

Government messaging on exercising during lockdown: A Rule of Law Analysis

Katie Lines, 8 February 2021



Executive Summary

The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 currently require every person who lives in England to stay at home, unless they have a reasonable excuse for being outside the place where they are living. The Regulations specify that taking exercise outdoors is a reasonable excuse, with some restrictions.

The Government has issued guidance containing further restrictions on exercising outdoors, one of which is that people should not travel outside their local area when exercising. Government messaging has repeatedly portrayed this guidance as being law. Such blurring of the line between law and guidance is incompatible with the Rule of Law, and the Government must ensure that it clearly distinguishes between law and guidance in future messaging.



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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.

The Report has been prepared by Katie Lines.

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Recent confusion around travelling to exercise

1. At the start of January 2021, Derbyshire Police issued fixed penalty notices (“FPNs”) to two women who had travelled to a reservoir about five miles from their homes for a walk. Derbyshire’s decision to issue the FPNs received widespread criticism, but the force initially defended its actions, stating that driving to exercise was “clearly not in the spirit of the national effort to reduce our travel.”¹ The force was supported by Matt Hancock MP, who confirmed that it was “right to take very seriously the rules we have brought in.”² However, the following week Derbyshire police reversed their initial position, withdrawing the FPNs and issuing a fresh statement noting that “at present there is no clear limit as to how far people can travel to exercise.”³
2. While this was playing out in the press, Boris Johnson was seen on a bike ride 7 miles from his home. The prime minister was criticised for travelling so far when exercising, especially after his ministers had supported Derbyshire police issuing FPNs for a shorter journey. However, Downing Street defended the prime minister, stating that his bike ride did not “break the rules.” Metropolitan Police Commissioner Dame Cressida Dick subsequently confirmed that Boris Johnson had not acted unlawfully.⁴
3. The above incidents illustrate confusion as to how far current lockdown laws prohibit travelling to exercise. This report first notes the need for legal certainty and foreseeability as a component of the Rule of Law. It then discusses the current law and guidance on travelling to exercise, before considering how far Government messaging has contributed to confusion by portraying guidance as law.

The importance of legal certainty

4. Legal certainty and foreseeability are essential elements of the Rule of Law.⁵ It is particularly important that legislation creating criminal offences is clear and has foreseeable effects, because “if you or I are liable to be prosecuted, fined and perhaps imprisoned for doing or for failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty.”⁶
5. Throughout the pandemic, the Government has made regular statements on what people must or must not do in order to avoid criminal penalty, and the gov.uk website currently contains a guide to “what you can and cannot do” during the national lockdown. Such public messaging is necessary to ensure that people are aware of the complex and rapidly changing legal landscape, but it is crucial that the Government’s explanation of coronavirus law is clear

¹ ‘Covid: Fines reviewed after women ‘surrounded by police’ (8 January 2021) <<https://www.bbc.co.uk/news/uk-england-derbyshire-55594244>> accessed on 26 January 2021

² ‘Bending Covid lockdown rules could be fatal, public warned’ (11 January 2021) <<https://www.thetimes.co.uk/article/bending-covid-lockdown-rules-could-be-fatal-public-warned-kb98wg6rp>> accessed on 26 January 2021

³ Derbyshire Constabulary, ‘Review into fixed penalty notices issued last week has now concluded’ (11 January 2021) <<https://www.derbyshire.police.uk/news/derbyshire/news/news/forcewide/2021/january/review-into-fixed-penalty-notices-issued-last-week-has-now-concluded/>> accessed on 26 January 2021

⁴ ‘Covid: Johnson’s bike ride ‘didn’t break rules’ (12 January 2021) <<https://www.bbc.co.uk/news/uk-politics-55630164>> accessed on 26 January 2021

⁵ Venice Commission “The Rule of Law Checklist” (Council of Europe 2016), Benchmark B3 available at <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> accessed on 26 January 2021

⁶ Tom Bingham, *The Rule of Law* (2011), p. 37.

and accurate. Inaccurate or confusing statements of the law undermine the Rule of Law. They are also likely also to damage trust in Government messaging, which may have wider implications for the efficacy of the public health response to the pandemic. A review of recent studies on the coronavirus pandemic suggests that people are more likely to comply with measures designed to tackle the spread of coronavirus when they trust those who are giving the orders, and that public trust in Government increases where Government messaging is clear.⁷

Overview of the Regulations

6. The current lockdown restrictions in England are governed by The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (“the Regulations”), which have been in force since 2 December 2020. The Regulations initially implemented a three-tier lockdown system, but were amended 20 December 2020 to introduce a fourth tier. The current national lockdown began on 6 January 2021, when the Regulations were further amended to place every area of England within Tier 4.
7. The detail of the Tier 4 restrictions is contained in Schedule 3A to the Regulations. Paragraph 1 of Schedule 3A requires every person who lives in England to stay at home, unless they have a reasonable excuse for being outside the place where they are living. A non-exhaustive list of “reasonable excuses” is set out in Paragraph 2 of Schedule 3A, one of which is that it is “reasonably necessary for the person concerned (“P”) to leave or be outside the place where P is living to take exercise outside”. It is an offence for an individual to be outside the place where they are living without a reasonable excuse. This offence is punishable on summary conviction by a fine, although in most cases the police have been issuing fixed penalty notices as an alternative to prosecution. FPNs carry an initial penalty of £200 (reduced to £100 if paid within 14 days), but this sum doubles for each FPN issued, up to a maximum of £6,400.
8. There is no restriction in the Regulations as to the distance that a person can travel to exercise. Derbyshire Police appear to have read the “reasonable excuse” provision in the Regulations as meaning that an individual can only travel a “reasonable” distance to exercise.⁸ However, this misunderstands the structure of the Regulations. Exercising is specified as a reasonable excuse for being outside. There is no additional reasonableness requirement limiting the nature of that exercise so long as it is “reasonably necessary” for the person to be outside in order to exercise, and the person complies with restrictions on the number of people who can exercise together. The National Police Chiefs’ Council has since confirmed that “the Covid Regulations which officers enforce and which enables them to issue FPNs for breaches, do not restrict the distance travelled for exercise.”⁹

⁷ Daniel Devine, Jennifer Gaskell, Will Jennings, Gerry Stoker, “Trust and the Coronavirus Pandemic: What are the Consequences of and for Trust? An Early Review of the Literature” in *Political Studies Review* (August 2020)

⁸The force stated “It is up to each individual officer on a case-by-case basis to decide what is reasonable as the legislation does not proscribe a distance”, ‘Covid: Women on exercise trip ‘surrounded by police’ (8 January 2021) < <https://www.bbc.co.uk/news/uk-england-derbyshire-55560814>> accessed on 26 January 2021. Aaron Bell MP reached a similar conclusion in the House of Commons debate on the first version of the lockdown Regulations, which contained similar provisions. He stated that “people can travel to take exercise, including by car, if reasonable.” HC Deb, 4 May 2020, vol 675, cols 463-463

⁹ Derbyshire Constabulary, ‘Force welcomes new guidance from NPCC about travelling during lockdown’ (8 January 2021) < <https://www.derbyshire.police.uk/news/derbyshire/news/news/forcewide/2021/january/force-welcomes-new-guidance-from-npcc-around-about-travelling-during-lockdown/>> accessed on 26 January 2021

Overview of Government guidance

9. The Government's guidance is more restrictive than the Regulations, repeating a pattern that has occurred throughout the pandemic.¹⁰ When discussing exercising outdoors, the guidance goes beyond the Regulations by limiting the distance that people should travel to exercise. People are instructed to "always stay local" when leaving the house unless it is "necessary" to go further, and not to travel outside their local area when exercising. "Local" is defined as being "the village, town or part of the city where you live."¹¹
10. Of course, people should follow public health guidance. However, the Government's guidance is not enforceable and no criminal liability can arise from its breach. Therefore, while Boris Johnson and the two women in Derbyshire may have acted against Government advice, they did not break the law, and the women should not have been subject to any enforcement action by the police.

Government messaging

11. When explaining the current restrictions on exercise in England, the Government's public messaging has continually misrepresented what is law and what is guidance. The Government's guidance gets off to a bad start by stating "You should follow this guidance immediately. This is the law."¹² This statement is simply wrong. While the guidance includes statements of the law, it also contains Government advice that has no legal basis. The words "the law" contain a hyperlink to the Regulations, but the Regulations are 130 pages long and difficult to navigate. Directing people to 130 pages of complex legislation is unlikely to remedy any confusion caused by the statement that the guidance is the law.
12. The guidance goes on to discuss exercise, noting that "you can leave your home to exercise. This should be limited to once per day, and you should not travel outside your local area." It is not made clear that the requirements to stay local and only exercise once per day are Government advice and carry no legal weight. It has been noted that the guidance tends to use "should" when outlining Government advice rather than a legal requirement. However, if the use of "should" is intended to distinguish advice from law, then this needs to be clearly stated at the start of the guidance in order to be of practical use.¹³

¹⁰ For instance, Government guidance at the start of the pandemic specified a limited list of purposes which were described as "the only reasons you should leave your home". In contrast, the corresponding Regulations contained a longer, non-exhaustive list of reasonable excuses for people to be outside. Government guidance also stated (and continues to state) that people can only leave their homes to exercise once per day, when the Regulations do not limit the number of times that a person can exercise outside. See the discussion by the Joint Committee on Human Rights in *The Government's response to COVID-19: human rights implications* (2019-2021, HL 125, HC 265) at pp. 20-23.

¹¹ National lockdown: Stay at Home < <https://www.gov.uk/guidance/national-lockdown-stay-at-home> accessed on 26 January 2021

¹² National lockdown: Stay at Home < <https://www.gov.uk/guidance/national-lockdown-stay-at-home> accessed on 26 January 2021

¹³ See the comparison of the coronavirus guidance with the Highway Code by Tom Hickman QC in 'The continuing misuse of guidance in response to the pandemic' (25 January 2021) < <https://blogs.lse.ac.uk/covid19/2021/01/25/the-continuing-misuse-of-guidance-in-response-to-the-pandemic/> accessed on 5 February 2021

13. Statements made by Members of Parliament have further confused law and guidance. When speaking to the press, MPs and Government spokespeople often refer in a blanket manner to “the rules”, failing to clarify that some of the rules they are discussing are guidance, not law. For instance, at a press conference on 11 January 2021, Matt Hancock MP repeatedly referred to “the rules” on exercising when discussing both law and guidance. The following day, the Home Secretary told a press conference that “the rules are very simple and clear” and included “staying local”. Statements made by ministers in Parliament have also failed to make clear what is law and what is guidance. When answering a written question about the lockdown laws on 19 January 2021, Nigel Huddleston MP stated “These regulations were voted on by the House on 6 January. You can continue to exercise alone, with one other person or with your household or support bubble... and you should not travel outside your local area.”¹⁴ This phrasing incorrectly implies that the prohibition on travelling is found in the Regulations.
14. The above criticism is not intended to downplay the importance of public health guidance, which should be followed. There is a place for both law and guidance in responding to the pandemic. Legislation cannot cover every eventuality, and some matters are simply better dealt with in non-enforceable guidance.¹⁵ However, it is incompatible with the Rule of Law for the Government to portray its guidance as having the force of law. Such messaging causes confusion among both the public and the police as to what activity is lawful, and risks individuals being given FPNs or being prosecuted for lawful behaviour. In addition, by misrepresenting the law, the Government is jeopardising public trust in its messaging and, as a consequence, public compliance with the lockdown measures.
15. If the Government felt that the law in England should set a limit on the distance that individuals can travel to exercise, then this should have been included in the Regulations. Precedent for such a provision is found in the Scottish lockdown Regulations, which only allow exercise outdoors to take place in an area under level 4 restrictions when the exercise “starts and ends at the same place, which place must be—
- (aa) in the local government area in which that person lives, or
 - (bb) within 5 miles of such local government area.”¹⁶
16. It is disappointing and concerning that the Government continues to portray its guidance as law. This has been a recurring problem since spring 2020, and has been brought to the Government’s attention by commentators and Parliamentarians on multiple occasions.¹⁷ In response, at the end of last year the Government stated that it recognised the difference between law and guidance, and would “strive to ensure appropriate wording and clarity is given in future.”¹⁸ So far that has not happened. It is hoped that the recent criticism of Boris Johnson’s bike ride may provide impetus for the Government to ensure that it makes clear going forwards what is law and what is non-enforceable guidance.

¹⁴ HC Deb, 19 January 2021, cW 134509

¹⁵ Public Administration and Constitutional Affairs Committee, *Parliamentary Scrutiny of the Government’s handling of Covid-19* (2019-2020, HC 377), p. 24

¹⁶ The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020, Schedule 5, Paragraph 18(2)(t)

¹⁷ Joint Committee on Human Rights *The Government’s response to COVID-19: human rights implications* (2019-2021, HL 125, HC 265) pp. 20-23; Public Administration and Constitutional Affairs Committee, *Parliamentary Scrutiny of the Government’s handling of Covid-19* (2019-2020, HC 377), pp. 22-24; <https://www.instituteforgovernment.org.uk/blog/government-law-and-guidance-coronavirus-crisis>.

¹⁸ *Parliamentary Scrutiny of the Government’s handling of Covid-19: Government Response to the Committee’s Fourth Report of Session 2019–21* (8 December 2020, HC 1078), p. 11

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