

Covid-19 and the criminal law

Evidence submission to the UK Parliament Justice Committee

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Introduction and summary

1. We are academics specialising in criminal law and criminal justice, criminology, health law, human rights law, and moral and political philosophy.
2. This evidence submission on Covid-19 and the criminal law covers the following matters:
 - a) the principle of legality [pages 1-5 paragraphs 5-16]
 - b) legitimacy and public trust [pages 5-6 paragraphs 17-22]
 - c) criminalisation and public health [pages 6-7 paragraphs 23-27]
 - d) fixed-penalty notices (FPNs) [pages 7-9 paragraphs 28-33]
3. Our **summary conclusions** are:
 - a) The legal regime for coronavirus restrictions gives rise to significant concern in respect of compliance with the requirements of the ECHR principle of legality.
 - b) The government's extensive use of criminalisation through the made affirmative procedure has deprived coronavirus restrictions of democratic legitimacy and may have reduced public understanding, acceptance, and trust in the legal response to Covid-19.
 - c) The experience of the response to Covid-19 offers an opportunity to learn lessons about the appropriateness and extent of criminalisation in public health, both in terms of effectiveness and externalities.
 - d) The use of FPNs as the principal tool of criminalisation of Covid-19 offences risks unintended criminalisation, may be counterproductive to public health objectives, and may further entrench inequality and discrimination.
4. Our evidence considers the law in England only.

Covid-19 legislation and the principle of legality

5. The *principle of legality* is a term employed to reflect the idea that individuals ought not to be, among other things, held liable for crimes and punishment unless the relevant offences and sentences are prescribed by law. The principle is reflected in article 7 ECHR (no punishment without law), as well as in the requirement that interference with the interests protected by ECHR articles 5 (liberty and security), 8 (private and family life), 9 (freedom

of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly and association), 12 (marriage) be ‘in accordance with’ or ‘prescribed by law’.

6. It is well-established that the restrictions that form part of the public response to Covid-19 contained in the Coronavirus Act 2020 and in regulations drawn under the Public Health (Control of Disease) Act 1984 interfere with a variety of interests protected by the ECHR,¹ and are backed by criminal sanctions for non-compliance.²
7. The substantive compliance of coronavirus restrictions with the ECHR, that is, whether the interference with protected interests is justified in pursuit of the legitimate aim of protecting health is not in doubt.³ However, we wish to raise concerns about the government’s extensive use of regulations backed by criminal offences as part of the response to Covid-19 from the point of view of the principle of legality.⁴
8. The case law on the principle of legality sets out three requirements: a) interference with ECHR interests has a basis in domestic law; b) the law is accessible and foreseeable; and c) the law is applied in a way that is not arbitrary, ie not resorted to in bad faith or applied disproportionately.⁵ We have reason to worry about the satisfaction of all these criteria, to varying degrees.
9. On basis in domestic law, most of the offences can be found in the relevant coronavirus restrictions regulations or in the Coronavirus Act 2020. However, there has been at least one case of an individual being charged with a coronavirus-related criminal offence that does not exist.⁶ Further, there is evidence of criminal enforcement of government coronavirus ‘guidance’, eg to ‘stay local’, that does not have the quality of law.⁷ The issue is sufficiently serious for the CPS to have initiated ongoing review of all finalised coronavirus cases.⁸ Their figures show that, from March 2020 to February 2021, 16 per cent of

¹ *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin).

² See eg The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, Part 5.

³ *Dolan* (CA) (n 1); *Dolan* (Admin) (n 1).

⁴ In *Dolan* (Admin) [77], [95], Lewis J held that interference with articles 8 and 11 ECHR respectively caused by coronavirus restrictions was in accordance with the law because it was ‘included in Regulations made under powers conferred by an Act of Parliament’. We believe that this issue merits closer attention.

⁵ See eg *R (oao Purdy) v DPP* [2009] UKHL 45 [40] (Lord Hope).

⁶ Ormerod David, ‘Coronavirus and emergency powers’ [2020](6) *Criminal Law Review* 473-477, 475.

⁷ BBC News, ‘Covid: Women fined for going for a walk receive police apology’ (11 Jan 2021)

<https://www.bbc.co.uk/news/uk-england-derbyshire-55625062>, accessed 21/04/06.

⁸ Crown Prosecution Service, ‘Coronavirus review findings, Mar 2020-Feb 2021’

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

<https://www.cps.gov.uk/cps/news/cps-review-finds-improvements-coronavirus-charging-compliance>

<https://www.cps.gov.uk/cps/news/latest-findings-cps-coronavirus-review>

<https://www.cps.gov.uk/cps/news/julys-coronavirus-review-findings>

<https://www.cps.gov.uk/cps/news/augusts-coronavirus-review-findings>

<https://www.cps.gov.uk/cps/news/septembers-coronavirus-review-findings>

<https://www.cps.gov.uk/cps/news/octobers-coronavirus-review-findings>

<https://www.cps.gov.uk/cps/news/novembers-coronavirus-review-findings>

<https://www.cps.gov.uk/cps/news/decembers-coronavirus-review-findings>

<https://www.cps.gov.uk/cps/news/januarys-coronavirus-review-findings>

<https://www.cps.gov.uk/cps/news/februarys-coronavirus-review-findings>, accessed 21/04/07.

prosecutions under the various Health Protection (Coronavirus, Restrictions) Regulations were incorrectly charged (total: 1,345; wrongly charged: 213) and 100 per cent of prosecutions under the Coronavirus Act 2020 (252 in total) have been incorrectly charged.

10. Accessibility has been described as ‘the formal or objective requirement that the law actually exists and is publicly available to its subjects with a sufficient level of precision, in case anyone intends to consult it’, whereas ‘foreseeability refers to the subjective ability of the average person to predict, to a degree that is reasonable in the circumstances, the consequences which a given action might entail’.⁹
11. On accessibility, both the Coronavirus Act 2020, Schedule 21, paragraph 20 and various iterations of the coronavirus restrictions regulations give police constables, among others, the power to give ‘reasonable instructions’ for which a failure to comply is a criminal offence.¹⁰ Our concern here is that the law is not specified with sufficient precision or fair notice to satisfy the requirement of accessibility. Indeed, it has been said that these powers permit the police ‘essentially... to write the criminal law on the streets’.¹¹ In any event, this worry can be re-expressed as one of foreseeability or arbitrariness.
12. Another accessibility worry concerns the law of protest. Some iterations of the coronavirus restrictions regulations make no explicit provision permitting protest,¹² whereas others do.¹³ When protest has not been explicitly exempted from coronavirus restrictions, this has led to considerable uncertainty as to whether protest is permitted. The legal position, which is that the coronavirus restrictions on protest must be read in accordance with the Human Rights Act 1998 (and as such protest may be lawful even if not exempted from restrictions under regulations) has only been clarified as of March 2021.¹⁴
13. On foreseeability, we suggest there are three principal issues: 1) the inconsistent practice of laying regulations that amend or revoke previous regulations (often in brief succession); 2) the use of geographical restrictions as well as ‘tiers’ and ‘steps’; 3) the practice of issuing ‘guidance’ to supplement the law. These practices have resulted in a very high degree of complexity regarding what the law requires,¹⁵ such that individuals may find it very difficult to gauge the consequences of their conduct (even with legal advice) for the purposes of compliance with the coronavirus restrictions. Research has demonstrated that public

⁹ Talita de Souza Dias, ‘Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?’ (2019) 19(4) Human Rights Law Review 649-674, 660.

¹⁰ See eg The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, regulation 10(12).

¹¹ Tom Hickman, ‘Eight ways to reinforce and revise the lockdown law’ (*UK Constitutional Law Association Blog*, 2020) <https://ukconstitutionallaw.org/2020/04/16/tom-hickman-eight-ways-to-reinforce-and-revise-the-lockdown-law/>, accessed 21/04/06.

¹² See eg The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

¹³ The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, schedule 1, para 3(20); The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, schedule 1, para 4(27).

¹⁴ *Leigh and others v The Commissioner of the Police of the Metropolis and others* [2021] EWHC 661 (Admin).

¹⁵ See eg Adam Wagner, ‘Taking liberties: Covid-19 and the anatomy of a constitutional catastrophe’ *Prospect* (26 March 2021) <https://www.prospectmagazine.co.uk/essays/adam-wagner-covid-lockdown-law-democracy-essay>, accessed 21/04/06.

understanding of the coronavirus restrictions has been consistently very poor.¹⁶ It has been remarked in Parliament that very few people possess full understanding of the law.¹⁷ Even police officers have reported a lack of confidence in knowing what coronavirus regulations require.¹⁸ Differential enforcement of the coronavirus restrictions by police in light of the uncertainty of what constitutes law or guidance may further contribute to a lack of foreseeability in respect of the restrictions.

14. A further foreseeability concern is the habitual practice of government to use the affirmative procedure for laying regulations before Parliament,¹⁹ often no more than a day or two before the regulations come into force.²⁰ The worry here is that the government has not given individuals fair opportunity to process the law in advance of it coming into force.
15. On arbitrariness, our concern relates to the degree of discretion possessed by the police in enforcing coronavirus restrictions and the overrepresentation of minority ethnic groups among those subject to penalties.²¹ Several occasions of abuse of power have been reported in the media.²² Our concern is that these abuses have been made possible partly due to the deliberately imprecise definition of police powers in relation to the pandemic.

¹⁶ See eg Daisy Fancourt, Feifei Bu, Hei Wan Mak and Andrew Steptoe, 'Covid-19 Social Study Results Release 23' (Nuffield Foundation, Wellcome Trust, 2020) https://b6bdcb03-332c-4ff9-8b9d-28f9c957493a.filesusr.com/ugd/3d9db5_770e0e1cd00a4f9eace2191ffa65353e.pdf, accessed 21/04/06.

¹⁷ HL Deb, 'Health Protection (Coronavirus, Restrictions) (Self-Isolation and Linked Households) (England) Regulations 2020' 7 Jan 2021, vol 809 col 330 [https://hansard.parliament.uk/Lords/2021-01-07/debates/A6FB3C66-F27A-43D8-9BDE-7A1B148D6074/HealthProtection\(CoronavirusRestrictions\)\(Self-IsolationAndLinkedHouseholds\)\(England\)Regulations2020](https://hansard.parliament.uk/Lords/2021-01-07/debates/A6FB3C66-F27A-43D8-9BDE-7A1B148D6074/HealthProtection(CoronavirusRestrictions)(Self-IsolationAndLinkedHouseholds)(England)Regulations2020), accessed 21/04/06.

¹⁸ UK Parliament Joint Committee on Human Rights, 'The Government response to covid-19: freedom of assembly and the right to protest' 17 Mar 2021, para 65 <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/1328/1328.pdf> accessed 2021/04/07, accessed 21/04/07; UK Parliament Joint Committee on Human Rights, Oral Evidence (Virtual Proceeding), 'The Government's Response to Covid-19: Human Rights Implications of Long Lockdown', Q35 (24 Feb 2021) <https://committees.parliament.uk/oralevidence/1751/pdf/>, accessed 21/04/07.

¹⁹ Public Health (Control of Disease) Act 1984, s 45R.

²⁰ See eg Tweets from the Hansard Society (@HansardSociety) <https://twitter.com/HansardSociety/status/1260239129130029056?s=20>; <https://twitter.com/HansardSociety/status/1267093207332126720?s=20>; <https://twitter.com/HansardSociety/status/1333435986957787136?s=20>.

²¹ National Police Chief's Council, 'Analysis of coronavirus fines published' <https://news.npcc.police.uk/releases/independent-analysis-of-coronavirus-fines-published>, accessed 21/04/07; Birmingham Mail, 'Ethnic minorities and young people disproportionately fined by police targeting Covid rulebreakers' (20 Jan 2021) <https://www.birminghammail.co.uk/news/midlands-news/ethnic-minorities-young-people-disproportionately-19663975>, accessed 21/04/07.

²² See eg Liberty, 'Pandemic of Police Powers: Liberty reveals scale of misuse of police powers under lockdown' (27 Jul 2020) <https://www.libertyhumanrights.org.uk/issue/pandemic-of-police-powers-liberty-reveals-scale-of-misuse-of-police-powers-under-lockdown/>, accessed 21/04/07; BBC News, 'Coronavirus: Lord Sumption brands Derbyshire Police "disgraceful"' <https://www.bbc.co.uk/news/uk-england-derbyshire-52095857>, accessed 21/04/07; Huffington Post, "'Power Hungry" Police Officer Caught On Video Abusing Covid Laws' https://www.huffingtonpost.co.uk/entry/west-midlands-police-solihull-video-abuse-covid_uk_6013d684c5b6bde2f5be53b3, accessed 21/04/07.

16. To summarise the above, our view is that the legal regime for coronavirus restrictions gives rise to significant concern in respect of compliance with the requirements of the ECHR principle of legality.

Covid-19 criminalisation, legitimacy, and public trust

17. It is a principle of criminalisation that new offences ought to be considered and justified in public fora, principally Parliament. This is to ensure that criminalisation has democratic legitimacy, offences have public notice (ideally *acceptance*), and that criminalisation does not undermine public trust in the legal framework for assuring social and public order.

18. As noted above, the government has made extensive use of the made affirmative procedure provided for by section 45R of the Public Health (Control of Disease) Act 1984. Section 45R of the Act enables a person making, among other things, domestic health protection regulations (including those that prescribe criminal offences) to bring a statutory instrument into force without first laying a draft (subsequently approved by resolution) before each House of Parliament. Regulations made under this emergency procedure required a made affirmative resolution of each House of Parliament within 28 days.²³ The Hansard Society note that, as of 6 April 2021, 84 coronavirus-related statutory instruments have been made under these powers.²⁴

19. In making extensive use of the made affirmative procedure, the government has bypassed *ex ante* scrutiny of new criminal offences. As Adam Wagner observes, ‘only twice—with the November lockdown and the principle of establishing the “three tiers”—has parliament voted before new rules came into effect, and in both these cases it was only one day before’.²⁵ The practice of criminalisation by statutory instrument raises important matters of principle and practice.

20. In respect of principle, while ministers may claim the authority to act on a democratic mandate, it is nevertheless necessary that discussion of criminalisation by elected representatives (or parliamentarians generally) takes place. The function of such discussion is to provide a public justification for criminalisation—the reasons why new criminal offences of a certain nature must be created. This is a constitutional good, independent of the outcome of such discussions. It provides legitimacy to criminalisation. The need for public justification is all the more pressing when widespread curtailment of civil liberties is at stake.

21. In respect of practice, parliamentary discussion of criminalisation may improve public understanding and acceptance of new offences. And parliamentary discussion may provide an opportunity for the public to react and make known their views on the acceptable

²³ Public Health (Control of Disease) Act 1984, s 45R(4).

²⁴ Hansard Society, ‘Coronavirus Statutory Instruments Dashboard’
<https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>,
accessed 21/04/06.

²⁵ Wagner (n 15).

bounds of criminalisation.²⁶ Criminalisation without public justification may corrode public trust, with two important implications. First, without trust in the purpose behind criminalisation, compliance may become simply a matter of avoiding punishment; this may lead to systematic violation of the law when the risk of detection is low. Second, criminalisation contributes to social and public order beyond the deterrence of harmful conduct, by reassuring the public that their interests are being protected. If the message behind criminalisation is unclear or insufficiently justified, this may erode public trust both in criminal offences and in the broader framework of social and public order. In respect of coronavirus criminalisation, the worry is that lack of trust in the enforcement of regulations may compromise public trust in the overall handling of the pandemic. This may hinder broader efforts in relation to the pandemic, such as confidence in the vaccination programme, particularly by those populations who are disproportionately affected by criminalisation in this area, such as minority ethnic groups.²⁷

22. In summary, the government's extensive use of criminalisation through the made affirmative procedure has deprived coronavirus restrictions of democratic legitimacy and may have reduced public understanding, acceptance, and trust in the legal response to Covid-19.

Criminalisation and public health

23. Part 2A of the Public Health (Control of Disease) Act 1984 allows for, among other things, the imposition of restrictions via regulations on 'persons, things or premises' in the event of public health emergencies such as pandemic disease.²⁸ The mode of regulation adopted by the government in response to Covid-19 has consisted in issuing regulations backed by criminal law sanctions. This restrictions plus criminal offences model was replicated in Schedule 21 of the Coronavirus Act 2020 in relation to 'potentially infectious persons'.
24. We are mindful that Part 2A of the Public Health (Control of Disease) Act 1984 was enacted in part to provide a framework for responding to the threat of new respiratory diseases, including SARS (another coronavirus).²⁹ We also note that once the government had belatedly identified the threat posed by Covid-19, urgent measures had become necessary. However, the experience of Covid-19 invites us to consider whether extensive use of the criminal law in support of public health restrictions is the best approach available, especially when measures are wide-ranging, and a high degree of enduring public compliance and acceptance is required.

²⁶ By analogy, we suggest that the reinstatement of a specific exemption to coronavirus restrictions on gatherings for the purposes of protest is a direct consequence of perceived overcriminalisation of protest following the death of Sarah Everard. See Jessica Elgot, 'Covid restrictions on protests in England to be lifted on Monday' *The Guardian* (22 Mar 2021) <https://www.theguardian.com/world/2021/mar/22/covid-restrictions-on-protests-in-england-to-be-lifted-on-monday> accessed 21/04/06.

²⁷ Mohammad S Razai, Tasnime Osama, Douglas G J McKechnie, Azeem Majeed, 'Covid-19 vaccine hesitancy among ethnic minority groups' (2021) 513 *British Medical Journal*, 1-2.

²⁸ Public Health (Control of Disease) Act 1984, s 45C(3)(c).

²⁹ Health and Social Care Act 2008 Explanatory Notes <https://www.legislation.gov.uk/ukpga/2008/14/notes/division/2/3>, accessed 21/04/06.

25. A number of concerns about extensive criminalisation in public health arise. First, analogous to other contexts in which preventive criminalisation is employed, we might doubt whether criminalisation actively contributes to public health protection.³⁰ The Telephone Crime Survey of England & Wales covering the lockdown period April–May 2020 found that 51 per cent of adults interviewed had observed breaches of coronavirus restrictions in their local area since the start of the Covid-19 pandemic. However, only 7 per cent of these interviewees reported the breach to the police. A substantial number (36 per cent) explained non-reporting to police in terms of the breach being trivial and thus not warranting the police attention. A further 10 per cent of interviewees considered it pointless to file a police report, since the latter would be unable to do anything.³¹ Thus while law may provide police powers to enforce public health restrictions, public understanding or acceptance of these restrictions as police or criminal matters may not follow.
26. Second, extensive criminalisation in public health may contribute towards more general trends of overcriminalisation—the criminal law is seen as a solution to an ever-increasing set of social problems. The worry here is twofold. What are initially presented and perceived as exceptional measures become normalised. And there is a risk of contagion or spillover of criminalisation from domains in which it is seen as a practical and effective tool to other areas of social life.³² Arguably, the introduction in this Parliament of a far-reaching statutory offence of public nuisance whose effect may be substantially to curtail the right to protest is not incidental to coronavirus restrictions, rather causally related to them.³³
27. In short, the experience of the response to the Covid-19 offers an opportunity to learn lessons about the appropriateness and extent of criminalisation in public health, both in terms of effectiveness and externalities.

³⁰ See eg Verónica Undurraga, 'Criminalisation under scrutiny: how constitutional courts are changing their narrative by using public health evidence in abortion cases' (2019) 27(1) *Sexual and Reproductive Health Matters*, 41-51.

³¹ ONS, 'Coronavirus and Crime in England and Wales August 2020' (26 Aug 2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/coronavirusandcrimeinenglandandwales/august2020>, accessed 21/04/07.

³² A parallel can be drawn here with counter-terrorism legislation. See eg Henrique Carvalho, *The Preventive Turn in Criminal Law* (2017) Oxford: Oxford University Press; Manuel Cancio Meliá 'Terrorism and Criminal Law: The Dream of Prevention, the Nightmare of the Rule of Law' (2011) 14(1) *New Criminal Law Review* 108-122. For the expansion of punitive logics more broadly, see Henrique Carvalho, Anastasia Chamberlen & Rachel Lewis, 'Punitiveness Beyond Criminal Justice: Punishable and Punitive Subjects in an Era of Prevention, Anti-Migration and Austerity' (2020) 60 *British Journal of Criminology*, 265-284.

³³ See Police, Crime, Sentencing and Courts Bill, s 59.

Fixed penalty notices

28. The primary vehicle of criminalisation under coronavirus regulations is the fixed penalty notice (FPN).³⁴ The latest NPCC data suggest that around 95,000 FPNs have been processed by the police in England and Wales in the period to March 2021.³⁵
29. In principle, FPNs function as an alternative to prosecution. By paying the monetary fine specified in the FPN, the person issued such a notice avoids prosecution in the magistrates' court.
30. Covid-19 FPNs provide for significant penalties either at first offence,³⁶ or in the event of successive offences.³⁷ These very substantial penalties are problematic, for at least three reasons. First, high penalties undermine the objective that FPNs operate as an alternative to formal criminalisation. For those people unable to pay Covid-19 FPNs, prosecution will follow. Since the elevated penalties associated with Covid-19 FPNs plausibly enlarge the class of people unable to pay the fine, we are likely to see substantial unintended criminalisation as a result of breaches of coronavirus regulations. Second, while unintended criminalisation as a result of Covid-19 criminalisation is problematic in and of itself, in addition the existence of elevated penalties carries the risk of 'two-tier' justice,³⁸ according to which wealthy individuals may escape criminalisation for coronavirus lockdown breaches, whereas those of limited or modest means face a distressing encounter with the criminal justice system. Third, if the public considers FPN penalties to be out of proportion to the wrongs targeted by criminalisation, we may see reduced, rather than increased compliance with the regulations—excessive penalties may prove counterproductive.³⁹
31. A further concern around FPNs is their appropriateness as a tool of public health enforcement: a) in a fluid regulatory environment; and b) for offences that carry a high degree of police discretion. In respect of a), we note above that both public and police understanding of what coronavirus regulations require and the distinction between law and guidance is far from optimal. In respect of b) we express concern above about how, among

³⁴ See eg The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, Part 5; The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, regulation 12; Offences under the Coronavirus Act 2020, schedule 21 are punishable on summary conviction by 'fine not exceeding level 3 on the standard scale' (£1,000).

³⁵ See NPCC, 'Update on Coronavirus FPNs issued by Police - March 2021, (26 March 2021), <https://news.npcc.police.uk/releases/update-on-coronavirus-fpns-issued-by-police-march-2021>, accessed 21/04/07.

³⁶ See eg The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, regulation 15 governing 'organised gathering offences', which sets a first offence penalty of £10,000.

³⁷ See eg *ibid* regulation 17 governing 'general offences' where the FPN for a first offence is £200 (£100 if paid within 14 days), subsequently doubling for successive breaches to a maximum of £6,400.

³⁸ Susan McVie, 'Lockdown fines more common in the poorest areas' (*Edinburgh Law School*, 2020) <https://www.ed.ac.uk/news/2020/lockdown-fines-more-common-in-the-poorest-areas>, accessed 21/04/08.

³⁹ See eg The Independent Sage, *Independent SAGE briefing note on use of punishments in the Covid response* (2021) <https://www.independentsage.org/independent-sage-briefing-note-on-use-of-punishments-in-the-covid-response/> accessed 2021/04/08; Sheheryar Banuri, 'Will increasing fines make people comply with coronavirus rules?' (*The Conversation*, 2020) <https://theconversation.com/will-increasing-fines-make-people-comply-with-coronavirus-rules-146900>, accessed 21/04/08.

other things, a failure to follow a police ‘reasonable instruction’ has been criminalised.⁴⁰ Considering the quantitative data on FPNs against CPS review of finalised cases data, a plausible inference is that thousands of FPNs have been unlawfully issued. This problematic in and of itself, and more so because the impacts of criminalisation as part of the response to Covid-19 falls unequally.

32. Evidence suggests FPNs have been issued disproportionately to minority ethnic groups. NPCC statistics show that people of a minority ethnic background have been 1.6 times more likely to be issued an FPN under the coronavirus regulations than white people.⁴¹ An investigation by *Liberty* revealed that, between March and May 2020, people of an ethnic minority background in England were 54 per cent more likely to be fined under the regulations than whites.⁴² These data, of course, can be connected to extant evidence on the over-policing and over-criminalisation of minority communities. The practice of police discretion in the public health context of Covid-19 is inseparable from longer histories documented in criminological literature in respect of the police’s discretionary powers’ and their association with endemic issues of discrimination and disproportionate use. That minority ethnic people find themselves relatively worse off than white people as a result of the policing of Covid-19 regulations exacerbates the already disproportionate impact of the pandemic on the former communities. In other words, these communities have been under-protected and overpoliced.⁴³
33. To summarise, the use of FPNs as the principal tool of criminalisation of Covid-19 offences risks unintended criminalisation, may be counterproductive to public health objectives, and may further entrench inequality and discrimination.

⁴⁰ See eg *ibid* regulations 10(12), 11(1)(d).

⁴¹ NPCC, ‘Analysis of Coronavirus Fines Published’, (27 Jul 2020), <https://news.npcc.police.uk/releases/independent-analysis-of-coronavirus-fines-published>, accessed 21/04/07.

⁴² Liberty Investigates, ‘BAME People Disproportionately Targeted By Coronavirus Fines’ (26 May 2020) <https://libertyinvestigates.org.uk/articles/bame-people-disproportionately-targeted-by-coronavirus-fines/>, accessed 21/04/07.

⁴³ See eg UK Parliament Joint Committee on Human Rights, Oral Evidence (Virtual Proceeding), ‘The Government’s Response to Covid-19: Human Rights Implications of Long Lockdown’, Q26 (24 February 2021) <https://committees.parliament.uk/oralevidence/1757/pdf/>, accessed 21/04/07.