injustice as members of the public who have been unfairly targeted with an FPN have no means of redress and police will know that their actions are unlikely to be scrutinised. *The Government should introduce a means of challenging FPNs by way of administrative review or appeal. (Paragraph 62)*
6. It is important that the rules also allow for reasonable flexibility to ensure that any interference with the right to protest under Article 10 and 11 is only to the extent necessary and proportionate. It is important that there is a consistent approach taken to preventing gatherings whether they be VE Day celebrations or Black Lives Matter protests. (Paragraph 63)

### Health and Care

7. *In order to prepare for further waves of Covid-19 or future pandemics, the Government must take steps to ensure that the allocation and prioritisation decisions and policies relating to the provision of PPE are evidence-based and non-discriminatory. (Paragraph 72)*



8. The blanket imposition of DNACPR notices without proper patient involvement is unlawful. The evidence suggests that the use of them in the context of the Covid-19 pandemic has been widespread. *The Court of Appeal has previously held that there is no legal requirement for the Government to implement a national DNACPR policy. However, the evidence suggests that the absence of such a policy has, in the context of the pandemic, led to systematic violation of the rights of patients under Articles 2 and 8 ECHR. The systematic nature of this violation means that it is now arguable that the Government is under such an obligation. Whether or not the events of the pandemic have changed the nature of the Government's legal obligation, we consider it would assist in the protection of patients' Article 2 and 8 rights if the Government did now set out such a policy. Such a policy should make clear, amongst other things, that DNACPR notices must never be imposed in a blanket fashion by care providers; the individuals must always be involved in the decision-making process, or where the individual does not have capacity, consultation must take place with persons with an interest in the welfare of the patient. It is not clear whether the documents promised by the Secretary of State will meet these requirements.* (Paragraph 76)
9. *We are concerned that decision-making relating to admission to hospital, in particular critical care, for adults with Covid-19 has discriminated against older and disabled people. We are also concerned that decisions made to support the capacity of the NHS to provide care for patients with Covid-19 have been made without adequate consideration of the impact on particular groups of others whose treatments have been cancelled or postponed in consequence. The Government must ensure both that clear national and local policies are in place to govern prioritisation of healthcare provision during a pandemic, and that those policies do not discriminate unlawfully.* (Paragraph 83)
10. *The decision to reduce care provision to certain individuals is a very serious matter, particularly in circumstances where care needs may have increased during the pandemic. The Government must justify its reasoning for the continuation of the powers to trigger easements to social care provision, and they must only continue if absolutely necessary and proportionate.* (Paragraph 89)
11. *If this power (which has barely been used thus far) is to continue beyond the six-month review period, the Government should issue specific guidance about meeting human rights standards in the discharge of obligations under the Care Act 2014 and develop guidance as to the content required of human rights assessments.* (Paragraph 90)
12. *The Government must ensure that local authorities and care providers are able to meet increased care and support needs during and resulting from the pandemic.* (Paragraph 91)
13. *We question whether removing vital protections for children was a proportionate response to the challenges posed to the children's social care system by Covid-19. The Government must justify its reasoning for the continuation of these powers, and they must only continue if they can be shown to be absolutely necessary and proportionate.* (Paragraph 94)
14. *The very high number of deaths from Covid-19 in care homes is a matter of deepest concern to us and engages the operational duty to secure life (Article 2 ECHR). The*

*causes behind it are complex and we have not been able to devote the necessary time and attention to address them fully in the context of this report. It is, however, imperative that they be interrogated thoroughly in order to meet the state's procedural obligations under Article 2. We urge the Government to ensure that addressing the issue of Covid-19 related deaths in care homes is dealt with as a priority in any inquiry or review they undertake (see chapter 9 below). (Paragraph 97)*

## Detention

15. *Lockdown restrictions in prisons must be subject to a reasoned and transparent human rights proportionality assessment and only used for the minimum time necessary. Children should not under any circumstances be subject to lockdown restrictions which amount to solitary confinement. (Paragraph 109)*
16. *Given the risk of further waves of the pandemic, the Ministry of Justice should carry out a full evaluation of its Covid-19 policy in prisons, young offender institutions and secure training centres as a matter of urgency and issue guidance on how to respond to future outbreaks. (Paragraph 110)*
17. *While short scrutiny visits by the prisons' inspectorate have proved an important source of information on what has been happening inside detention settings during the pandemic, continuing restrictions on inspections mean that human rights abuses may be going undetected in these settings. It is imperative that full inspections resume, safely, as soon as possible. (Paragraph 112)*
18. *Blanket visiting bans in prisons are incompatible with the right to family life (Article 8 ECHR). Any restriction on visiting rights must be shown to be necessary and proportionate in each individual case. As soon as it is safe to do so, prison visiting must resume as a matter of priority in all prisons. (Paragraph 115)*
19. *In accordance with the Government's commitments, in-cell telephones and facilities to make video calls must be installed in all prisons and young offenders institutions without delay, so that in the event that it is necessary to restrict prison visits again in the future, the technology is available to allow prisoners to maintain contact with their families and loved ones. (Paragraph 116)*
20. *At the time of writing the Government had not yet responded to our July 2020 report "Human Rights and the Government's response to COVID-19: children whose mothers are in prison". We urge them to commit to implementing our recommendations from this report in full at the earliest opportunity. (Paragraph 120)*
21. *We are currently awaiting the Government's response to both our previous reports on the detention of young people who are autistic and/or have a learning disability. Those reports exposed that young people in these settings were subjected to significant and frequent violations of their human rights. Our recommendations in these reports must be implemented in full as matter of urgency to bring these human rights violations to an end. (Paragraph 125)*
22. *The continued ability of the DHSC to bring changes to the Mental Health Act 1983 into force after the first six months of the CV Act must be justified or the powers repealed. If the powers are maintained in any way, the DHSC must publish the guidance to*

*accompany them so that it is possible for there to be scrutiny of their provisions. The Government should also make clear what steps it is taking to bring forward the White Paper promised to respond to the Independent Review of the Mental Health Act 1983. (Paragraph 128)*

23. *The Mental Health Tribunal should be supported to be able to discharge its functions with hearings conducted by three member panels, by video, wherever possible, and to enable the return of pre-hearing examinations, to minimise the impact of what has been a substantial diminution in the safeguards provided by the Tribunal. (Paragraph 130)*
24. We agree with Mr Justice Hayden that Deprivation of Liberty Safeguards (DoLS) provide 'indispensable safeguards' for those who are subject to them. Indeed, DoLS are more important than ever when those who lack capacity to consent to new restrictions on their freedoms may be subjected to such new restrictions intended to protect their right to life. DoLS provide a framework for verifying that such restrictions are necessary and proportionate. It is vital that DoLS authorisations are in place to ensure persons deprived of their liberty on the ground of mental incapacity have safeguards in place and the means to challenge their deprivation of liberty. (Paragraph 133)
25. *It is essential that Liberty Protection Safeguards are introduced in April 2022 and that there is no further delay. Resources must be allocated to ensuring that the new safeguards are implemented effectively, and that all those involved are properly trained, within the new timetable. (Paragraph 134)*
26. We hope that future DHSC guidance on visiting in care homes will allow for a more proportionate approach to visiting which minimises any necessary interference with residents' right to family life (Article 8 ECHR). *The Government must ensure that care homes are not implementing blanket bans on visiting. Restrictions on visiting rights must only be implemented on the basis of an individualised risk assessment and such risk assessment must take into account the risks to the person's emotional wellbeing and mental health of not having visits. (Paragraph 136)*
27. Where there is no reasonable prospect of removal within a reasonable timeframe, immigration detention ceases to be lawful. The Home Office should keep cases under review to ensure that individuals are not detained unlawfully. (Paragraph 140)
28. *For those individuals in immigration detention, as in other detention settings, steps taken to prevent the spread of the disease into and within detention settings should be reviewed at regular intervals and particular care should be taken in respect of individuals who are considered to be especially vulnerable to Covid-19 (Paragraph 141)*
29. The JCHR's previous report on immigration detention highlighted the importance of making detention decisions independent of the Home Office to ensure that the initial decision to deprive a person of their liberty is robust and fully justified. The Committee recommended that "in cases where detention is planned there should be properly independent decision-making" and that detention "decisions should be pre-authorised by a person or body fully independent of the Home Office." We

urge the Government to implement this recommendation: in the context of the pandemic it is more important than ever, given the risk to immigration detainees' health. (Paragraph 142)

30. There is no safeguard as to the length of storage of the biological information collected under powers relating to potentially infectious persons, nor safeguards relating to its destruction, and future use. *The Coronavirus Act should be amended to ensure this medical data is subject to adequate safeguards.* (Paragraph 148)
31. It is hoped that the vast majority of "potentially infectious" people will comply with public health advice, and that legal enforcement will not be necessary in such cases. In such circumstances, the Government must justify the continued need for an executive power to deprive a wide cohort of persons of their liberty. Article 5(1)(e) ECHR allows states to detain individuals "for the prevention of the spreading of infectious diseases ... ". Although the case law on Article 5(1)(e) is very limited in this context, it is clear that the courts will consider whether less severe measures have been considered and found to be insufficient to safeguard the public interest, before using detention as a last resort. *The Government must justify why it is necessary and proportionate for these extraordinary powers to remain law. In particular, the Government must provide evidence to Parliament that these powers are necessary for the prevention of the spread of Covid-19 and that the power to prosecute is not being misapplied. In the absence of any clear evidence to support the retention of these powers, they ought to be repealed.* (Paragraph 154)
32. *In order to allow Parliament to assess the Government's use of these significant powers, the Government must publish data setting out the number of individuals who have been subject to these powers, the number of individuals who have been charged under the new offences, and any successful appeals there have been against the use of these powers.* (Paragraph 155)
33. *There are some safeguards built into the powers, but if these powers are to be retained beyond the six-month review, these safeguards should be strengthened*
  - a) *The definition of "potentially infectious person" should be reviewed to ensure that its scope is not too wide and the powers are not open to abuse.*
  - b) *The Act provides that these powers may only be exercised where necessary and proportionate in the interests of the person, for the protection of other people, or the maintenance of public health. The Government should ensure its guidance is up to date and available for officers regarding the application of this test.*
  - c) *There should be minimum requirements for the designation of a "public health officer" to ensure only experienced and qualified persons are able to exercise such powers.*
  - d) *There should be robust safeguards as to the length of storage of the biological information collected, its destruction and future use.*

- e) *The only right of appeal provided for is in relation to powers exercisable post-screening and assessment. Individuals should be given a right of appeal to the Magistrates Court in relation to all powers, particularly given the option of judicial review is not an immediate and effective remedy for detained persons.*
- f) *Guidance from the Department for Health should be incorporated into the Act to state that if someone lacks the capacity to make an appeal, it can be made by someone on their behalf even if the person is not objecting or does not understand they can make a challenge. (Paragraph 156)*

## Contact Tracing

- 34. *It is welcome that the Government decided to stop the development of the centralised model for their contact tracing and is now working on a decentralised model instead. However, privacy issues remain. To build trust with users, which has been shaken by high-profile missteps, the Government should introduce legislation which defines what data will be collected, how long it can be held, when it will be deleted. Such legislation should include a ban on contact tracing data being shared for any purpose other than combating the spread of Coronavirus. (Paragraph 167)*
- 35. *Manual contact tracing is the main component of the UK's test, track and trace system. This still involves data being collected; indeed, that data is arguably more sensitive than that collected by the app. Whether that data is gathered digitally or manually, the legislation should limit how long manually gathered data can be held, define what type of information can be gathered, confirm when it will be deleted, and restrict it from being shared for any purpose other than combating the spread of Coronavirus. (Paragraph 168)*

## Children and the right to education

- 36. *The Government has obligations to ensure that all children have access to education and that the best interests of the child are a primary consideration in decision-making. Thus, the provision of education and the best interests of the child should be at the forefront of policy and decision making. (Paragraph 177)*
- 37. *Our evidence suggests that whilst school closures have affected all children, these closures have had different impacts for different groups of children. The effects of these different impacts - and how best to mitigate against unwanted impacts - should be factored into the Government's policy and decision-making. The disparity in education accessed by different groups of children suggests that there should have been better guidance to schools from the Government around continuity of education. The unequal access to education for disadvantaged children is of real concern and the Government must ensure that it does not lead to wider inequality in society. (Paragraph 178)*
- 38. *In particular, school closures have created specific barriers to children with SEND's access to their right to education. This is really concerning. We urge the Government to look into the effect that school closures have had on young people with SEND and to address any barriers to them returning to schools and accessing education. Where it*



*is not in the best interests of the child to be in school, for example if they are shielding, appropriate support should be provided to them so that they can learn from home. (Paragraph 179)*

39. Some of these changes to children's right to education were made through press announcements alone or through the use of Notices or Directions issued under powers in the Coronavirus Act. *The Government should not interfere with human rights without a clear legal base and should be clear as to whether it has legally changed children's rights or is merely changing messaging—such differences have been obscured during the Coronavirus crisis communications and this makes it difficult for parents and children to understand their rights. Whilst Government explanations, comments and press notices can be useful tools to explain legal changes, the Government must make it clear as to whether a new announcement, such as one purporting to “close schools” is made under legal powers to direct the closure of schools or is merely advisory—the rule of law is threatened if the Government obscures the legal status of its announcements. Further, legal documents—including Notices and Directions—which may interfere with human rights should be easily accessible. This is crucial for compliance with both the rule of law and human rights. The Government must ensure that all Notices and Directions interfering with human rights are published and readily available or signposted on gov.uk. (Paragraph 180)*

#### Access to Justice

40. The judicial approval of warrants is a necessary safeguard against unjustified interference with private and family life (Article 8). Extending the period of time before judicial approval of an urgent warrant is required could prolong any unjustified interferences with Article 8. *As part of the review process, the Government should provide to Parliament data on how many urgent warrants have been used during the emergency period, and the timeframe within which judicial approval was obtained. The Government should also inform Parliament whether the Investigatory Powers Commissioner has made a request that the Secretary of State vary the time allowed for urgent warrants, and the outcome of this request. (Paragraph 184)*
41. *Whilst we welcome the expansion of technology to overcome the severe challenges facing the justice system, we are concerned to hear of these barriers to the public accessing court hearings. Virtual public galleries must be implemented to ensure scrutiny of criminal proceedings and respect for the principle of open justice. Public access should not be subject to the permission of judges. This is an important safeguard to ensure the right to a fair trial is being upheld. (Paragraph 187)*
42. *The expansion of live link technology in courts is to be welcomed as a means of avoiding delays in the criminal justice system. However, if such measures are to continue, the Government must ensure that digitally excluded persons, or those who are vulnerable, can participate effectively and are not disadvantaged. The technology must also be of sufficient quality to ensure a fair trial. It is crucial that defendants are provided with a direct and confidential line of communication with their representatives, just as they would have in person in court. The public must also be able to attend virtually to ensure the principle of open justice is preserved and to allow for scrutiny of proceedings. (Paragraph 190)*



43. *Given these significant delays, where children turn 18 between the commission of the offence and their sentencing, they should be dealt with as children in the youth courts. (Paragraph 192)*
44. Whilst it is clear that the European Convention provides that defendants are entitled to appear before court within a reasonable time period, determining what is “reasonable” in the midst of a public health emergency is difficult. Delays are inevitable, and the margin of appreciation afforded to states during the pandemic is likely to allow for significant leeway given the exigencies of the situation, but prolonged pre-trial detention must be avoided. *As trials are being adjourned for significant periods of time, extensions to custody time limits must be reviewed to ensure that persons who have not been convicted are not being held in detention for lengthy periods of time. All defendants have the right to a timely trial before an independent and impartial tribunal and this right must be respected and provided for as speedily as possible. (Paragraph 198)*

### Procedural obligations to protect the right to life

45. The Government should give serious thought to establishing a Commissioner or Office of Article 2 compliance, to ensure that the correct processes are followed in cases requiring Article 2 investigations, without relying on bereaved families for ensuring appropriate follow-up. Such a body could ensure that lessons are learned, and that best practice is disseminated to relevant bodies to prevent future unnecessary deaths (Paragraph 203)
46. The absence of any imminent inquiry into Covid-19 deaths means that in England and Wales, and in Northern Ireland, inquests will be the principal means of discharging the UK's procedural duties under Article 2. Coronial courts will have to progress as best as they can all matters requiring a procedural Article 2 investigation in a given case. (Paragraph 206)
47. The most urgent of the procedural obligations in the Covid-19 context is to ensure that lessons are being learned as soon as possible so as to avoid unnecessary deaths. It is therefore crucial that some form of swift lessons learned review is undertaken as soon as feasible and incorporated in the Government's planning and response to any further waves of the pandemic. (Paragraph 210)
48. Although it is reassuring to know that the Government values lesson learning and that there are a number of systems in place for regular investigations into deaths in health and care settings, this is not a sufficient response to their duties under Article 2. The systems referred to by the Government are not designed to review a complex and wide-ranging response to a pandemic. The response to the Coronavirus outbreak has necessarily not been equivalent to a standard response to an individual death in NHS care. The response has affected the entire population in profound (and profoundly different) ways. Therefore, the reviews and processes in place for individual deaths are obviously ill-adapted to the sort of review required in relation to a complex and wide-ranging response to a pandemic. (Paragraph 211)

49. *The Government should immediately organise a quick, interim review into deaths from Coronavirus to ensure that key lessons are learned as soon as possible, and in advance of any second peak in the Autumn/Winter. This review should be swift, independent and must be published.* (Paragraph 212)
50. It is very likely that an inquiry will be needed in order to fulfil the State's obligations under Article 2 ECHR to investigate structural issues affecting Covid deaths. We welcome the Prime Minister's announcement that there will be an inquiry. If such an inquiry is to be effective in learning lessons in time to save lives, it would ideally have clear, focussed objectives and be time-limited. *Such an inquiry should include consideration of (i) Covid-19 deaths in a detention setting; (ii) Covid-19 deaths of healthcare/care workers and PPE; (iii) Covid-19 deaths in care homes due to early releases from hospitals; (iv) deaths where the person has been denied access to critical care; (v) Covid-19 deaths of transport workers, the police and security guards due to inadequate PPE.* (Paragraph 215)
51. *The Government should consider whether there is a need for a more targeted and automated Article 2 inquiry process to enable a more cost-effective, depoliticised and focussed means for the UK to swiftly learn lessons from unnecessary deaths and discharge its right to life obligations.* (Paragraph 216)

### Accountability and scrutiny

52. We expect any extension to the expiry date of the Coronavirus Act provisions to be subject to parliamentary debate and approval before, not after, any extension comes into effect. The made affirmative should be avoided for such purposes. (Paragraph 221)
53. It is unfortunate that the Government has chosen not to use the powers within the Civil Contingencies Act 2004 or the Coronavirus Act 2020 to legislate. These pieces of legislation were designed to be used in emergencies, and contain specific safeguards to ensure that while the Government can act, its actions are subject to Parliamentary monitoring and approval. These safeguards, along with the opportunity for proper parliamentary scrutiny, are particularly important when human rights are engaged on such a massive scale. The Government must explain why it used the 1984 Act power for legislating rather than the Coronavirus Act 2020 or the Civil Contingencies Act 2004 with all the safeguards that these measures contain. (Paragraph 222)
54. The use of emergency procedures for passing laws should be exceptional, limited to situations where the nature of the emergency itself requires the use of emergency procedures, and should require explicit justification, especially when human rights are at stake. The Government must consider whether a better balance could be struck between the flexibility of urgent legislation and the need for scrutiny by Parliament when legislating to respond to a public health crisis such as this. (Paragraph 228)
55. Major announcements should be made to Parliament rather than through news channels or other press briefings, especially when human rights of so many are to be engaged in so many ways. (Paragraph 230)

## Annex: Lockdown regulations in respect of England

This list was accurate at the time of writing (28 August 2020). Since then new national and local lockdown measures have been announced and/or contained in statutory instruments and undoubtedly more will be announced and/or come into force in the coming weeks.

Regulations	Laid before Parliament	In force	Link
The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 2020/350)*	26 March	26 March	<a href="#">Contents</a> <a href="#">PDF</a>
Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 (S.I. 2020/447)**	21 April	22 April	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020 (S.I. 2020/500)**	12 May	13 May	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020 (S.I. 2020/558)**	31 May	1 June	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (S.I. 2020/568)*	3 June	8 June	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 (S.I. 2020/588)**	12 June	13 and 15 June	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 (S.I. 2020/592)*	15 June	15 June	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (S.I. 2020/684)*	3 July	3 July	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 (S.I. 2020/685)***	3 July	4 July	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) Regulations 2020 (S.I. 2020/719)**	10 July	11 and 13 July	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020 (S.I. 2020/750)*	16 July	18 July	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (Leicester) (Amendment) Regulations 2020 (S.I. 2020/754)****	18 July	20 July	<a href="#">Contents</a> <a href="#">PDF</a>

Regulations	Laid before Parliament	In force	Link
The Health Protection (Coronavirus, Restrictions) (Leicester) (Amendment) (No. 2) Regulations 2020 (S.I. 2020/787)****	23 July	24 July	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 (S.I. 2020/791)*	23 July	24 July	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 2) Regulations 2020 (S.I. 2020/788)**	23 July	25 July	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Luton) Regulations 2020 (S.I. 2020/800)***	24 July	25 July	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) Regulations 2020 (S.I. 2020/822)***	31 July	1 August	<a href="#">Contents</a> <a href="#">PDF</a>
Health Protection (Coronavirus, Restrictions) (Leicester) (Amendment) (No. 3) Regulations 2020 (S.I. 2020/823)****	31 July	1 August	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions on Gatherings) (North of England) Regulations 2020 (S.I. 2020/828)***	4 August	5 August	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) (Amendment) Regulations 2020 (S.I. 2020/839)**	7 August	8 August	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions on Gatherings) (North of England) (Amendment) Regulations 2020 (S.I. 2020/846)****	7 August	8 August	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions on Gatherings) (North of England) (Amendment) (No. 2) Regulations 2020 (S.I. 2020/865)****	14 August	15 August	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (Leicester) (No. 2) (Amendment) Regulations 2020 (S.I. 2020/875)****	18 August	19 August	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) (Amendment) (No. 2) Regulations 2020 (S.I. 2020/882)**	21 August	22 August	<a href="#">Contents</a> <a href="#">PDF</a>

Regulations	Laid before Parliament	In force	Link
The Health Protection (Coronavirus, Restrictions on Gatherings) (North of England) (Amendment) (No. 2) Regulations 2020 (S.I. 2020/897)****	25 August	26 August	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) (Amendment) Regulations 2020 (S.I. 2020/898)****	25 August	26 August	<a href="#">Contents</a> <a href="#">PDF</a>
The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place and on Public Transport) (England) (Amendment) Regulations 2020 (S.I. 2020/906)**	27 August	28 August	<a href="#">Contents</a> <a href="#">PDF</a>
Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020 (S.I. 2020/907)**	27 August	28 August	<a href="#">Contents</a> <a href="#">PDF</a>

Key: National regulations\* / Amending national regulations\*\* / Local regulations\*\*\* / Amending local regulations\*\*\*\*

## Declaration of Interests

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### **Lord Brabazon of Tara**

- No interests to declare

### **Lord Dubs**

- No interests to declare

### **Baroness Ludford**

- Vice-President of Justice

### **Baroness Massey of Darwen**

- No interests to declare

### **Lord Singh of Wimbledon**

- No interests to declare

### **Lord Trimble**

- No interests declared



# Formal minutes

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**Monday 14 September 2020**

Virtual Meeting

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP	Lord Dubs
Ms Karen Buck MP	Baroness Massey of Darwen
Joanna Cherry MP	Lord Singh of Wimbledon
Dean Russell MP	Lord Trimble

Draft Report (*The Government's response to COVID-19: human rights implications*), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 230 read and agreed to.

Annex and Summary agreed to.

*Resolved*, That the Report be the Seventh Report of the Committee.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of House of Commons Standing Order No. 134.

[Adjourned till 28 September at 2.00pm.]

## Witnesses

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The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

### Monday 20 April 2020

**Rt Hon Robert Buckland QC MP**, Lord Chancellor and Secretary of State, Ministry of Justice; **Andrew Waldren**, Deputy Director, Human Rights Team, Ministry of Justice

[Q1–9](#)

### Monday 4 May 2020

**Dr Orla Lynskey**, Associated Professor of Law, London School of Economics; **Dr Michael Veale**, Lecturer in Digital Rights and Regulation, University College London

[Q10–14](#)

**Matthew Gould CMG MBE**, CEO at NHSX, Department of Health and Social Care; **Dr Ian Levy**, Technical Director, National Cyber Security Centre; **Elizabeth Denham CBE**, UK Information Commissioner, Information Commissioner's Office; **Simon McDougall**, Executive Director, Technology and Innovation, Information Commissioner's Office

[Q15–26](#)

### Monday 18 May 2020

**Adele Green**; **Andrea Attree**

[Q27–30](#)

**Dr Kevin Cleary**, Deputy Chief Inspector of Hospitals (and lead for mental health and community services), Care Quality Commission; **Kate Terroni**, Chief Inspector of Adult Social Care, Care Quality Commission; **Ray James CBE**, Director, Learning Disabilities, NHS England and NHS Improvement; **Claire Murdoch**, National Director Mental Health, NHS England and NHS Improvement

[Q31–37](#)

### Monday 8 June 2020

**Witnesses supported by Children Heard and Seen**

[Q38](#)

**Lucy Frazer QC MP**, Minister of State, Ministry of Justice; **Naomi Mallick**, Legal Director, Ministry of Justice; **Jo Farrar**, Chief Executive Officer, HM Prison and Probation Service

[Q39–52](#)

## Published written evidence

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The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

COV numbers are generated by the evidence processing system and so may not be complete.

- 1 Adolphe, Mrs Nicola ([COV0036](#))
- 2 The Advocacy People ([COV0089](#))
- 3 Age UK ([COV0116](#))
- 4 akt ([COV0186](#))
- 5 Alhelbawy, Dr Ayman ([COV0090](#))
- 6 Alliance for Inclusive Education ([COV0160](#))
- 7 Alton, Lord Alton of Liverpool David ([COV0095](#))
- 8 Amnesty International UK ([COV0252](#))
- 9 Amnesty International UK, and Migrant Voice ([COV0067](#))
- 10 Amnesty International UK, and Migrant Voice ([COV0104](#))
- 11 Amos, Professor Merris ([COV0029](#))
- 12 Amos, Professor Merris ([COV0026](#))
- 13 Anti-slavery International ([COV0237](#))
- 14 Appleton, Yana ([COV0034](#))
- 15 Article 39 ([COV0175](#))
- 16 ATD Fourth World UK ([COV0198](#))
- 17 Atkinson, Mr Luke ([COV0071](#))
- 18 Basu, Dr Subhajit ([COV0108](#))
- 19 Bestel, Dr Sheahan ([COV0042](#))
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