

# Coronavirus, Face Coverings on Public Transport Regulations: A Rule of Law Analysis

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## Executive Summary

The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 prohibit the use of public transport unless a person is wearing a face covering. This basic policy is sound, rational and to be welcomed. However, there are several Rule of Law concerns.

Sound law-making procedures are not being followed because of the continued use of the 'urgent procedure' to make a law which bypasses normal parliamentary scrutiny.

The one day turnaround between the law being made and the law coming into force makes the law inaccessible and therefore unfair to apply against citizens who don't have a reasonable chance of knowing about such a rapid change. It is also unfair to apply such a law against visitors to England before they even touch down on English soil.

Some definitions are technical and lack clear examples to help citizens know what they are meant to do.

In a similar vein, some of the legal and technical definitions are uncertain, meaning it is difficult to know to what circumstances they apply.

There has been no equality or regulatory impact assessment to determine what the effect of these Regulations will be on BAME groups, or on poorer sections of the community.

Giving Transport for London employees the power to issue fixed penalty notices is problematic. They won't have the training and expertise that police officers have when making nuanced judgements about the application of the law.

Finally, the standard review and expiry provisions (as set out in other social distancing regulations) have been considerably weakened.

These objections do not make the Regulations fatally flawed, but they do undermine the Rule of Law.



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## Rule of Law Monitoring of Legislation Project

This Report is part of a new 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.

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## Introduction

The purpose of the Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 is to require the wearing of face coverings on public transport. The purpose of this Report is to carry out Rule of Law scrutiny of these Regulations.

The Regulations were made under the Public Health (Control of Disease) Act 1984.

They only extend to England (although they can have effect in English airspace and English territorial waters). The devolved jurisdictions are considering, or have already enacted, similar measures.

They were made under the emergency procedure in s. 45R of the 1984 Act meaning that they came into force straight away, and lapse unless approved by resolution of each House of Parliament within 28 days.

They were made on 14 June 2020, came into force 15 June and laid before Parliament on 15 June. As of 30 June 2020, they have not been scheduled for debate before either House of Parliament.<sup>1</sup>

## Overview of the Regulations

Part 2 of the Regulations makes it mandatory to wear a face covering on public transport unless the person has a reasonable excuse. Public transport is defined to include buses, trains, planes and ferries, but not taxis and private hire vehicles. A face covering is defined to mean a covering which covers a person's nose and mouth. The rule does not apply to children under 11, employees of the transport service, police, and a small number of other categories.

Part 3 of the Regulations deals with enforcement. Persons not wearing a face covering can be refused entry onto public transport, and can be directed to leave. A police constable can exercise reasonable force to secure compliance. Failure to comply with the Regulations is a criminal offence punishable by a fine. An alternative route to a criminal prosecution is the imposition of a fixed penalty notice of £100 (reduced to £50 if paid within 14 days). The fixed penalty notice can be issued by police officers, or by Transport for London employees (but not employees of other transport services).

## Sound law-making procedures

Benchmark 5 of the Venice Commission Rule of Law Checklist is that there is a process for making law which is transparent, accountable, inclusive and democratic.<sup>2</sup> Sound democratic law-making procedures are also implicit in Tom Bingham's analysis of the Rule of Law.<sup>3</sup> UK courts have in the past challenged legislation because of breaches of sound law-making procedures, for example for failure to carry out a proper consultation,<sup>4</sup> lack of rationality,<sup>5</sup> or retrospective law making which affected property rights.<sup>6</sup>

## Use of the emergency procedure

The emergency procedure can be used if the 'person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved.'<sup>7</sup>

The emergency procedure has been used for all of the other social distancing regulations made under the Public Health (Control of Disease) Act 1984.

It is difficult to see why, 3 months after the passing of the Coronavirus Act 2020, it is suddenly urgent to pass regulations requiring the use of face coverings on public transport. The case for urgency was certainly met at the outset of the pandemic, and there is no difficulty with the original Health Protection

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<sup>1</sup> For Parliamentary timetable, see < <https://statutoryinstruments.parliament.uk/timeline/r9n43D63/SI-2020592/>>

<sup>2</sup> Venice Commission "The Rule of Law Checklist" (Council of Europe 2016), 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)>.

<sup>3</sup> Tom Bingham, *The Rule of Law* (Penguin UK 2011).

<sup>4</sup> *Greenpeace v Secretary of State for Trade and Industry* [2007] EWHC 311.

<sup>5</sup> *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778.

<sup>6</sup> *Breyer Group Plc & Ors v Department of Energy and Climate Change* [2014] EWHC 2257

<sup>7</sup> S. 45R(2) Public Health (Control of Disease) Act 1984.



(Coronavirus, Restrictions) (England) Regulations 2020, made on 26 March 2020. However, there has been on-going public, scientific and political debate about the use of face coverings since that time. It is very difficult to see the case for urgency 3 months later. The use of the emergency procedure seriously undermines good democratic law-making practice because (a) the Regulations are made and come into force within 24 hours, and (b) Parliament only get a chance to retrospectively validate them up to 28 days after they are made. Although this may be administratively convenient, this seriously restricts the ability of Parliament to properly scrutinise the Government.

This is not an argument that requiring face coverings is a bad idea. It is instead an argument that the law requiring face coverings is not so urgent that it needs to be made outside the normal law-making process of the Executive laying draft regulations before Parliament for Parliament to approve them before they come into effect.<sup>8</sup> Baroness Hamwee, in debating the first set of English social distancing regulations stated that “The rule of law requires law, brought to both Houses of Parliament as soon as possible”.<sup>9</sup>

In the debate on the same regulations in the House of Commons, Justin Madders MP stated that

given that they represent the biggest peacetime restrictions that this country has ever seen, they do demand full parliamentary scrutiny. ... but a couple of hours’ debate weeks after the regulations were introduced cannot in future be sufficient to provide the level of examination and scrutiny that such sweeping laws require.<sup>10</sup>

Tim Farron MP called for “full scrutiny of all new legislation” in the debate.<sup>11</sup> Layla Moran MP made a similar point, stating that “parliamentary scrutiny is, as ever, the most important thing we can provide as a Parliament”.<sup>12</sup> Philip Dunne MP made a similar point saying it was “absolutely right that Parliament, which regards itself as the beacon of democracy around the world, is here to scrutinise, to hold Ministers to account and to hold the Government to account”.<sup>13</sup> Andrew Griffiths MP was explicit in questioning why the vehicle of secondary legislation was being used – “I regret the fact that matters of such importance were not dealt with by primary legislation, given that the House was able to pass the Coronavirus Bill when it met before the Easter recess on 23 March”.<sup>14</sup>

### Suitability of the enabling powers cited

A considerable number of enabling powers are cited in the preamble to the Regulations.<sup>15</sup> The main enabling power is S. 45C of the 1984 Act which allows for the making of domestic health protection regulations.

However, these Regulations also apply in English airspace to a person on board a plane which took off from, or is to land in England, as well as to vessels in English territorial sea (other than vessels which are merely passing through and will not dock in England). It would therefore have been advisable to also use the enabling power in s. 45B of the Act. That enabling power is designed to cover international travel, including:

- (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.

Although not a critical flaw, citing this additional enabling power would have copper-fastened the lawfulness of the Regulations. In particular, an argument could be made in the courts that those parts of the Regulations which apply to international travel are ultra vires as the correct enabling power has not been used.

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<sup>8</sup> This normal law making process is set out in S. 45Q of the 1984 Act.

<sup>9</sup> Hansard HL 12 May 2020 Vol 803 Col 605.

<sup>10</sup> Hansard 4 May 2020, Vol 675. Col 444.

<sup>11</sup> Ibid. Col. 447.

<sup>12</sup> Ibid. Col. 454.

<sup>13</sup> Ibid. 456.

<sup>14</sup> Ibid. 465

<sup>15</sup> S. 45C(1), (3)(c), and (4)(d), s. 45F(2) and s. 45P(2).

## Transparency of scientific advice behind the policy

According to Weinberg and Pagliari<sup>16</sup>

The tragedy of Covid-19 demonstrates the profound, life-saving, importance of good advice. It is essential that the governance system enables the best possible provision of scientific advice, a mechanism for correcting sub-optimal advice, and clarity around the difference between scientific advice and political decision making

One aspect of this is the transparency of the scientific advice justifying particular measures. We note that Baroness McIntosh discussed BMA evidence on the efficacy of face coverings in a private notice question in the House of Lords on 25 June 2020.<sup>17</sup> To that end, we welcome the inclusion of a summary of the advice of the Chief Scientific Adviser on the benefits of face coverings on public transport in the Explanatory Memorandum.<sup>18</sup> We hope that this policy continues and that even greater detail is included in subsequent Explanatory Memorandum on social distancing regulations.

## Accessibility of law

Tom Bingham said that law must be accessible. The Venice Commission on the Rule of Law stated that legislation must be published and easily accessible by citizens. This isn't exactly a novel idea, John Locke said, over 300 years ago, that law must be properly promulgated 'that both people may know their duty, and be safe and secure within the limits of the law'.<sup>19</sup>

Citizens need to be able to easily find the authoritative rules setting out what they can and can't do during the pandemic. Unlike rules on dairy produce,<sup>20</sup> criminal legal aid,<sup>21</sup> or any of the other myriad technical rule changes made in response to the pandemic, rules on public transport apply to everyone. It is therefore imperative that people can easily and quickly get access to these rules.

### Date of coming into force

These Regulations were made on Sunday 14 June, and came into force on Monday 15 June. This is insufficient time for the general public to be made aware of a significant change to the criminal law. Citizens cannot be expected to carry out daily checks on [www.legislation.gov.uk](http://www.legislation.gov.uk) to see what new laws have been made and then to turn on a sixpence to react to them.

It is true that the Government made announcements in advance that there was to be a change in the law. The Transport Secretary Grant Shapps stated on 4 June 2020 that face coverings were going to become mandatory on public transport.<sup>22</sup> However, there is a world of a difference between a Ministerial announcement and an actual law. For example, according to the announcement,

Grant Shapps confirmed the government is asking operators to introduce face coverings as a requirement for travel from 15 June 2020. .... The changes will be made under legislation such as the National Rail Conditions of Travel and Public Service Vehicle Regulations for buses.

This would mean that face coverings would be a contractual requirement between passenger and transport company. However the actual Regulations make this a matter of criminal law, not a private contractual matter. There is no criticism of the content of the announcement (made when the Government were still determining the best way to give effect to the policy). However, it does rather illustrate the danger of using a Ministerial announcement 10 days before a law is made as an

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<sup>16</sup> N. Weinberg and C. Pagliari, 'Covid-19 reveals the need to review the transparency and independence of scientific advice', U.K. Const. L. Blog (15th June 2020) (available at <<https://ukconstitutionallaw.org>>).

<sup>17</sup> Hansard 25 June 2020 Volume 84 Col 369.

<sup>18</sup> Paragraph 7.5.

<sup>19</sup> John Locke, *Locke: Two Treatises of Government*. See section 137.

<sup>20</sup> Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020.

<sup>21</sup> Criminal Legal Aid (Coronavirus, Remuneration) (Amendment) Regulations 2020

<sup>22</sup> See official announcement on < <https://www.gov.uk/government/news/face-coverings-to-become-mandatory-on-public-transport>>.

accurate guide to the content of that law. Furthermore, reliance on Ministerial statements is complicated as they regularly blur the line between law and guidance.<sup>23</sup>

The only attempt at mitigating the effect of this 24 hour period between making and coming into force is that the rules don't apply to journeys started before 15 June 2020.<sup>24</sup>

A similar point arose in New Zealand, where s. 14 of the COVID-19 Public Health Response Act 2020 states:

- (2) A section 11 order must, at least 48 hours before it comes into force –
  - (a) be published on a publicly accessible Internet site maintained by or on behalf of the New Zealand Government; and
  - (b) be notified in the Gazette
- (3) However, the Minister or Director-General (as the case may be) need not comply with the 48-hour time limit in subsection (2) if satisfied that the order should come into force urgently to prevent or contain the outbreak or spread of COVID-19, but in that case must comply with subsection (2)(a) and (b) as soon as practicable.

The Law Society of New Zealand, in responding to this particular provision recommended that there be no prosecutions for any breach taking place for any order which is not in compliance with s. 14(2). It is difficult to disagree with their central point that 'It is incompatible with basic principles of the rule of law to expose individuals to criminal liability under an undiscoverable law'.<sup>25</sup>

In the UK, the Court of Appeal has reluctantly ruled that an Act of Parliament has effect notwithstanding that it hasn't yet been published,<sup>26</sup> but there is no guarantee that this same ruling would apply in respect of secondary legislation.

Making rules on a Sunday that come into force on a Monday seriously undermines accessibility of legislation and undermines the Rule of Law. There needs to be a period of at least several days between the making of a law and its coming into effect, or at least an official moratorium on sanctions for a short period.

### People travelling to England

As well as applying to journeys within England, these Regulations also apply to people arriving from outside England. A person may lawfully get onto a train in Wales without a face-covering, but be in breach of the law as soon as they cross the border. The same will apply to a ferry passenger from Belfast to Liverpool at some notional point when the ferry crosses into English territorial waters. At least these people will originate from the UK, but how will an international air passenger know about the English face covering rules before they leave their home jurisdiction? As will be seen below, even if an airline relays official Government advice to the foreign visitor, this will be no protection.

There is a legal maxim that ignorance of the law is no defence.<sup>28</sup> This even applies to foreign nationals, 'one who enters a foreign land is necessarily under an obligation to know its relevant laws'.<sup>29</sup> However, it would seem manifestly unfair to prosecute a foreigner for something they have done before they even touched down in England.

There is a mechanism for this information to be provided. The Health Protection (Coronavirus, Public Health Information for Passengers Travelling to England) Regulations 2020 were made on 3 June

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<sup>23</sup> R Cormacain 'Covid-19: when is a rule not a rule?' Bingham Centre for the Rule of Law Blogpost 24 April 2020, < <https://binghamcentre.biicl.org/comments/88/covid-19-when-is-a-rule-not-a-rule>>, Tom Hickman 'A very English lockdown relaxation' UK Constitutional Law Association Blogpost 14 May 2020, < <https://ukconstitutionallaw.org/2020/05/14/tom-hickman-a-very-english-lockdown-relaxation/>>.

<sup>24</sup> Reg 1(4).

<sup>25</sup> New Zealand Law Society, Written Submission on COVID-19 Public Health Response Act 2020 (5 June 2020, available at < [https://www.lawsociety.org.nz/\\_\\_data/assets/pdf\\_file/0005/147029/l-FEC-COVID-19-Public-Health-Response-Act-2020-5-6-20.pdf](https://www.lawsociety.org.nz/__data/assets/pdf_file/0005/147029/l-FEC-COVID-19-Public-Health-Response-Act-2020-5-6-20.pdf)>

<sup>26</sup> *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25.

<sup>28</sup> 'Ignorance or mistaken understanding of legislation is not accepted in law as an excuse for failure to comply with it', according to Bennion on Statutory Interpretation, 5<sup>th</sup> Edition at page 40.

<sup>29</sup> Bennion, *ibid*, page 42.



2020. They oblige commercial transport operators to supply travellers to England with what is called 'required information'. This required information is to be set out online by the Secretary of State. As of 1 July 2020 (16 days after the Face Coverings Regulations were made) the information to be given is:

"The following is a public health message on behalf of the UK's public health agencies.

The symptoms of coronavirus are a new continuous cough, a high temperature or a loss of, or change in, normal sense of taste or smell. If you experience any of these symptoms, however mild, you are advised to make yourself known to the crew.

Simple measures you can take to help protect yourself and family are:

1. wash your hands
2. avoid touching your face with your hands
3. catch coughs and sneezes in a tissue and dispose of it immediately

Before entering the UK, you must complete a contact locator form online. You must also self-isolate for the first 14 days after you arrive, unless you are in an exempt category.

Visit the GOV.UK website to view the exemptions list<sup>30</sup>

There are additional links to the requirement to quarantine upon arrival. There is no reference to the obligation to wear face coverings on public transport. So the Government itself, 16 days after the Face Coverings Regulations are made hasn't updated its advice to travellers, but those same travellers are still expected to comply with that (unannounced) law. A visitor to England reading this information notice would reasonably conclude that these are the key rules to follow. How unfair would it be to prosecute them for a rule that the Government itself don't seem to have noticed?

## Intelligibility

Tom Bingham said that law must be intelligible, meaning that people ought to be able to easily understand it. The Venice Commission checklist requires that laws are written in an intelligible manner.

### Title

The title of these Regulations is excellent. Although the "Health Protection" element is formulaic, the rest of the title gives an admirably clear summary of the content. The casual reader will know straight away what the Regulations are about.

### Definition of vehicle

'Vehicle' is defined to include 'aircraft, cable car, train and a vessel'. Very helpfully the footnote in the Regulations states that 'vessel' is further defined in the 1984 Act. Given that one of the most obvious forms of public transport is a bus, it may have been helpful to readers if 'bus' was also included in the list of examples of vehicles. In a similar vein, it may also be helpful to readers if 'boat' was given as an example of a vessel. This kind of demotic language makes the law easier to understand for the average citizen. The Explanatory Note does mention 'bus' as an example, but it would be better if 'bus' was mentioned as an example in the Regulation itself.

### Taxis or private hire vehicle service

These Regulations apply to public transport services, but not to taxis or private hire vehicles. There is a technical definition of what a taxi or private hire vehicle service is in regulation 2(3). This definition is made by way of reference to various pieces of legislation under which taxis are licensed. Although this may be technically correct, the average citizen will be in the dark whether this covers Ubers or black taxis. If the purpose of the law is for citizens to follow it, how can they follow it when they don't

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<sup>30</sup> Available on the Government's coronavirus guidance page at <  
<https://www.gov.uk/government/publications/coronavirus-covid-19-requirements-to-provide-public-health-information-to-passengers-travelling-to-england/coronavirus-covid-19-required-information-and-exemption-periods-under-the-public-health-information-for-passengers-travelling-to-england-regulati>>.

know what it applies to? This is a place where the regulations could very helpfully include a reference to Ubers or black taxis by way of an example to show if the law applies to those types of transport or not.

#### Definition of face covering

Face covering is defined as meaning a covering which covers a person's nose and mouth. This is straightforward and clear. However, it would be useful if this definition included a few examples to aid the reader. In the Impact section of the Explanatory Memorandum there is the following statement "The definition of face covering used is broad and includes using a scarf or bandana".<sup>31</sup> This example is helpful, but it would be much easier for readers if examples were contained directly in the definition in the actual Regulations. So, the definition could read as follows:

"face covering" means a covering of any type which covers a person's nose and mouth, and includes, for example –

- (a) surgical and non-surgical masks,
- (b) scarves and bandanas covering the nose and mouth,
- (c) niqabs and burqas;

The one point of uncertainty is whether a T-shirt pulled up to the nose constitutes a 'face covering'.

There is a certain irony that calls to ban the burqa must now be modified to reflect its help in preventing the spread of Covid-19. In France and Belgium there is now the possibility of a law requiring Muslims to wear face coverings but banning them from wearing religious face coverings, see for example a report on this point by Article 19.<sup>32</sup>

## Certainty

Tom Bingham also said that the law must be certain. Legal certainty is also part of the Venice Commission Checklist on the Rule of Law.

There is a slight ambiguity in reg 3(2). This regulation sets out that it applies to a person when:

- (a) they are boarding any vehicle ..., or
- (b) they are (whether or not for the purposes of travel) on board any vehicle ....

The ambiguity is created by the qualification in (b). If you are on board a vehicle, it doesn't matter if you are not on board for the purposes of travel. But the fact that this qualification isn't mentioned in (a) means that a person could argue that they are boarding a vehicle without a face covering, but they aren't boarding for the purposes of travel. This is an unnecessary ambiguity, and either the qualification should be removed from (b), or added in to (a).

## Equality before the law

Tom Bingham said that the laws should apply equally to all. The Venice Commission Checklist reiterates this requirement of equal treatment and non-discrimination.

### Impact Assessment

A Regulatory Impact Assessment is "a systematic, comparative appraisal of how proposed primary and / or secondary legislation might affect stakeholders, society, economic sectors and the environment".<sup>33</sup> According to the Ministry of Justice

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<sup>31</sup> Paragraph 12.2.

<sup>32</sup> Article 19 'Coronavirus: Rules illustrate "bad law" on face coverings' 19 June 2020, available at <<https://www.article19.org/resources/coronavirus-rules-illustrate-bad-law-on-face-coverings/>>.

<sup>33</sup> S Naundorf and C Radaelli, "Regulatory Evaluation Ex Ante and Ex Post: Best Practice, Guidance and Methods", in U Karpen and H Xanthaki, *Legislation in Europe* (Hart Publishing 2017)

The equality impact assessment is a systematic and evidence-based tool, which enables us to consider the likely impact of work on different groups of people. Completion of equality impact assessments is a legal requirement under race, disability and gender equality legislation.<sup>34</sup>

In the context of face coverings on public transport, an equality impact assessment would seek to determine, in advance of the legislation being made, what its likely effects would be on different sections of the community.

According to paragraph 12.2 of the Explanatory Memorandum prepared by the Department for Transport and attached to the Regulations, there was no impact assessment because the Regulations are only designed to be in force for 1 year. On the Government's official website for legislation, there is a statement linked to these Regulations that "There are no associated impact assessment for this legislation".<sup>35</sup> It is unclear why, on behalf of the Government, Baroness Vere of Norbiton, in a debate on these Regulations in the House of Lords on 25 June 2020 said that 'we did an equalities impact assessment'.<sup>36</sup> It would appear from her speech that there was discussion with the Disabled Persons Transport Advisory Committee, but this is not the same as an equalities impact assessment.

The Regulations do contain provisions to take into account those with a physical or mental disability, and this is to be welcomed. For example, it is a reasonable excuse not to wear a face mask if you are travelling with, or assisting someone who needs to lip read.<sup>37</sup> It is also a reasonable excuse not to wear a mask if you have a physical or mental illness or impairment which prevents you from wearing one.<sup>38</sup> In terms of impact on those in lower socio-economic groups, there is one reference in the explanatory memorandum to face masks being cheap, meaning that they would be available to all.

These minor points do not represent a proper assessment of the impact of these Regulations upon different communities, in particular those from lower socio-economic backgrounds, or those from BAME communities.

### **Selected Statistics – BAME and lower socio-economic groups**

The Department for Transport issued its Annual Bus Statistics for England 2018/2019 on 17 December 2019.<sup>39</sup> These statistics clearly show a direct correlation between low household income and bus use.<sup>40</sup> Low income does not automatically equate to BAME and this shows another aspect of the need for proper impact assessment on effect on poorer people. NGOs have argued that public transport use is also gendered, with a third more men than women travelling by bus, and a third more men than women travelling by train.<sup>41</sup>

According to the Office for National Statistics<sup>42</sup>

17 specific occupations were found to have raised rates of death involving COVID-19, some of which included: taxi drivers and chauffeurs (65.3 deaths per 100,000; 134 deaths); bus and coach drivers (44.2 deaths per 100,000; 53 deaths)

According to a report from the BBC<sup>43</sup>

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<sup>34</sup> < <https://www.gov.uk/government/publications/equality-impact-assessments-2010>>.

<sup>35</sup> Full details available at < <http://www.legislation.gov.uk/uksi/2020/592/resources>>.

<sup>36</sup> Hansard 25 June 2020 Volume 84 Col 371.

<sup>37</sup> Reg. 4(b).

<sup>38</sup> Reg 4(a)(i).

<sup>39</sup> <

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/852652/annual-bus-statistics-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/852652/annual-bus-statistics-2019.pdf)>

<sup>40</sup> See graphic on page 16 setting out local bus use by household income quintile where households on the lowest income take nearly twice as many trips as households on the highest income.

<sup>41</sup> Public Transport and Gender, Briefing from UK Women's Budget Group on public transport and gender, October 2018, available at < <https://wbg.org.uk/wp-content/uploads/2018/10/Transport-October-2018-w-cover.pdf>>. We have not independently verified these statistics.

<sup>42</sup> Office for National Statistics "Coronavirus (COVID-19) related deaths by occupation, England and Wales: deaths registered between 9 March and 25 May 2020" (26 June 2020), available at < <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/causesofdeath/bulletins/coronavirus-covid19relateddeathsbyoccupationenglandandwales/deathsregisteredbetween9marchand25may2020>>.

Most taxi and private-hire drivers are male, and a high proportion are from black, Asian and ethnic minority (BAME) backgrounds - two of the groups at high risk from coronavirus

In a report in the Guardian on action being taken by minicab drivers against the Mayor of London, it was stated that 94% of minicab drivers are from BAME communities.<sup>44</sup>

Finally, research by Dr Krisztián Pósch at UCL<sup>45</sup> showed that the Met police are twice as likely to fine black people than white people over breaches of Covid-19 Regulations.<sup>46</sup>

This is just a brief overview of some of the publicly available statistics on who uses public transport and it doesn't pretend to be a proper and detailed analysis. This rather makes the point that there ought to be more specific and detailed work done by the Government in assessing this.

The following issues need to be addressed by means of a proper equality impact assessment of these Regulations:

- Is lack of face coverings on public transport having negative effect upon society as a whole, and on BAME and lower income groups in particular?
- Will lack of access to face coverings discourage BAME and lower income groups from using public transport?
- Will BAME and lower income groups be disproportionately affected by criminal sanctions for failure to wear face coverings?
- Should free face coverings be provided for users on public transport?
- Given that taxi drivers are at a high risk, why are face coverings not mandatory in taxis?

### Law v guidance for taxi drivers

Finally, there is a degree of confusion in the official guidance on this point. On the Government's official website for coronavirus advice for travellers,<sup>47</sup> it states:

From 15 June 2020, it is the law that you must wear a face covering when travelling in England on a:

- bus or coach
- train or tram
- ferry or hovercraft or other vessel
- aircraft
- cable car

This is perfectly correct.

But it then goes on to say:

You should also wear a face covering in other enclosed spaces where it is difficult to maintain social distancing. For example, at stations, interchanges, ports and airports and in taxis and private hire vehicles. A taxi driver or private hire vehicle operator may be entitled to refuse to accept you if you do not wear a face covering.

The word "should" is problematic here in the context of referring to official rules as it implies that this is also part of the actual rules, whereas it is simply guidance. A lawyer may recognise the difference between "should" and "must", but for the average citizen, the natural assumption would be to see this as a matter of legal obligation. It would be more accurate to say "we advise you to ...". Furthermore,

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<sup>43</sup> Anna Collinson, 'Coronavirus: Taxi drivers 'unprotected' against Covid-19' (26 June 2020) available at <<https://www.bbc.co.uk/news/health-53171372>>.

<sup>44</sup> Owen Bowcott and Robert Booth, 'London minicab charge discriminates against vulnerable, court hears' (Guardian 30 June 2020).

<sup>45</sup> See Policing the Pandemic, available at <<https://krisztianposch.net/policing-the-pandemic/>>.

<sup>46</sup> Vikram Dodd, 'Met police twice as likely to fine black people over lockdown breaches' (Guardian 3 June 2020) available at <<https://www.theguardian.com/uk-news/2020/jun/03/met-police-twice-as-likely-to-fine-black-people-over-lockdown-breaches-research>>.

<sup>47</sup> <<https://www.gov.uk/guidance/coronavirus-covid-19-safer-travel-guidance-for-passengers>> (accessed 1 July 2020).

the reference to taxi drivers refusing to accept passengers is expressly not part of the actual Regulations. There is no legal basis (in the Regulations) for taxi drivers to refuse passengers who don't have face coverings.

## Right to fair trial, including prosecutorial independence

The Venice Commission checklist requires that there is a right to a fair trial<sup>48</sup> and sufficient autonomy and control for the prosecution of offences.<sup>49</sup>

The most common sanction for failure to follow these Regulations will be the fixed penalty notice. A fixed penalty notice is an alternative to prosecution in a court. It is still a crime, but dealt with administratively (if there is a guilty plea) and more cheaply. Most of the provisions around this are uncontroversial. The list of persons who can issue a fixed penalty notice is set out in regulation 7(11) and includes constables, police community support officers and a person designated by the Secretary of State for the purposes of that regulation. However, it also includes Transport for London (TfL) officers. A TfL officer is defined to mean an employee or agent of TfL, or an employee or agent of a TfL contractor.

This means that a bus driver in London has the power to issue a fixed penalty notice imposing a fine of £100. This is highly problematic as it is unlikely that TfL officers will have the training or expertise to correctly exercise this power. The definition of the offence contains some complicated factors, and requires the exercise of considerable judgement in certain circumstances. For example, under regulation 4, it is a reasonable excuse to not wear a face covering if:

- The person has a physical or mental illness or impairment meaning that they can't wear it
- Wearing it would cause severe distress
- The person is travelling to avoid injury or escape a risk of harm
- It is reasonably necessary for the person to eat

Many of these require nuanced judgements of a kind that police officers are trained to make. The Explanatory Memorandum to the Regulations states

As with the wider coronavirus restrictions an authorised person is expected to use their discretion and judgement when considering reasonable excuses and exemptions in the circumstances.<sup>50</sup>

Is it appropriate for a bus driver to make a determination that a person is on the bus to escape harm? Is it fair to ask a Tube attendant to decide if a face covering is causing severe distress for a person? Following on from this, will the person issued a fixed penalty notice by the TfL officer feel sufficiently confident to appeal it?

It may not be the intention that bus drivers and Tube attendants will issue fixed penalty notices. But the law clearly gives them this power.

A general concern on enforcement by travel staff was expressed by Baroness Bull on a debate on this subject when she stated:<sup>51</sup>

I know that exemptions are in place but they are not clearly advertised; nor are staff adequately trained to deal with them. This has left people with disabilities being refused entry and being reported to police by fellow travellers; some have had to pay for GP letters that prove their exemption. Will the Minister commit to reviewing communications and mandating transport staff training so that people who cannot wear face coverings can travel safely without further questioning and harassment?

According to official government guidance on this point "If you refuse to wear a face covering, you can receive a fine from the police or Transport for London enforcement officers" (my emphasis).<sup>52</sup> This

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<sup>48</sup> Benchmark E2.

<sup>49</sup> Benchmark E1d.

<sup>50</sup> Paragraph 7.9.

<sup>51</sup> Hansard 25 June 2020 Volume 84 Col 371



guidance is incorrect. There is no qualification in the legislation for who can issue a fixed penalty notice, it is a power which resides in any TfL employee or agent, and any employee or agent of a TfL contractor.

The additional risk is that responsibility for oversight over uncontested fixed penalty notices issued by TfL officers might be removed from the Crown Prosecution Service. This oversight has already been removed for offences under the Health Protection (Coronavirus, Restrictions) Regulations (England) 2020.<sup>53</sup> The Justice Committee is already concerned about this issue, (see the letter<sup>54</sup> issued by its Chair, Sir Robert Neill MP to the Attorney General on 9 June 2020). We could end up in a situation where untrained bus drivers are issuing dubious fixed penalty notices to people without the wherewithal to challenge them, and that here is no independent prosecutorial oversight.

The existing power of TfL to issued fixed penalty notices does not apply to the types of complex cases set out above. Examples of existing powers include powers in the Transport for London Act 2008 to issue fixed penalty notices in respect of taxis for

- Failure to wear or produce a badge
- Failure to produce copy of a licence
- Carrying excess passengers

Furthermore, these existing powers aren't exercisable by any TfL employee or agent, but only by persons specifically authorised in writing by TfL.<sup>55</sup> Other types of fixed penalty notices are for straightforward infringements, for example driving a car in a bus lane.

## Time-limited nature of these Regulations

The Rule of Law still clearly applies during emergencies, as is evidenced by the huge volume of legislation with 'coronavirus' in the title (186 statutory instruments as of 25 June 2020). One key aspect of law-making during emergencies is that it should be strictly time limited.<sup>56</sup> The Government are to be commended for respecting this in the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 – the key social distancing regulations. These Regulations incorporate a requirement that they must be reviewed every 28 days by law, and automatically expire after 6 months. Similar review and expiry periods exist for the equivalent regulations in Scotland, Wales and Northern Ireland.

However, these Regulations must be reviewed just once, within 6 months of the period of coming into force.<sup>57</sup> Instead of a 6 month automatic expiry, they expire after 12 months.<sup>58</sup> It is unclear why review every 28 days has been replaced by one review within 6 months, especially given that the point of the social distancing regulations is exactly the same as the point of these Regulations. In particular, given the issues around equality impact assessment, prosecutorial concerns and the general novelty of these Regulations, it would be much better if they would be subject to regular review.

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<sup>52</sup> <<https://www.gov.uk/guidance/coronavirus-covid-19-safer-travel-guidance-for-passengers#exemptions-face-coverings>> (accessed 1 July 2020).

<sup>53</sup> See the Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order 2020.

<sup>54</sup> Available at < <https://committees.parliament.uk/publications/1414/documents/12920/default/>>.

<sup>55</sup> S. 17 Transport for London Act 2008.

<sup>56</sup> Venice Commission Rule of Law Checklist, Benchmark A4.

<sup>57</sup> Reg. 9.

<sup>58</sup> Reg. 10.



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