Critique of the Government's approach to easing the COVID-19 Lockdown Restrictions

Society of Labour Lawyers
The legal think tank of the Labour Party

Society of Labour Lawyers

Report

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FOREWORD

This report considers the legal basis for policy measures that will be central to the continued easing of the Covid-19 lockdown and the management of further outbreaks of the virus, which are almost inevitable unless and until effective treatments or vaccines emerge. As we have already seen, dealing with the virus effectively involves enormous practical, political, and moral challenges. These will be amplified as the country slowly opens-up again.

The early public support for Government action has been severely challenged by numerous mistakes in the design and communication of policy, many of which were predictable and preventable. The Government has paid insufficient attention to the importance of proper scrutiny and transparency over its legislation and the policy choices made in that legislation, and has often created confusion between guidance and legal requirements. This approach is not sustainable.

A central challenge is that, in the easing phase, restrictions will apply to different people in different ways and potentially at different times. For example, more vulnerable people may face greater restrictions than the rest of the population. Others face restrictions at short notice, e.g. having to self-isolate after coming into contact with somebody who later tests positive for Covid-19.

In addition, the virus is affecting certain parts of the population much more severely. Research by Public Health England and the Office of National Statistics shows that BAME groups in particular are experiencing significantly higher infection and death rates. This reality must be central to the design of policy and the allocation of resources.

In our view, the Covid-19 response must be based on a robust set of principles, underpinned by legislation and subject to effective Parliamentary scrutiny. To maintain legitimacy, the rules must be proportionate, fair, and properly communicated. They must also balance public health objectives and individual rights and be able to address marginal or unusual cases fairly.

For now, the Labour Party must push the Government to drastically improve its performance and ensure that resources are allocated appropriately. In the longer term, the Party will need to reflect on the deep social injustices exposed by the crisis as starts to articulate its vision for the country and develops new policy.

The Society of Labour Lawyers, July 2020

EXECUTIVE SUMMARY

Background

Summary of the paper: The Government's approach to Covid-19 has been disorganised, reactive and ad hoc. There is an urgent need to ensure that the policy response is based on a robust set of principles and subject to democratic accountability and the rule of law. The paper outlines an alternative approach.

Structure of the paper: In the first part of the paper, we outline a set of proposed principles which, in our view, ought to be applied. In the second part, we assess seven policy areas which are either already central to easing the lockdown or have been widely discussed but have not yet been implemented.

Addressing varying health outcomes: As part of its role in scrutinising the Government, Labour must ensure that the disproportionate impact of the virus on certain parts of the population, in particular many BAME groups, is central to the Government's pandemic response and that appropriate policies are adopted.

Policymaking based on principles

The need for a robust, principles-based approach. The policy designed to bring about an easing of the lockdown must be based on a set of core principles all of which already exist in the common law, human rights law and data protection legislation. They just need to be applied in practice. Our proposed principles fall into three broad areas:

1. ***Democratic accountability and the rule of law:***

    - The current confusion between guidance and law must come to an end with the crisis response properly based in legislation, with guidance playing its proper role of advising how to comply with rules and helping people take the right decisions in areas where rules creating criminal offences are inappropriate.

    - Legislation should be made following a proper consultation and efficient and effective Parliamentary scrutiny

    - Where possible policy proposals should be subject to proper consultation and then feedback and improvements once implemented.

2. ***Human rights law and principles:***

    - The following ECHR Articles are particularly relevant: Article 2 (the right to life), Article 7 (no punishment without law), Article 5 (right to liberty), Article 8 (privacy and family life), Article 9 (freedom of religion) and Article 11 (freedom of association).

    - These are all qualified rights and can be subject to certain restrictions where this is justified on public health grounds. As such it is vital to ensure that the approach is reasonable, necessary and proportionate and justified by evidence.

- Ensuring that both the legislation, and the policing of it, are proportionate, is essential. This will require, for example, appropriate training and guidance to be provided to police enforcing the legislation.

3. Data protection law and principles.

- The UK has a well-developed legal framework for the protection of privacy and data, primarily contained in the General Data Protection Regulation and the Data Protection Act 2018. The principles outlined in the GDPR are of particular importance here.

- Currently, it could be compliant with the GDPR and the DPA 2018 for information to be collected by the NHS for the purposes of the protection of health but then passed to the police, HMRC or the UK Border Agency for other purposes using the exemptions contained in the DPA 2018

- Therefore consideration should be given as to whether new primary legislation is needed to put in place a higher level of protection for data collected as part of the process of easing the lockdown (e.g. by a tracking app).

Current legal framework

The framework in England has gone through three key stages which are discussed in detail in Section 3 and summarised briefly below.

First, the original lockdown regulations made it an offence for anyone to leave the place where they were living without a reasonable excuse, restricted all public gatherings, and ordered the closure of many types of businesses. Various amendments were subsequently made to, for example, allow certain business activities to take place.

Second, at the start of June three very important changes which effectively replaced the previous framework were made. First, people were generally permitted to be outside their home, without having to have a reasonable excuse. Second, small social meetings were allowed outdoors (for example in gardens), and (a little later) to allow single adult households to "link" to another household so that they could mix with each other indoors. Third, most shops were permitted to open.

Finally, on 4 July, there was a complete replacement of the Regulations in particular to allow pubs and bars to open, hotels and self-catering holiday accommodation to open and remove restriction on staying outside the home overnight, along with various other rule changes to allow for greater easing.

Other specific measures that have been introduced are to requirements for masks on public transport and the introduction of quarantine for people arriving into England from outside Common travel area (subject to a list of exceptions) for countries not specified as being safe.

The new regulations do not currently apply in Leicester which is, in effect, continuing to live according to the previous regulations.

Policy options considered in this report

The policy options covered in this report are ones that have been discussed widely and which are likely to form (or continue to be) the basis of the easing to the lockdown. The policies are then analysed and assessed based on the above fundamental principles. The policy areas addressed are:

- Targeted restrictions for specific demographics, sectors or locations
- Use of face masks in public
- Shielding vulnerable groups
- Mass-testing of the population
- Tracking and tracing apps
- Use of immunity passports
- Health and safety in the workplace

Assessment of policy options

Targeted easing and restrictions. Selective lifting of the lockdown for certain kinds of business and for certain population groups or geographical areas is legally possible and has been progressively done, but requires careful and evidence-led justification for treating different businesses and different people differently – justification which has not been a feature of the progressive unwinding of the lockdown. There are serious concerns that a selective retention of (or re-imposition of) the lockdown could in practice bear down most heavily on disadvantaged groups, raising significant legal issues.

Face masks. As noted above, face masks are now mandatory (with limited exceptions) on public transport in England from 15 June 2020. Although much about the transmission of Covid-19 remains uncertain, there is a volume of scientific evidence that mask-wearing can significantly reduce infection, especially indoors where maintaining social distancing is not possible. It may well be appropriate to make mask-wearing compulsory (subject to limited exceptions) in certain other environments rather than to rely on guidance.

Shielding the vulnerable. There are not specific criminal laws enforcing shielding of the vulnerable. There is different guidance, only, and this has been significantly loosened recently as well.

Manual testing and tracing While the Digital Contact Tracking (Data Protection) Bill was developed for tracking and tasting apps, a number of the protections in includes could equally be applied to manual testing and tracing (e.g. preventing use of the data for other purposes, such as law enforcement).

NHS Tracking and Tracing App The Government has abandoned its original plan to develop the NHS tracking and tracing App independently from the Apple/Google API and now plan to use the Apple/Google API. However, the Government's approach to data privacy so far in relation to the app has been concerning and it is not clear that the approach used for its trial app was lawful. In addition, there is a case that the current legislative protections for the data processed by tracking and tracing apps are inadequate and should be strengthened. This could potentially be done by enacting the Digital Contact Tracking (Data Protection) Bill proposed by Joint Committee on Human Rights, which includes a wide range of additional potential legislative protections. In order for the tracking and tracing app to operate as well as possible the UK needs to have in place an effective testing system, which does not appear to be the case currently.

Immunity passports. Currently the WHO is not advising this policy, as the science is not sufficiently strong around immunity and so it is regarded as dangerous. If it does become a

relevant idea again, the government will need to consider carefully police powers, as well as criminal enforcement, and also ensuring disadvantaged groups are considered.

Employment and health and safety. We explore the interaction between the government's guidance and existing employment and health and safety law and describe a number of inadequacies which we consider can be pragmatically reconciled. We also explore the lack of effectiveness at the Health and Safety Executive which has resulted in it being effectively disregarded by most employers.

Conclusions. The need to address the underlying social injustices exposed by the crisis: Over the longer term, the Labour Party, like wider society, must reflect deeply on some of the inherent social injustices which have been laid bare by the crisis as it articulates its vision for the country and develops new policy.

1. GENERAL PRINCIPLES

Democracy and the Rule of Law

1.1. Democratic and rule of law concerns about scrutiny and clarity are not an "optional extra" here. There are a number of serious concerns about the Government's approach to successive measures easing the lockdown.

1.2. **Confusion between guidance and law.** First, there has been a persistent and dangerous confusion between guidance and law. Indeed, guidance seems to come first, with the law coming along only at the last minute as an afterthought. During the first phase of lockdown, there was persistent confusion (which spread to law enforcement agencies) between guidance (for example the advice to go out for exercise only once a day) and the law (which, in England, imposed no such limitation).

1.3. One uncontroversial conclusion that can be drawn from the Cummings affair is that confusion about what the rules and guidance require itself damages the legitimacy of those rules: the Government's sudden emphasis on the point that the rules always permitted being outside with a reasonable excuse, when the guidance had been a more or less unqualified "stay at home", understandably generated widespread cynicism. Without legitimacy, the rules will not command consent and will not be complied with. And lack of clarity – and in some cases absurdity – is the inevitable consequence of rules rushed through without any detailed consultation or scrutiny.

1.4. None of that is to deny the need for guidance – both to help businesses and citizens understand the rules, particularly in grey areas, and to steer conduct in areas where binding rules subject to criminal penalties are not appropriate – but confusion between the rules and guidance is ultimately unhelpful.

1.5. **Lack of transparency and scrutiny** Second, easing the lockdown (and re-imposing it, where that proves necessary) involves choices about which businesses are allowed to open and under what conditions, what activities are permitted to take place, and who people are and are not allowed to meet. Those choices, though ostensibly informed by scientific advice, are fundamentally political, as they involve judgments about the acceptability of risk and the importance given to some businesses and activities over others. It is vital to the legitimacy of those choices that they are seen to be taken on rational grounds, after as much consultation with those most affected as time allows, and supported by evidence, and not on the basis of which industries and activities happen to be favoured by current Ministers. But no coherent explanation was provided for the decision (for example) to allow garden centres to open in May 2020 but not outdoor zoos. Nor has the Government explained why air travel is now permitted but not attending a theatre performance, when both involve sitting close to an unknown person for some time. There may well be good scientific or economic reasons behind those decisions, but the lack of transparency is wholly unsatisfactory, and undermines the legitimacy of the rules. The remedy is accountability (clear and detailed explanations of the choices made and why) and scrutiny (detailed Parliamentary examination of the new rules and the rationale and evidence for them).

1.6. Further, without such scrutiny and accountability, impacts on groups not well-represented in the current Government risk being forgotten or ignored. The announcement of the changed recommendations for those shielding by paywalled article and tweet overnight on a Saturday was strong evidence that such individuals are not at the focus of government concern: in particular, there was no sign of any of guidance or planning for how that impacted on their lives, interacted with their working lives and choices made by them and their employers, or how it could affect their fundamental human rights including their right to life. Nor has anything been done to enforce social distancing in workplaces or to require employers to consider the needs of those most vulnerable to the virus (e.g. pregnant women, older people, people with disabilities, and BAME people). Nor, without scrutiny and accountability of the reasoning behind changes in rules and guidance, can we be confident that the Public Sector Equality Duty (PSED) has been properly considered: concern about the unfortunate Whitehall tendency to think that compliance with the PSED is a matter of clever legal drafting at the end of a decision-making process rather than a duty that lies at the heart of that process was not wholly dispelled by the Prime Minister's evidence to the Liaison Committee on 27 May.

1.7. As for clarity, the rules, as they have developed, have been frequently obscure or complex, and sometimes absurd: for example, in the second phase of the lockdown rules it was entirely unclear in many cases what the distinction was between staying overnight (prohibited) and moving home (permitted) – confusion that mattered in the case of university students with rented accommodation near their university considering returning there in. It is also unclear what is meant by generally permitting gatherings "for work purposes": does that include the case where one of those persons is working and the other persons involved are customers?

1.8. So far, the Government has simply failed to provide for any proper accountability or scrutiny for the choices it has made. The set of changes in England made in mid-May were announced in vague terms by the Prime Minister on a Sunday outside Parliament, with no opportunity for questioning: confusion was bound to result, and did result. Further very substantial changes to the rules, with impact on the lives of everyone in England, were made with 14 hours notice on Monday 1 June: a pattern which has been typical of all the major changes made (including the fundamental changes made on 4 July, where the new rules were published 9 hours before coming into force). In both cases, the new rules were made without any Parliamentary scrutiny at all on the basis that the changes, though flagged some days in advance, were somehow too urgent to allow for a Parliamentary vote[1]. It may be that Parliamentary procedures for affirmative resolutions would have been too slow: but the answer (particularly once the immediate emergency had passed) was to see if better and swifter procedures could have been agreed rather than to continue circumventing them. In any event, nothing stopped the Government from publishing draft rule changes a few days before they came into force so as to give time for MPs and others to comment and suggest improvements before they took final legal form. Changes should be announced in Parliament and followed by questioning, accompanied by the text of proposed rule changes and a detailed explanation of the choices made and the evidence lying behind them, and Parliament should not just approve the changes in a single "yes/no"

[1] That is the only basis on which s.45R of the Public Health (Control of Disease) Act 1984 can lawfully be used to make rule changes of this kind without an affirmative vote of both Houses.

vote[2] but should be able, through departmental select committees or an ad hoc select committee of both Houses, to hold Ministers to detailed account for their choices.

1.9. Guidance about how to approach issues such as "reasonable excuse", and on the meaning and effect of other aspects of the legal text of the rules, is likely to be helpful (given that these are public health measures and the Govt is better-placed than eg courts and the police to understand the public health issues) and should be issued with draft rule changes and scrutinised with them. But guidance should be used as a supplement for, and not as a replacement for, rule-making: if certain businesses or activities should, given the scientific advice, not be carried out or carried out only on strict conditions, then that should be reflected in rules that can be enforced and which those working in those industries can rely on, not guidance that has no basis in the text of those rules and which can be ignored by employers desperate to re-start their businesses.

Human Rights

1.10. The lockdown and many of the proposals for easing it represent significant and blanket restrictions on individual freedoms. As noted in the Joint Committee on Human Rights Chair's brief on the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020[3]:

> *"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".*

1.11. Key human rights considerations for assessing any legislation in this area include the following articles of the European Convention on Human Rights (**ECHR**):

- **Article 2 (right to life) of the ECHR.**

- **Article 7 –(no punishment without law) of the ECHR.** This right is reflected in the common law principle of legality, that a criminal offence must be both foreseeable and accessible (i.e. an individual can know from the wording of the provision in question (if necessary with the interpretation of the courts), what acts/omissions would make him liable for committing an offence.

- **Article 5 (right to liberty), articles 8 (privacy and family life), 9 (freedom of religion) and 11 (freedom of association) of the ECHR**. These are all qualified rights, where the interferences can be legal if they are properly justified, proportionate and necessary as a means of protecting public health. However, as the lockdown is being lifted some groups will continue to have their rights infringed for much longer than others, and this may be especially onerous for some. Such prolongation needs to

[2] The procedure generally required by s.45Q of the 1984 Act.
[3] Joint Committee on Human Rights Chair's brief on the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (8 April 2020)

be for good, necessary and proportionate reasons, and justified by evidence rather than hunch or a desire to favour groups with the ear of Ministers.

- **Proportionate enforcement.** This requires that the policing of legislation as well as the legislation itself is proportionate. This will require, for example, appropriate training and guidance to be provided to police enforcing the legislation.

Data Protection and Privacy

1.12. **GDPR and Data Protection Act 2018:** The United Kingdom has a well-developed legal framework for the protection of privacy and data, primarily contained in the General Data Protection Regulation (EU) 2016/679 (GDPR) and the Data Protection Act 2018.

1.13. **Lawful Processing:** Data may only be processed lawfully if done so on one of the lawful bases in Article 6 of the GDPR. Where personal data is also "special category" data (which includes health data) it must also have a lawful basis in Article 9 GDPR.

1.14. **Human rights law:** The collection of personal data by the app is likely to engage Article 8 of the European Convention on Human Rights (Right to respect for private and family life, home and correspondence). Article 8 is a qualified right meaning that it can be interfered with by a public authority "such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Data protection principles

1.15. Depending on the approach taken, the following data protection principles, contained in the GDPR, may come into play:

1. **Privacy Policy.** There should be a privacy notice on the app(s) ensuring that citizens know what will be done with data submitted on the app and which entities will process it.

2. **Lawful basis**. Health data is special category data so there will need to be a lawful basis and a condition identified for it to be processed. In this context such processing is very likely to be lawful - **however** a policy document should be in place. Labour could call on the government to publish its relevant policy document.

3. **Data sharing requirements.** There should be clarity about which entities will process/ receive the data.

4. **Purpose Limitation Principle**. Personal data must only be used for purposes compatible with the original purposes for which it was collected.

5. **Security**. The data should be stored very securely (encrypted at rest and in transit for example). Access should be restricted on a need- to- know basis. Consider data breaches.

6. **Data Minimisation principle**. No more data should be collected than needed. Data could be aggregated and anonymised to create datasets for secondary usage e.g. to improve health systems or analyse coronavirus after the fact. Data retention periods should be strict and data should be deleted in line with the agreed data retention period.

7. **Data subjects' rights**. The government/NHS bodies should put in place governance arrangements and additional resource to ensure UK citizens' rights under data protection law are met. For example, honouring subject access requests or the right to rectify or the right to be forgotten. Again, there are exemptions to these rights which need to be considered. There may be enhanced litigation risks around an intrusive track-tracing policy.

1.16. **Exemptions to the GDPR:** The GDPR and the Data Protection Act 2018 provides a very wide range of exemptions to certain GDPR requirements, including, crucially, the purpose limitation principle. These include, for example processing data for:

- The prevention and detection of crime.
- The apprehension or prosecution of offenders.
- The assessment or collection of a tax or duty.
- Where it is necessary to disclose the data for the purposes of, or in connection with, legal proceedings.
- The purposes of maintaining effective immigration control.

1.17. Currently, it could be compliant with the GDPR and the DPA 2018 for information to be collected by the NHS for the purposes of the protection of health but then passed to the police, HMRC or the UK Border Agency for other purposes using the exemptions contained in the DPA 2018. For example, Paragraph 2, Part 1 of Schedule 2 of the DPA 2018 provides an exemption from a wide range of DPA 2018 requirements where a controller (e.g. the police) obtains data from another controller (e.g. the NHS) for the purposes of discharging statutory functions and processes it for the purpose of discharging statutory functions, for the prevention or detection of crime and other crime/tax enforcement purposes.

1.18. Given the scope of these exemptions, consideration should be given as to whether new primary legislation is needed to put in place a higher level of protection for data collected as part of the process of easing the lockdown (e.g. by a tracking app).

Investigatory Powers Act 2016 and Regulation of Investigatory Powers Act 2000

1.19. Thought needs to be given to how the government wish existing powers under the Investigatory Powers Act 2016 or Regulation of Investigatory Powers Act 2000 to apply to this new potential source of data. If it is the government's intention that this data should be excluded from these powers for all, or some, public bodies other than those concerned

with public health, then it would be wiser to state this expressly in primary legislation, and amend the Acts appropriately.

1.20. There is no clarity currently that these powers could not apply to this new sources of data. There has already been concern, expressed in an open letter by technology professionals, that part 3 s.61A of the Investigatory Powers Act 2000 has enabled police to use existing phone data to track people believed to have Coronavirus. This may or may not be correct, but the belief that this is happening demonstrates this is an area calling out for urgent clarity, if there is not to be a lack of public trust that undermines take up of any app.

1.21. Introducing these kinds of safeguarding provisions (along with publicising them) would be a part of reassuring the public that this data will, and can, only be used for public health purposes to tackle Coronavirus and not by law enforcement, security services or any other bodies.

1.22. **Brexit and the GDPR.** A number of the policy options considered in this report involve the collection and processing of personal data. At present, the European Withdrawal Act 2018 and the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 propose to retain GDPR in UK law beyond the end of the transition period; however Boris Johnson has raised the possibility that the UK's data protection law may diverge from GDPR after the transition period has ended. It is very likely that the information gathering process here will create datasets that will be needed beyond the end of the transition. There is therefore a concern among the privacy community that the government could potentially choose to water down data protection law which applies to these datasets in future. This is particularly concerning with regards to the use of tracking apps hosted by Google, which has recently announced that it will no longer hold UK citizens' data in the EEA following Brexit. Ensuring that UK citizens' personal data collected in the context of coronavirus, will continue, at a minimum, to be protected to GDPR-standards after the transition period would help reassure the British public and encourage take-up of policy options that involve the processing of personal data.

1.23. **Special category data.** A number of the policy options would entail the mass collection of health data, which is 'special category data' and is therefore required by data protection legislation to be treated more carefully and stored more securely than other types of personal data. In the ICO's recent guidance on coronavirus, the ICO confirms that, in its view, public bodies may lawfully require additional collection and sharing of personal data to protect against serious threats to public health.

1.24. **Data Privacy Impact Assessment:** Where large amounts of special category data are processed by the NHS it is likely that a Data Privacy Impact Assessment will be required by law. DPIAs should spell out (i) how the health data will be securely collected and stored (ii) how long it will be retained and (iii) for what purposes it will be used and (iv) what the lawful basis under GDPR is for processing such data. These should be published well in advance of data being collected to allow sufficient time for proper scrutiny. Publication of these details may also help reassure citizens concerned about the potential infringement of their privacy that such mass testing represents; it is also, in a parliamentary democracy, appropriate that such details be made public.

1.25. **Privacy policy.** Data protection legislation requires data processors to publish a privacy policy and provide it to those who are providing personal data. In order to meet the transparency requirements under GDPR, the government would need to publish details of which contractors it may use in the collection of data; and with which third parties it intends to share the data. For example, will such data be shared between NHS trusts, with central government, or with employers?

1.26. **Contractors and third-party suppliers.** Strict data privacy obligations would need to be imposed through contractual mechanisms on any contractors or third-party suppliers who supported with the collection/processing of personal data collected during mass testing. Again, we would call on the government to make clear how it will monitor and enforce these contractual obligations to avoid mis-use or other breach of the personal data collected.

1.27. **Security measures.** Stricter security measures should be taken owing to the sensitivity of the health data to be collected by a number of the policy options. The government would be required to store such details securely. In the circumstances, to the extent practically possible, we would expect the government to store these datasets securely in the UK and to heavily restrict access to them. In the event of any data breach, the government would have a duty to notify individuals whose personal data was collected if the breach resulted in a 'high' risk to their rights and freedoms. Given the nature of the pandemic and the special category of the data collected, we would anticipate that in most circumstances a data security breach would pose a 'high' risk to the data subjects in question and would require notification.

1.28. **Purpose of collection:** Under data protection legislation, personal data must not be used for purposes 'incompatible' with the purposes for which it was originally collected, unless an exemption to this requirement applies. The government should carefully define these purposes at the outset of collection. The government may wish to use such datasets for wider public health uses, such as for statistical use by epidemiologists, or to create datasets used to train AI tools used for NHS improvements.

1.29. **Retention.** Finally, it is important to consider how long data will be retained before being deleted. This will need some careful consideration, as being able to assure citizens that 'data will only be retained for a short period and will then be permanently deleted' may go some way to assuaging citizens' privacy concerns. A balance must be struck between the need to respect privacy concerns and the potential usefulness of the data for wider public health purposes (discussed further below).

2. POLICY OPTIONS CONSIDERED IN THIS PAPER

2.1. The policy options covered in this report are ones that have been discussed widely and which are likely to form (or continue to be) the basis of the easing to the lockdown. The policies are then analysed and assessed based on these fundamental principles. The policy areas addressed are:

1) easing restrictions for specific demographics, sectors or locations (see **Targeted easing and restrictions**)

2) the requirement to use face masks in public (see **Face masks**);

3) measures designed to shield particularly vulnerable groups (see **Shielding the vulnerable**);

4) engaging in mass-testing of the population (see **Mass testing**);

5) technology augmented track and trace systems (see **Tracking and tracing apps**);

6) requiring immunity passports to be produced on demand (see **Immunity passports**); and

7) implementing appropriate health and safety in the workplace (see **Employment and health and safety**).

2.2. These policies are addressed in turn in more detail below along with the relevant legal considerations, and potential enforcement mechanisms.

3. THE CURRENT LEGAL FRAMEWORK

Legal basis for the lockdown

3.1. **The legal framework:** The framework in England has gone through three key stages.

3.2. First, the original lockdown regulations (SI 2020/350) made it an offence for anyone to leave the place where they were living without a reasonable excuse (a long list of examples of reasonable excuses being given, such as taking exercise, travelling to work where that could not be done from home, and buying essential goods). They also restricted all public gatherings and ordered the closure of many types of business. Various minor amendments to those regulations were made on 22 April (SI 2020/447). Further amendments on 13 May (SI 2020/500) allowed further businesses (such as garden centres) to open and permitted further reasons for being outside the home, including in particular outdoor recreation and buying, selling or renting residential property.

3.3. Second, on 1 June 2020 SI 2020/558 made two very important changes which effectively replaced the previous framework. First, it removed the general restriction on being outside the home and replacing it with a general prohibition on staying overnight outside the home. On the other hand, it prohibited (subject to listed exceptions such as gatherings for work purposes, and moving home) all gatherings indoors of people who were not members of the same household and all gatherings outdoors of more than six people. The effect was to allow small social meetings outdoors (for example in gardens), though it continued to prohibit, for example, two lovers in different households from meeting each other indoors (though they could outdoors). On 13 June, SI 2020/588 amended those rules so as to permit most shops to open and to allow households with only one adult to "link" to another household so as to be treated as part of that household (thus, for example, permitting lovers to meet indoors as long as at least one of the lovers lived alone or only with children, or people to visit the home of elderly parents living on their own).

3.4. Third, on 4 July, SI 2020/684 completely replaced the former Regulations. The new Regulations prohibit limited classes of businesses (for example, theatres and gyms) from opening but permit the opening of pubs and bars. There was no longer any restriction on staying outside the home overnight, and hotels and self-catering holiday accommodation are allowed to open. Restrictions on gatherings now do not apply to visitor attractions or business premises: and also do not apply where the gathering is necessary for work or other listed purposes. Outside those exclusions, gatherings of 30 people or more are permitted only outside and only where the gathering is organised by a business, charity, political body or public body which has carried out a risk assessment and taken all reasonable steps to prevent the spread of the virus.

3.5. However, in the light of an outbreak of Covid-19 in Leicester, the new regulations do not currently apply there: specific regulations for Leicester (SI 2020/685) effectively preserve the previous regulations in that city.

3.6. **Masks**. On 15 June 2020, SI 2020/592 made it an offence to travel on public transport without wearing a mask, subject to various listed exceptions and a general "reasonable excuse" exception.

3.7. **Quarantine.** On 8 June 2020, SI 2020/568 came into force. Those regulations required all people arriving in England from outside the Common Travel Area (the UK and Ireland)

to self-isolate for 14 days. There is a long list of exceptions, including lorry drivers and international commuters (those who live abroad but travel to the UK for work very frequently). Those regulations were amended by SI 2020/691, essentially as from 10 July, so as to disapply the quarantine requirement to persons arriving in England from a list of countries, including most but not all of the EU (Portugal and Sweden being notable exceptions) but excluding, in particular, the United States.

3.8. **Relevant legislation** The main parts of the 'lockdown'[4] in England are set out in the introduction to this paper. Somewhat similar, but different, measures are in place in respect of Wales, Scotland and Northern Ireland. The regulations have never been identical, and have moved further apart with time, as the different parts of the United Kingdom have made different decisions about easing.

3.9. **Key role of the Public Health Act 1984.** The primary piece of legislation, under which the Coronavirus Regulations have been made, is the Public Health Act 1984. It is of note that neither the introduction of the regulations, nor any of the subsequent amendments have been approved by Parliament, having all been introduced under s.45R (emergency provisions) of the Public Health Act 1984. The first edition of this paper noted that academic articles had challenged this structure, there is now a legal challenge to this overall approach[5], and concerns have also been raised over whether even if it had originally been appropriate to use s.45R how easing of the lockdown could qualify as such an urgent emergency that it continues to be appropriate[6]

3.10. **Central role currently played by guidance** Many of the big changes in society around Coronavirus are being undertaken voluntarily. For example, keeping two metres away from other people is guidance, with no criminal sanction for breach, as is increased hand washing. Wearing a mask in certain situations, is also (outside the area of public transport, as from 15 June) only guidance, without a criminal enforcement mechanism. Currently the guidance is much stricter on gatherings than the post 4th July legal changes. The guidance on the gov.uk website sets out:

> *'It remains the case that you should not:*
>
> - *socialise indoors in groups of more than two households (anyone in your support bubble counts as one household) – this includes when dining out or going to the pub*

[4] There are also powers under the Coronavirus Act 2020, s.51 and schedule 21 giving the police significant powers over potentially infected persons, but these are not the main 'lockdown' rules governing the lockdown for everyone.

[5] Pursued by Mr Dolan, with Phillip Havers QC instructed, they are initially seeking disclosure of SAGE materials. Permission to bring judicial review was refused by Mr Justice Lewis but it is understood that permission will be sought from the Court of Appeal.

[6] https://www.prospectmagazine.co.uk/politics/george-peretz-lockdown-regulations-parliament-scrutiny-law

- *socialise outdoors in a group of more than six people from different households; gatherings larger than six should only take place if everyone is from exclusively from two households or support bubbles*
- *interact socially with anyone outside the group you are attending a place with, even if you see other people you know, for example, in a restaurant, community centre or place of worship*
- *hold or attend celebrations (such as parties) where it is difficult to maintain social distancing*
- *stay overnight away from your home with members of more than one other household (your support bubble counts as one household)'*

There is a big diversion between this guidance and the law currently, as none of the above are any longer illegal (provided the numbers are below 30).

4. TARGETED EASING AND RESTRICTIONS

Description of the policy

4.1. This policy option entails restrictions remaining in force for (or being re-imposed on) individuals belonging to certain demographics (such as those currently subject to voluntary shielding), workplaces in certain sectors or specific geographical locations. This could also involve allowing only certain businesses and public institutions to open and monitoring the impact on the rate of infection.

4.2. IFS research has shown that around one-third of workers in shutdown sectors are under 25 with a significantly higher proportion of women. ONS data show deaths are overwhelmingly among older people. Mortality for under 40s is one in 100,000. By comparison heart attack mortality is 0.67 for 15-34-year olds. Covid-19 mortality rises to 25.5 for 40-65s and for over 65s it is 491. Men are overrepresented at every age.

4.3. This suggests that young people could be allowed to return to work first (or not be prevented from working if an outbreak occurs) with lower personal risk.[7] Warwick University researchers have proposed releasing from lockdown 4.2 million workers aged 20-30 who do not live with their parents.[8]

Legal considerations

4.4. **Amending the Coronavirus Regulations.** The powers in section 45C of the Public Health (Control of Disease) Act 1984 (the 1984 Act) to make these regulations are broad, including the power to make "specific provisions" as well as "provisions of a general nature"[9], and there is no reason to suppose that regulations could not be made that impose different restrictions on persons in different parts of England (and prohibiting persons from moving into or out of those areas[10]) or different restrictions on persons of different ages or other specified characteristics. Indeed, SI 2020/685 made specific provision maintaining the pre-4 July lockdown rules in Leicester. In relation to closure of businesses, the Regulations already apply differently to different classes of business, and the relaxation of the Regulations that took place in May introduced further classes of businesses that were permitted to open.

4.5. **Consistency with the ECHR.** Any such regulations would have to be consistent with the ECHR. Since they engage a number of Convention rights (assembly/family life/religion) the prohibition on unjustified discrimination in relation to the enjoyment of those rights (Article 14) would also be engaged. The public sector equality duty (PSED) would also require consideration of the impact of such regulations on persons with protected

[7] Mulheirn, I. 'A sustainable exit strategy: Managing uncertainty, minimising harm'. Institute for Global Change, 20 March 2020. p. 16.
[8] https://warwick.ac.uk/fac/soc/economics/research/centres/cage/news/06-04-20-the_case_for_releasing_the_young_from_lockdown_a_briefing_paper_for_policymakers
[9] S.45C(2)(b)
[10] See s.45G(2)(j), which permits restrictions on where persons go. That has not however been done in the current Leicester regulations (SI 2020/685), save to the extent that persons living in the protected area are prohibited from staying the night outside their home.

characteristics, which include age and racial background – again, as noted above, it is not clear to what extent the PSED has actually been complied with in decision-making to date.

4.6. **Segmentation by age and discrimination**. This approach is perhaps especially prone to being, or being seen as unfair and discriminatory, and to be consistent with Article 14, it needs to be based on objective fact and medical science, and not stereotypes. Further, it would be necessary to show that voluntary compliance with government recommendations would not be effective – a claim that might be hard to maintain in the face of the fact that government advice on shielding – going well beyond what was ever required in law – has been generally complied with.

4.7. **Geographical segmentation** Equally, selective geographical easing is likely to arouse strong disagreements about one area being favoured over another unless clearly based on some objective criteria, and there could be legal challenges, or at least a loss of good will and consensus. There is also a risk that people who can move from restricted to unrestricted areas (for example those with parents or second homes in unrestricted areas) would choose to do so: even if regulations seek to prevent that, enforcement will be an issue. Different geographical areas have different age and racial background profiles, so that Article 14 and PSED issues will arise. Subject to those concerns, if the risk of spreading Covid-19 is established to be clearly different in different geographical areas, it may well be disproportionate to maintain equally severe lockdowns in less affected areas.

4.8. **Opening up different classes of businesses at different times** One question that may arise is whether the Government can, in deciding which sectors to open up, take account of the economic and social benefit of opening up those sectors as well as purely health-related concerns (for example, the extent to which social distancing is possible in those sectors). However, the 1984 Act not only permits but arguably requires consideration to be given to economic and social benefit, since it requires all restrictions of the kind at issue to be proportionate[11], and the assessment of proportionality is bound to include an assessment of the economic impact of imposing that restriction (which is not, of course, to say that the economic impact has to have any particular weight vis-à-vis health impacts – that is a matter for Ministers). Indeed, some such judgment appears to have been made from the outset when deciding, for example, to permit all construction sites to continue operating, and (in May 2020) in permitting business related to property sales to resume, but not (at that stage) car showrooms. As noted above (§2.1) it is not at all clear on what basis that decision, and other similar decisions, have been taken, and there is a real need for scrutiny and accountability when future decisions of this kind are taken. A further issue is that opening up certain kinds of business but not others will have different effects on different groups within the population depending on the age, income and racial profile of those working in the affected sectors (for example, the hospitality sector tends to employ younger people): so the PSED will be engaged – again, as noted above, it is not clear to what extent more than lip-service has been paid to it to date.

4.9. We do not see that either the Competition Act or EU competition or State aid rules would be engaged by treating different businesses differently for the purposes of easing the lockdown. However, any difference of treatment that appears arbitrary (for example

[11] S.45D(1)

allowing one type of retailer to open but not another supplying very similar goods or services from similar premises) will be vulnerable to challenge on rationality grounds unless there is a clear justification for the difference. This paper has already noted that some of the distinctions that have been and are being drawn do appear arbitrary, or at least not obviously based on sound policy. There will also be problems with defining in a robust way those retailers that are allowed to re-open or are required to close if lockdowns have to be re-imposed.

4.10. **Current guidance for business.** Consideration should be given to whether current guidance on businesses should become law. In some Southern States in the USA, as those states gradually re-open social distancing laws were put in place to limit the population density allowed in stores: and much closer to home, in Wales, the revised regulations prescribe social distancing rules for open businesses (rather than leaving distancing solely to voluntary guidance, as in England). We need to consider what elements of guidance concerning businesses, such as social distancing, should be embedded in law: clear powers to achieve that are to be found in paragraph 6 of Schedule 22 to the Coronavirus Act 2020 (the 2020 Act) which enables binding directions to be given to the owners of premises as to the location of persons within premises. Similarly, the question of whether there should be additional guidance, or laws, for high density public transport should have been considered, before the progressive re-opening of businesses caused numbers travelling to rise[12]: exhortations to workers (many of whom have little real choice but to go back to work when their employers reopen) to avoid public transport are not going to be adequate to avoid dangerous crowding: and such concerns are not adequately addressed by rules that now require face-masks to be worn.

4.11. **Avoiding legal challenge.** As identified above, the 1984 and 2020 Acts contain the powers necessary to apply the lockdown more selectively and to impose social distancing rules in place of closure. In order to avoid claims of discrimination by those who continued to bear the burden of more serious restrictions, it would be necessary to have a careful and evidenced justification of the reason for different treatment, especially when restrictions continued to bear down more heavily on certain groups rather than others.

4.12. **Significant adverse impact people facing domestic violence, mental health illnesses and physical disabilities.** When introducing the pandemic restrictions, the government did not seem to consider the negative impact the restrictions would have on particular groups. In particular it became clear that people subject to domestic violence; people with mental health illnesses; and people with physical disabilities, are at a far greater disadvantage under the restrictions than others.

4.13. Several lawyers have written about the human rights implications of the restrictions on these groups of people, in particular Francis Hoar who writes:

> "The isolation required by the Regulations engages Article 14, being indirectly discriminatory on those with mental illness (in view of the isolation it imposes) and on women (given that they are disproportionately affected by the domestic violence that has more than doubled during the 'lockdown)."

[12] In Sched.22 to the 2020 Act, "premises" includes trains, vessels and aircraft, so the para. 6 powers can be used in relation to public transport.

4.14. **Ad hoc and flawed policy response.** Having failed to consider the impact of restrictions on these groups of people, the government has been on the back foot on these issues ever since. As a result, we have seen scattered attempts to address the issues as they came to light, such as increased funding for domestic violence services, and a clarification of the regulations stating that those with disabilities can in fact leave home more than once a day, and can travel to locations not local, where necessary.

4.15. **Potential policy options.** In considering how restrictions are eased, these groups of people need to be at the forefront of considerations. Potential policy options could include:

- These groups being able to leave home more easily and/or frequently than others.
- These groups should be able to use public transport in addition to key workers, so they can more easily access the services they require.
- Services that support these groups should be some of the first organisations to move back to more “normal” working set-ups.

5. FACE MASKS

Description of the policy option

5.1. This policy option involves the recommending or imposition of legal requirements to wear face masks in some or all public spaces, including in shops and other commercial premises, public transport, parks and opens spaces, and generally in the street.

5.2. The governments advice on masks for England is now to 'wear a face covering in enclosed public spaces where social distancing isn't possible and where you will come into contact with people you do not normally meet'. The Government has also made face masks mandatory (with limited exceptions) on public transport in England from 15 June 2020.

5.3. In addition, the Government has announced that wearing a face covering in shops and supermarkets in England is to become mandatory from 24 July. Those who fail to comply with the new rules will face a fine of up to £100.

5.4. There has been a divergence of views regarding the use of masks by the public, with Public Health England initially not recommending their use but a number of health authorities, such as the Center for Disease Control and Prevention (CDC) in the US, recommending the use of cloth masks.

5.5. The feasibility of this approach depends on the availability of masks which are restricted at present, partly because of export bans in many producer countries. However, many countries health agencies have recommended that the public wear cloth masks which would not be used in a medical setting. This recommendation is on the basis that cloth face coverings protect others but not the user (due to droplets from the user's breath being bigger when they leave the user's mouth and so intercepted by the cloth mask).[13]

5.6. In the Czech Republic and Austria, it is mandatory under law to wear face masks outside the home.[14] Germany has made masks mandatory on public transport and when shopping in nearly all of the 16 states[15], residents in the worst hit region of Italy have to cover their noses and mouths in public spaces,[16] South Korea and Taiwan have been able to supply two masks a day for everyone through increasing production and rationing.[17]

Legal considerations

5.7. **Clarity of the legal position and proper public information.** If it is to be made a criminal offence for an individual not to wear a mask in public, there needs to be clarity about what exactly people are required to do both in law, and in terms of public information.

[13] Mulheirn, I. 'A sustainable exit strategy: Managing uncertainty, minimising harm'. Institute for Global Change, 20 March 2020.
[14] https://www.macleans.ca/society/health/the-case-for-mandatory-mask-wearing-in-canada/
[15] BBC website 'should we all be wearing masks'
[16] BBC website 'should we all be wearing masks'
[17] Mulheirn, I. 'A sustainable exit strategy: Managing uncertainty, minimising harm'. Institute for Global Change, 20 March 2020.

5.8. **What meets the legal requirements for a mask or face covering.** Should the law require a certain standard of mask, or only a government issued mask be worn? Should the law require a mask per se, or merely something that covers the nose and mouth in public, as was done in Lombardy, Italy*?* Some countries (Japan, Taiwan) have supplied masks to the population, others have mandated masks be worn, but have not supplied them, which has caused anger and problems and many attempts to make masks at home. It would need to be considered to what extent home-made masks would be acceptable. Much of this will depend on the science, and whether a home-made cloth mask is useful.

5.9. **Supply of face masks/face coverings.** Some countries (Japan, Taiwan) have supplied masks to the population, others have mandated masks be worn, but have not supplied them, which has caused anger and problems and many attempts to make masks at home. Consideration should be given as to whether not wearing a mask/face covering in public when these have not been supplied or are unavailable should still be an offence. If there are no masks/face coverings available and home-made masks are not acceptable substitutes, then this may mean that those who cannot afford, access (e.g. if there is high demand) or create (e.g. for lack of skills or materials) masks are essentially trapped. This raises obvious human rights and basic fairness issues. If wearing a mask/face covering is effectively a condition of venturing out, with a criminal sanction for not wearing one, then there is a strong argument that if this is to be proportionate, and not to disadvantage some groups severely, that masks/face coverings must be readily available, and potentially provided by the government (or by private companies at government direction and to set standards) to all citizens. Otherwise, poorer groups or those with disabilities may be unable to buy or make masks and trapped by their poverty and/or disability. It would be a serious problem if there was a mandatory requirement to wear masks/face coverings, at the same time as a mask/face covering shortage, but that seems a risk unless thought is given in advance, as demand would surge. This is obviously closely linked with policy, and whether the government envisages being able to supply or ensure the availability of millions of masks/face coverings. SAGE has been considering this and updated recommendations from SAGE have been given to the Government.

5.10. **Exceptions to wearing a mask/face covering.** There also needs to be thought also about what duty precisely is going to be imposed. Should the duty be to have one's mouth and nose covered in public at all times, this would mean someone having a sip of water or lowering their mask to smoke a cigarette, or speak, would be breaking the law. The wording needs to be carefully chosen, and it is submitted that any criminal offence of failing to wear a mask should include the clause, 'without reasonable excuse'. Making it an absolute offence would surely be too strict, e.g. if someone intended well, but their home-made mask broke whilst they were out.

5.11. **Alternatives to criminal sanctions.** We should consider carefully before turning to the criminal law, especially if the government is unable to supply millions of masks. Labour has supported changing the guidance from not recommending them to recommending them in public (if this is what the evolving science shows). Other steps could be taken short of criminalisation, to increase uptake, such as an advertising push, or providing free masks to London Underground users, who do not have their own. Or face coverings could be made mandatory, but only in certain clearly defined situations such as on London Underground.

5.12. **Impact on business.** Any legal requirement to wear masks/face coverings “in public” will have a potential impact on businesses to which the public have access, such as shops, pubs, restaurants, cafes and the like. Owners, managers and staff of those premises will need to be protected from any legal liability if they refuse entry to someone not wearing a mask/face covering and will need to understand the extent of their responsibility for enforcing a requirement to wear masks/face coverings. For example, if a shop keeper allows a customer to enter their shop without a mask/face covering, and another customer complains, what is the shopkeeper’s liability?

6. SHIELDING THE VULNERABLE

6.1. There is no legal framework for enforcement, beyond the general provision for the lockdown above. This area largely concerns what guidance people are given. The guidance has very significantly shifted after 1st June 2020. It now states:

> *"People who are shielding remain vulnerable and should continue to take precautions but can now leave their home if they wish, as long as they are able to maintain strict social distancing. If you choose to spend time outdoors, this can be with members of your own household. If you live alone, you can spend time outdoors with one person from another household. Ideally, this should be the same person each time. If you do go out, you should take extra care to minimise contact with others by keeping 2 metres apart'.*

6.2. This guidance is for those who are clinically extremely vulnerable and have received a letter from their GP's or hospital clinician. There are not any stricter laws in place for those shielding.

7. MASS-TESTING THE GENERAL POPULATION

Description of the policy option

7.1. Since the start of the pandemic, the World Health Organisation has emphasised the importance of testing in order to trace transmission.

7.2. Random sampling in Iceland showed that the virus had a much wider spread in the community than had been assumed from original screening of high- risk people, indicating the importance of a broader testing regime. Antigen tests have accuracy limitations but can still be effective at scale.[18] No antibody tests are currently licenced in the UK. Opinions on the capacity required vary, for example Paul Romer calls for universal random testing of 7% of the population.[19]

7.3. However, Cleevely et al. suggest that 21% daily testing would be needed, if done at random, but that targeted testing of critical groups is a more practical option. The principal challenges to the effectiveness of this policy option are that:

(a) antigen tests produce significant false negatives, face scaling challenges

(b) testing capacity is constrained by availability of reagents, as well as PPE; and

(c) that a significant workforce is required to administer tests.[20]

7.4. The UK has been developing a mass testing and tracing programme. To support this, the Department of Health and Social Care has published guidance on maintaining records of staff, customers and visitors to support NHS Test and Trace. The ICO has also published initial guidance for businesses collecting customer and visitor personal data for contact tracing.

Legal considerations

7.5. **Collection of personal data.** This policy option involves the collection of personal data and as such must be considered in the context of current UK data protection legislation, including the GDPR and the Data Protection Act 2018.

7.6. Other measures required by data protection legislation, such as the provision of a privacy policy to citizens being tested, would be required (see Section 9 for a description of relevant principles in more detail). In order to meet the transparency requirements under GDPR, we would expect the government to publish details of which contractors it may use in the collection of data; and with which third parties it intends to share the data. For

[18] See Mulheirn, I. 'A sustainable exit strategy: Managing uncertainty, minimising harm'. Institute for Global Change, 20 March 2020

[19] Mulheirn, I. 'A sustainable exit strategy: Managing uncertainty, minimising harm'. Institute for Global Change, 20 March 2020. p. 23-24

[20] Mulheirn, I. 'A sustainable exit strategy: Managing uncertainty, minimising harm'. Institute for Global Change, 20 March 2020. p. 24

example, will such data be shared between NHS trusts, with central government, with employers?

7.7. Strict data privacy obligations would need to be imposed through contractual mechanisms on any contractors or third-party suppliers who supported with the collection/processing of personal data collected during mass testing. The government should make clear how it will monitor and enforce these contractual obligations to avoid mis-use or other breach of the personal data collected.

7.8. Stricter security measures should be taken owing to the sensitivity of the health data to be collected. The government would be required to store such details securely. In the circumstances, to the extent practically possible, the government should store these datasets securely in the UK and heavily restrict access to them. In the event of any data breach, the government would have a duty to notify individuals whose personal data was collected if the breach resulted in a 'high' risk to their rights and freedoms. Given the nature of the pandemic and the special category of the data collected, in most circumstances a data security breach is likely to pose a 'high' risk to the data subjects in question and would require notification.

7.9. Under data protection legislation, personal data must not be used for purposes 'incompatible' with the purposes for which it was originally collected. The government should carefully define these purposes at the outset of collection. The government to consider whether it could use such datasets for wider public health uses, such as for statistical use by epidemiologists, or to create datasets used to train AI tools used for NHS improvements. In accordance with data protection requirements, the government should make its purposes for data processing known to citizens before they are tested and should only use such personal data for purposes compatible to those set out.

7.10. Finally, how long will the data be retained before being deleted? This will need some careful consideration, as being able to assure citizens that 'data will only be retained for a short period and will then be permanently deleted' may go some way to assuaging citizens' privacy concerns. A balance must be struck between the need to respect privacy concerns and the potential usefulness of the data for wider public health purposes (discussed further below).

8. TRACKING AND TRACING APPS

Description of the policy option

8.1. **Central role of contact tracing and warning.** Contact tracing and warning can play an important role in all phases of the outbreak especially as part of containment measures during de-escalation scenarios. Its impact can be boosted by a strategy supporting wider testing of persons showing mild symptoms. The aim of contact tracing and warning is for public health authorities to rapidly identify as many contacts as possible with a confirmed case of COVID-19, ask them to self-quarantine if possible, and rapidly test and isolate them if they develop symptoms. Effective tracking and tracing therefore relies on the existence of an effective testing system.

8.2. **Understanding transmission dynamics** An aim of contact tracing could also be to have anonymised and aggregated data of infection patterns in society, as a means to make containment decisions at local level. At EU and world level, the ECDC and WHO have asked Member States to identify and follow up nationally contacts linked to each case so as to interrupt transmission and, as a secondary objective, understand transmission dynamics.[21]

8.3. **Application by public health authorities**. Contact tracing is normally carried out manually by public health authorities. This is a process where cases are interviewed in order to determine who they remember being in contact with from 48 hours before symptom onset and up to the point of self-isolation and diagnosis. Longer contact duration and closer proximity means a higher risk of infection. This process relies on the recall of the case by the patients – who may be very ill at the time of interview – both in terms of who they have met and the proximity and duration of that meeting, as well as the ability to produce names and phone numbers of these people (or 'contacts'). Such manual processes rely on the patient's memory and obviously cannot trace individuals who have been in contact with the patient but are who are unknown to him/her.[22]

Tracking and tracing app technology

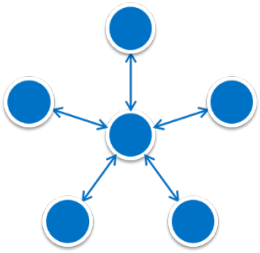
8.4. **Digital tools such as mobile apps with tracing functionalities** can be of substantial support in this process, identifying both known and unknown contacts of a confirmed case and possibly help in their follow up, in particular in settings with large numbers of cases where public health authorities can get overwhelmed. Such functionalities can help identify more contacts and speed up the overall process substantially, which is of essence in this pandemic. The functionality in such apps, if rolled out on a large scale so that they reach well over 50% of the population , could be useful for Member States to rapidly detect contacts of cases, collect information on these contacts and to inform contacts on the need for follow-up and testing if required. In addition, the apps can provide contacts of COVID-

[21] eHealth Network, 'Mobile applications to support contact tracing in the EU's fight against COVID-19: Common EU Toolbox for Member States'. 15 April 2020. p. 6
[22] eHealth Network, 'Mobile applications to support contact tracing in the EU's fight against COVID-19: Common EU Toolbox for Member States'. 15 April 2020. p. 6

19 cases with the information on how to reduce the risk of further transmission and advice on what to do if they develop symptoms.[23]

8.5. The two main electronic tracking technologies being used or considered around the world are global positioning system (GPS) and Bluetooth based approaches.

GPS tracking



8.6. GPS based apps work using the GPS location tracking function on smartphones. The data is collected centrally and processed to identify who individuals with potential or confirmed Covid-19 have been in proximity to. This means someone with access to the central data can identify where people have been physically and in real time.

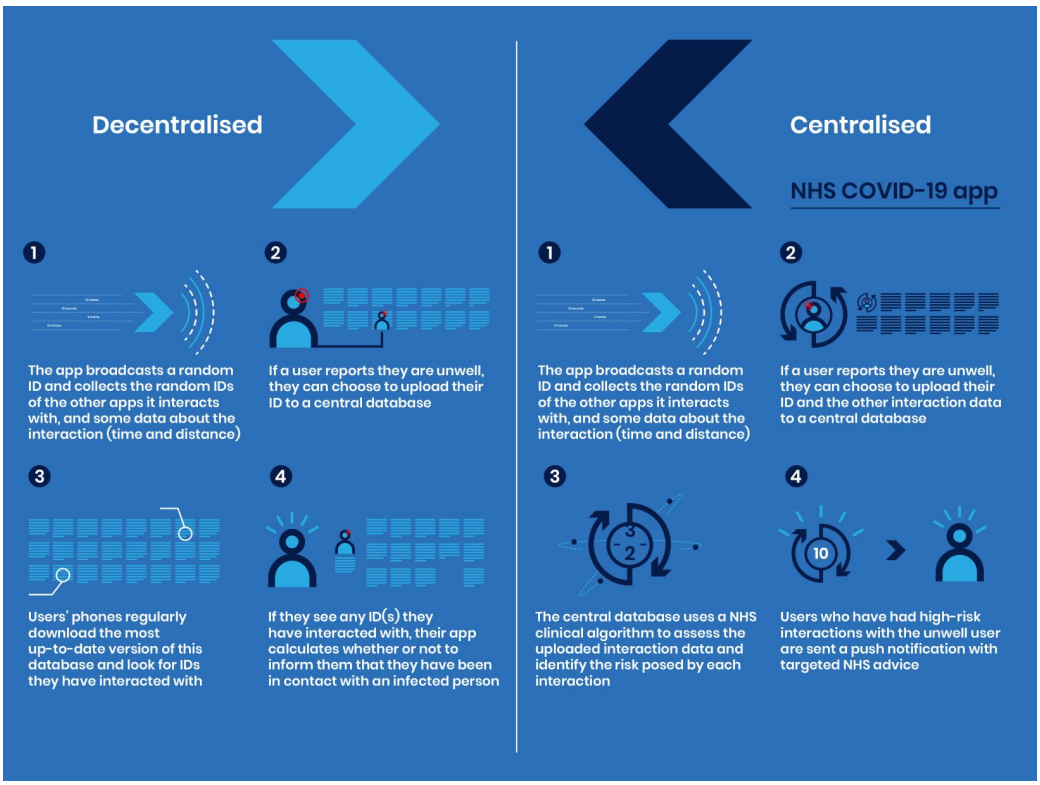
8.7. Examples of countries that are using GPS based apps include China and South Korea. Examples of initiatives in this area include:

- An MIT-developed app, Private Kit: Safe Paths, includes certain privacy features that may make a GPS approach more acceptable. It stores up to 28 days of users' GPS location data but redacts personally identifiable data and blurs individuals' location trail.
- Singapore's TraceTogether app takes an opt-in approach and clear and time-limited conditions on how matched data is centralised. iPhone users must keep the app open and their screen unlocked for it to work; this is a iOS security measure that significantly impacts convenience and take up.
- Taiwan has developed a mobile phone-based tracking system – known as an "electronic fence". This uses location-tracking to ensure those who are quarantined stay home.

Bluetooth based approaches

8.8. There are two possible Bluetooth based approaches that can be used by tracking and tracing apps. These can be used in isolation or combination. The diagram below shows the differences between these approaches.

[23] eHealth Network, 'Mobile applications to support contact tracing in the EU's fight against COVID-19: Common EU Toolbox for Member States'. 15 April 2020. pp. 6-7



Both the centralised and decentralised approaches use the low power Bluetooth function on users' phones. Bluetooth can only transmit data over short distances, using short-wavelength ultra-high-frequency (UHF) radio waves, to connect to others' phones.

A smartphone with the Bluetooth app will constantly broadcast a Bluetooth identifier that allows other phones nearby to see it and connect to it. Under both approaches, the Bluetooth tracking app would initially keep a record on the phone (but not centrally) of the identifier of every Bluetooth device that phone had come into contact with in the previous 14 days, with older data being deleted. The identifier for each phone would typically change regularly (e.g. every 30 minutes) to help preserve privacy.

Under the decentralised approach, if someone has suspected Covid-19 or has tested positive for it, that person would inform their app and it, using the cellular phone network, upload their identifiers to the central database. Users phones matching those identifiers would regularly check through the cellular network whether the identifier of someone who has tested positive for Covid-19 and had interacted with them. If so, the user receives an anonymous notification through the app warning him/her to quarantine/get tested for Covid-19. Under the centralised approach, the identifiers of all users are uploaded onto the central database and when a user notifies that they have tested positive for Covid-19 the matching is carried out on the central database and anonymous notifications sent to the phones of those who had interacted with the person who has tested positive for Covid-19.

Apple and Google are developing a decentralised Bluetooth based solution and have published the application programming interface (APIs) that they propose using. APIs are essentially the framework of a software system. Anyone will be able to produce an app using the API, with Apple and Google, checking that the apps don't do anything malicious. The app shouldn't use too much battery power and will be able to work in the background - rather than having to be open all the time or have the phone unlocked.

Legal considerations

8.9. **Discrimination of people unable to access smartphones.** Consideration should be given to the needs of persons who are not able to access the smartphone technology platforms on which the app would operate. A relevant recent experience is the process for application for permanent residency for EU citizens, which was only available on limited platforms, excluding many individuals from the process until local authorities and the third sector made technology available for them.

8.10. **Medical devices legislation** It is possible that an app that had any diagnostic function would be a "medical device" under EU law and require regulatory approval.

8.11. **Data protection.** As with mass-testing, any technology based approach will require the large scale collection of personal data and must therefore involve consideration of the UK data protection legislation (including GDPR and the Data Protection Act 2018) general and in the context of Brexit (**see above**).

8.12. **Privacy implications.** Technology enabled tracking is a substantially more intrusive approach than mass-testing. It will require careful consideration of the data privacy and other relevant legislation in the following areas:

- The automated collection of personal data using individuals' devices.
- The central role of private technology companies.
- Such technology companies may transmit such data to be processed on servers outside of countries bound by the European data protection framework.
- The approach is more susceptible to hacking and data breaches.
- The approach is more susceptible to the sale or transfer of personal to third parties without the individual's knowledge.
- It is seen by some privacy experts as representing a significant step towards the 'surveillance state'.

8.13. **Tech tracking and centralization or de-centralisation.** There are competing arguments around whether de-centralisation or a centralised system better protects citizens' rights in the field of app contact tracing.

8.14. **Private companies setting privacy standards.** Given the reliance on a small group of tech companies, there is the risk that the standards of privacy and data protection are effectively set by commercial entities, such as Google and Apple, which are not democratically accountable. See for example the Guardian article which claims Apple is setting limits on an NHS contact tracing app. It cannot be right that US tech companies are the arbiter of privacy standards in relation to the collection of UK citizens' personal data, or that we have extremely limited oversight over how these companies may use the personal data collected on such apps.

8.15. Apple and Google's decentralised approach was designed in the US which has a more deregulated approach to data protection and does not have a public national health service. In such a context a de-centralised approach to collecting personal data has the distinct advantage of being less susceptible to hacking or abuse.

8.16. Apple and Google would argue they are seeking more data protection and less state centralisation of data which could all be breached in one incident or be misused. However, this approach may not be appropriate in a more regulated European context. It may also prevent, for example, the NHS using aggregated tracking data to improve and enhance its tracking capabilities.

8.17. **Steps to protect personal health data,** Labour should seek to ensure that there are adequate mechanisms to protect UK citizens' health data whichever app developers or tech companies are involved in collecting this data. Labour should call on the government to impose contractual conditions and/or legislation to ensure that UK citizens' health data shared during this time is "not for sale" and that tech companies cannot sell or otherwise use it to further their commercial ends.

8.18. **ICO guidance on coronavirus.** It may be helpful to note that in the ICO guidance on coronavirus the ICO confirms that in its view public bodies may require additional collection and sharing of personal data to protect against serious threats to public health. This could involve tech-tracking. As set out earlier, we expect the government to publish any advice it has received from the ICO so we can check whether such advice is being adhered to. Equally, the ICO's approach has been known to be subject to challenge in the courts - most recently in connection with CCTV and facial recognition use by police forces- so Labour should not be afraid to challenge the ICO's approach where it feels this is unduly lenient on the government.

8.19. Debate is raging on what approach is appropriate in this context. It is our view that data protection legislation would not prohibit this policy option provided that it is carefully designed, an appropriate balancing test is carried out and documented, data subjects' rights are respected (e.g. subject access requests are provided for) and that the approach is appropriately and accurately described in a privacy statement given to users at the outset (e.g. downloading or first use of an app).

8.20. **Using data for future public health purposes.** Labour could encourage the government to ensure that the health data collected is of a high enough quality, and collected widely enough, that it could be used in the NHS to drive NHS improvements in future years. This would need to be done through aggregation and anonymisation. These sorts of datasets are invaluable to train 'AI' tech which could be used to drive NHS improvements in future.

We note that the scientific and higher education sector in the UK has substantial expertise in considering these questions in the context of scientific research (sometimes in the form of ethics committees/bodies) and their advice should be sought by the government to enable the lawful and ethical use of the data collected.

8.21. However, on the other hand, some may feel the public should be assured that all data will be promptly destroyed after the pandemic. Such an approach could potentially be more effective in ensuring a high degree of public co-operation and consent (given the more than 50% co-operation required).

8.22. **Retention periods.** The data would need to be deleted in line with agreed retention periods. Given the extraordinary circumstances, we would call on the government to give (equally extraordinary) assurances that such data would by the security services and to set out what safeguards would be in place to protect against slippage into a 'surveillance state'. Again, without such assurances there may not be adequate take-up of this option.

8.23. **Security.** A further concern we would have around this option is whether the use of Bluetooth is an adequately secure method for transmission of personal data in tech tracking; if it considered to be insecure, what other privacy mechanisms (such as short retention period) could be used to mitigate against such risk?

8.24. **Data gathering by employers.** Labour should be aware that a number of employers are considering how they can support the gathering of data through such tracking apps. The ICO has confirmed in its coronavirus guidance note that in its view, employers may share information about staff with authorities for public health purposes - but they cannot require staff to implement or use any tracking app.

Proposed NHS app

8.25. **NHS app:** NHSX has trialled a tracking and tracing app on the Isle of Wight. The Isle of Wight trial used a centralised Bluetooth based model rather than the Apple/Google API. However, the Department of Health and Social Care has now announced that "we will now be taking forward a solution that brings together the work on our app and the Google/Apple solution"[24]. It is not clear what this means in practice but the same legal principles apply to all types of tracking and tracing app. The Isle of Wight trial is also instructive of the Government's approach to data privacy, which is revealed to be concerning.

8.26. **Legal framework:** In addition to the GDPR and the Data Protection Act 2018, the Health and Social Care Act 2001 also provides a lawful basis for NHS Digital to collect data through such an app[25], while the Health and Social Care Act 2012 regulates NHS Digital.

8.27. **Personal and special category data:** The data processed by the app was both (a) personal data (GDPR 4(1)), and (b) special category personal data (GDPR 9(1)). It

[24] Next phase of NHS coronavirus (COVID-19) app announced (Department of Health and Social Care, 18 June 2020). Available at https://www.gov.uk/government/news/next-phase-of-nhs-coronavirus-covid-19-app-announced (accessed 6 July 2020)

[25] In particular, the Health Service (Control of Patient Information Regulations) 2002 made under it.

included identifying facts about legal and natural persons and these facts contain information about those persons' health. The fact that the data collected was pseudonymised is not sufficient to take it outside the class of "personal data" (GDPR, Recital 26). The Data Protection Impact Assessment (DPIA) for the App made a number of statements on this subject (pp. 3, 6, and 8) which suggest that the app would protect "anonymity" and/or not "reveal users' identities". These statements might lead to the inference, from a non-specialist user, that the App did not process personal data. Both the statements and any such inference are wrong in both fact and law.

8.28. **Lawful basis:** Given that the data processed is both personal data and special category data, it could not be processed save where there is a lawful basis under both Article 6 and Article 9 of the GDPR. The Data Protection Impact Assessment (DPIA) prepared by the Department of Health and Social care for the trial of the NHS tracking app on the Isle of Wight (the IoW DPIA) states that the basis for processing all the personal data collected by the app is "processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller" (GDPR 6(1)(e)). The DPIA sets out the following legal basis for the app's processing of special category data:

- it is necessary for health or social care purposes under GDPR Article 9(2)(h) (underpinned by DPA 2018 – Schedule 1, Part 1, s. 2(2)(f) – Health or social care purposes); and
- it is necessary for public health under GDPR Article 9(2)(i) (underpinned by Regulation 3(1) and 3(3) of the Health Service (Control of Patient Information Regulations) 2002.

For either of these exemptions to apply the processing must (a) be for a "health or social care", or "public health" purpose, and (b) be necessary for that purpose.

8.29. **Test for necessity:** The test for necessity includes, in essence, an assessment of the proportionality (South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55). In assessing whether the processing is necessary we must consider:

1. Whether the purpose for which it is processed is one which falls within the relevant exemption.

2. Whether the processing is "necessary" (in the ordinary meaning of the word for that purpose.

3. Whether the extent of the processing goes beyond what is necessary for the purpose.

4. Whether the extent or any other aspect of the processes is warranted given the possible prejudice it may cause to the rights and freedoms of the data subjects.

5. Whether the purpose is a genuine pressing social need and whether the processing is proportionate in the light of this.

6. Whether sufficient measures are in place to preserve the rights and freedoms of the data subjects.

It is not necessary to take a "tick box" approach to these questions. The processing should be considered in the round.

The Government seems to have the following potential purposes for its processes of the data:

1. Alerting members of the public if they have been in the vicinity of someone who has reported to the app that they have Covid-19.

2. Study of the behaviour of Covid-19 for the purpose of informing the public health response (by the government or non-government actors).

3. Study of the data for purposes other than informing the public health response (by the government or non-government actors).

Careful consideration needs to be given as to the extent to which a centralised database is necessary for the pursuit of the above purposes. For example, processing in a centralised database may not be necessary for (1) but necessary for (2).

When these issues are considered in the round, both primary purposes can, in principle, meet the South Lanarkshire test if the rights and freedoms of the data subjects are properly protected (at present, they are not, see below).

8.30. **Legal concerns regarding the NHS Isle of Wight Trial App:** There are a number of concerns regarding the NHS Isle of Wight Trial App:

- Whether using a centralised rather than a decentralised Bluetooth based approach is both necessary and proportionate.

- The DPIA requires further refinement and to more clearly describe the status of the data processed (see above).

- The App purported to "anonymise" the data collected before it is used for either secondary purpose. This is unlikely to be possible from a technical standpoint and is, therefore, not a sufficient measure to protect the rights and freedoms of the data subjects.

- The app allowed NHSX to systematically monitor public spaces. There is, at present, no assessment of this in the DPIA not any indication of how this clear violation of the rights and freedoms of data subjects will be ameliorated.

- The Isle of Wight DPIA states the following regarding research:

> "*There will be a research value for data selected by the NHS COVID-19 App, along with any other COVID-19 data set. Whilst the NHS COVID-19 App will ensure that information processed within the NHS COVID-19 App cannot be identified, there*

may be requests to process data from the app for research purposes, which may be linked with identifiable data. All such requests will be subject to further approvals and independent oversight."

This is very unclear as to the Government's view of the legal status of this data and what it meant by "further approvals" and "independent oversight".

- The App did not comply with the data protection principles because, as a function of its design, it excludes the possibility of data subjects exercising their rights under the GDPR. This is inconsistent with Article 25 of the GDPR which requires mechanisms of processing to be designed to maximise protection for, and facilitate the fulfilment of, the rights of data subjects. In particular:

    - The App denied the data subject access to the "Sonar ID" for their data by deliberately making it accessible only through the "back end" of the App. This means that the government can access the Sonar ID but the data subject cannot. This means that it was not technically possible for the data subject to access their rights to, inter alia, access (GDPR 15), erasure (GDPR 17), to object to processing (GDPR 21). This is unlawful.

    - NHSX indicated it would, in any case, refuse all requests for erasure on the basis of "technical difficulties"[26]. At no point has NHSX identified any lawful basis for this position.

    - The DPIA does not appear to mention the right to object to processing (GDPR 21). The right to object specifically applies to Article 6(1)(e) of the GDPR (the basis on which the app processes data). It creates a general duty to act on objections to processing but that duty is a specific duty in relation to Article 6(1)(e). It is difficult to see how processing under the app can be lawful without proper consideration and facilitation of the right to object.

    - The DPIA indicates that the app would make "qualifying significant decisions" by solely automated means (Data Protection Act 2018, s. 14(3)). Such decisions must be "authorised by law". The purported legal basis for this is Regulation 3(1)-(3) of the Health Service (Control of Patient Information) Regulations 2002. These regulations do not, however, apply to "decision-making". They cannot, therefore, be a legal basis for a qualifying decision under s. 14.

Similar considerations apply in respect of Article 8 of the European Convention on Human Rights. This requires an assessment of the proportionality of the infringement of privacy. Such an assessment will raise the same issues as set out above.

8.31. **Additional safeguards within the GDPR Framework:** A decentralised basis provides the highest quality protection of rights. If the app is to continue on a centralised basis then further measures should be put in place to ensure as far as possible the protection of data

[26] Matthew Gould, Oral evidence to the Joint Committee on Human Rights, HC, 265, Monday 4 May 2020

subjects' rights and lawfulness. At a minimum, the following steps should be taken in the app privacy statement:

1. setting out the specific purposes for which data will be processed;

2. stating that processing will be limited to those purposes;

3. stating that where data is processed by third parties it will be subject to a data processing agreement (a link to a sample agreement should be provided); and

4. as genuine anonymisation of the data processed by the app is not possible, it should be made clear that data will be protected as personal data and special category data at all times.

In addition:

- The app should be updated to give data subjects access to their Sonar ID or otherwise ensure that they can exercise their rights.

- NHSX must identify a lawful basis for a blanket denial of the right to erasure or else reverse that policy.

- A proper legal basis for the use of solely automated decision-making must be identified. If one cannot be identified then specific legislation will be necessary.

8.32. **Safeguards requiring new legislation:** We must distinguish between safeguards which are required to make the processing lawful, and additional legislative safeguards that are required to make lawful processing compatible with our moral or political views on privacy.

The Joint Committee on Human Rights expressed concern that the current legal framework for personal data processed by a track and tracing app are insufficient and have published a Bill aimed at putting in place appropriate new legislative safeguards. Its Digital Contact Tracking (Data Protection) Bill (the Bill) includes the following safeguards:

1. the appointment of a Digital Contact Tracking Human Rights Commissioner (the Commissioner), with the same powers as the Information Commissioners in relation to the app, to:

   a) review the law, processing of data, security, risk regarding identification of individuals, necessity and proportionality of digital contact tracing; and

   b) deal with complaints about digital contact tracing;

2. creating an offence for a person who is not the Secretary of State or someone specified by the Secretary of State by regulations to collect or process digital contact tracing data. The Bill makes the regulations subject to annulment in the pursuance of a resolution either House of Parliament.

3. requiring the Secretary of State to take all reasonable steps to ensure that systems used for processing digital contact tracing data:

    a) are designed so as to process no more data than is required for the permitted contact tracing purposes; and

    b) are as secure as possible;

4. creating an offence for a person knowingly or recklessly to re-identify de-identified digital contact tracing data (although it is worth noting than a similar offence already exists under Section 171 DPA 2018, albeit with certain exclusions);

5. requiring the Secretary of State to arrange for the security of digital contact tracing systems to be reviewed by the National Cyber Security Centre;

6. requiring that digital contact tracing data may not be collected from a mobile device unless each person who owns or operates the device has given consent;

7. requiring a digital contact tracing system to comply with approved arrangements for the deletion of contact tracing data published by the Secretary of State having consulted the Commissioner. The approved arrangements must:

    a) make separate provision requiring the automatic deletion of digital contact tracing data from mobile devices as soon as is practicable;

    b) provide that no digital contact tracing data is shared from a mobile device unless the person has specifically consented to upload their digital contact tracing data;

    c) ensure that any digital contact tracing data held by an authorised person is anonymised as soon as is practicable after it is obtained;

    d) ensure that digital contact tracing data held by an authorised person is deleted or anonymised as soon as it is no longer required for a permitted contact tracing purpose; and

    e) ensure that digital contact tracing data is deleted where a data subject so requests;

8. requiring the Secretary of State to review the need for the digital contact tracing during the period of 21 days beginning with the date of Royal Assent and at least once during each succeeding period of 21 days. The review must be published and laid before Parliament. The reviews must consider:

    a) whether digital contact tracing has been effective in achieving the permitted contact tracing purposes;

    b) potential for discrimination contrary to the Equality Act 2010;

    c) potential for breaches of Convention rights (within the meaning of the Human Rights Act 1998);

d) any complaints upheld under the Bill; and

e) the security of contact tracing data;

9. requiring the Secretary of State if he concludes that the processing of contact tracing data is no longer necessary for or proportionate to the purposes set out in section 3 of the Act to immediately:

   a) direct any authorised person to stop processing contact tracing data, and

   b) direct any authorised person to delete any contact tracing data which that person retains;

10. requiring the Secretary of State to publish:

    a) any DPIA required of any data controller under Article 35 of the GDPR relating to digital contact tracing;

    b) information relating to the design and security of the contact tracing app; and

    c) minutes of meetings and reports by the Contact Tracing Ethics Advisory Board.

8.33. It is worth noting that there are some technical issues with how the Bill fits with the current data protection framework, such as whether by requiring consent that means that it would not be possible for the NHS to rely on a different lawful basis for processing the data in the app.

8.34. However, overall, this appears to be a comprehensive package of protections that deals with many of the concerns that have been expressed about reliance only on the current legislative data protection framework. Additional protections that could be added include:

- not allow the anonymisation of data, as the Bill does, but require all data collected by the app to be deleted;
- strengthening Parliamentary control over specification of "authorised persons" (for example by requiring this to be done by statutory instrument requiring positive affirmation by Parliament);
- a commitment from the government that any UK residents' personal data collected in the context of coronavirus, will continue to be protected to GDPR-standards after the transition period;
- publication of DPIAs well in advance (e.g. 14 days) before the deployment of any app; and
- a sunset provision requiring Parliamentary approval for the digital contact tracing app to continue to be used.

9. IMMUNITY PASSPORTS

Description of the policy option

9.1. This policy option involves individuals being issued by health authorities with a certificate of immunity, if the science supports such, (on the basis of having already contracted and recovered from the virus). These could take the form of a hard copy document or card, or a virtual passport displayed on an app.

9.2. It is very important to note that on 24 April 2020, the WHO warned that *"there is currently no evidence that people who have recovered from COVID-19 and have antibodies are protected from a second infection."* As such, unless and until it is established that the previous exposure to COVID-19 provides immunity, the concept of an immunity passport idea is potentially dangerous.[27]

Legal considerations

9.3. **Amending the Coronavirus Regulations** Now regulation 6 has been amended so we can all travel without needing a reasonable excuse the rationale for the immunity passport seems less clear. It would need to be clear just what it allowed a citizen to do/access they could not access previously. Thought would need to be given, from the start, to ensuring that the system is accessible and fair to all groups, and human rights are considered. Care needs to be taken that the practical implementation does not exclude people for example who choose not to own, or cannot operate, smartphones or are unable to read.

9.4. **Grounds for the police to stop people to request information.** Many police powers rely on the concept of 'reasonable suspicion', i.e. that the police need some objective basis before stopping someone, to search or question them. There is no generalised legal presumption that members of the public must answer questions when asked on a street by an officer. If immunity passports are to be enforced the police would need legal powers to stop people and request to see their immunity passport, to ask them for their name, date of birth and home address, all without the need for reasonable suspicion. This is a significant change, and might risk consent, especially at a time of heightened concerns over policing and police powers.

9.5. **Proportionality and discrimination.** There ought to be safeguards to ensure that no one group feels (or is) disproportionately targeted. That could be around recording ethnicity or other data, akin to stop and search, or it could be that the practice is there are checkpoints where absolutely everybody is checked as they pass through, or both. Human rights lawyers could advise police at the stage of preparing guidance as to just how the police operate any checks.

9.6. **Facial recognition.** Another possibility is facial recognition, this would potentially alleviate the need to carry certificates, but there would still have to be police powers to stop and ask people to submit to having their face checked, and a duty on people to agree and

[27] https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19

(depending on how the system works) to provide details, with criminal sanctions, as above, for not complying.

Considerations of legal mechanisms for enforcement of restrictions

9.7. **Protection for employees.** One legal issue arising from the restrictions currently in place concerns the position of employees committing prima facie breaches of restrictions in pursuance of the orders of unscrupulous employers.

9.8. It may be prudent to consider additional protection for employees by providing that employees have either a complete defence or are able to present as a mitigating factor to a breach of restriction the fact that their employer directed or encouraged them to do so. In tandem, one could provide for civil liability for the employer for the inducement of such a breach.

9.9. One could consider extending the reach of the existing victimisation protections (e.g. in discrimination and health and safety rules) to provide that an employee may not be victimised by the employer as a result of anything the employer discovers as a result of COVID related monitoring. We recommend that any protections that are introduced are extended to limb (b) workers alongside traditional employees.

9.10. In addition, any relaxation of lockdown restrictions as they impact on the employer/employee relationship should provide an employee with a defence not only for breach of any government restriction or obligation if they reasonably believed their employer had directed or encouraged them to do so, but also for breach of any restriction or obligation imposed by their employer if they reasonably believed government advice had directed or encouraged them to do so. This would cover the converse situation where an employer directed or encouraged an employee to return to work, but an employee reasonably believed that government guidance directed or encouraged them not to do so. This is a situation which is occurring now under current lockdown rules.

Potential legal challenges in relation to data protection

9.11. UK citizens could challenge any breach of data protection law or of their right to privacy, in connection with the options (e) and (f), by bringing a claim through the courts. Case law has established the right (i) to claim damages for the tort of breach of privacy, (ii) for the tort of misuse of private information, while GDPR provides a statutory right to claim compensation for breach of data protection law. These recourses could potentially be available to individual claimants or classes of claimant depending on the facts.

9.12. In Gulati, damages were found to be available for the tort of misuse of private information, even if the claimant suffered no pecuniary loss or distress. In Lloyd v Google, in 2019, the Court of Appeal found that it was possible to bring a class action against Google to claim damages for loss of control of data - even if a claimant has suffered no pecuniary loss and in distress. This was found to be linked to the need to provide a remedy where claimants' fundamental rights are infringed.

9.13. Questions remain as to whether such claims could potentially fail in the context of coronavirus, on public policy grounds. That may turn on the facts and on whether the

defendant was the government, or an NHS body, or a private tech company (a claimant might be more likely to succeed against the latter).

10. EMPLOYMENT LAW AND HEALTH AND SAFETY

Issues with 'return to workplace' guidance

10.1. On 11 May 2020, the UK Government published "Our Plan to Rebuild: the UK Government's COVID-19 strategy" together with industry specific guidance on best practice for avoiding transmission of the virus. This provided, effective 13 May 2020, that all workers who cannot work from home should travel to work if their workplace is open but that "for the foreseeable future", workers should continue to work from home wherever possible. The government has now released staged relaxations of that strategy which introduced additional uncertainties in how employers and employees should act.

10.2. This guidance does not address existing legal protections for workers, including the rights under sections 44 and 100 of the Employment Rights Act 1996 which protect employees from detriment or dismissal where they have a reasonable concern that they are in serious or imminent danger. Some employers have attempted to argue that this is not engaged in the current situation. However exposure to the virus is undoubtedly serious for the individual and others, and it is difficult to regard it as something which is not imminent. The government's own Health Protection (Coronavirus Restrictions) (England) Regulations 2020 recite that they are made 'because of the serious and imminent threat to public health'. A consistency in approach is required. In order to avoid unscrupulous employers from taking advantage of any uncertainty, the government's guidance should expressly confirm that it considers the current pandemic to place employees in potential serious, imminent, harm without the taking of reasonably practicable steps.

10.3. Additionally, there has been some uncertainty about the interaction between the new guidance and the existing protections and, while the guidance states that no health and safety obligations are superseded, it does nothing to explain what health and safety rules apply. Many employers outside manufacturing and primary industries, particularly small employers who make up the vast majority of British businesses, have not had to engage with the health and safety regime before and so there is great uncertainty about which rules apply. The existing health and safety law already provides the standards to which employers should be held. The government should make clear to employers and employees, ideally through an amendment to the guidance, the particular health and safety obligations to which employers are subject and rights which are held by employees and should provide examples (as it does elsewhere in the guidance) of what it considers reasonable employer action in response to these obligations and rights. This could include, at a minimum, the duty of every employer to provide PPE; keep the workplace and workstations safe; make a proper risk assessment; and not to penalise or dismiss a worker for refusing to work where he or she has a reasonable belief of imminent danger of infection.

10.4. In addition, the strategy and guidance state that PPE should not generally be used in the workplace and should be reserved for those who truly need it. While we agree that PPE should be prioritised for health and other key workers, this direction has proved difficult for many employers to reconcile with their existing obligation under health and safety law to take all reasonably practicable steps to protect their employees from harm. This is exacerbated by the fact the guidance itself acknowledges that face coverings may be

beneficial as a precautionary measure in certain circumstances. The government should provide further clarification on the standard to which employers should be held to and ideally – given the increased availability of PPE – direction should be given to employers that provision of basic PPE (particularly for public facing employees) is obligatory to comply with health and safety obligations.

10.5. There are a number of uncertain standards contained in the guidance. For office based staff, the guidance states that only those in roles "critical for business and operational continuity, safe facility management, or regulatory requirements" may return. It is unclear from the guidance (i) which roles would meet that threshold; and (ii) whether those in non-critical roles, but who wished to attend the office for other potentially legitimate reasons (for example, due to mental health) may do so. We are aware of a large number of office based workplaces giving 10-25% employees the option to return even though they are able to work from home. The government should clarify what is meant by 'business and operational continuity'.

Health and Safety Executive

10.6. The Health and Safety Executive published its own guidance to a return to work (available on its website). Unfortunately (as at the date of this report) it emphasises the responsibility of employees to 'protect yourself and others' and in the more detailed guidance focuses on the employer obligation to carry out a risk assessment and fails to make clear the other, very important, protections which employees enjoy. The HSE's approach throughout the guidance is to emphasise the government guidance even where the legal standing of that guidance is questionable and fails to properly inform employers and individuals about the deeper legislation and regulation which applies to them. This is a failure of its responsibilities as a regulator. The HSE should be pressed to update this guidance to provide accessible guidance to employers and employees about the protections under s.44 and s.100 of the Employment Rights Act and other particular obligations such as the Workplace (Health , Safety and Welfare) Regulations 1992 (on workstations), Regulation 3 of the Management of Health and Safety Regulations 1999 (on suitable and sufficient assessment), and the Safety Representatives and Safety Committees Regulations 1977 and Health and Safety (Consultation with Employees) Regulations 1996 (each on consultation).

10.7. The Health and Safety Executive has been starved of funding over the last decade – from £239 million in 2010 to £135 million in 2018. While the Prime Minister has committed to an increase in spot checks and provided £14 million in additional funding, one recent report estimated that the likelihood of a workplace being subjected to such a check is so low that it will occur once in every 275 years. This is clearly unsatisfactory and we are aware of employers simply disregarding the HSE (and the associated civil and criminal liability which parliament has legislated for) because of the extremely low likelihood of investigation. The government should be pressed to properly resource the HSE to, at a minimum, the levels of funding that it received in the high water mark of 2010 (adjusted for inflation).

10.8. Additionally, the Department of Work and Pensions has identified a number of sectors as 'low-risk' and prohibited proactive inspections by local authorities and the HSE. We are not aware of the rationale for this distinction and in any event the pandemic has undoubtedly

altered the risk matrix of all workplaces. One examination two years after the change found that 53% of fatalities were in "low-risk" sectors. The government should reverse this decision or at the very least undertake a reassessment of low risk sectors.

Extent of protections

10.9. As will be well known to members, the Enterprise and Regulatory Reform Act 2013 revoked the potential for civil liability of employers for health and safety breaches, making it exceptionally difficult to gain compensation for injury or death at work. The pandemic offers an opportunity to reassess this decision. While we recognise the difficulties of current parliamentary arithmetic, the government could be pressed to justify this change in the law which left substantial parts of the health and safety regime relatively toothless.

10.10. A number of protections in the Health and Safety at Work Act 1974 only extend, on their face, to employees. Those classed as 'workers' or 'self-employed' are denied the protection of much of the regime. These are generally in roles which are exposed to the public or otherwise have little collective bargaining ability and so such individuals are generally exposed to the whims of the employer. This is immensely unsatisfactory and it is also unclear whether this adequately implements the underlying European directive.[28] Accordingly there is some scope to argue that (under the obligation which exists until 31 December 2020) courts should be interpreting the regulations in conformity with EU law and so workers are already covered. The government should be pressed to either (i) confirm that the regime extends to workers, or (ii) if it does not wish to accept this, to temporarily extend the regime, insofar as is practicable, to workers at a minimum and ideally self-employed individuals and once parliamentary and civil service time can be found to legislate properly to bring both categories under the protection of the regime. At a minimum, the government should publish confirmation in the accessible guidance that workers and self-employed individuals are covered by s.3 of the Health and Safety at Work Act 1974 (which provides for a smaller number of employer obligations to non-employees such as the public).

10.11. In addition, a number of the consultative provisions require an existing collectively recognised trade union or the appointment of representatives. In a large number of workplaces no union is recognised and health and safety has not been considered relevant and so no representatives are appointed for this purpose. While the government's most recent employer guidance on the return to work has helpfully referred to the consultation obligations of employers, it does not provide sufficient detail about what employers and employees should be consulting over save a reference to 'health and safety'. This has created uncertainty even for employers who wish to comply.

Retaliation against employees

10.12. One could consider extending the reach of the existing victimisation protections (e.g. in discrimination and health and safety rules) to provide that an employee may not be victimised by the employer as a result of anything the employer discovers as a result of COVID related monitoring. We recommend that any protections that are introduced are extended to limb (b) workers alongside traditional employees.

[28] In light of Fenoll v Centre D'Aide par le Travail "La Jouvene", EUC 2015-200 [24] has expanded the definition in other health and safety contexts and so there is an arguable case that the extent of the health and safety Framework Directive (89/391/EEC) is similarly expanded.

Protection for inducement of breaches

10.13. A further legal issue arising from the restrictions currently in place concerns the position of employees committing prima facie breaches of restrictions in pursuance of the orders of unscrupulous employers. It may be prudent to consider additional protection for employees by providing that employees have either a complete defence or are able to present as a mitigating factor to a breach of restriction the fact that their employer directed or encouraged them to do so. In tandem, one could provide for civil liability for the employer for the inducement of such a breach.

10.14. In addition, any relaxation of lockdown restrictions as they impact on the employer/employee relationship should provide an employee with a defence not only for breach of any government restriction or obligation if they reasonably believed their employer had directed or encouraged them to do so, but also for breach of any restriction or obligation imposed by their employer if they reasonably believed government advice had directed or encouraged them to do so. This would cover the converse situation where an employer directed or encouraged an employee to return to work, but an employee reasonably believed that government guidance directed or encouraged them not to do so. This is a situation which is arising frequently under current lockdown rules.