

# Coronavirus, Hotel Quarantine Regulations (England): A Rule of Law Analysis

Katie Lines, 18 March 2021



## Executive Summary

The Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 7) Regulations 2021 (SI 2021/150) (“the Regulations”) were made on 12 February 2021, and came into force at 4am on 15 February 2021. The Regulations amend four existing sets of regulations governing international travel. The most notable change made by the Regulations is the introduction of a system of hotel quarantine for travellers who have visited or passed through a “red list” county in the 10 days before arriving in England. This report scrutinises the Regulations from a Rule of Law perspective and is intended to inform members of the House of Lords when they debate Baroness Thornton’s regret motion on Monday 22nd March 2021.

The Regulations are subject to the made negative procedure. We query whether the very limited parliamentary scrutiny afforded by the negative procedure is an appropriate way to introduce the powers contained in these regulations. The Regulations create a system of mandatory quarantine backed by criminal sanction, give the police the power to enter people’s homes, and allow individuals to be detained, searched, and their belongings seized: these are not minor changes to the law. In addition, the Regulations were laid before Parliament less than three days before they came into force. This is a breach of the parliamentary convention that a negative statutory instrument will not come into force until 21 calendar days after it has been laid. The fast-tracking of the Regulations also meant that individuals and businesses affected by hotel quarantine had less than one working day to get to grips with the detail of the scheme, raising several Rule of Law concerns surrounding the accessibility and foreseeability of the law. We query the nature of the urgency that led to the Regulations being brought into force so quickly after they were made.

We also consider the accuracy of the Government’s warnings that a traveller who lies about having visited red list country may face up to 10 years imprisonment, and conclude that the Government’s messaging has been misleading. Misleading statements of the law undermine the Rule of Law by creating confusion about what the law is.

It is an elementary principle of the Rule of Law that anyone exercising a statutory power must not act beyond the limits of that power. The Secretary of State’s ability to charge people for staying in a quarantine hotel appears to breach the International Health Regulations 2005, and may be ultra vires the parent act as a result.

The Rule of Law also requires measures introduced in response to an emergency to be necessary and proportionate to the situation. It is difficult to assess the proportionality of the Regulations as the Government has not conducted an impact assessment, nor explained the scientific rationale underpinning the hotel quarantine policy. Nonetheless, we have attempted to identify provisions within the Regulations which should be most closely scrutinised to ensure that they are necessary and proportionate. In particular, there should be scrutiny of the necessity and proportionality of:

- the strictness of the quarantine measures, which may amount to a deprivation of liberty under Article 5 ECHR and/or common law imprisonment;
- the power of entry granted to the police;
- the powers to detain and search travellers;
- the cost of a stay in a quarantine hotel (if charging for quarantine is intra vires); and
- the creation of new offences.

Finally, the Rule of Law requires laws to be non-discriminatory in their effect, and we are concerned that the Regulations do not appear to make adequate provision for individuals who are unable to stay in a quarantine hotel because of a disability.

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## Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. Previous Reports have been on the EU (Withdrawal Agreement) Bill and the Terrorist Offenders (Restriction of Early Release) Bill as well as on various coronavirus laws. Dr Ronan Cormacain is leading this Project.

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## Overview of the Regulations

1. The Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 7) Regulations 2021 (“the Regulations”) were made on 12 February 2021, and came into force at 4am on 15 February 2021. The Regulations amend four existing sets of regulations.<sup>1</sup>
2. The most notable change made by the Regulations is the introduction of a system of hotel quarantine for travellers who have visited or passed through a “red list” county in the 10 days before arriving in England. Travel to the UK from a red list country is currently banned for everyone except British and Irish nationals, and those with residence rights. Anyone who is able to enter England from a red list country must:
  - a. provide a negative coronavirus test result taken in the three days before travelling;<sup>2</sup>
  - b. book and pay for a stay of at least 10 days in a quarantine hotel (regulation 15);
  - c. arrive in England at an approved airport (regulation 15);
  - d. complete a passenger locator form (regulations 4 and 16);<sup>3</sup> and
  - e. take coronavirus tests on days 2 and 8 of their quarantine (regulation 5).<sup>4</sup>
3. The hotel quarantine requirement does not just affect those who have travelled abroad to go on holiday, but also catches many business travellers<sup>5</sup> and those who have travelled for legitimate personal reasons (i.e. for medical treatment, to attend a funeral, or to provide care for a family member). The Regulations also impose duties on operators of transport services, who must notify travellers of the quarantine requirements (regulation 21) and ensure that travellers from red-list countries only enter England via an approved airport (regulation 22(4)). Transport operators must also ensure that travellers fully complete a passenger locator form (regulation 22(3)).
4. The Regulations create new criminal offences for both travellers and transport operators who fail to comply with the hotel quarantine system.
5. This report scrutinises the Regulations from a Rule of Law perspective and is intended to inform members of the House of Lords when they debate Baroness Thornton’s regret motion on Monday 22nd March 2021.

## Democratic Legitimacy

6. The Rule of Law requires there to be a democratic process for enacting legislation, with Parliament having an adequate opportunity to debate proposed legislation.<sup>6</sup> Even during times of emergency, Parliament’s ordinary legislative functions and its ability to scrutinise executive

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<sup>1</sup> These are (1) the Health Protection (Coronavirus, International Travel) (England) Regulations 2020; (2) the Health Protection (Notification) Regulations 2010; (3) the Health Protection (Coronavirus, Public Health Information for Passengers Travelling to England) Regulations 2020; and (4) the Health Protection (Coronavirus, Pre-Departure Testing and Operator Liability) (England) (Amendment) Regulations 2021

<sup>2</sup> This is a pre-existing requirement found in The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, regulation 3A and schedule 2B, paragraph 1(c)

<sup>3</sup> See also The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, regulation 3

<sup>4</sup> Individuals who test positive on day 2 will not need to take a day 8 test

<sup>5</sup> A list of jobs that qualify for exemptions from travel restrictions can be found at <<https://www.gov.uk/government/publications/coronavirus-covid-19-travellers-exempt-from-uk-border-rules/coronavirus-covid-19-travellers-exempt-from-uk-border-rules#legislation>>

<sup>6</sup> Venice Commission, “The Rule of Law Checklist” (Council of Europe 2016), Benchmark A5, available at <[https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule\\_of\\_Law\\_Check\\_List.pdf](https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf)>

actions should be preserved as far as possible.<sup>7</sup> Maintaining proper parliamentary scrutiny is important not just as a matter of principle, but also to ensure that emergency legislation is proportionate, justified, and free of errors or policy defects.<sup>8</sup>

7. The Regulations are subject to minimal parliamentary scrutiny by virtue of how the Secretary of State has used the enacting legislation. The Regulations are made under the Public Health (Control of Disease) Act 1984 (“[the Public Health Act](#)”). The Public Health Act specifies the level of scrutiny that instruments made under it must receive. Most instruments made under the Act will be subject to the **made negative procedure**, and receive very little parliamentary scrutiny as a result. Instruments subject to the made negative procedure become and remain law unless Parliament objects. An MP who opposes a negative instrument can table a motion to annul the instrument, but it is rare for such motions to succeed; the last time a negative instrument was annulled by the House of Commons was in 1979.<sup>9</sup>
8. Some regulations made under the Public Health Act will be subject to a higher standard of scrutiny. In certain circumstances, the Act requires regulations to be subject to the **draft affirmative procedure** or, in cases of urgency, the **made affirmative procedure**.

### Summary of the main parliamentary procedures for most statutory instruments

#### Made negative

- The instrument is made and then laid before both Houses, and will come into force on the date stated in the instrument unless either House annuls the instrument within a specified time, usually 40 days.

#### Draft negative

- A rarely used variation of the negative procedure. The instrument is laid before both Houses in draft and cannot be made until 40 days have passed. Either House can stop the instrument being made by annulling it within the 40 day period.

#### Draft affirmative

- The instrument is laid in draft before each House and cannot be made unless approved by resolution of both Houses.

#### Made affirmative

- A version of the affirmative procedure used in cases of urgency. An instrument can be made and come into force without parliamentary approval, but will expire within a specified period unless it is approved by resolution of both Houses.

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<sup>7</sup>Joelle Gorgan and Nyasha Weinberg, “Principles to Uphold the Rule of Law and Good Governance in Public Health Emergencies”, RECONNECT Policy Brief (August 2020) p.20, available at <[https://reconnect-europe.eu/wp-content/uploads/2020/08/RECONNECTPB\\_082020B.pdf](https://reconnect-europe.eu/wp-content/uploads/2020/08/RECONNECTPB_082020B.pdf) >

<sup>8</sup> See our discussion of the practical benefits of parliamentary oversight of delegated legislation in Ronan Cormacain, “Parliamentary Scrutiny of Coronavirus Lockdown Regulations: A Rule of Law Analysis” (Bingham Centre for the Rule of Law, 2020), pp.8-9, available at <<https://binghamcentre.biicl.org/publications/parliamentary-scrutiny-of-coronavirus-lockdown-regulations-a-rule-of-law-analysis>>

<sup>9</sup> UK Parliament, “MPs’ Guide to Procedure” (2021) <<https://guidetoprocedure.parliament.uk/collections/PtBJuBiU/negative-procedure>>

9. To determine whether the hotel quarantine Regulations should have been subject to the negative or affirmative procedure, we need to look at which parts of the Act they were made under. The Regulations were made under sections 45B, 45C, 45F(2), 45P(2) and 60A of the Public Health Act. Sections 45B and 45C are the main provisions which grant the Secretary of State the power to make regulations, while sections 45F(2), 45P(2) and 60A define the extent of that power. Section 45B is entitled “Health protection regulations: international travel etc” and enables regulations to be made:
  - “(a) for preventing danger to public health from vessels, aircraft, trains or other conveyances arriving at any place,
  - (b) for preventing the spread of infection or contamination by means of any vessel, aircraft, train or other conveyance leaving any place, and
  - (c) for giving effect to any international agreement or arrangement relating to the spread of infection or contamination.”
10. Section 45C is entitled “Health protection regulations: domestic” and empowers the Secretary of State to make regulations: “for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere)”.
11. Regulations made under section 45B are subject to fewer procedural protections than those made under section 45C. Regulations made solely under section 45B are always subject to the made negative procedure.<sup>10</sup> They can also contain more severe restrictions on people’s liberties than regulations made under section 45C. In particular, regulations made under section 45B can include provision for the isolation or quarantine of persons, whereas regulations made under section 45C cannot.<sup>11</sup>
12. Regulations containing measures made under section 45C, whether alone or with other provisions, must ordinarily be subject to the draft affirmative procedure.<sup>12</sup> In other words, where a set of regulations contains some measures made under section 45C and others made under a different section of the Public Health Act, then the procedural requirements of section 45C take precedence and the draft affirmative procedure must ordinarily be used. There is only one circumstance where regulations containing measures made under section 45C can be subject to the made negative procedure. The made negative procedure can be used where the regulations do not contain any “restrictions or requirements in relation to persons, things or premises” which are made under section 45C, and which constitute “a special restriction or requirement or any other restriction or requirement which has or would have a significant effect on a person’s rights.”<sup>13</sup> A special restriction or requirement is one of a small number of particularly severe measures specified in the Public Health Act, including requiring someone’s health to be monitored, or restricting with whom a person has contact.
13. Therefore, in sum, regulations which contain measures made under both sections 45B and 45C must ordinarily be subject to the draft affirmative procedure. The made negative procedure can only be used if either (i) the regulations do not contain restrictions or requirements which significantly affect a person’s rights (including the “special restrictions or requirements” specified in the Act), or (ii) any such restrictions or requirements are not made under section 45C.

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<sup>10</sup> Public Health Act, section 45Q(1)

<sup>11</sup> Public Health Act sections 45B(2)(b), 45D(3) and 45G(2)(d)

<sup>12</sup> Public Health Act, section 45Q(2) and (4)

<sup>13</sup> Public Health Act, section 45Q(1)-(4)

14. The hotel quarantine Regulations are made under both sections 45B and 45C. They also contain several “special restrictions or requirements”, as well as other restrictions or requirements that would have a significant effect on a person’s rights. Some of these restrictions could only sensibly be made under section 45B alone, unless the Secretary of State wanted to risk legal challenge. For instance, as noted above, regulations made under section 45B can include provision for the isolation or quarantine of persons, whereas regulations made under section 45C cannot.<sup>14</sup> However, a number of the most intrusive restrictions in the Regulations could seemingly have been made under sections 45B or 45C, such as the requirement for travellers to take coronavirus tests on days 2 and 8 after their arrival in the UK. Most of the special restrictions or requirements set out in the Public Health Act can be made under section 45C, so long as additional procedural safeguards are satisfied. For instance, the regulations must be made in response to a serious and imminent threat to public health, or the imposition of the restriction or requirement must be contingent on their being such a threat at the time it is imposed.<sup>15</sup>
15. If the Government had used section 45C to make some of the more severe restrictions in the Regulations, then the Regulations would have been subject to the affirmative procedure. However, the Government did not do this. Any restrictions in the Regulations which significantly affect people’s rights must have been made using only section 45B, because the Regulations were enacted using the made negative procedure, with the Secretary of State declaring that he “is of the opinion that these Regulations do not contain any provision made by virtue of section 45C(3)(c) of the Act which imposes or enables the imposition of a special restriction or requirement or any other restriction or requirement which has or would have a significant effect on a person’s rights.” In effect, the Public Health Act gave the Government a choice as to whether to use the affirmative or negative procedure. The Government could have accepted that it would have been appropriate to use the affirmative procedure, but instead chose the route of least parliamentary scrutiny.
16. The Government also rapidly accelerated the standard parliamentary timescales, compounding the lack of scrutiny afforded by the made negative procedure. By convention, a negative statutory instrument should not come into force until 21 calendar days after it has been laid before Parliament.<sup>16</sup> The 21-day rule is designed to enable some parliamentary scrutiny of a negative instrument before it comes into force, and also to allow people affected by secondary legislation a reasonable opportunity to understand upcoming changes to the law. The hotel quarantine Regulations came into force less than 3 calendar days after they were laid before Parliament. The explanatory notes to the Regulations express “regret” that the Regulations breached the 21-day rule, but explains that “the Government considers these measures as urgently necessary to protect public health and is acting accordingly to prevent the ingress from overseas of a variant of concern. Delaying the implementation of these measures could allow a variant of concern to spread.”
17. When coronavirus first emerged as a serious threat, a convincing case could be made for prioritising a rapid response over detailed parliamentary scrutiny. However, we have now had almost a year to understand the nature of the virus and anticipate the measures that might be needed to tackle it. At this stage of the pandemic, claims of urgency should be closely scrutinised for their validity. When we look at the background to the Regulations, concerning

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<sup>14</sup> Although see the judgment in *R (Francis) v Secretary of State for Health and Social Care* [2020] EWHC 3287 (Admin) at [34]-[57], which suggests that hotel quarantine would not be classified as self-isolation or quarantine for the purposes of the Public Health Act because it does not involve “an element of clinical management and/or supervision and the exclusion of contact with anyone other than those involved in that management and supervision”.

<sup>15</sup> Public Health Act, section 45D(4)

<sup>16</sup> The National Archives, *Statutory Instrument Practice* (November 2017), p.37 accessible at <<https://www.nationalarchives.gov.uk/documents/f0051073-si-practice-5th-edition.pdf> >



variants of coronavirus were first reported in South Africa on 18 December 2020 and then in Brazil on 10 January 2021.<sup>17</sup> The possibility of hotel quarantine was discussed by ministers as early as 22 January 2021.<sup>18</sup> On 27 January 2021, the Prime Minister confirmed that hotel quarantine would be implemented.<sup>19</sup> At this stage, the policy was already sketched in outline: all arrivals from certain countries would be required to isolate in hotels for 10 days. However, the Government then waited a further sixteen days before the Regulations were laid before Parliament. The Government should explain what necessitated the breach of the 21-day rule, when there was more than a two-week delay between the announcement of the policy and the drafting of the Regulations. It may be that the Government received updated scientific data that led to the rushed introduction of the Regulations. If so, such data should be published. Otherwise, it appears that Parliament has been unnecessarily side-lined.

18. More broadly, we do not think that the very limited parliamentary scrutiny afforded by the negative procedure is appropriate for these Regulations. The Regulations create a system of compulsory quarantine backed by criminal sanction, give the police the power to enter people's homes to search for those unlawfully avoiding quarantine, and allow travellers to be detained, searched, and their belongings seized. These are extraordinary powers that have been passed into law by a minister with no parliamentary approval. If at all possible, the justification for these measures should have been tested by parliamentary debate, and legitimised by parliamentary vote, before they became law.
19. The Government's use of the negative procedure does not sit well with the Secretary of State's assurance last year that "for significant national measures with effect in the whole of England or UK-wide, we will consult Parliament; wherever possible, we will hold votes before such regulations come into force."<sup>20</sup> It also goes against recommendations made by the Joint Committee on Human Rights, who have stated that, when responding to the pandemic, "ministers need to exercise the powers they are given in a way which allows the highest level of control and scrutiny possible".<sup>21</sup>
20. If the Government felt that the Public Health Act precluded them from using the affirmative procedure, then parliamentary oversight could have been preserved by foregoing the use of delegated legislation, and introducing hotel quarantine via new primary legislation. Parliament is capable of fast-tracking primary legislation where necessary: the Coronavirus Act 2020 was passed within four sitting days. From a Rule of Law perspective, it would have been preferable for the Government to have used primary rather than delegated legislation, as this would have ensured maximum democratic oversight of the hotel quarantine scheme. The House of Lords Constitution Committee is of the view that delegated legislation should not be used to create new criminal offences, or measures that will have a major impact on an individual's right to privacy.<sup>22</sup> The hotel quarantine Regulations create both.

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<sup>17</sup> World Health Organization, "SARS-CoV-2 Variants" (31 December 2020) <<https://www.who.int/csr/don/31-december-2020-sars-cov2-variants/en/>> and Michael Le Page and Matt Hambly, "Brazil covid-19 variant (P.1)" *New Scientist* (1 March 2021) <<https://www.newscientist.com/term/brazil-covid-19-variant-p-1/>>

<sup>18</sup>BBC, "Hotel quarantine for UK arrivals to be discussed" (22 January 2021) <<https://www.bbc.co.uk/news/uk-55774380>>

<sup>19</sup> HC Deb 27 January 2021, vol 688, col 386-387

<sup>20</sup> HC Deb 30 September 2020, vol 681, col 388. This assurance was given in relation to affirmative statutory instruments, but it still jars with the subsequent use of the negative procedure for the Regulations.

<sup>21</sup> Joint Committee on Human Rights *The Government's response to COVID-19: human rights implications* (2019-2021, HL 125, HC 265) p.68

<sup>22</sup>Constitution Committee, *Policing and Crime Bill Report* (2008-09, HL Paper 128) paras 11-15; Constitution Committee, *Co-operative and Community Benefit Societies and Credit Unions Bill* (2009-09, HL Paper ) para 14, and see the UCL Constitution Unit report Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (The Constitution Unit, UCL, 2017), p. 8.

## Regulations May Exceed Legal Powers

21. It is an elementary principle of the Rule of Law that anyone exercising a statutory power must not act beyond the limits of that power.<sup>23</sup> This means that a statutory instrument must not go beyond the powers (ultra vires) of its parent act. One provision within the Regulations may be ultra vires the Public Health Act.
22. Regulation 15 allows the Secretary of State to charge travellers for their stay in a quarantine hotel. On the face of it, this provision is within the powers granted by the Public Health Act, as section 45F(2)(f) of the Act allows the Secretary of State to make regulations which “permit or prohibit the levy of charges”. However, Article 40 of the International Health Regulations (2005) prohibits states from charging for the “isolation or quarantine requirements of travellers” except where travellers are “seeking temporary or permanent residence”.<sup>24</sup> The UK has adopted the International Health Regulations (2005) through its membership of the World Health Organisation, and there is a strong presumption that domestic legislation should be interpreted in a way that is compatible with the UK’s international obligations.<sup>25</sup> It is therefore arguable that Parliament did not intend for the broad reference to the “levy of charges” in section 45F(2)(f) to empower the Secretary of State to impose a charge upon travellers who are required to quarantine. In any event, even if charging travellers for their quarantine is intra vires, it is against the Rule of Law for a state to breach its international obligations.<sup>26</sup>
23. It is regrettable that Parliament did not have an opportunity to consider the vires of this regulation before it came into force. Parliamentary scrutiny is designed to identify, raise for debate, and resolve such issues.

## Accessibility

24. A central component of the Rule of Law is that laws must be accessible and foreseeable, which includes legislation being published in advance of its implementation.<sup>27</sup> Individuals cannot claim rights to which they are entitled, or perform their legal obligations, if they cannot reasonably discover what those rights and obligations are. It is of particular importance that legislation creating criminal offences is accessible and foreseeable, so that people know what they must or must not do in order to avoid criminal penalty.<sup>28</sup>
25. There are a number of Rule of Law concerns surrounding the accessibility of the Regulations. First, the Regulations were published on a Friday afternoon and came into force at 4am the following Monday. Businesses, travellers and anyone else affected by the Regulations only had

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<sup>23</sup> Tom Bingham, *The Rule of Law* (Penguin, 2011), p.63.

<sup>24</sup> Accessible at <<https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=434ED066E9A11C685FAF1599D9CC309A?sequence=1>>

<sup>25</sup> *Bennion, Bailey and Norbury on Statutory Interpretation*, 8<sup>th</sup> ed. (LexisNexis Butterworth, December 2020), section 26.9

<sup>26</sup> Venice Commission, “Checklist” Benchmark A3, see also Murray Hunt, “United Kingdom Internal Market Bill: House of Lords Committee Stage: A Rule of Law Analysis of Clauses 44-47” (Bingham Centre for the Rule of Law, 2020) p.10 available at <[https://inghamcentre.biicl.org/documents/100\\_bingham\\_centre\\_report\\_on\\_uk\\_internal\\_market\\_bill\\_for\\_lords\\_committee\\_stage\\_09.pdf](https://inghamcentre.biicl.org/documents/100_bingham_centre_report_on_uk_internal_market_bill_for_lords_committee_stage_09.pdf)>

<sup>27</sup> Venice Commission, “Checklist” Benchmark B1

<sup>28</sup> Bingham, *Rule of Law*, p. 37

a weekend to get to grips with their substance. This is clearly an insufficient amount of time, especially for a complex set of laws which create criminal offences. It is not surprising that, less than three days before hotel quarantine came into force, the Immigration Services Union expressed concern that border officials did not know how the system would work in practice.<sup>29</sup> Border force staff only received guidance on how to implement the Regulations the evening before the new laws came into effect.<sup>30</sup> As discussed above, it is not clear why the making of the Regulations was so rushed when the Government had announced the policy underpinning them weeks in advance.

26. Second, the Regulations introduce hotel quarantine by making amendments to four existing sets of regulations on international travel. While this is not an issue in itself, we are concerned with how long it took legislation.gov.uk to publish consolidated versions of the original regulations, incorporating the amendments made by the hotel quarantine Regulations. The Rule of Law requires amendments to legislation to be incorporated in a consolidated, publicly accessible manner.<sup>31</sup> Yet consolidated versions of the original regulations had still not been published by the time the new laws came into force. At this time, the law governing hotel quarantine was only intelligible by comparing line-by-line the original regulations with the amendments set out in the new hotel quarantine Regulations. This is a difficult task even for someone with legal training, as the hotel quarantine Regulations are convoluted. A typical paragraph reads as follows:

“In regulation 4 –

...

- (f) in paragraph (5), at the beginning insert “Except where P falls within paragraph (1)(d)”;
- (g) in paragraph (7)(a) for “last departed from or transited through a non-exempt country or territory” (5) substitute “arrived in England or, if later, the end of any period that applies by virtue of paragraph 2 or 3 of Schedule 2C”;
- (h) omit paragraph (7A);
- (i) after paragraph (7A) insert—  
“(7B) Paragraphs (8) to (13A) do not apply where P falls within paragraph (1)(d) (and thus Schedule B1A applies).”

27. Those affected by hotel quarantine should not be expected to engage in legislative detective work in order to piece together the detail of the law. The Rule of Law requires the precise detail of new legislation to be made accessible in an intelligible format a reasonable time before it comes into force.<sup>32</sup> This is important so that individuals and businesses know exactly what the law requires of them, what rights they have under the law, and what type of behaviour carries criminal sanction. Officials enforcing the law also need to know exactly what is and is not lawful behaviour. Going forwards, the Government should ensure that coronavirus legislation is published as far in advance as possible. Where at all possible, when coronavirus legislation amends previous legislation, a consolidated, publicly accessible version of the amended legislation should be published a reasonable time before it comes into force.

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<sup>29</sup> BBC, “Covid: ‘No guidance’ for immigration officials on hotel quarantine” (12 February 2021) <<https://www.bbc.co.uk/news/uk-56047916>>

<sup>30</sup> iNews, “UK hotel quarantine: Border Force given coronavirus rules for ‘red list’ passengers with hours notice” (15 February 2021) <<https://iNews.co.uk/news/politics/uk-coronavirus-quarantine-hotel-border-force-rules-criticism-873581>>

<sup>31</sup> Venice Commission, “Checklist” Benchmark B3

<sup>32</sup> Jonathan Jones made this point (and those that follow in this paragraph) in a recent article: “The government’s hasty Covid law-making cannot become a template for the future” *The Guardian* (18 February 2021) <[www.theguardian.com/commentisfree/2021/feb/18/governments-hasty-covid-law-making-template-future](http://www.theguardian.com/commentisfree/2021/feb/18/governments-hasty-covid-law-making-template-future)>

## Clarity of Government Messaging

28. The Rule of Law requires the law to be clear and foreseeable in its effects.<sup>33</sup> Government messaging should accurately set out the detail of the law and the likely consequences for breaching it. As we have discussed before, confusing or inaccurate statements of the law may have wider public health implications, as a lack of trust in Government messaging appears to lead to lower levels of public compliance with measures designed to tackle the spread of coronavirus.<sup>34</sup>
29. When introducing the hotel quarantine policy, the Government warned that anyone who lied on their passenger locator form to conceal that they had been in a red list country would face up to 10 years imprisonment.<sup>35</sup> The Government would presumably have had to have introduced new primary legislation to create an offence punishable by 10 years imprisonment. Delegated legislation made under the Public Health Act cannot create imprisonable offences (section 45F(5)(a)), so although the first set of international travel regulations had already criminalised intentionally or recklessly providing false or misleading passenger information, the maximum penalty upon conviction of this offence could only ever be a fine.<sup>36</sup> The Government could not simply increase this penalty to 10 years imprisonment via amending regulations.
30. However, no new primary legislation was created. Instead, the Prime Minister's spokesperson clarified that the Government was intending for people to be prosecuted under the existing Forgery and Counterfeiting Act 1981, which imposes a maximum 10 year prison sentence for the offence of forgery. But it is questionable whether someone who enters false information on their passenger locator form could successfully be prosecuted for forgery. Forgery is the making of a false instrument. Does entering false information on a form make the form itself false? A few days before the Regulations were made, Joshua Rozenberg QC suggested that the offence of fraud – which also carries a 10 year maximum prison sentence - might be a more natural fit than that of forgery.<sup>37</sup> Under sections 1 and 2 of the Fraud Act 2006, it is an offence for a person to dishonestly make a false representation and intend, by making the representation, to make a gain of money or property for himself or another. Making a gain includes "keeping what one has", and Rozenberg suggests that lying on a passenger locator form to avoid paying for a stay in a quarantine hotel could fall within this definition. Rozenberg also notes that people who make false statements in other documents, like mortgage statements, are prosecuted for fraud rather than forgery. Therefore, lying on a passenger locator form is unlikely to be forgery, but might at a stretch be fraud.
31. It seems that the Government had reached the same conclusion by the time the Regulations were made. The original international travel regulations contain a provision against self-incrimination, which prevents any information that a person enters on their passenger locator form from being used as evidence against them in criminal proceedings.<sup>38</sup> Initially, there were only two exceptions to this provision: evidence from the passenger locator form could be used

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<sup>33</sup> Venice Commission, "Checklist" Benchmark B3

<sup>34</sup> Katie Lines, "Government messaging on exercising during lockdown: A Rule of Law Analysis" (Bingham Centre for the Rule of Law, 8 February 2021), pp.5-6, available at <<https://binghamcentre.biicl.org/publications/government-messaging-on-exercising-during-lockdown-a-rule-of-law-analysis>>

<sup>35</sup> HC Deb 9 February 2021, vol 689, col 157

<sup>36</sup> The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, regulation 6(3)

<sup>37</sup> Joshua Rozenberg "Is it forgery or fraud?" *A Lawyer Writes* (10 February 2021)

<<https://rozenberg.substack.com/p/is-it-forgery-or-fraud>>

<sup>38</sup> The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, regulation 10

in prosecutions brought under the international travel regulations themselves, or under section 5 of the Perjury Act 1911. The hotel quarantine Regulations add a further exception, information that a traveller enters on their passenger locator form can now also be used as evidence against them in proceedings brought under section 1 of the Fraud Act 2006.<sup>39</sup> There is no mention of the Forgery and Counterfeiting Act 1981. Presumably, this precludes any prosecutions for forgery being brought against travellers who lie on their passenger locator form. As far as we are aware, the Government has not issued any public statements clarifying that they have changed their policy on the Forgery and Counterfeiting Act being used to prosecute people who lie about having visited a red list country. The guidance on hotel quarantine simply warns:

“You could be fined up to £10,000, imprisoned for up to 10 years, or both, if you do not provide accurate details about the countries you have visited in the 10 days before you arrived in the UK.”<sup>40</sup>

32. There are a number of Rule of Law problems arising from the above. First, the Government has not been sufficiently clear about the law under which it is claiming that travellers could be liable for a 10 year prison sentence. It is misleading for the Government not to have publicised its change of position with regards to the use of the Forgery and Counterfeiting Act.

33. Second, it is not in the gift of the Government to decide whether an individual will be prosecuted for fraud. Charging decisions are made by the Crown Prosecution Service and the police. In most cases, it seems unlikely that an individual who lies about visiting a red list country will be prosecuted for fraud when there already exists a specific offence to deal with that type of offending behaviour. As noted above, the first set of international travel regulations created the offence of intentionally or recklessly providing false or misleading passenger information.<sup>41</sup> The maximum penalty upon conviction for this offence is a fine, or the person charged may be offered the chance to avoid prosecution by paying a fixed penalty notice (“FPN”). Where a person has provided false or misleading information about their travel to a red list country, the FPN will be set at £10,000.<sup>42</sup> In most circumstances, a charge of providing false passenger information is likely to be more suitable than a fraud charge, bearing in mind that prosecutors and the police are required to select charges which:

- reflect the seriousness and extent of the offending;
- give the court adequate powers to sentence and impose appropriate post-conviction orders;
- enable the case to be presented in a clear and simple way; and
- allow a confiscation order to be made in appropriate cases where a defendant has benefitted from criminal conduct.<sup>43</sup>

34. Even if a traveller is successfully prosecuted under the Fraud Act, it is highly unlikely that they would receive anything close to a ten year prison sentence. Lying about visiting a red list country is unlikely to be part of a wider fraudulent scheme, the amount of money a traveller saves by avoiding quarantine is likely to be relatively small (i.e. under £5,000), and minimal harm will usually be caused to the victim (i.e. the Secretary of State). Under current sentencing guidelines, this combination of factors is likely to lead to the imposition of a fine or a community

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<sup>39</sup> The Regulations, regulation 14

<sup>40</sup> Department of Health and Social Care, “Booking and staying in a quarantine hotel when you arrive in England” (15 February 2021) available at <<https://www.gov.uk/guidance/booking-and-staying-in-a-quarantine-hotel-when-you-arrive-in-england?priority-taxon=774cee22-d896-44c1-a611-e3109cce8eae>>

<sup>41</sup> The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, Regulation 6(3)

<sup>42</sup> The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, Regulation 7(5AB)

<sup>43</sup> Director of Public Prosecutions, “Charging (The Director’s Guidance) - sixth edition” (31 December 2021) <<https://www.cps.gov.uk/legal-guidance/charging-directors-guidance-sixth-edition-december-2020>>

order.<sup>44</sup> There may be rare cases with significant aggravating factors, such as if an individual knew they were infected with coronavirus and their failure to quarantine can be linked to an outbreak.<sup>45</sup> However, even in those circumstances, it would be surprising if the penalty exceeded a suspended sentence of a few months.<sup>46</sup>

35. Therefore, it is misleading for the Government to suggest that an individual could face a prison sentence of up to 10 years for lying about having visited a red list country. Misleading statements of the law undermine the Rule of Law by creating confusion about what the law is, and also reduce trust in Government messaging. If the Government felt that a failure to disclose visiting a red list country was a sufficiently serious offence to merit a 10 year prison sentence, then they should have created new primary legislation specifying this. Of course, creating new legislation would require parliamentary approval, and it would be surprising if Parliament authorised such a severe maximum penalty for lying on a passenger locator form. A number of previous Justice Secretaries from both Labour and Conservative governments have noted that a 10 year prison sentence seems deeply disproportionate to the nature of the offence.<sup>47</sup> Other offences that carry a maximum 10 year prison sentence include firearm possession, rioting, and indecent assault. It is concerning that the Government appears to have chosen to bypass parliamentary scrutiny by suggesting that prosecutors should use existing legislation for purposes to which it is not well suited, instead of seeking parliamentary approval for new legislation.

## Proportionality

36. The Rule of Law requires measures introduced in response to an emergency to be strictly necessary and proportionate to the situation.<sup>48</sup> Any interference with individuals' rights should be the least intrusive measure necessary to achieve the policy aim. The policy aim of the Regulations is to reduce the risk of new strains of coronavirus entering the UK from international travel.<sup>49</sup>
37. In order to assess whether emergency measures are proportionate, it is necessary to know the nature of the emergency, including any relevant expert advice that the Government has received. The Government should be commended for regularly publishing scientific data on the pandemic and the minutes from meetings of the Scientific Advisory Group for Emergencies ("SAGE"). However, the Government has not explained which scientific evidence and policy rationale underpins the hotel quarantine policy, despite Parliamentarians calling for this to be made available.<sup>50</sup> Parliamentarians have made similar points in relation to previous regulations,

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<sup>44</sup> Sentencing Council, "Fraud, bribery and money laundering offences: Definitive guideline" (23 May 2014), available at < <https://www.sentencingcouncil.org.uk/publications/item/fraud-bribery-and-money-laundering-offences-definitive-guideline/> >

<sup>45</sup> James Bevan, "10-year prison sentences for breaching COVID-19 entry requirements into the United Kingdom? Governmental Decree is undermining the Rule of Law" UK Constitutional Law Blog (24 February 2021), available at < <https://ukconstitutionallaw.org/2021/02/24/james-bevan-10-year-prison-sentences-for-breaching-covid-19-entry-requirements-into-the-united-kingdom-governmental-decree-is-undermining-the-rule-of-law/> >. This article discusses prosecutions for forgery rather than fraud, but the main principles are the same.

<sup>46</sup> Ibid.

<sup>47</sup> Camilla Tominey and Charles Hymas, "Former justice secretaries hit out at Matt Hancock's 10-year sentences for avoiding quarantine" *The Telegraph* (10 February 2021) <<https://www.telegraph.co.uk/politics/2021/02/10/former-justice-secretaries-hit-matt-hancocks-10-year-sentences/> >

<sup>48</sup> Venice Commission: European Commission for Democracy through Law, *Respect for democracy, human rights and the rule of law during states of emergency – Reflections* (26 May 2020) CDL-PI(2020)005rev, pp. 4-5; Gorgan and Weinberg, "Principles to Uphold the Rule of Law", p.12

<sup>49</sup> See the explanatory note to the Regulations.

<sup>50</sup> HC Deb 9 February 2021, Vol 689 Col 161; HC Deb 1 February 2021, Vol 688 col 752

with Lord Hunt of Kings Heath introducing a motion to regret the first set of international travel regulations because they were laid without making available the advice from SAGE.

38. The general scientific data that has been published calls into question the effectiveness of the type of reactive and geographically targeted hotel quarantine that has been adopted. The minutes from SAGE's meeting on 21 January 2021 state that:

“No intervention, other than a complete, pre-emptive closure of borders, or the mandatory quarantine of all visitors upon arrival in designated facilities, irrespective of testing history, can get close to fully preventing the importation of cases or new variants (moderate confidence, moderate evidence).

The emergence of new variants of concern around the world presents a rationale for attempting to reduce importation of even small numbers of infectious cases. This rationale will strengthen if new variants emerge that are capable of immune escape. Measures would be likely to delay importation of these variants rather than prevent them altogether. These measures will make most difference when domestic prevalence of the variant is low and there is little domestic transmission.

Reactive, geographically targeted travel bans cannot be relied upon to stop importation of new variants, due to the lag between the emergence and identification of variants of concern, as well as the potential for indirect travel via a third country (moderate confidence, moderate evidence).”<sup>51</sup>

39. It is difficult for Parliament to properly scrutinise the proportionality of the Regulations without knowing whether the Government based the hotel quarantine policy on the above advice from SAGE, whether they received additional scientific advice or evidence that supported a geographically-targeted hotel quarantine scheme, or whether the Government made a policy decision not to fully follow the science in order to balance business and other concerns against public health risks.
40. In addition, no impact assessment has been prepared for the Regulations because they are “a temporary measure which is part of the Government’s response to COVID-19.”<sup>52</sup> Again, this makes it difficult for Parliament to see how the Government has balanced public health concerns against the impact that hotel quarantine will have on travellers, the travel industry and other businesses. An impact assessment should have been produced, as the Regulations make significant changes to the law and are not due to expire until June 2021, some 5 months after they came into force.
41. The introduction of hotel quarantine may be a proportionate public health response to the threat of new strains of the virus, but it is difficult to assess this without knowing the evidence underpinning the policy or having access to an impact assessment. Nonetheless, we have attempted to identify provisions within the Regulations which should be most closely scrutinised to ensure that they are necessary and proportionate.
42. The type of quarantine imposed upon travellers is relatively extreme: travellers must stay in their hotel rooms for the duration of their quarantine and are only allowed outside in a very limited number of circumstances, such as to escape a risk of harm (regulation 15). A traveller can leave their room to exercise, but only with the permission of security staff. Such permission is likely to be hard won, as Government guidance states that travellers “will not as a matter of

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<sup>51</sup> SAGE, “Seventy-seventh SAGE meeting on COVID-19, 21st January 2021” available at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/958730/S1037\\_Covid-19\\_SAGE\\_77\\_minutes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958730/S1037_Covid-19_SAGE_77_minutes.pdf)>

<sup>52</sup> See the explanatory note the Regulations.

course be allowed outside to exercise”.<sup>53</sup> Travellers can only leave their hotel room for a reason not specified in the Regulations in “exceptional circumstances”. The Regulations give some examples of exceptional circumstances, which include seeking urgent medical assistance or accessing critical public services.

43. If a traveller is outside their room for a reason not authorised by the Regulations, then they commit an offence (regulation 11(b)). Unlike many offences created by coronavirus legislation, there is no reasonable excuse defence: even if a traveller has a reasonable excuse for leaving their hotel room, they will still have committed an offence if their reason for leaving is not listed in the Regulations and is not an exceptional circumstance. The police, immigration officers, and any person “designated by the Secretary of State” can use reasonable force to remove to a quarantine hotel anyone who is breaching the quarantine requirements.
  
44. We query whether the hotel quarantine scheme amounts to a deprivation of liberty under Article 5 ECHR and/or imprisonment at common law. In determining whether there has been a deprivation of liberty under Article 5, account must be taken of “a whole range” of criteria such as the “type, duration, effects and manner of implementation of the measure in question.”<sup>54</sup> Relevant factors include whether a person is able to leave the restricted area, the degree of supervision and control over the person’s movements, the extent of isolation and the availability of social contacts.<sup>55</sup> There will no deprivation of liberty where a person has validly consented to their confinement. However, the current hotel quarantine scheme is not a consent-based system. People travelling from a red list country are required to quarantine whether they want to or not, and can be physically removed to a hotel if they fail to quarantine. The European Court of Human Rights has found that a 6 day period of house arrest during which the detained person was allowed to leave their house “for medical reasons, to purchase necessities and to attend religious services” amounted to a deprivation of liberty.<sup>56</sup> Closer to home, the Supreme Court has held that a control order amounted to a deprivation of liberty where it imposed a 16-hour curfew, restrictions on association, and required the person subject to the order to relocate to a town where he experienced social isolation.<sup>57</sup> In the context of these cases, it seems arguable that the hotel quarantine restrictions amount to a deprivation of liberty.
  
45. A person can be lawfully deprived of their liberty under Article 5 if the deprivation is for the purpose of preventing the spreading of an infectious disease. The only Strasbourg case to date concerning this justification is *Enhorn v Sweden* (2005) 41 EHRR 30, where the European Court of Human Rights found that detention will only be lawful if it is “the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest” (at paragraph 44). *Enhorn* concerned the detention of a person who was infected with HIV, and it is unclear whether Article 5 permits the detention on public health grounds of a person who is not infected with an infectious disease, or not suspected to be infected. This is relevant because the hotel quarantine scheme catches everyone who has travelled from a red list country, whether or not they have tested positive for Covid-19. Therefore, any scrutiny of the Regulations for their proportionality and lawfulness must consider (i) whether hotel quarantine is a deprivation of liberty under Article 5; (ii) if it is, whether hotel quarantine was the last resort to prevent the spread of coronavirus; and (iii) whether Article 5 ECHR permits the quarantining of individuals who are not infected with a disease.

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<sup>53</sup> Department for Health and Social Care, “Managed quarantine: what to expect” (14 February 2021)

<<https://www.gov.uk/government/publications/managed-quarantine-what-to-expect>>

<sup>54</sup> *Storck v Germany* (2005) 43 EHRR 96 at [71]

<sup>55</sup> *Guzzardi v Italy* (1980) 3 EHRR 333 at [95]; *HM v Switzerland* (2004) 38 EHRR17 at [45]; *HL v the United Kingdom* (2005) 40 EHHR 32 at [91]; *Storck* at [73]

<sup>56</sup> *Dacosta Silva v Spain*, (App. 69966/01), 2 February 2007

<sup>57</sup> *Secretary of State for the Home Department v AP* [2010] UKSC 24



46. Even if the hotel quarantine scheme does not amount to a deprivation of liberty under Article 5 ECHR, it may constitute imprisonment at common law.<sup>58</sup> The essence of imprisonment is one person being made to stay in a particular place by another person. The barriers preventing a person leaving that place do not need to be physical, and can amount to the threat of legal process.<sup>59</sup> Looking outside the hotel quarantine Regulations, the High Court has found that the self-isolation requirements for people who have tested positive for Covid-19, or have been notified that they must self-isolate, do not amount to imprisonment.<sup>60</sup> However, the hotel quarantine provisions are more restrictive than the self-isolation regime, and much of the reasoning behind the High Court's judgment does not apply to the Regulations. The High Court distinguished self-isolation from imprisonment partly because the self-isolation regime allows people to self-isolate at any place that is "suitable", whereas imprisonment involves another person or authority defining the place where an individual must stay. Hotel quarantine comes quite close to this feature of imprisonment, as individuals are required to stay in accommodation designated by the Secretary of State. In addition, when distinguishing self-isolation from imprisonment, the High Court relied on the fact that an individual who is required to self-isolate will not be subject to a criminal or civil penalty if he or she has a reasonable excuse for breaching their self-isolation. Again, the hotel quarantine regime differs in that an individual will commit an offence if they leave their room for any purpose not listed in the Regulations, unless there were "exceptional circumstances". It seems at least arguable that the quarantine provisions may amount to imprisonment, and Parliament should satisfy itself that this is a proportionate response to the public health risks.
47. There are also number of specific provisions within the Regulations which should be scrutinised for their proportionality. First, regulation 10 permits a constable to use reasonable force to enter a person's home in order to search for someone who is suspected of breaching the requirement to isolate in a quarantine hotel. This is an extraordinary power, and we query its necessity. The self-isolation regulations do not give the police a power of entry, even though some individuals required to self-isolate will have tested positive for Covid-19.<sup>61</sup> Why is it now necessary to give the police a power of entry to enforce the hotel quarantine scheme?
48. Second, regulation 9 introduces new powers to deal with people who have travelled from a red-list country and who are suspected of breaching the requirement to provide passenger information, or of providing false information. Under regulations 9(1B), a constable, immigration officer, or a person designated by the Secretary of State can use reasonable force to detain a traveller for up to three hours, search the traveller and their belongings for evidence, and seize and retain items recovered from the search. There are limits to the type of search that can be carried out: the Regulations do not confer a power to conduct an intimate search or to detain and search an unaccompanied child, and any search must be conducted by a person of the same gender as the traveller. However, the Rule of Law requires such a severe intrusion of a person's liberty to be strictly necessary. In particular, we query the necessity of seizing and retaining items recovered from a search of a traveller when the purpose of the search is simply to discover whether the traveller has lied on their passenger locator form. In addition, we have concerns that any person designated by the Secretary of State can detain and search travellers, and use reasonable force to do so. Will the Secretary of State clarify who has been designated for these purposes, so that there can be scrutiny of that decision?
49. Third, regulation 15 allows the Secretary of State to charge travellers for their stay in a quarantine hotel. We have already queried the vires of this power. Even if the Public Health Act authorises such a provision, the proportionality of the existence and extent of these charges

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<sup>58</sup> *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4; [2020] 2 WLR 41 at [34]

<sup>59</sup> *R (Jalloh)* at [24]

<sup>60</sup> *R (Francis) v Secretary of State for Health and Social Care* [2020] EWHC 3287 (Admin)

<sup>61</sup> The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020

should be scrutinised. The Secretary of State is effectively compulsory detaining people and then requiring them to pay for that detention.

50. Currently, an adult will be charged £1,750 for the minimum stay of 10 days, with a daily rate of £152 charged for any additional time that they are required to quarantine. The corresponding figures for children over 12 years are £650 and a £41 day rate, and for children aged 5-12 years the figures are £325 and a £12 day rate. There is no waiver for low-income individuals, although people who are in receipt of income-related benefits can apply to pay the charge in 12 monthly instalments. However, even spreading the payments over 12 months is likely to create a significant financial burden for a low-income family. For example, a family comprising 2 adults and 2 teenage children who were quarantined for the minimum period of 10 days would need to find an additional £400 per month to repay the cost of their stay.
51. It is likely that many people in hotel quarantine will be required to stay for longer than 10 days, and will incur additional charges as a consequence. Travellers are required to take a coronavirus test on day 2 of their quarantine, and if this test is negative then an additional test must be taken on day 8. Where the day 8 test is positive, the person who took the test and anyone who is quarantining with them will be required to quarantine for a further 10 days (i.e. until day 19). For a family comprising two adults and two teenage children, this is an additional charge of £3,474, bringing their total hotel quarantine bill to £8,274. If that family is in receipt of income-related benefits, their monthly repayment rate would rise to £689.50.
52. Even if a traveller tests negative on days 2 and day 8, they can only leave quarantine once they have received their negative day 8 test result. The tests are self-administered, collected by hotel security, and then processed through the NHS Test and Trace service.<sup>62</sup> This suggests that tests taken by people in hotel quarantine will be processed the same way as tests taken by people at home (as opposed to tests taken at in-person test sites). The Test and Trace system has been beset by delays: in the week starting 4 March 2021, 27.9% of people who took a coronavirus test at home had still not received their results within 48 hours.<sup>63</sup> If tests taken by people in hotel quarantine are processed the same way, then that means that just over a quarter of people in hotel quarantine who are required to take a day 8 test are likely to have to quarantine for longer than 10 days, even if that test is negative. For a family comprising two adults and two teenage children, every extra day spent in hotel quarantine after the minimum 10 days will cost an extra £386. This is a significant amount of money. The Government should confirm how the tests taken by people in hotel quarantine will be processed, and whether there will be a special effort made to make sure that people receive their day 8 test result within 48 hours so that they are not paying for delays in the Test and Trace service.
53. Finally, the Regulations create several new offences. Almost any breach of the hotel quarantine requirements is now an offence, and in many cases there is no exception made where a person has a reasonable excuse for the breach. For instance, travellers who are required to quarantine commit an offence if they enter England at any place other than an approved airport (Heathrow, Gatwick, London City, Birmingham, Farnborough or a military airfield), do not travel directly from that airport to a quarantine hotel, or do not use their pre-booked means of transportation to reach the hotel (unless the transport is no longer available for reasons beyond the person's control) (regulations 6 and 15). An individual who has committed an offence under the Regulations may be offered the chance to avoid prosecution by paying a fixed penalty notice,

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<sup>62</sup> Department for Health and Social Care, "Managed quarantine"

<sup>63</sup> Department for Health and Social Care, "Weekly statistics for NHS Test and Trace (England): 4 February to 10 February 2021" (18 February 2021) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/970744/Test\\_and\\_Trace\\_Week41.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970744/Test_and_Trace_Week41.pdf)>

but the Regulations set the financial penalty for a number of offences at an extremely high level. For instance, if a traveller from a red list country enters the UK other than at an airport approved in the Regulations, then the FPN will be set at £10,000 (regulation 12(c)). The Government should explain why the creation of new offences and expensive FPNs is a necessary and proportionate response to the public health risk. Joelle Grogan and Nyasha Weinberg have noted that there is no correlation between the use of coercive enforcement and better outcomes for states during the pandemic.<sup>64</sup>

## Discriminatory Impact

54. The Rule of Law requires laws to be non-discriminatory in their effect. The law should prohibit any unjustified unequal treatment, and ensure that all persons have guaranteed equal and effective protection against discrimination.<sup>65</sup>
55. As we noted above, no impact assessment has been prepared for the Regulations. This makes it difficult for Parliamentarians and others to see how the Government identified and addressed any potential discriminatory effects of the Regulations. We repeat our view that an impact assessment should have been prepared. We also repeat our concerns that the hotel quarantine scheme has a disproportionate impact on individuals with a low income, due to the high level of charges and the limited relief for travellers who receive income related benefits.
56. In addition, the Regulations do not appear to make adequate provision for individuals who are unable to stay in a quarantine hotel because of a disability. There are a limited number of people who are exempt from the main hotel quarantine requirements, and for whom the Secretary of State will arrange “such provisions as to accommodation, transport and testing as the Secretary of State considers appropriate” (regulation 15). Asylum seekers, potential victims of modern slavery, and people requiring urgent medical assistance will be entitled to this special accommodation, but there is no exemption for people with disabilities for whom a stay in hotel quarantine would be inappropriate or simply impossible. A person with a disability is allowed to have another person stay with them while they are quarantining, in order to provide assistance (regulation 15). However, it is not clear whether that person would also have to pay the hotel quarantine charge. If they do have to pay, that would appear to be a form of indirect discrimination, as a disabled person would not only have to pay the cost of their own quarantine but may also have to pay for a carer to come into quarantine with them. A similar consideration applies to unaccompanied children, who are allowed to have an adult enter quarantine to stay with them, but it is not clear whether this adult would have to pay the quarantine fee. Provision should be made to ensure that a person does not have to quarantine in a hotel if they are unable to do so because of a disability, and to ensure that any unaccompanied child or disabled person who is able to quarantine will not have to pay an additional fee for a carer to come into quarantine.
57. Finally, we query whether the Regulations have a disproportionate impact on UK residents who are dual citizens or have another nationality, who may be more likely to need to travel to a red list country for family, health or business purposes. However, it is difficult to assess this without the Government having carried out an impact assessment.

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<sup>64</sup> Grogan and Weinberg, “Principles to Uphold the Rule of Law”, p.13.

<sup>65</sup> Venice Commission, “Checklist” Benchmarks D2 and D3

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