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**JOINT COMMITTEE ON
HUMAN RIGHTS
CHAIR'S BRIEFING PAPER**



**THE HEALTH PROTECTION (CORONAVIRUS, RESTRICTIONS) (ENGLAND)
REGULATIONS 2020 & THE LOCKDOWN RESTRICTIONS**

SUMMARY: The Health Protection (Coronavirus, Restrictions) (England) Regulation 2020 and their counterparts in the other UK jurisdictions give legal effect to the “lockdown”. These Regulations must be reviewed by the Health Secretary every 21 days, with the next review being by 16 April.

This lockdown is the most significant and blanket interference with individual liberty in modern times. Such extreme measures can only be considered lawful, justified, necessary and proportionate if (1) the threat from disease and death remains sufficiently significant to justify such extraordinary measures; (2) the measures only interfere with human rights and civil liberties to the extent necessary; (3) the measures are enforced in a clear, reasonable and balanced manner; (4) enforcement is authorised, and does not go beyond what is prohibited, by law.

The ‘lockdown’ restriction (Regulation 6) allows for people to leave their homes provided they have a “reasonable excuse”. There is a non-exhaustive list of what could be a reasonable excuse. In order to be proportionate, “reasonable excuse” must be interpreted broadly and in the way that least infringes with the right to private and family life and other civil liberties. The lockdown restriction is supplemented by a ban on almost all public ‘gatherings’ of more than two people who are not from the same household.

Any enforcement action taken by the police will need to maintain a close link to the health protection objective of these extraordinary measures. The helpful National Police Chief’s Council and College of Policing Guidance makes clear that there is no power to “stop and account”. Therefore, the police should not be intercepting people who they do not suspect to be causing health risks by their behaviour in violation of Regulation 6 or 7. Further steps could be taken to ensure that the enforcement powers are clear and proportionate.

The restriction and its enforcement also needs to be flexible to different needs. For example, some people may need to go out of their homes to avoid a family dispute (given the significantly increased risks of domestic violence under lockdown), other may have specific social or mental health needs. It could be helpful for the (continually improving) guidance to clarify these situations further so that people do not suffer as a result of being afraid to take necessary fresh air and exercise.

Additionally, it may be necessary specifically to consider what measures are proportionate to facilitate reasonable exercise for those living in crowded cities without ready access to outdoor spaces, where the policing and health risk challenges are very different from those living in rural or less populated areas.

I. Introduction

1. The Health Protection (Coronavirus Restrictions) (England) Regulations 2020 ('the Regulations') were made and came into force on Thursday 26 March 2020. Equivalent measures were made in respect of Wales, Scotland and Northern Ireland. The Regulations give legal effect to the nationwide 'lockdown' announced by the Prime Minister on Monday 23 March. They impose the most wide-ranging restrictions on individual liberties, affecting the greatest number of people, since the Defence Regulations made during the Second World War. Despite their extent, the Regulations have not been subject to any Parliamentary scrutiny because they were promulgated by the Secretary of State for Health under emergency powers. Unsurprisingly, this has resulted in a number of potentially important human rights issues arising, most pertinently (a) ambiguity caused by the gap between the legal requirements of the Regulations and the Government's public messaging, (b) ambiguity (in both drafting and policy) about what might be the situation for certain issues e.g. people feeling stressed and needing air, people travelling by car, the needs of disabled people, and (c) enforcement and implementation in practice being disproportionate/powers being misunderstood.
2. The four sets of Regulations apply in culmination to everyone in the United Kingdom and impose swingeing restrictions on everyday life, potentially interfering with a number of ECHR rights, including Article 8 (the right to respect for privacy and family life), Article 9 (freedom of religion) and Article 11 (freedom of association). In broad terms, those interferences can be justified if they are proportionate means of protecting public health.
3. However, the devil is in the detail, and it is conceivable that certain aspects of the restrictions may, for example, disproportionately and unjustifiably impact on particular groups such as people with specific social needs, mental health issues, autism or disabilities¹ and the recent updated guidance to help to address that issue is welcome although it is regrettable that change only happened after a threat of legal challenge. It is likely that such concerns will emerge in the coming days and weeks as the impact of the Regulations becomes clearer, however at present the non-exhaustive list of 'reasonable excuses' (relating to restrictions on movement under the lockdown) allows for significant flexibility, as long as the police apply a flexible approach.
4. Moreover, the Secretary of State is required under the terms of the Regulations² and under human rights principles to immediately discontinue any restriction which

¹ See for example the concerns raised by barristers Aswini Weererante QC and Sophy Miles in an article relating to the likely effect of the Regulations and the Coronavirus Act on people who lack mental capacity: <https://insights.doughtystreet.co.uk/post/102g3es/coronavirus-and-detention-under-the-mental-health-act>
A legal challenge has also been launched against the Government's guidance that people may only exercise once per day: <https://www.bindmans.com/news/disabled-people-and-carers-challenge-governments-limit-on-outdoor-exercise>

² See Regulation 3 which requires that the Secretary of State must review the need for restrictions and requirements at least once every 21 days, with the first review being carried out by 16th April 2020, and as soon as the Secretary of State considers that any restrictions or requirements are no longer necessary to

is no longer necessary. This means that ‘real time’ scrutiny by Parliament and civil society of the effect of these Regulations on the general public is essential.

II. Overview of the Regulations

5. The Secretary of State made the Regulations on 26 March, at 1pm. They came into force immediately.³ The Regulations were made under section 45C, 45F and 45P of the Public Health (Control of Disease) Act 1984 (“the 1984 Act”). The 1984 Act 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”.⁴ In accordance with section 45R of the 1984 Act the Secretary of State was of the opinion that, by reason of urgency, it was necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament.
6. The Regulations put the new measures announced by the Prime Minister on 23 March on a statutory footing, making them legally enforceable from 1pm on Thursday 26 March. It is important to note that prior to this, there was no legal basis for the announced restrictions on movement and gatherings. We have more general concerns about the recent disconnect between laws that are in force and therefore binding, and “announcements”, “directions” or “instructions”⁵ from Government which have no legal force, but which are communicated in such a way as to appear binding. It is crucial that enforcement authorities are clear on the law. Otherwise there are real risks in respect of the rule of law and potentially also Article 7 ECHR (no punishment without law).
7. Under the Regulations, the Secretary of State must review the need for restrictions and requirements imposed by the Regulations at least once every 21 days, with the first review being carried out by 16 April.⁶ As soon as the restrictions or requirements are no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England of coronavirus, the Secretary of State must publish a direction terminating that restriction or requirement.⁷
8. The Regulations provide for various restrictions and requirements during the ‘emergency period’⁸ as set out below.

prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus, he must publish a direction terminating that restriction or requirement.

³ These Regulations were made under section 45C, 45F and 45P of the Public Health (Control of Disease) Act 1984.

⁴ Section 45(3)(c) PHA 1984.

⁵ For example, on 10 April the Health Secretary Matt Hancock said at the daily Government press conference: “This advice is not a request – it is an instruction. Stay at home, protect lives and then you will be doing your part.”

⁶ Regulation 3(2).

⁷ Regulation 3(3).

⁸ The emergency period is defined in Regulation 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.

(i) Requirements to close premises and businesses during the emergency (including holiday accommodation, places of worship, community centres, crematorium, and burial grounds):

- a. A person responsible for a listed business must close any premises, or part of the premises in which food or drink are sold for consumption on those premises, and cease selling food or drink for consumption on its premises; or if the business sells food or drink for consumption off the premises, cease selling food or drink for consumption on its premises during the emergency period.⁹
- b. A person responsible for a business¹⁰ offering goods for sale or for hire in a shop, or providing library services must, during the emergency period:
 - i. cease to carry on that business or provide that service except by making deliveries or otherwise providing services in response to orders received through a website, or otherwise by on-line communication, by telephone, including orders by text message, or by post;
 - ii. close any premises which are not required to carry out its business or provide its services.
 - iii. cease to admit any person to its premises who is not required to carry on its business or provide its service.¹¹
- c. A person responsible for carrying on a business consisting of the provision of holiday accommodation, whether in a hotel, hostel, bed and breakfast accommodation, holiday apartment, home, cottage or bungalow, campsite, caravan park or boarding house, must cease to carry on that business during the emergency period.¹² This is subject to an exception that such businesses may keep premises open for certain specified purposes, such as providing accommodation to the homeless or hosting blood donation.¹³
- d. A person who is responsible for a place of worship must ensure that, during the emergency period, the place of worship is closed, except for permitted uses (funerals, to broadcast an act of worship, or to provide essential voluntary services or urgent public support services e.g. food banks).¹⁴
- e. A person who is responsible for a community centre must ensure that, during the emergency period, the community centre is closed except where it is used to provide essential voluntary activities or urgent public support services (including the provision of food banks or other support

⁹ Regulation 4

¹⁰ Other than those listed in Part 3 of Schedule 2

¹¹ Regulation 5 (1)

¹² Regulation 5(3)

¹³ Regulation 5(3)

¹⁴ Regulation 5(5)

for the homeless or vulnerable people, blood donation sessions or support in an emergency).¹⁵

- f. A person who is responsible for a crematorium or burial ground must ensure that, during the emergency period, the crematorium is closed to members of the public, except for funerals or burials.¹⁶

(ii) **Restrictions on movement:** 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 state that a “reasonable excuse includes” various reasons:

- a. to obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household) or for vulnerable persons and supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person, or to obtain money;
- b. to take exercise either alone or with other members of their household;
- c. to seek medical assistance;
- d. to provide care or assistance, including relevant personal care to a vulnerable person, or to provide emergency assistance;
- e. to donate blood;
- f. to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living;
- g. to attend a funeral of a member of the person’s household, a close family member, or if no-one within the household or family are attending, a friend;
- h. to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings;
- i. to access critical public services, including:
 - i. childcare or educational facilities (where these are still available to a child in relation to whom that person is the parent, or has parental responsibility for, or care of the child);
 - ii. social services;
 - iii. services provided by the Department of Work and Pensions;
 - iv. services provided to victims (such as victims of crime).
- j. in relation to children who do not live in the same household as their parents, or one of their parents, to continue existing arrangements for access to, and contact between, parents and children;

¹⁵ Regulation 5(7)

¹⁶ Reg 5(8)

- k. in the case of a minister of religion or worship leader, to go to their place of worship;
 - l. to move house where reasonably necessary;
 - m. to avoid injury or illness or to escape a risk of harm.
- (iii) **Restrictions on gatherings.** Regulation 7 provides that, during the emergency period, no person may participate in a gathering in a public place of more than two people. There are a number of exceptions to this restriction:
- a. where all the persons in the gathering are members of the same household,
 - b. where the gathering is essential for work purposes,
 - c. to attend a funeral,
 - d. where reasonably necessary:
 - i. to facilitate a house move,
 - ii. to provide care or assistance to a vulnerable person, including relevant personal care,
 - iii. to provide emergency assistance, or
 - iv. to participate in legal proceedings or fulfil a legal obligation.¹⁷

9. It is important to note that this list of “reasonable excuses” in Regulation 6 (restrictions on movement) is not exhaustive. Any person leaving their place of residence for a reason not listed above will therefore need to rely on having a “reasonable excuse”. Unlike Regulation 6, the list of exemptions in Regulation 7 is exhaustive - there is no defence of “reasonable excuse”.

10. These restrictions on movement and on gatherings potentially interfere with:

- a. The right to respect for a private and family life (Article 8 ECHR)
- b. Freedom of thought, conscience and religion (Article 9 ECHR)
- c. Freedom of assembly and association (Article 11 ECHR)
- d. The protection of property (Article 1 Protocol 1 ECHR).

11. The Regulations also create new summary offences, potentially engaging the right to liberty (Article 5) and the right to a fair trial (Article 6).

12. Each of these rights is qualified. They may be lawfully interfered with in accordance with the law, on the grounds of public health, where necessary and proportionate. Prior to these Regulations coming into force, the enforcement of these restrictions on movement was not prescribed in law. However, the restrictions are now on a legal footing (“in accordance with the law”) and the justification for the interference is the public health emergency. The proportionality of these restrictions must be judged in accordance with what is necessary for public health purposes and whether any less intrusive measures could be used instead.

¹⁷ Regulation 7

III. Analysis of the Regulations

13. The Regulations require most businesses, places of worship, community centres, crematoriums and burial grounds to close (Regulations 4 and 5), prevent citizens from leaving their homes without ‘reasonable excuse’ (Regulation 6) and almost entirely restrict gatherings of more than two people (Regulation 7). They give police extensive powers of enforcement which include issuing ‘prohibition notices’ to businesses (Regulation 8), the power to use reasonable force to remove a person to the place where they are living (Regulation 8), the creation of criminal offences for breaching the Regulations or obstructing someone carrying out a function under the Regulations (Regulation 9) and the imposition of fixed penalty notices ranging from £30 for a first notice to £960 for a third notice to someone breaching the Regulations.
14. The Regulations were promulgated at speed and without any prior Parliamentary scrutiny. They were made, laid before Parliament and came into force on 26 March 2020, following the Prime Minister’s announcement of new restrictions on life in the UK on 23 March 2020. They were made under the powers conferred by the 1984 Act.¹⁸ The 1984 Act permits regulations to be made where they are “*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*”.
15. It is necessary for the police to be given powers to enforce the ‘lockdown’ announced by the Prime Minister. The state has a positive duty to protect life under Article 2 ECHR and, as stated above, the Parliament has, through the 1984 Act, given power to the Government to make regulations to prevent the spread of an infectious disease. Moreover, the law specifically envisages situations where the Regulations need to be made, because of the urgency, prior to Parliamentary scrutiny and the current situation seems to meet those criteria. However, it is then all the more important for Parliamentary scrutiny once those Regulations are made – and there is an opportunity to help inform the 21-day reviews of the Regulations.
16. There are three areas of concern highlighted below in relation to the Regulations. Engaging on these issues is important because (a) as stated above, these Regulations impose the most wide ranging restrictions on civil liberties for at least 75 years, so Parliament has a responsibility to provide scrutiny, (b) the Regulations or their successors are likely to last for a number of further weeks or months and therefore it may be possible and indeed necessary to ‘iron out’ these issues, and (c) the Secretary of State for Health is obliged to review the Regulations by 16 April 2020 (and at 21 day intervals thereafter).
 - (i) ***Communications: Rule of law & Article 7 ECHR (no punishment without law)***
17. There is a requirement under Article 7 ECHR, 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

¹⁸ Specifically sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P

need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him or her liable.¹⁹ It is therefore essential that new 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 suggest that things are unlawful that are not unlawful on the face of the law. If it did so and this led to convictions, it would breach Article 7 ECHR (no punishment without law). The communication challenge is particularly acute where the new laws are so wide-ranging and introduced at the same time as they come into force, i.e. with no possibility for a public education campaign.

18. The lockdown was announced three days prior to legal powers being put in place to enforce it, which generated a significant risk of Article 7 breaches if enforcement occurred prior to the laws being in place, or occurred after 26 March in relation to events which occurred from 23-26 March. On Monday 23 March the Prime Minister announced the “lockdown” (seemingly with immediate effect). However, prior to the Regulations being made on Thursday 26 March, such an announcement had no legal effect. So there was no legal basis for the announced restrictions on movement and gatherings. Therefore, any attempts to enforce them prior to that date were unlawful and would have been an unlawful interference with human rights.
19. There have, moreover, been significant inconsistencies in public communication about the new Regulations. There are a number of different sources of information, in particular: (i) the Regulations which set out the law; (ii) Government guidance that is intended to try to explain the Regulations, for example to give examples of what might be a “reasonable excuse”; and (iii) Government advice that has no relation to the Regulations (or to criminal law) but suggests recommended best practice or behaviour. All of these differ in material respects and have become confused. Not least as the Government and police seem at different times to refer to all three as the “rules” even though only one of these three is legally binding law. The table in the Annex to this briefing paper attempts to distinguish between what is in the law and what is in advice/guidance in the four constituent parts of the UK.
20. A prominent example is the guidance and the law relating to how often people can take exercise outside of their homes. This is an important issue for tens of millions of people so guidance and law must be as clear as possible. The current guidance states that “*you can [...] still go outside **once a day** for a walk, run, cycle*” (original emphasis in guidance)²⁰ and “*you can still go to the park for outdoor exercise once*

¹⁹ 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]

²⁰ <https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do>

a day". The regulations for England, Northern Ireland²¹ and Scotland²² allow for a person to leave the house for a "reasonable excuse", which explicitly includes for taking exercise. However, there is no limit on the number of times a person can take exercise. Confusingly, the Welsh regulations do specify that individuals can only take exercise "*no more than once a day*".²³ It is difficult to understand why a blanket "once per day" restriction on exercise might be considered necessary and proportionate, particularly given that these are blanket measure applying to many different situations. Moreover, it is arguable that the correct approach in dealing with what appears to be a small minority of people creating a public health risk, is to take action to enforce the rules in respect of those people and/or areas which pose a threat, rather than putting in place unduly restrictive rules for all.

21. The communication of the guidance and new laws has at times been confusing and unclear leading to widespread confusion as to what people are and are not permitted to do. For example, the Prime Minister's statement of 23 March 2020²⁴ referred only to four "*very limited purposes*" which it stated were "*the only reasons you should leave your home*". Those reasons have now been expanded upon on the gov.uk website by a number of questions and answers. However, the Regulations, which came into force three days later, provide a non-exhaustive list of "*reasonable excuses*" for which people are legally permitted to leave the house. Not only is this list non-exhaustive, but it specifically includes important reasons which are not mentioned at all in the Government guidance (or advisory announcements), for example to access social services (Reg 6(i)(ii)), for children of two parents who live apart to travel between homes (Reg 6(j)) and to fulfil a legal obligation (Reg 6(h)).
22. Moreover, both ministers and police have given statements which have further muddied the waters. For example:
 - a. A number of police forces, at least initially, interpreted the guidance and Regulations as preventing 'non-essential' travel, despite this not forming part of either the guidance or the Regulations. 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.*"²⁵ 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 is, however, no restriction to "essential travel" in either the Government guidance or the Regulations. The Glossop Police guidance

²¹ <https://www.health-ni.gov.uk/sites/default/files/publications/health/Coronavirus-Restrictions-Regs-2020.pdf>

²² <http://www.legislation.gov.uk/ssi/2020/103/contents/made>

²³ The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, Regulation 8(2)(b)

²⁴ <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020>

²⁵ <https://www.newsandstar.co.uk/news/18344970.picking-puppy-not-essential-travel/>

was removed later in the day. A number of police forces have set up roadblocks to question motorists as to whether their journey is “essential”.²⁶

- b. The helpful National Police Chief’s Council (‘NPCC’) and College of Policing (‘CoP’) guidance produced on 31 March made clear “*we don’t want the public sanctioned for travelling a reasonable distance to exercise. Road checks on every vehicle is equally disproportionate*”.²⁷ However, it is not clear that all police forces have internalised this guidance. On 9 April it was reported that the Northamptonshire Police Chief has said “*the three week ‘grace period’ of lockdown is now over*” and because a small number of people had been flouting the regulations “*the force may have to resort to more extreme measures such as road blocks and searching shopping trolleys should people continue to break the rules*”.²⁸
- c. The Derbyshire Police force has defended its initial use of drones to highlight people exercising away from their homes in the Peak District by saying that the “emergency laws were unclear”.²⁹
- d. The morning after the Prime Minister’s announcement on 23 March, the Minister for the Cabinet Office, Michael Gove said on *Good Morning Britain* that children of two parents living in different households should stay in one household – he later apologised and said “*this is permissible and has been made clear in the guidance*”, however as stated above the current guidance does not mention the issue, even though the law is actually clear – it is clearly stated on the face of Regulation 6(2) that this sort of movement is a “reasonable excuse”.
- e. On 31 March, 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 is, 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.³⁰

23. It is understandable that the introduction of such wide-ranging restrictions and advice at speed will lead to some confusion at least in the immediate period after it is introduced. However, there has been a worryingly haphazard approach to communicating the content of the guidance and advice and how either of these relate to the new Regulations. This will inevitably lead to members of the public

²⁶ <https://www.wokinghampaper.co.uk/police-set-up-roadblock-to-check-drivers-are-on-essential-journeys/>

²⁷ Covid-19 – Policing brief in response to Coronavirus Government Legislation, 31.3.20
<https://www.college.police.uk/Documents/COVID-19-Police-brief-in-response-to-Coronavirus-Government-Legislation.pdf>

²⁸ <https://www.mirror.co.uk/news/uk-news/breaking-police-chief-issues-lockdown-21838760>

²⁹ <https://www.theguardian.com/uk-news/2020/mar/31/derbyshire-police-chief-defends-forces-reaction-to-lockdown>

³⁰ <https://www.theguardian.com/world/2020/mar/31/no-10-slaps-down-shapps-over-shop-once-a-week-comment-coronavirus>

and the police not understanding the current law.³¹ The NPCC/CoP guidance, updated on 31 March³², has improved matters significantly and should lead to more consistent and appropriate policing. However, this updated guidance was released five days after the Regulations came into force, and replaced an earlier version of the guidance which was criticised.

24. It is crucial that Government and police messaging reflects the law. To do otherwise risks real confusion with members of the public being punished without any legal basis, contrary to Article 7 ECHR and the rule of law. Similar concerns arise where members of the public feel intimidated into not leaving their homes, raising potential Article 8 and 11 ECHR issues. The Secretary of State should ensure that the public and police are clear in relation to the current guidance and Regulations and that the significant communications issues identified above are not repeated for any future changes to the guidance or Regulations.
25. It is therefore essential that any future changes are carefully coordinated, in advance, with the police and relevant advisory bodies such as the NPCC and CoP so that all public communications are consistent, and moreover that all Ministers and Government Representatives keep their public statements to clear briefing notes on what is and is not permitted. Such an approach will not only protect the public from unlawful interferences with their rights, but will also ensure good relations between the police and the general public in these difficult times. In these circumstances, maintaining trust between the public and public authorities is of paramount importance in achieving the objective of preventing the spread of Covid-19.

(ii) **Policing**

26. A number of concerns have been raised over the drafting of the Regulations, which are in places unclear and potentially contradictory. For example, Dijen Basu QC has raised drafting issues in relation to the Regulations and has written that:

“Emergencies require emergency action. Emergency action is not the same as hasty action. The current emergency action requires restrictions on liberty. Any restriction on liberty which is backed by the potential of coercive law enforcement action and penalties involving having a criminal record and paying a potentially unlimited fine, must be contained in very clearly expressed legislation so that it can be applied consistently, proportionately and rationally. No citizen of a free country – including a police officer – wants to see restrictions which seem arbitrary or unfair or which differ between different parts of a united kingdom which face precisely the same threat.”³³

³¹ As reported in The Times, 2 April 2020: Woman fined £660 for crime that ‘doesn’t exist’ <https://www.thetimes.co.uk/article/police-fine-woman-660-for-breaching-coronavirus-lockdown-laws-at-train-station-5ftr9ql0f>

³² The initial version was on 26 March 2020 <https://www.college.police.uk/Documents/NPCC-CoP-Version-differences-COVID-19-Policing-brief.pdf>

³³ The quickly mutating Coronavirus legislation - drafting anomalies and police powers, 31 March 2020 <http://ukpolicelawblog.com/index.php/9-blog/241-the-quickly-mutating-coronavirus-legislation>

27. This legal uncertainty feeds into a wider concern that the Regulations have fundamentally, if temporarily, altered the relationship between the police and citizens and perhaps even between citizens. There is confusion over whether police can or should be stopping people walking, alone, on quiet roads and asking them to justify themselves. And whether a person stopped and asked by the police about their shopping or their exercise regime should have to reply to explain themselves.
28. There are concerns that the police are now able, and even required, to enquire into every citizen's private life, for example through questioning, in order to ascertain whether they have a 'reasonable excuse' for leaving the place where they live. This is highly intrusive and it is not clear that such an approach is justifiable 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*", not least because face to face encounters (caused by police questioning) risk placing both police officers and members of the public at risk of the very spread of infectious disease which the Regulations are designed to prevent. Moreover, such questioning will in some circumstances be very intrusive indeed, for example where a person's reasonable excuse is that they left their home to protect themselves against the risk of harm through domestic violence – escaping 'risk of harm' is a listed reasonable excuse. Police misinterpreting these broad and, in some instances, vague powers is likely to lead to wrongful convictions. This has already occurred after a woman's conviction and £660 fine purportedly under the Coronavirus Act is to be quashed following comments by lawyers on social media.³⁴
29. Whilst the Regulations are in general terms capable of being proportionate, an unduly heavy-handed attempt to enforce these Regulations would not be. Thus, a large and unnecessary increase in police intrusion into people's private lives through questioning, without reasonable suspicion, would not be proportionate and would be unlikely to comply with Article 8 ECHR.
30. Furthermore, the Regulations do not expressly give police a power to stop and question people who they do not reasonably suspect are committing an offence. The NPCC/CoP guidance states '*[t]here is no power to 'stop and account'*'. Whilst the police may be permitted to ask questions of the public under their common law rights, the public would have no duty to provide answers.
31. As stated above, the NPCC and CoP have now provided guidance which, for example, recommends that police keep an "*inquisitive, questioning mind-set*", considering whether there are any safeguarding issues and focussing on engaging, explaining and encouraging before moving onto enforcement. However, it remains a concern that some police forces will take a more proactive approach than is necessary and perhaps even lawful. It is also unfortunate that the enforcement powers are unclear and seem to differ significantly in terms of protections and safeguards as between the various UK jurisdictions.

³⁴ <https://www.independent.co.uk/news/uk/crime/coronavirus-fine-police-lockdown-travel-newcastle-marie-dinou-a9444186.html>

32. There have also been concerning reports of individual police forces establishing online forms seeming to encourage people to report on their neighbours for potential infringements of “the rules”. In the instances in the footnote, the relevant forces reference enforcing the “guidance” (advisory) and the government “advice” rather than enforcing the law, which unhelpfully conflates what is law and what is advice.³⁵ This has caused alarm amongst members of the public that there could be a risk of a breakdown in trust between citizens, at a difficult time where mutual support and aid is of critical importance, and also the consequent risks to trust between the police and the public. One possible justification for the online forms is that they divert people who are overwhelming the 111 telephone service. However, if this is the case then the online forms should be used as an opportunity to educate the public on what the law is and should therefore carefully explain what people should report and what they should not. It is also important to note that most offences under the Regulations require, to prove behaviour constitutes an offence, questioning as to whether a person has a ‘reasonable excuse’ or is gathering with people in their household, i.e. offences cannot simply be observed. In those circumstances, it is of concern that seeking public assistance is likely to lead to members of the public confronting other members of the public and asking them to account for their behaviour. This will almost certainly engender an atmosphere of mutual distrust and intrusive behaviour which arguably the state should not be encouraging.

33. The Government should review (as part of its 16 April review) how it intends to ensure good police - community relations and only proportionate enforcement, so that police restrict their interventions to instances where they have a reasonable suspicion that a person or persons is breaching the Regulations, for example where a shop which is not listed in the Schedule has remained open, or more than two people are gathering in a public place without reasonable excuse.

(iii) Reasonable excuse

34. Regulation 6 prohibits individuals leaving the place where they are living without “reasonable excuse”. Regulation 6 provides a number of potential ‘reasonable excuses’ in a non-exhaustive list. It is clear that the list is non-exhaustive because of the use of the word “includes” (“a reasonable excuse includes the need...”).

35. This ‘safety valve’ is necessary to ensure that these very wide-ranging and restrictive regulations remain proportionate. Moreover, what is proportionate may change if the lockdown is extended as people will have greater needs (both practical and social) the longer a lockdown is in place. Some commentators argue that the social limitations of the current lockdown could be so significant in some cases (esp. for people living alone) as to engage Article 5 ECHR³⁶.

36. A number of unexpected issues are likely to arise as these Regulations are applied. For example, it is not currently clear that two people who do not live together but

³⁵ <https://www.avonandsomerset.police.uk/report/breach-of-covid-19-restrictions>
<https://www.cambs.police.uk/report/Report-a-breach-of-COVID-19-restrictions>

³⁶ <https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/> See also the approach taken in certain German regions to ease this problem.

are in a relationship are able to leave their respective homes to meet. This is an extraordinary interference with the right to private and family life and will become more severe the longer the Regulations or their successors remain in force.

37. It is therefore important that the list of reasonable excuses in Regulation 6 is not treated as exhaustive by police so that members of the public retain a level of personal autonomy and discretion over what is 'reasonable' *for them*. It is of concern that the NPCC/CoP guidance does not currently make clear that the list of statutory 'reasonable excuses' is non-exhaustive, which is likely to discourage police officers from using their common sense and discretion in deciding whether a person has a reasonable excuse to leave the place where they are living, for example avoiding a family argument, taking time outside for personal wellbeing reasons or disabled people who may have specific needs as to how they exercise or get fresh air. Proportionality requires that interference with private life is logically connected to the objective and it is unclear how a person leaving the place where they live and maintaining social distancing for any of these reasons would be causing the spread of Covid-19.
38. It could be helpful for the Government to consider how it intends to communicate to the public and police that the list of 'reasonable excuses' is non-exhaustive and that a relatively broad approach will be taken to interpreting what is reasonable for individuals. Plainly there must be a balance so that the Regulations are not interpreted too permissively, and public health is put at risk. However, whomever is communicating and enforcing the Regulations should focus on the underlying purpose which is for preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination from Covid-19. If an individual is not undermining that purpose it is difficult to see what justification there is for interfering with their human rights.
39. A good example of the recommended approach is the latest NPCC/CoP guidance on the Coronavirus Act 2020 (which is not the subject of this note but gives rise to similar issues). The guidance has red boxes on every page which state "*Support Public Health - exceptional powers for exceptional circumstances only*". This is clear, unambiguous communication and helpfully focusses on the underlying purpose and exceptionality of the law.

ANNEX: TABLE OF LEGAL AND ADVISORY “RULES” IN THE FOUR UK COUNTRIES

Type of restriction or requirement	Specific restriction or requirement	Law or Advisory Guidance
Restrictions on premises and businesses	Requirements to close certain premises and businesses during the emergency (including for example, those selling food/drink, holiday accommodation, places of worship, community centres, crematorium, and burial grounds).	LAW ³⁷
Restrictions on movement	During the emergency period, no person may leave the place where they are living without reasonable excuse (see para 8(ii) above for non-exhaustive list of reasonable excuses).	LAW ³⁸
	Leaving home to exercise is limited to once per day, either alone or with members of the same household.	GUIDANCE ³⁹ in England, Scotland and Northern Ireland. LAW ⁴⁰ in Wales
	When going for a walk, run, or cycle, you must minimise the time you are out of your home.	GUIDANCE ⁴¹
	If you (or a person in your care) have a specific health condition that requires you to leave the home to maintain your health - including if that involves travel beyond your local area - then you can do so. This could, for example, include where individuals with learning disabilities or autism require specific exercise in an open space two or three times each day - ideally in line with a care plan agreed with a medical professional.	GUIDANCE ⁴²
	Only go outside for food, health reasons or work (but only if you cannot work from home).	GUIDANCE ⁴³
	If you go out, stay 2m away from other people at all times	GUIDANCE ⁴⁴
	Stay local and use open spaces near your home where possible – do not travel unnecessarily.	GUIDANCE ⁴⁵
Restrictions on gatherings	During the emergency period, no person may participate in a gathering in a public place or more than two people.	LAW ⁴⁶

³⁷ Regulation 4 and 5, Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. Regulations 4 - 7, Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020. Regulation 3 and 4, Health Protection (Coronavirus, Restrictions) (Scotland) Regulations 2020. Regulation 3 and 4, Health Protection (Coronavirus, Restrictions) (Northern Ireland) Regulations 2020.

³⁸ Regulation 6, Health Protection (Coronavirus, Restrictions) (England) Regulations 2020). Regulations 8, Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020. Regulation 5 and 8(4), Health Protection (Coronavirus, Restrictions) (Scotland) Regulations 2020. Regulation 5, Health Protection (Coronavirus, Restrictions) (Northern Ireland) Regulations 2020.

³⁹ Coronavirus Outbreak FAQs: what you can and can't do

⁴⁰ Regulation 8 (2)(b), Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020).

⁴¹ Coronavirus Outbreak FAQs: what you can and can't do

⁴² Coronavirus Outbreak FAQs: what you can and can't do

⁴³ Coronavirus Outbreak FAQs: what you can and can't do

⁴⁴ Coronavirus Outbreak FAQs: what you can and can't do

⁴⁵ Coronavirus Outbreak FAQs: what you can and can't do

⁴⁶ Regulation 7, Health Protection (Coronavirus, Restrictions) (England) Regulations 2020) Regulations 8(5) Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020.

	There are a number of exceptions to this restriction: where all the persons in the gathering are members of the same household, where the gathering is essential for work purposes, to attend a funeral, where reasonably necessary: to facilitate a house move, to provide care or assistance to a vulnerable person, including relevant personal care, to provide emergency assistance, or to participate in legal proceedings or fulfil a legal obligation	
Requirement to self-isolate	Anyone who has symptoms or is in a household where someone has symptoms should not go to work and should self-isolate.	GUIDANCE ⁴⁷
Requirement to close public areas	Relevant authorities must close certain public paths and land during the emergency period if it is liable to large numbers congregating / persons in close proximity / poses a high risk to spread of infection.	N/A in England, Scotland and Northern Ireland. LAW ⁴⁸ in Wales
Other requirements or restrictions	Wash your hands as soon as you get home	GUIDANCE ⁴⁹

Regulation 6, Health Protection (Coronavirus, Restrictions) (Scotland) Regulations 2020.

Regulation 6, Health Protection (Coronavirus, Restrictions) (Northern Ireland) Regulations 2020,

⁴⁷ *Coronavirus Outbreak FAQs: what you can and can't do*

⁴⁸ *Regulation 9, Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020*

⁴⁹ *Coronavirus Outbreak FAQs: what you can and can't do*