

The Contact Tracing Self-Isolation Regime in England: A Rule of Law Analysis

Katie Lines, 7 October 2021



Executive Summary

On 28 May 2020, the Government launched a national contact tracing scheme in England to identify people who had recently come into close contact with an individual who had tested positive for Covid-19. The scheme uses both manual contact tracing via the NHS Test and Trace Service, and a digital contact tracing app. This report analyses how far the Government's implementation of the contact tracing scheme has complied with the Rule of Law. In particular, we consider how far Government messaging has made clear the different legal statuses of the manual NHS Test and Trace service and the contact tracing app, and how the Government has utilised legal exemptions in the regulations governing contact tracing.

We identify Rule of Law concerns that will be familiar to those who have been following the Government's response to the pandemic. The Government has blurred the line between law and guidance, used non-statutory guidance to expand upon and/or fill gaps in the law rather than passing new legislation, and has failed to make publicly available the information underpinning its policy decisions. A future inquiry may note that these Rule of Law concerns were brought to the Government's attention, in relation to various other Government policies, both before the contact tracing scheme was launched and on multiple subsequent occasions.

Blurring of the line between law and guidance

In September 2020, the Secretary of State used regulations to create a legal duty for close contacts to self-isolate if notified by Test and Trace: The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (SI 2020/1045). No corresponding legal duty was created for people pinged by the NHS app. The use of the app is entirely voluntary, although Government guidance strongly advises close contacts to isolate if the app instructs them to do so. However, the Government has consistently portrayed its guidance as having the force of law, by suggesting that the legal obligation to self-isolate also applies to users of the NHS app.

Using non-statutory guidance to expand upon/fill gaps in the law

Under the Self-Isolation Regulations, it is a criminal offence to breach the legal duty to self-isolate unless a person has a reasonable excuse for the breach. On 19 July 2021, the Government announced that double-vaccinated frontline NHS and social care staff would have a "reasonable excuse" for failing to comply with a notification to self-isolate if they attended work when their absence may lead to a significant risk of harm. However, the Government had no power to specify what would or would not be a reasonable excuse for breaching the legal duty to self-isolate. The Self-Isolation Regulations do not contain any provision allowing the Secretary of State to further define or interpret the meaning of "reasonable excuse", and the Government should not be using non-statutory guidance to try and fill gaps in the law.

The Self-Isolation Regulations also exempt participants in a "testing scheme" from the legal duty to self-isolate. The testing scheme exemption is too widely drafted and leaves too much discretion to the Secretary of State to approve what he considers to be a suitable scheme. The Department of Health and Social Care relied upon the testing scheme exemption to implement a pilot workplace testing scheme that allows some organisations to use daily contact testing as an alternative to self-isolation. That pilot scheme has since been rolled out as established policy. However, it is questionable whether a pilot of a Government policy can properly be considered a "testing scheme", and even more doubtful whether Government policy can be considered a "scheme" once the pilot stage has finished and the policy has been rolled out more widely.

Failing to make publicly available the information underpinning its policy decisions

The workplace testing scheme had a virtually non-existent public profile until mid-August 2021. The lack of public information on the workplace testing scheme arguably breaches the Rule of Law requirement that the law be accessible.



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The Report has been prepared by Katie Lines, Research Fellow in Rule of Law Monitoring of Coronavirus Legislation.

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Introduction

1. On 28 May 2020, the NHS Test and Trace Service was launched as part of the Government's COVID-19 recovery strategy. Anyone in England who receives a positive PCR test result, or otherwise notifies the NHS that they have tested positive for coronavirus, will be asked to share details of people they have seen in the preceding days. NHS contact tracing teams will then determine whether anyone who has had close contact with the person who has tested positive needs to self-isolate, and will notify them accordingly. The self-isolation regime was given statutory footing in September 2020, when the Government used regulations to create a legal duty for people to self-isolate if notified by Test and Trace.¹ Until recently, almost all close contacts notified by Test and Trace were required to self-isolate for 10 days. However, on 16 August 2021 the law was relaxed so that close contacts need not self-isolate if they have received both doses of the coronavirus vaccine in the UK and it has been more than 14 days since their second vaccination; they cannot be vaccinated for medical reasons; or they are under 18.²
2. The Test and Trace service is supplemented by an NHS contact tracing app. The app works by using Bluetooth to identify and log nearby phones that are also running the app. When a user of the app tests positive for coronavirus, they can choose to send an anonymous alert to any other app users with whom they have recently been in close contact. The app will then inform those close contacts that they have been exposed to coronavirus, and advise them if they need to self-isolate. Again, contacts will not be asked to self-isolate if they are double-vaccinated; cannot be vaccinated; or are under 18. People are free to choose whether they download the app and follow its instructions. The legal duty to self-isolate only applies to people notified by the manual Test and Trace service, and does not apply to users of the app.
3. In the summer of 2021, there was a sharp rise in coronavirus cases in England, which caused a corresponding increase in the number of people being identified as close contacts and asked to self-isolate. To give some idea of numbers; in the week commencing 14 July 2021, around 8% of the population in England was self-isolating.³ With so many people confined to their homes, many workplaces experienced staff shortages, with the hospitality, retail, manufacturing and healthcare sectors particularly hard-hit. Some respite came when the rules were relaxed in August 2021 to allow double vaccinated people to avoid self-isolation, but before then the Government struggled to balance the self-isolation regime with the needs of businesses and frontline services.
4. This report analyses how far Government implementation of the contact tracing scheme has complied with the Rule of Law. In particular, we consider how far Government messaging has made clear the different legal status of the two contact tracing schemes, and how the Government utilised legal exemptions to respond to the staff shortages that occurred in many workplaces over the summer.

¹ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (SI 2020/1045)

² The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) (Amendment) Regulations 2021 (SI 2021/851)

³ Office for National Statistics, 'Coronavirus and the social impacts on Great Britain: self-isolation' (27 August 2021)

<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/datasets/coronavirusandthesocialimpactsongreatbritainselfisolation>

The Legal Status of Test and Trace

5. When Test and Trace was first introduced, there were no legal obligations for close contacts to isolate following a notification from the service. The decision was voluntary, although the Health Secretary at the time, Matt Hancock MP, stressed that people had a “civic duty” to self-isolate if instructed to do so.⁴ By the autumn of 2020, the Government had decided that relying on people’s sense of civic duty was no longer sufficient and a strategy was needed to “increase compliance with self-isolation after a person has been... exposed to coronavirus.”⁵ So, on 27 September 2020, the Health Secretary made regulations which created a legal duty for close contacts to self-isolate after receiving a notification from Test and Trace: The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (SI 2020/1045). These regulations are still in force, although they have been amended multiple times over the last 11 months.
6. Under the current version of the Regulations, close contacts who are notified by Test and Trace must self-isolate for 10 days, starting with the last date on which they had contact with the person who has tested positive for coronavirus⁶ The Regulations set out a limited and exhaustive list of circumstances that allow an individual to break their self-isolation, including where it is necessary for that person to leave their accommodation in order to escape a risk of harm, to attend a coronavirus testing site, or to post a completed home test.⁷ There are also a number of exemptions which relieve people from the legal duty to self-isolate, the most notable being the recent exemption for double-vaccinated people, as mentioned above.
7. An individual commits an offence if they fail to self-isolate when required to do so, unless they have a “reasonable excuse” for the failure.⁸ The maximum penalty upon conviction is a fine, although an individual can pay a fixed penalty notice to avoid prosecution. The sum of the fixed penalty notice will be set at £1,000 in the first instance, but can rise to £10,000 for people who have breached the regulations four or more times.⁹

The Legal Status of the NHS Contact Tracing App

8. Although the app complements the work of the manual Test and Trace service, it does not fall under the same regulatory framework. There is no law governing the use of the app: the Self-Isolation Regulations only apply to the manual Test and Trace service, and not to people who are informed that they should self-isolate via the app. Individuals are free to choose how far they engage with the app and follow its instructions. The decision to download the app is entirely voluntary, and there is no legal (as opposed to moral) obligation for an individual to isolate if the app advises them to do so.
9. This fundamental difference between the Test and Trace service and the contact tracing app arose partly by circumstance and partly by design. When the Government was first developing Test and Trace at the start of May 2020, it appeared as though the app would form the heart of

⁴ Health and Social Care Secretary's statement on coronavirus (COVID-19): 27 May 2020 available at <<https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-27-may-2020>>

⁵ See Helen Whately's explanation of the regulations to the Delegated Legislation Committee in HC Deb 19 October 2020 col 4

⁶ Regulation 2B and 3(3)

⁷ Regulation 2(2)

⁸ Regulation 11

⁹ Regulation 12(4)

the scheme, and there would be no legal difference between two. The Health Secretary informed the Commons that a new “test, track, and trace programme” was being launched which will “bring together technology through an app, an extensive web of phone-based contact tracing, and, of course, the testing needed to underpin all that”.¹⁰ The Government placed such emphasis on the app that concerns were raised in Parliament about how contact tracing would reach people who did not have a smart phone. Lord Bethell – the Parliamentary Under-Secretary of State at the Department of Health and Social Care – reassured the House of Lords that “the app is not the only thing we are depending on. Manual track and trace... will still be a core part of our track-and-trace arrangements.”¹¹

10. However, the contact tracing app was beset by technical issues when it was trialled shortly before its intended launch, the most concerning being that it failed to detect 96% of nearby iPhone users.¹² By mid-May, the Government had dialled back its emphasis on the use of digital contact tracing. On 18 May 2020, Lord Bethell described the app as being “not intrinsically necessary” to a contact tracing scheme, and informed the Lords that the app “would benefit from being introduced later, rather than earlier, than human-based tracing mechanisms”.¹³ Ten days later the Test and Trace Service was rolled out nationwide without incorporating a contact tracing app. It took another four months for a fully functional version of the app to be developed, and the new and improved app was launched throughout England on 24 September 2020.

11. One of the central concerns in the development of the app was ensuring data security. When the app was first being considered by Government, scientific advice indicated that people’s willingness to use a contact tracing app would be affected by perceptions of the “possibility of data being lost or misused”.¹⁴ The Government responded to potential data protection concerns by “put[ting] privacy at the heart of the app”, and designing it so that users do not have to share their personal details¹⁵ However, the decision to anonymise users of the app had repercussions when the Government made the Self-Isolation Regulations which, as we discussed above, created a legal duty for people to self-isolate following a notification from Test and Trace. The Government could not sensibly create a corresponding legal duty for people pinged by the contact tracing app, because there was no way of knowing who the app had instructed to self-isolate. It would be impossible to enforce the law. This much was explained to the House of Lords Secondary Legislation Scrutiny Committee when the Self-Isolation Regulations were introduced. The Committee queried why those notified by Test and Trace had a legal duty to self-isolate, when app users did not. The Department of Health and Social Care responded by stating that “The NHS COVID-19 app has been explicitly designed to protect the anonymity of its users. The legal duty and associated fines do not, therefore, apply to people notified through the app that they have been in contact with someone who has tested positive for COVID-19.”¹⁶

12. Therefore, two parallel contact tracing systems now exist: the manual Test and Trace service, which is underpinned by legislation creating a legal duty to self-isolate; and the contact

¹⁰ HC Deb 5 May 2020, vol 675 cols 485- 486

¹¹ HL Deb 6 May 2020, vol 803 col 448

¹² Rory Cellan-Jones ‘Coronavirus: What went wrong with the UK’s contact tracing app?’ *BBC* (20 June 2020) <<https://www.bbc.co.uk/news/technology-53114251>>

¹³ HL Deb 18 May 2020, vol 803, col 900

¹⁴ Royal Society DELVE Initiative, *Test, Trace, Isolate* (18 May 2020, updated on 27 May 2020) available at <<https://rs-delve.github.io/reports/2020/05/27/test-trace-isolate.html#4-maximizing-population-participation-and-compliance-with-tti-guidance>> and cited by SAGE as “reinforcing existing SAGE advice” in their meeting on 19 May 2020, minutes available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/893667/S046_7_Thirty-seventh_SAGE_meeting_on_Covid-19.pdf>

¹⁵ See statements made in the Commons and the Lords by The Solicitor General and Lord Bethell – HC 28 April 2020, vol 675 col 199 and HL Deb 18 May 2020, vol 803 col 897

¹⁶ See concerns raised by the Committee in its 29th Report of Session 2019-21 published 8 October 2020 (HL Paper 138)

tracing app, where users are anonymous and the decision to self-isolate is voluntary. While the Government strongly advises people to follow the app's instructions – and public health advice should be followed as a matter of principle – there has never been a legal duty for people to isolate when the app advises them to do so.

Government Messaging in Relation to Self-Isolation

13. It is important that Government messaging does not blur the line between the law and Government advice. Legal certainty and foreseeability are essential elements of the Rule of Law.¹⁷ A failure to clarify the difference between legal rules and Government advice undermines the Rule of Law by creating confusion for both the public and the police as to what the law actually requires. This confusion can have serious repercussions, as we saw at earlier stages of the pandemic, when the police charged people with criminal offences for behaviour that was contrary to Government guidance but was nonetheless lawful.¹⁸ People will be deterred from undertaking lawful behaviour where there are uncertainties as to whether that behaviour is in fact legal, or whether it will result in a fine or criminal sanction.
14. In addition, there are constitutional problems with the Government portraying its advice as having the force of law. The Rule of Law requires Parliament to have legislative supremacy so as to ensure that law-making is democratic and subject to proper scrutiny, and to protect against the arbitrary exercise of executive power.¹⁹ The Government effectively bypasses Parliament's role in law-making when it portrays its advice as having the force of law.²⁰
15. Therefore, from a Rule of Law perspective, Government messaging should have clearly explained the legal distinction between the Test and Trace service and the contact tracing app. After the Self-Isolation Regulations were made, the Government should have clarified that people now have a legal duty to self-isolate if told to do so by Test and Trace, whereas they are advised – but not legally required – to isolate if pinged by the app.
16. In the initial months of the Test and Trace scheme, when there were no legal duties to self-isolate, it was generally made clear that the decision to follow Test and Trace's instructions was voluntary. Matt Hancock's statement introducing the Test and Trace service in May 2020 told people that they must self-isolate if contacted by Test and Trace, but also explained that the requirement to self-isolate "will be voluntary at first because we trust everyone to do the right thing."²¹
17. Government messaging became less clear when the contact tracing app was rolled out nationwide on 24 September 2020. Matt Hancock appeared on BBC Breakfast and explained that the app would ping close contacts and tell them to isolate, but "that self-isolation is voluntary." So far so accurate. The Health Secretary then went on to contrast the app with the Test and Trace service, explaining that "it is now mandatory to self-isolate if you are phoned up

¹⁷ 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>

¹⁸ Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, 'Policing in the pandemic', p.35 <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/policing-in-the-pandemic-police-response-to-coronavirus-pandemic-during-2020.pdf>> and see the examples discussed by Big Brother Watch in 'Emergency Powers and Civil Liberties Report' (April 2020) <<https://bigbrotherwatch.org.uk/wp-content/uploads/2020/04/Emergency-Powers-and-Civil-Liberties-Report-april-2020.pdf>>

¹⁹ Venice Commission "The Rule of Law Checklist", Benchmark A5.

²⁰ For a more in-depth discussion on this point see Tom Hickman, 'The use and misuse of guidance during the UK's coronavirus lockdown' (September 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3686857> P.16

²¹ 27 May 2020 daily press briefing on the government's response to the COVID-19 pandemic, available at <<https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-27-may-2020>>

by NHS Test and Trace". This statement was inaccurate. The Self-Isolation Regulations, which created a legal duty to self-isolate if contacted by Test and Trace, were not made until 27 September 2020 and did not come into force until four days after Matt Hancock's interview. At the time Matt Hancock was speaking, the requirement to self-isolate following a Test and Trace notification remained voluntary, and neither Parliament nor the public had had sight of the legislation that would change this. It is confusing for the Government to announce that it has made certain behaviour mandatory when there is no law underpinning that decision, and no means of enforcing it.

18. Government messaging continued to blur the line between law and guidance when the Self-Isolation Regulations were eventually introduced on 28 September 2020. The Government released a press statement that day announcing that the "new legal duty to self-isolate comes into force today".²² This means that the duty to self-isolate was announced as having come into force twice: once on 24 September when Matt Hancock said that Government had made self-isolation mandatory, and once on 28 September, when the new law actually came into force. This is confusing, and could lead casual followers of the news to think that two different legal duties had been created.

19. In addition, the press statement announcing the Self-Isolation Regulations referred multiple times to a new "legal obligation to self-isolate", without explicitly stating that this obligation does not apply to the contact tracing app. The statement ends by clarifying that "[u]sers of the official NHS COVID-19 contact tracing app are anonymous and we cannot force them to self-isolate or identify them if they are not self-isolating." However, the phrasing here is ambiguous - does the legal duty not apply to app users, or is it applicable but just unenforceable?

20. Official Government guidance only worsened the potential for confusion. The guidance for close contacts makes no attempt to distinguish between the manual Test and Trace service and the NHS app.²³ Rather, the two contact tracing systems are merged, with the guidance on multiple occasions referring to "NHS Test and Trace, including the NHS COVID-19 app" (*emphasis added*). The guidance then ends by stating that people have a legal duty to self-isolate if notified by NHS Test and Trace:

"Legal requirements for self-isolation

You could be fined if you do not stay at home and self-isolate... if you are a contact of someone who has tested positive, and you are notified by NHS Test and Trace that you need to self-isolate. It is also an offence to knowingly provide false information about your close contacts to NHS Test and Trace. Failure to comply with these requirements may result in a fine of up to £10,000."

21. There is no suggestion here that app users do not have a legal obligation to self-isolate. To the contrary, this final paragraph implies that app users are legally required to self-isolate. The guidance states multiple times that its references to "NHS Test and Trace" include the NHS COVID-19 app. It then ends by discussing how close contacts who are notified by NHS Test and Trace are legally required to self-isolate. There is no indication that, on this occasion, "NHS Test and Trace" has a different meaning to its use elsewhere in the guidance, and does not include the NHS COVID-19 app. It is hard to see how anyone who is reading the guidance to try and understand their legal obligations would be able to deduce that the app's instructions are only advisory.

²² Department of Health and Social Care, 'New legal duty to self-isolate comes into force today' (28 September 2020) <<https://www.gov.uk/government/news/new-legal-duty-to-self-isolate-comes-into-force-today>>

²³ Available at <<https://www.gov.uk/government/publications/guidance-for-contacts-of-people-with-possible-or-confirmed-coronavirus-covid-19-infection-who-do-not-live-with-the-person/guidance-for-contacts-of-people-with-possible-or-confirmed-coronavirus-covid-19-infection-who-do-not-live-with-the-person>>

22. It is not clear if the Government's repeated portrayal of its advice as having the force of law was deliberate or accidental. However, Downing Street responded negatively when ministers attempted to clarify that it is not mandatory for people to self-isolate if they are pinged by the app. On 20 July 2021, Business Minister Paul Scully MP explained on Times Radio that you "have to legally isolate if you are contacted by Test and Trace... The app is there to allow you to make informed decisions... [B]y backing out of mandating a lot of things, we're encouraging people to really get the data in their own hands." When asked whether this meant that people did not need to self-isolate if pinged by the app, Scully confirmed that "it is up to individuals and employers."²⁴
23. Scully's statements were an accurate reflection of the law. However, Downing Street moved quickly to dismiss any suggestion that app users could choose whether or not to self-isolate, and released a press statement stating that "it is crucial people isolate when they are told to do so, either by NHS Test and Trace or by the NHS Covid app."²⁵
24. It is no surprise that, by mid-July 2021, there was widespread confusion as to when the law required people to self-isolate. A YouGov study published on 26 July 2021 found that 59% of Britons wrongly thought that anyone pinged by the Covid-19 app was legally required to self-isolate, while an extra 16% did not know either way.²⁶ Only 25% of people gave the correct answer – that there was no legal requirement to self-isolate when pinged by the app.
25. It is concerning and disappointing that the Government's discussions of the contact tracing scheme over the last year have repeatedly portrayed public health advice as having the force of law. The Rule of Law problems caused by blurring the line between law and guidance have been raised repeatedly by multiple commentators within and outside of Parliament since April 2020.²⁷

Exceptions from Isolation for Participants in Testing Schemes

26. There is a further Rule of Law concern with the Government's use of the Self-Isolation Regulations. The Regulations contain a number of exemptions which remove the legal obligation for close contacts to isolate after receiving a notification from Test and Trace. In particular, we have concerns about the Government's use of regulation 2D, which exempts people taking part in a testing scheme from the legal duty to self-isolate.²⁸ The exemption allows

²⁴ David Hughes, 'People should make 'informed decision' if pinged by Covid app, minister says' *Independent* (20 July 2021) < <https://www.independent.co.uk/business/people-should-make-informed-decision-if-pinged-by-covid-app-minister-says-b1887057.html>>

²⁵ Marie Jackson, 'Covid-19: Crucial for pinged people to self-isolate – No 10' *BBC News* (20 July 2021) < <https://www.bbc.co.uk/news/uk-57902213>>

²⁶ Connor Ibbetson, 'Is it a legal requirement to self-isolate after being pinged by the NHS COVID-19 app?' *YouGov* (26 July 2021) < <https://yougov.co.uk/topics/health/articles-reports/2021/07/26/it-legal-requirement-self-isolate-after-being-ping>>

²⁷ In April 2020, the House of Lords Secondary Legislation Committee wrote to Matt Hancock MP drawing to his attention the need for a clear distinction between legislation and guidance, and a debate was held in the Lords on 5 May 2020 discussing the problems with the Government failing to distinguish between law and guidance (HL Deb 5 May 2020, Vol 803). See also 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; Katie Lines, 'Government Messaging on Exercising during Lockdown - A Rule of Law Analysis' (The Bingham Centre for the Rule of Law, 8 February 2021) < <https://binghamcentre.biicl.org/publications/government-messaging-on-exercising-during-lockdown-a-rule-of-law-analysis>>.

²⁸ Regulation 2D of the Self-Isolation Regulations, inserted by The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 (SI 2021/364)

participants in a testing scheme to undertake behaviour (i.e. not self-isolating) that would otherwise be a criminal offence. The Regulations define a testing scheme as a scheme –

“(a) under which participants take a test for the detection of coronavirus at such intervals as are specified in the scheme for a period specified in the scheme, and at a place and in a manner specified in the scheme, and

(b) which is approved by, or on behalf of, the Secretary of State.”

27. The testing scheme exemption came about after The Scientific Advisory Group for Emergencies (“SAGE”) advised that daily testing of contacts of confirmed cases of Covid-19 may offer an alternative to quarantine strategies. SAGE strongly endorsed trials and pilots of daily testing to gather additional data.²⁹ The Department of Health and Social care launched two clinical trials in response. One involved secondary schools and colleges and ran from January to June 2021. This trial aimed to compare the impact of daily contact testing to the usual policy of self-isolation, measure how far this affected learning, and to find more COVID-19 cases and break the chains of transmission.³⁰ The second clinical trial was a much larger study involving the general public, which ran from 9 May to August 2021 and was simply called “the NHS Test and Trace daily contact testing study”.³¹ People identified by Test and Trace as close contacts were invited to take part in the study, provided that they did not already have symptoms of coronavirus. The aim of the Test and Trace study was to “find out if daily testing can replace the need for self-isolating for people without symptoms if their test result is negative.”³²
28. Both clinical trials were randomised controlled research studies. Participants in both studies were allocated either to a control group, where they had to self-isolate as normal, or a daily testing group, where they took daily coronavirus tests and were allowed out of self-isolation for 24-hours if the test was negative.

Workplace daily contact testing pilot

29. The Government also ran a pilot scheme for daily contact testing in workplaces, which started in December 2020. This was not a randomised clinical trial, but rather a pilot of a policy that allowed workers to use daily contact testing as an alternative to self-isolation. The policy paper explains that the workplaces selected to take part in the pilot “gave a spread of different types of organisation to help generate a range of learning about the operational implications of running daily contact testing”.³³ Participating organisations included the Cabinet Office, Border Force and Transport for London.
30. The pilot allowed workers who were close contacts of positive Covid-19 cases to take daily lateral flow tests for up to 7 days as an alternative to self-isolation. If the test result was negative, they could attend work in the following 24 hours.

²⁹ SAGE, ‘SAGE 83 minutes: Coronavirus (COVID-19) response, 11 March 2021’ (26 March 2021), available at <<https://www.gov.uk/government/publications/sage-83-minutes-coronavirus-covid-19-response-11-march-2021>>

³⁰ See the ISRCTN registry entry at <<https://www.isrctn.com/ISRCTN18100261>>

³¹ Department of Health and Social Care, ‘Daily contact testing study’ (last updated 4 June 2021) <<https://www.gov.uk/guidance/daily-contact-testing-study>>

³² Ibid

³³ Department of Health and Social Care, ‘Workplace daily contact testing pilot’ (13 August 2021) <<https://www.gov.uk/government/publications/workplace-daily-contact-testing-pilot/workplace-daily-contact-testing-pilot>>

31. In July 2021, in response to widespread staff shortages caused by rising numbers of people being asked to self-isolate, the workplace contact testing pilot was expanded to a further 700 testing sites.³⁴ These sites included industries that were particularly badly affected by their workforce being required to stay at home: frontline police and fire services; rail infrastructure, ports and airports; and haulage firms. By 13 August, the pilot had come to an end, and daily contacted testing in workplaces was rolled out as an established policy, starting with 2,000 sites.³⁵ When double-vaccinated people were exempted from the Self-Isolation Regulations on 16 August 2021, the Government announced that “sites approved for workplace daily contact testing will be able to continue providing this service after 16 August for contacts who are not exempt from self-isolation. The government will keep under review the duration of the scheme.”³⁶
32. The workplace pilot and the subsequent policy roll out appear at first glance to fall under the definition of a testing scheme in regulation 2D of the Self-Isolation Regulations, which would exempt participants from the legal obligation to isolate after receiving a notification from Test and Trace. However, there is a question mark as to whether a pilot of a Government policy can properly be considered a “testing scheme”. There is an even bigger question mark as to whether Government policy can be considered a “scheme” once the pilot stage has finished and the policy has been rolled out more widely. If the policy cannot be considered a “scheme”, then there is no legal basis for the Department of Health and Social Care continuing to allow workers to avoid self-isolation following a notification from Test and Trace, and the Government is acting beyond the powers granted to it by Parliament.
33. Part of the problem is that the definition of a “testing scheme” in the Self-Isolation Regulations is vague, and leaves substantial discretion to the Secretary of State to approve what he considers to be a suitable testing scheme. There are no criteria in the Regulations setting out the purposes that a testing scheme should serve, who should be the subject of the scheme, or how the details of each scheme will be published. Where Parliament delegates power to the executive, the objectives, contents and scope of that power should be explicitly defined in legislation, in order to ensure legislative supremacy and protect against the arbitrary exercise of executive power.³⁷ This especially the case where the Secretary of State is granted a significant discretionary power. Here the Secretary of State has been given the power to allow people to avoid self-isolating in the midst of a global pandemic, and allow them to undertake behaviour that would otherwise be a criminal offence. These are not trivial matters.
34. From a Rule of Law perspective, it would have been preferable for the testing scheme exemption to be much more narrowly defined, with less discretion left to the Secretary of State to determine which testing schemes should be approved. The Self-Isolation Regulations could have also included an additional exemption allowing daily contact testing to take place in certain workplaces under a Government pilot scheme, followed by a wider roll out if the Secretary of State deemed the pilot scheme to be successful. This would have ensured that there was no doubt that the workplace testing policy falls within the exemptions permitted by Parliament.
35. A further Rule of Law issue was caused by the lack of publicly available information on the workplace contact testing scheme. A press release on 2 May 2021 briefly mentioned that

³⁴ Department of Health and Social Care, ‘Daily contact testing rolled out to further critical sectors’ (24 July 2021) <<https://www.gov.uk/government/news/daily-contact-testing-rolled-out-to-further-critical-sectors>>; Department of Health and Social Care, ‘Food industry Covid testing rolled out to support sector’ (23 July 2021)

<<https://www.gov.uk/government/news/food-industry-covid-testing-rolled-out-to-support-sector>>

³⁵ Department of Health and Social Care, ‘Workplace daily contact testing pilot’

³⁶ See Government guidance at <https://www.gov.uk/guidance/nhs-test-and-trace-workplace-guidance#guidance-for-workers>

³⁷ Venice Commission “The Rule of Law Checklist”, Benchmark A4

“[s]ince December over 200 schools, 180 workplaces and over 800 individuals have participated in daily testing pilots”³⁸, but it appears that the first document to discuss the scheme in any detail was a press release published on 23 July 2021.³⁹ This explained that “[f]ollowing clinical trial results, daily contact testing will be rolled out to critical workplaces in the food supply chain so that contacts who would otherwise be self-isolating can instead take daily tests.” A subsequent press release announced that “[f]urther targeted daily contact testing is being rolled out in England to frontline emergency services and some transport workers... so that contacts who would otherwise be self-isolating can instead take daily tests, with an expected initial additional 200 testing sites.”⁴⁰

36. While these press releases made clear the existence of a daily workplace contact testing scheme, they did not contain a list of participating workplaces or explain the rationale for selecting workplaces to take part in the scheme. This arguably breaches the Rule of Law requirement that the law be accessible.⁴¹ As the exempted persons and workplaces were not publicly available, and the operation and legal basis of the workplace testing scheme unclear, the operation of the Self-Isolation Regulations was in effect partly secret.
37. The virtually non-existent public profile of the workplace testing scheme caused practical problems on 18 July 2021, when Boris Johnson and Rishi Sunak were contacted by NHS Test and Trace and informed that they had both been in close contact with an individual who had tested positive for coronavirus. The Prime Minister and Chancellor chose not to self-isolate, with a spokesperson explaining that Downing Street was enrolled in the workplace testing scheme, and Johnson and Sunak would “be participating in the daily contact testing pilot to allow them to continue to work from Downing Street.”⁴² This announcement was met by a public backlash, as it appeared that ministers were following different rules from the general public, who by and large were legally obliged to self-isolate following a notification from Test and Trace.⁴³ Those working within Government realised this mistake, and within three hours of its initial announcement Downing Street reversed its decision and confirmed that Johnson and Sunak would be self-isolating.⁴⁴
38. Johnson and Sunak’s initial decision not to self-isolate gave the impression that the Government had afforded special legal privileges to its ministers. Equality before the law is a fundamental requirement of the Rule of Law, and differential applications of the law must be objectively justified.⁴⁵ The inclusion of the Cabinet Office in the workplace daily testing scheme may well have objective justifications behind it. However, the lack of public information on the workplace testing scheme made it difficult to assess whether the exemption of the Cabinet Office from the self-isolation rules was in accordance with the Rule of Law. The policy document published on 13 August 2021 gives a relatively full explanation of the workplace testing regime, but fails to go into any great detail as to how and why the participating organisations were selected, and why the Cabinet Office in particular was chosen to take part in the scheme. Going forwards, the Government should clearly explain in its public messaging any legal exemptions that its ministers have granted themselves, and why those exemptions are objectively justified.

³⁸ Department of Health and Social Care, ‘Government to launch 40,000 person daily contact testing study’ (2 May 2021) <<https://www.gov.uk/government/news/government-to-launch-40000-person-daily-contact-testing-study>>

³⁹ Department of Health and Social Care, ‘Food industry Covid testing rolled out to support sector’

⁴⁰ Department of Health and Social Care, ‘Daily contact testing rolled out to further critical sectors’

⁴¹ Venice Commission, “The Rule of Law Checklist”, Benchmark B1

⁴² BBC, ‘Covid: PM and chancellor not isolating after Javid test’ (18 July 2021) <<https://www.bbc.co.uk/news/uk-57877373>>

⁴³ BBC, ‘Covid-19: PM and chancellor self-isolate after rapid U-turn’ (19 July 2021) <<https://www.bbc.co.uk/news/uk-57879730>>

⁴⁴ Ibid.

⁴⁵ Venice Commission “The Rule of Law Checklist”, Benchmark D3

Special Treatment of Double-Vaccinated Frontline NHS and Social Care Staff

39. On 19 July 2021, the Government announced that double-vaccinated frontline NHS and social care staff in England who had been told to self-isolate by NHS Test and Trace would be permitted to attend work in cases where their absence may lead to a significant risk of harm.⁴⁶ Those staff would first need to take a negative PCR test and also take daily negative lateral flow tests for a minimum of 7 days. The measure was introduced before there was an exemption to the self-isolation regime for people who had been double-vaccinated, and was designed “to alleviate pressure on NHS and social care services”.
40. At first glance it appeared as though the special treatment of NHS and social care staff was another pilot or clinical trial, which may have fallen under the testing scheme exemption in regulation 2D of the Self-Isolation Regulations. However, this was not the case. The press release announcing the new policy for frontline staff explained that “[s]taff who are permitted to attend work will remain under a legal duty to self-isolate as a close contact when not at work, but will be considered to have a ‘reasonable excuse’ under the self-isolation regulations to leave self-isolation to attend work where their absence could result in harm.” Under the Self-Isolation Regulations, it is not an offence to breach the legal duty to self-isolate if a person has a reasonable excuse for the breach.⁴⁷
41. In other words, the Government was not trying to fit its special treatment of healthcare staff into the testing scheme exemption. It accepted that frontline staff would be breaching their legal duty to self-isolate if they attended work. However, the Government was telling those frontline staff that they would have a reasonable excuse for breaking the law, meaning that they would not be committing a criminal offence by going to work.
42. The problem is that the Government had no power to specify what would or would not be a reasonable excuse. The Regulations do not contain any provision allowing the Government to further define or interpret the meaning of “reasonable excuse”, and the Secretary of State cannot legislate by press statement. The assertion that frontline staff would have a ‘reasonable excuse’ was mere guidance, and non-statutory guidance does not have legislative authority. Neither the courts, the police nor other public authorities would be required to take the Government’s views into account when deciding whether a frontline worker had committed a criminal offence by failing to self-isolate (although any staff who were prosecuted would presumably argue that the prosecution was an abuse of process in light of the Government’s press release).
43. The Government’s assertion that frontline staff “will have a ‘reasonable excuse’ under the self-isolation regulations” lacks a solid legal basis, and places those staff at risk of criminal prosecution. From a Rule of Law perspective, it is unacceptable for the Government to misrepresent the law in this way, whether or not the misrepresentation was intentional. It would have been straightforward for the Government to amend the Self-Isolation Regulations so as to create an additional exemption which would allow double-vaccinated frontline NHS and social care staff to attend work in certain circumstances. It is not clear why the Government chose instead to present its advice as having legal force, misrepresenting the law in the process.

⁴⁶ Department of Health and Social Care, ‘Frontline health and care staff can work rather than self-isolate’ (19 July 2021) < <https://www.gov.uk/government/news/frontline-health-and-care-staff-can-work-rather-than-self-isolate>>

⁴⁷ Regulation 11 of the Self-Isolation Regulations

44. This is far from the first time that the Government has presented non-statutory guidance as having legislative authority. Earlier this year, the Joint Committee on Statutory Instruments raised concerns that there had been several examples of the Government using non-statutory guidance to fill gaps in the law “as if it were the law itself.”⁴⁸ Again, it appears that the Government is failing to take on board concerns raised at earlier stages of the pandemic.

Conclusion

45. The Government’s implementation of the Test and Trace scheme reveals Rule of Law concerns that will be familiar to anyone who has been following the response to the pandemic. The Government has blurred the line between law and guidance, used non-statutory guidance to expand upon or fill in gaps in the law rather than passing new legislation, and failed to make publicly available the information underpinning its policy decisions.
46. A future inquiry may note that all of these Rule of Law concerns had already been brought to the Government’s attention before the contact tracing scheme was launched, in relation to various other Government policies.⁴⁹ They have subsequently been raised on many other occasions over the last year.⁵⁰

⁴⁸ Joint Committee on Statutory Instruments, *Rule of Law Themes from COVID-19 Regulations (2021-22)*, HL 57, HC 600), pp.15-16.

⁴⁹ In April 2020, the House of Lords Secondary Legislation Committee wrote to Matt Hancock MP drawing to his attention the need for a clear distinction between legislation and guidance, and a debate was held in the Lords on 5 May 2020 discussing the problems with the Government failing to distinguish between law and guidance (HL Deb 5 May 2020, Vol 803). Similar concerns were raised in the Commons on 12 May 2020 (HC Deb 12 May 2020, Vol 803) In addition, on 18 May 2020, the House of Commons Science and Technology Committee wrote to the Prime Minister expressing concerns over the lack of transparency of the scientific advice received by Government and its relationship to decision making. Calls were also made in both the Commons and the Lords during April and May 2020 for increased transparency as to how the Government had reached its policy positions. For example, see comments at HL Deb 23 April 2020, vol 803 col 162; HC Deb 4 May 2020, vol 675 col 462.

⁵⁰ For some examples, see the September 2020 report by the Joint Committee on Human Rights: *The Government’s response to COVID-19: human rights implications (2019-2021)*, HL 125, HC 265) pp. 20-23; and the January 2021 report by the House of Commons Science and Technology Committee: *The UK response to covid-19: use of scientific advice (2019-21 HC 136)*, pp. 24-36

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
E binghamcentre@biicl.org

www.binghamcentre.biicl.org

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