



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

Legal Considerations for Easing the COVID-19 Pandemic Lockdown Restrictions

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1. INTRODUCTION

- 1.1. **Aims of this paper.** This document addresses the key legal considerations for evaluating and implementing different policy options for easing and eventually exiting the UK's Covid-19 lockdown. Given the importance of dealing with Covid-19 effectively, the huge impact on people's lives of many of the potential policy options and the significant curtailment of liberties likely to be involved, a robust legal framework for easing and eventually exiting the lockdown. This is important both to limit the possibility that policies for exiting the lockdown are unlawful and to ensure that individuals' human rights, wellbeing and legitimate interests are protected as far as possible.
- 1.2. **Approach needed.** The approach that needs to be taken in relation to easing the lockdown should be justified, proportionate and necessary to the aims that are being pursued. Due consideration should also be given to the potential negative effects of the government's policies and of any mitigating steps that can be taken. These considerations should be subject to wide-ranging public debate before legislation is enacted and allow sufficient time for planning the implementation of such policies for easing the lockdown. Such planning should not and must not be delayed until every uncertainty, as to timing or otherwise, can be and has been resolved.
- 1.3. **Policy options.** We have identified a range of policy options, not for the purpose of arguing for or against any of them (though inevitably we do express views), but as assumptions to allow the legal framework for each to be analysed and assessed. We hope that this approach, which we acknowledge may be subject to further input from many sources as time goes by, will above all enable Labour to show, not only that it is well prepared from a policy perspective, but that it has the expertise and competence to implement policy in the community at large in a thoughtful and measured manner.
- 1.4. **Involvements of employers, employees and trade unions.** As well as having major legal implications for the relationship between the citizen and the state, any regulations implementing an easing of Covid-19 lockdown restrictions will have a serious potential impact on relations between employers and their employees/trade unions. There must be proper consultation between the government, business groups and trade unions on draft legislation to ease the current lockdown to ensure that the right balance is struck and unintended consequences are minimised. This could be done through an economy-wide National Council for Reconstruction and Recovery, as called for by the General Secretary of the TUC, Frances O'Grady with the support of Labour.
- 1.5. **Importance of Parliamentary scrutiny.** It is essential that there be as thorough Parliamentary scrutiny of these regulations as time permits – perhaps hearing from relevant experts as well as representatives of those most affected – in order both to maximise public confidence in the effectiveness of and necessity for the new or retained restrictions and to test the reasoning behind them and their workability.

2. LOCKDOWN RESTRICTIONS CURRENTLY IN PLACE IN THE UK



Legal basis for the lockdown

- 2.1. **Relevant legislation.** The key parts of what is being called the 'lockdown' is governed by, in England, the Health Protection (Coronavirus Restrictions) (England) Regulations 2020, which came into force on 26 March 2020 (and were amended on 22 April 2020) (the Coronavirus Regulations). Equivalent, very similar, though not identical¹, measures have been made in respect of Wales, Scotland and Northern Ireland. The primary piece of legislation, empowering the Coronavirus Regulations, is the Public Health Act 1984, not the Coronavirus Act 2020, which some thought would be less liable to successful legal challenge.²
- 2.2. **Key provisions.** The key restrictions contained in the Coronavirus Regulations are:
1. **Restrictions requiring certain premises and business to close:** for example, cafes and restaurants, places of worship, community centres and libraries (Regulations 4 and 5 England, Regulations 4-7 Wales, Regulations 3 and 4 Northern Ireland).
 2. **Restrictions on movement:** that during the emergency period (defined by the Secretary of State) no person may leave (or, as from 22 April, remain outside) the place they are living without an ongoing 'reasonable excuse', a non-exhaustive set of reasonable excuses are included. (Regulation 6 England, Regulation 8 Wales, Regulation 5 and 8 (4) Scotland, Regulation 5 Northern Ireland).
 3. **Restrictions on gatherings:** no two persons may gather in a public place who are not members of the same household group (Regulation 7 England, Regulation 8 (5) Wales, Regulation 6 Scotland, Regulation 6 Northern Ireland).
- 2.3. **Criminal sanctions.** These provisions are backed by the sanction of criminal law:
1. Police may use reasonable force to return people to their homes (Regulation 8).
 2. A summary only criminal offence has been created (Regulation 9) for anyone breaching or obstructing the enforcement of the Coronavirus Regulations.
 3. There are also fixed penalty notices ranging from £30 for a first infringement to £960 for a third.

¹ As an example, as was pointed out in the joint committee on human rights briefing paper (8 April 2020) the Welsh regulations give what is only guidance in England, about the number of times of daily exercise permitted, legal force.

² There have been a number of academic articles suggesting that the regulations do not properly come within the primary piece of legislation, the Public Health Act 1984, and it would have been less open to legal challenge to have them in the Coronavirus Act 2020 itself, or other primary legislation, e.g. 'Pardonable in the Heat of Crisis – Building a Solid Foundation for Action' co-authored by Lord Sandhurst QC. Others have argued that it would have been preferable to use the Civil Contingencies Act 2004, with its stronger provisions for Parliamentary approval and scrutiny.



- 2.4. In practice, the police are being encouraged to first seek to persuade and encourage people to abide by the Coronavirus Regulations, before taking coercive action.
- 2.5. **Central role currently played by guidance.** It is important to note when considering next steps that many of the changes currently affecting people's lives are guidance, not law and are in fact being undertaken voluntarily³ without any enforcement mechanism. For example, keeping two metres away from other people for example is only guidance, with no legal sanction. Similarly, the idea of so-called 'shielding' (i.e. that a higher standard of isolation should be applied for the most vulnerable), is not embedded in law, but in voluntary guidance.
- 2.6. **Risk of easing the lockdown**⁴ There are real and urgent economic and other reasons for easing the lockdown. The Office for Budget Responsibility (OBR) has modelled a 35% fall in GDP in June if the lockdown continues⁵, and it is likely that the health costs of the lockdown are high as well. Nevertheless, the risks of a spike in deaths from Covid-19 as the lockdown is eased are very real and should not be underestimated. Any actions to ease the lockdown should be taken very cautiously, with all possible mitigation in place.

3. POLICY OPTIONS FOR EASING LOCKDOWN RESTRICTIONS

- 3.1. Other countries have used a combination of some or all the following 6 policies to enable lockdown restrictions to be eased while mitigating some of the perceived risks:
1. Easing lockdown restrictions on individuals in specific demographics, business sectors and/or geographic locations over time.
 2. Recommending or requiring everyone to wear masks or face coverings in public.
 3. Shielding the vulnerable.
 4. Mass-testing the general population.
 5. Technology-augmented tracking and tracing to enable enforcement of partial lockdown restrictions on individuals.
 6. Requiring individuals outside the home to produce immunity passports on demand.
- 3.2. These policies are addressed in turn in more detail below along with the relevant legal considerations, and potential enforcement mechanisms.

³ See page 15 of joint committee of human rights chairs briefing paper for a helpful table of what is guidance, and more generally for the human rights impacts of what has already been put in place, and the need for clear and prompt guidance and sensible policing.

⁴ This paragraph draws heavily from Mulheim, I. 'A sustainable exit strategy: Managing uncertainty, minimising harm'. Institute for Global Change, 20 March 2020.

⁵ <https://obr.uk/coronavirus-reference-scenario/>



4. HUMAN RIGHTS CONSIDERATIONS

- 4.1. The lockdown and many of the proposals for easing it represent significant and blanket restrictions on individual freedoms. As noted in the Joint Committee on Human Rights Chair's brief on the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020⁶, "such extreme measures can only be considered lawful, justified, necessary and proportionate if (1) the threat from disease and death remains sufficiently significant to justify such extraordinary measures; (2) the measures only interfere with human rights and civil liberties to the extent necessary; (3) the measures are enforced in a clear, reasonable and balanced manner; (4) enforcement is authorised, and does not go beyond what is prohibited, by law".
- 4.2. Key human rights considerations for assessing any legislation in this area include:
1. complying with the requirement under Article 7 ECHR, reflected in the common law principle of legality, that a criminal offence must be both foreseeable and accessible (i.e. an individual can know from the wording of the provision in question (if necessary with the interpretation of the courts), what acts/omissions would make him liable for committing an offence.
 2. compliance with article 5 (right to liberty), articles 8 (privacy and family life), 9 (freedom of religion) and 11 (freedom of association) of the ECHR. These are all qualified rights, where the interferences can be legal if they are properly justified, proportionate and necessary as a means of protecting public health. However, as the lockdown is being lifted some groups will continue to have their rights infringed for much longer than others, and this may be especially onerous for some. Such prolongation needs to be for good, necessary and proportionate reasons.
 3. ensuring that not only legislation is proportionate but that its policing is. This will require, for example, appropriate training and guidance to be provided to police enforcing the legislation.

5. EASING LOCKDOWN RESTRICTIONS ON INDIVIDUALS IN SPECIFIC DEMOGRAPHICS, SECTORS OR GEOGRAPHIC LOCATIONS

Description of what this policy option entails

- 5.1. This policy option entails easing lockdown restrictions gradually over time, with restrictions remaining in force for individuals belonging to certain demographics (such as those currently subject to voluntary shielding), workplaces in certain sectors or specific

⁶ Joint Committee on Human Rights Chair's brief on the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (8 April 2020)



geographical locations. This could also involve allowing only certain businesses and public institutions to reopen initially and monitoring the impact on the rate of infection.

- 5.2. IFS research has shown that around one-third of workers in shutdown sectors are under 25 with a significantly higher proportion of women. ONS data show deaths are overwhelmingly among older people. Mortality for under 40s is one in 100,000. By comparison heart attack mortality is 0.67 for 15-34-year olds. Covid-19 mortality rises to 25.5 for 40-65s and for over 65s it is 491. Men are overrepresented at every age.
- 5.3. This suggests that young people could be allowed to return to work first with lower personal risk.⁷ Warwick University researchers have proposed releasing from lockdown 4.2 million workers aged 20-30 who do not live with their parents.⁸

Legal considerations flowing from this policy option

- 5.4. **Amending the Coronavirus Regulations.** Under the current system this would require amending regulation 6 of the Coronavirus Regulations in relation to whichever segment was chosen (and the equivalent regulations for Scotland, Wales and Northern Ireland). The powers in section 45C of the Public Health (Control of Disease) Act 1984 (the 1984 Act) to make these regulations are broad, including the power to make “specific provisions” as well as “provisions of a general nature”⁹, and there is no reason to suppose that regulations could not be made that impose different restrictions on persons in different parts of England (and prohibiting persons from moving into or out of those areas¹⁰) or different restrictions on persons of different ages or other specified characteristics. In relation to closure of businesses, the Regulations already apply differently to different classes of business.
- 5.5. **Consistency with the ECHR.** Any such regulations would have to be consistent with the ECHR. Since they engage a number of Convention rights (assembly/family life/religion) the prohibition on unjustified discrimination in relation to the enjoyment of those rights (Article 14) would also be engaged. The public sector equality duty (PSED) would also require consideration of the impact of such regulations on persons with protected characteristics, which include age and racial background.
- 5.6. **Segmentation by age and discrimination.** This approach is perhaps especially prone to being, or being seen as unfair and discriminatory, and to be consistent with Article 14, it needs to be based on objective fact and medical science, and not stereotypes. It may also be criticised as telling people what they should do to protect themselves, although it is important to remember that when anyone exposes themselves to an unnecessary risk of contracting the virus they are potentially placing pressure on the NHS at a time when it is vital, in everyone’s interests, to reduce that pressure: and the fact is that older people are

⁷ Mulheirn, I. ‘A sustainable exit strategy: Managing uncertainty, minimising harm’. Institute for Global Change, 20 March 2020. p. 16.

⁸ https://warwick.ac.uk/fac/soc/economics/research/centres/cage/news/06-04-20-the_case_for_releasing_the_young_from_lockdown_a_briefing_paper_for_policymakers

⁹ S.45C(2)(b)

¹⁰ See s.45G(2)(j), which permits restrictions on where persons go.



more likely to place pressure on the NHS when they contract the virus than younger people.

- 5.7. Other groups of vulnerable people will be harder to segment (for example, it will be difficult to specify in a way that makes sense to those affected and is enforceable what degree of asthma makes a person sufficiently vulnerable to be required to stay at home while others are not.) On the other hand, it might be argued that children are far less likely to suffer with coronavirus and therefore opening schools could be a viable first step in easing lockdown, also considering the serious consequences of closing schools. There are other arguments for the primacy of other groups, such as young workers as above but whatever step taken would need to be based on objective defensible evidence, so that those who remained in lockdown could not argue they had been arbitrarily penalised.
- 5.8. **Geographical segmentation** Equally, selective geographical lifting is likely to arouse strong disagreements about one area being favoured over another unless clearly based on some objective criteria, and there could be legal challenges, or at least a loss of good will and consensus. There is also a risk that people who can move from restricted to unrestricted areas (for example those with parents or second homes in unrestricted areas) would choose to do so: even if regulations seek to prevent that, enforcement will be an issue. Different geographical areas have different age and racial background profiles, so that Article 14 and PSED issues will arise. Subject to those concerns, if the risk of spreading Covid-19 is established to be clearly different in different geographical areas, it may well be disproportionate to maintain equally severe lockdowns in less affected areas.
- 5.9. **Opening up different classes of businesses at different times** One question that may arise is whether the Government can, in deciding which sectors to open up, take account of the economic and social benefit of opening up those sectors as well as purely health-related concerns (for example, the extent to which social distancing is possible in those sectors). However, the 1984 Act not only permits but arguably requires consideration to be given to economic and social benefit, since it requires all restrictions of the kind at issue to be proportionate¹¹, and the assessment of proportionality is bound to include an assessment of the economic impact of imposing that restriction (which is not, of course, to say that the economic impact has to have any particular weight vis-à-vis health impacts – that is a matter for Ministers). Indeed, some such judgment appears to have been made already in deciding, for example, to permit all construction sites to continue operating. A further issue is that opening up certain kinds of business but not others will have different effects on different groups within the population depending on the age, income and racial profile of those working in the affected sectors (for example, the hospitality sector tends to employ younger people): so the PSED will be engaged.
- 5.10. We do not see that either the Competition Act or EU competition or State aid rules would be engaged by treating different businesses differently for the purposes of lifting the lockdown. However, any difference of treatment that appears arbitrary (for example allowing one type of retailer to open but not another supplying very similar goods from similar premises) will be vulnerable to challenge on rationality grounds unless there is a

¹¹ S.45D(1)



clear justification for the difference. There will also be problems with defining in a robust way those retailers that are allowed to re-open: the strict restriction on leaving home has meant that to date there has been little to be gained for businesses not selling essential items such as food and drink in trying to argue that they fall within the class of retailers that are permitted to remain open: but once lockdown starts being relaxed and more customers are on the streets, the incentive to try to re-open, if there is any ground for arguing that the business is within a permitted category, will become very strong.

- 5.11. **Current guidance for business.** Before businesses re-open, consideration should be given to whether current guidance on businesses should become law. In some Southern States in the USA, as those states gradually re-open social distancing laws were put in place to limit the population density allowed in stores. We need to consider what elements of guidance concerning businesses, such as social distancing, should be embedded in law: the powers to achieve that are to be found in paragraph 6 of Schedule 22 to the Coronavirus Act 2020 (the 2020 Act) which enables binding directions to be given to the owners of premises as to the location of persons within premises. It makes most sense if this is done before they are re-opened. Similarly, whether there needs to be additional guidance, or laws, for high density public transport should be considered, before numbers travelling rise¹².
- 5.12. **Avoiding legal challenge.** As identified above, the 1984 and 2020 Acts contain the powers necessary to apply the lockdown more selectively and to impose social distancing rules in place of closure. In order to avoid claims of discrimination by those who continued to bear the burden of more serious restrictions, it would be necessary to have a careful and evidenced justification of the reason for different treatment, especially when restrictions continued to bear down more heavily on certain groups rather than others.

6. LEGAL REQUIREMENTS ON INDIVIDUALS TO WEAR FACE MASKS IN PUBLIC

Description of what this policy option entails

- 6.1. This policy option involves the recommending or imposition of legal requirements to wear face masks in some or all public spaces, including in shops and other commercial premises, public transport, parks and open spaces, and generally in the street.
- 6.2. There is a divergence of views regarding the use of masks by the public, with Public Health England not recommending their use but a number of health authorities, such as the Center for Disease Control and Prevention (CDC) in the US, recommending the use of cloth masks.
- 6.3. The feasibility of this approach depends on the availability of masks which are restricted at present, partly because of export bans in many producer countries. However, many

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



countries health agencies have recommended that the public wear cloth masks which would not be used in a medical setting. This recommendation is on the basis that cloth masks protect others but not the user (due to droplets from the user's breath being bigger when they leave the user's mouth and so intercepted by the cloth mask).¹³

- 6.4. In the Czech Republic and Austria, it is mandatory under law to wear face masks outside the home.¹⁴ Germany has made masks mandatory on public transport and when shopping in nearly all of the 16 states¹⁵, residents in the worst hit region of Italy have to cover their noses and mouths in public spaces,¹⁶ South Korea and Taiwan have been able to supply two masks a day for everyone through increasing production and rationing.¹⁷

Legal considerations flowing from this policy option

- 6.5. **Clarity of the legal position and proper public information.** If it is to be made a criminal offence for an individual not to wear a mask in public, there needs to be clarity about what exactly people are required to do both in law and in term of public information.
- 6.6. **What meets the legal requirements for a mask or face covering.** Should the law require a certain standard of mask, or only a government issued mask be worn? Should the law require a mask per se, or merely something that covers the nose and mouth in public, as was done in Lombardy, Italy? Some countries (Japan, Taiwan) have supplied masks to the population, others have mandated masks be worn, but have not supplied them, which has caused anger and problems and many attempts to make masks at home. It would need to be considered to what extent home-made masks would be acceptable. Much of this will depend on the science, and whether a home-made cloth mask is useful.
- 6.7. **Supply of face masks/face coverings.** Some countries (Japan, Taiwan) have supplied masks to the population, others have mandated masks be worn, but have not supplied them, which has caused anger and problems and many attempts to make masks at home. Consideration should be given as to whether not wearing a mask/face covering in public when these have not been supplied or are unavailable should still be an offence. If there are no masks/face coverings available and home-made masks are not acceptable substitutes, then this may mean that those who cannot afford, access (e.g. if there is high demand) or create (e.g. for lack of skills or materials) masks are essentially trapped. This raises obvious human rights and basic fairness issues. If wearing a mask/face covering is effectively a condition of venturing out, with a criminal sanction for not wearing one, then there is a strong argument that if this is to be proportionate, and not to disadvantage some groups severely, that masks/face coverings must be readily available, and potentially provided by the government (or by private companies at government direction and to set standards) to all citizens. Otherwise, poorer groups or those with disabilities may be

¹³ Mulheim, I. 'A sustainable exit strategy: Managing uncertainty, minimising harm'. Institute for Global Change, 20 March 2020.

¹⁴ <https://www.macleans.ca/society/health/the-case-for-mandatory-mask-wearing-in-canada/>

¹⁵ BBC website 'should we all be wearing masks'

¹⁶ BBC website 'should we all be wearing masks'

¹⁷ Mulheim, I. 'A sustainable exit strategy: Managing uncertainty, minimising harm'. Institute for Global Change, 20 March 2020.



unable to buy or make masks and trapped by their poverty and/or disability. It would be a serious problem if there was a mandatory requirement to wear masks/face coverings, at the same time as a mask/face covering shortage, but that seems a risk unless thought is given in advance, as demand would surge. This is obviously closely linked with policy, and whether the government envisages being able to supply or ensure the availability of millions of masks/face coverings. SAGE has been considering this and updated recommendations from SAGE have been given to the Government.

- 6.8. **Exceptions to wearing a mask/face covering.** There also needs to be thought also about what duty precisely is going to be imposed. Should the duty be to have one's mouth and nose covered in public at all times, this would mean someone having a sip of water or lowering their mask to smoke a cigarette, or speak, would be breaking the law. The wording needs to be carefully chosen, and it is submitted that any criminal offence of failing to wear a mask should include the clause, 'without reasonable excuse'. Making it an absolute offence would surely be too strict, e.g. if someone intended well, but their home-made mask broke whilst they were out.
- 6.9. **Alternatives to criminal sanctions.** We should not necessarily turn to the criminal law, especially if the government is unable to supply millions of masks. Guidance does not to date recommend masks, in the UK, and many people are already wearing them. Labour has supported changing the guidance from not recommending them to recommending them in public (if this is what the evolving science shows) Social pressure and people's desire to protect others, and themselves, may achieve a very marked increase in mask use without coercion, as has been achieved with the 2m social distancing guidance. It may well be worth least trying this approach before seeing if mandatory laws are required. Other steps could be taken without criminalisation, to increase uptake, such as providing free masks to London Underground users, an area where social distancing is not practical.
- 6.10. **Impact on business.** Any legal requirement to wear masks/face coverings "in public" will have a potential impact on businesses to which the public have access, such as shops, pubs, restaurants, cafes and the like. Owners, managers and staff of those premises will need to be protected from any legal liability if they refuse entry to someone not wearing a mask/face covering and will need to understand the extent of their responsibility for enforcing a requirement to wear masks/face coverings. For example, if a shop keeper allows a customer to enter their shop without a mask/face covering, and another customer complains, what is the shopkeeper's liability?

7. SHIELDING THE VULNERABLE: BASIS OF ENFORCEMENT

Description of what this policy option entails

- 7.1. **Different approaches to shielding.** Currently those who are most vulnerable are 'shielded', i.e. isolated to a greater degree than required by Regulation 6. However, there is no legal framework for this approach beyond the general provision for the lockdown more widely. Shielding raises difficult policy and legal considerations as the lockdown is gradually eased. A key problem is that shielding is likely to be required until either there



is a vaccine or there is verifiable widespread immunity in wider population. There are two broad approaches.

(a) Self-shielding. This involves relying on the self-interest/common sense of the most vulnerable to continue to self-shield and follow guidance without legal enforcement. The law could allow them to venture out without a reasonable excuse, but there would be clear guidance that this was deeply unwise for their own health. This approach avoids the difficult issue of definition of vulnerability, the concerns that the law is being harsher with the more vulnerable, as well as reducing resentment in this section of the population, and reducing human rights challenge. It also might increase consent and compliance.

(b) Amending the law. The alternate view is that as the lockdown is being lifted that is the moment of most danger to those who should be shielding, and what is currently guidance would become law under an amended regulation (or amendment to the Coronavirus Act 2020). This would be a highly draconian action, given the strict shielding guidelines, especially as it may have to last for a long and indeterminate period. It might corrode consent, would almost certainly face challenge, and would also face the difficulty around definition of who is vulnerable and it might be hard to defend as necessary or proportionate if a voluntary approach seemed objectively to have been working, at least for those to whom the risk must be most obvious to them. In principle it would seem harder to defend draconian restrictions on vulnerable people imposed for their own good, rather than the good of others. However, it is reasonable that shielding is also for the benefit of others besides those being shielded, for example by reducing the risk of ventilators being needed for those being shielded meaning that need for ventilators does not exceed the NHS's capacity.

Legal considerations flowing from this policy option

- 7.2. **Amendments to Regulation 6** would be required to maintain restrictions on the shielded group (an estimated 1.5 million people) whilst allowing less vulnerable segments of the population or those with “immunity passports” (considered below) to leave their home without a reasonable excuse. Those within the shielded group would therefore be treated differently under the criminal law.
- 7.3. **Clearly defining and identifying the shielded group** and ensuring they are aware of this status and its consequences would be essential but has significant practical and legal problems. One option would be to apply the designation to anyone who received the shielding letter or rely on the information which has been shared with supermarkets for priority shopping slots or used to identify those in need of food parcels. However, either his approach is likely to lead to problems caused by administrative error. In our view a clear and precise definition in the relevant legislation will be needed as well as a process for dealing with errors.
- 7.4. **Differing application of criminal liability across the population.** It may as a matter of principle offend that some of the more vulnerable would thus face more criminal risk than the healthy.



- 7.5. **Human rights issues.** Human rights qualifications or infringements which may have seemed to a court to be necessary and proportionate for a 2-3 month lockdown may be much more open to challenge if it is envisaged to last until a vaccine has been widely used in the population, something that may be 12-18 months away, and with no guaranteed end in sight, and only for a narrower section of the population.

8. MASS-TESTING THE GENERAL POPULATION

Description of what this policy option entails

- 8.1. Since the start of the pandemic, the World Health Organisation has emphasised the importance of testing in order to trace transmission.
- 8.2. Random sampling in Iceland showed that the virus had a much wider spread in the community than had been assumed from original screening of high- risk people, indicating the importance of a broader testing regime. Antigen tests have accuracy limitations but can still be effective at scale.¹⁸ No antibody tests are currently licenced in the UK. Opinions on the capacity required vary, for example Paul Romer calls for universal random testing of 7% of the population.¹⁹
- 8.3. However, Cleevely et al. suggest that 21% daily testing would be needed, if done at random, but that targeted testing of critical groups is a more practical option. The principal challenges to the effectiveness of this policy option are that:
- (a) antigen tests produce significant false negatives, face scaling challenges
 - (b) testing capacity is constrained by availability of reagents, as well as PPE; and
 - (c) that a significant workforce is required to administer tests.²⁰

Legal considerations flowing from this policy option

- 8.4. **Collection of personal data.** This policy option involves the collection of personal data and as such must be considered in the context of current UK data protection legislation, including General Data Protection Regulation (EU) 2016/679 (GDPR) and the Data Protection Act 2018.
- 8.5. **Maintaining GDPR standards.** Labour should call on the government to confirm that any UK citizens' personal data collected in the context of coronavirus, will continue to be

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

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

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



protected to GDPR-standards after the transition period. These assurances will help reassure the British public and encourage take-up of this policy option.

- 8.6. **GDPR and the end of the Brexit transition.** At present, the European Withdrawal Act 2018 and the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 propose to retain GDPR in UK law beyond the end of the transition period; however Boris Johnson has raised the possibility that the UK's data protection law may diverge from GDPR after the transition period has ended. It is very likely that the information gathering process here will create datasets that will be needed beyond the end of the transition. There is therefore a concern among the privacy community that the government could potentially choose to water down data protection law which applies to these datasets in future. This is particularly concerning with regards to the use of tracking apps hosted by Google, which has recently announced that it will no longer hold UK citizens' data in the EEA following Brexit.

Maintaining GDPR standards. Labour should call on the government to confirm that any UK citizens' personal data collected in the context of coronavirus, will continue to be protected to GDPR-standards after the transition period. These assurances will help reassure the British public and encourage take-up of this policy option.

- 8.7. **Extra privacy and security measures required due to mass collection of 'special category' data.** This option would entail the mass collection of health data, which is 'special category data' and is therefore required by data protection legislation to be treated more carefully and stored more securely than other types of personal data. In the [ICO's recent guidance on coronavirus](#), the ICO confirms that, in its view, public bodies may lawfully require additional collection and sharing of personal data to protect against serious threats to public health.
- 8.8. The government, or NHS bodies carrying out this testing will be required to carry out a Data Privacy Impact Assessment due to the scale of the testing and the fact health data is collected - as further described below. We would call on the government to publish and consult on the DPIA it is preparing in connection with mass testing, and to publish consultation responses. The DPIA should spell out (i) how the health data will be securely collected and stored (ii) how long it will be retained and (iii) for what purposes it will be used and (iv) what the lawful basis under GDPR is for processing such data. Publication of these details may help reassure citizens concerned about the potential infringement of their privacy that such mass testing represents; it is also, in a parliamentary democracy, appropriate that such details be made public.
- 8.9. From their website it appears that the ICO, the UK's data protection regulator, may currently be advising the government on the data protection aspects of this option. We would call on the government to publish the ICO's advice in this regard (see below for further details about the ICO's publications to date regarding coronavirus).
- 8.10. Other measures required by data protection legislation, such as the provision of a privacy policy to citizens being tested, would be required (see Section 9 for a description of



relevant principles in more detail). In order to meet the transparency requirements under GDPR, we would expect the government to publish details of which contractors it may use in the collection of data; and with which third parties it intends to share the data. For example, will such data be shared between NHS trusts, with central government, with employers?

- 8.11. Strict data privacy obligations would need to be imposed through contractual mechanisms on any contractors or third-party suppliers who supported with the collection/processing of personal data collected during mass testing. Again, we would call on the government to make clear how it will monitor and enforce these contractual obligations to avoid mis-use or other breach of the personal data collected.
- 8.12. Stricter security measures should be taken owing to the sensitivity of the health data to be collected. The government would be required to store such details securely. In the circumstances, to the extent practically possible, we would expect the government to store these datasets securely in the UK and to heavily restrict access to them. In the event of any data breach, the government would have a duty to notify individuals whose personal data was collected if the breach resulted in a 'high' risk to their rights and freedoms. Given the nature of the pandemic and the special category of the data collected, we would anticipate that in most circumstances a data security breach would pose a 'high' risk to the data subjects in question and would require notification.
- 8.13. Under data protection legislation, personal data must not be used for purposes 'incompatible' with the purposes for which it was originally collected. We would therefore call on the government to carefully define these purposes at the outset of collection; in our view it would be appropriate for these to be wider than simply 'coronavirus-related' and could extend to 'public health purposes'. We would urge the government to consider whether it could use such datasets for wider public health uses, such as for statistical use by epidemiologists, or to create datasets used to train AI tools used for NHS improvements. In accordance with data protection requirements, the government should make its purposes for data processing known to citizens before they are tested and should only use such personal data for purposes compatible to those set out.
- 8.14. Finally, how long will the data be retained before being deleted? This will need some careful consideration, as being able to assure citizens that 'data will only be retained for a short period and will then be permanently deleted' may go some way to assuaging citizens' privacy concerns. A balance must be struck between the need to respect privacy concerns and the potential usefulness of the data for wider public health purposes (discussed further below).

9. TECHNOLOGY-AUGMENTED TRACKING AND TRACING

Description of what this policy option entails



- 9.1. **Contact tracing and warning** can play an important role in all phases of the outbreak especially as part of containment measures during de-escalation scenarios. Its impact can be boosted by a strategy supporting wider testing of persons showing mild symptoms. The aim of contact tracing and warning is for public health authorities to rapidly identify as many contacts as possible with a confirmed case of COVID-19, ask them to self-quarantine if possible, and rapidly test and isolate them if they develop symptoms. The aim of contact tracing could also be to have anonymised and aggregated data of infection patterns in society, as a means to make containment decisions at local level. At EU and world level, the ECDC and WHO have asked Member States to identify and follow up nationally contacts linked to each case so as to interrupt transmission and, as a secondary objective, understand transmission dynamics.²¹
- 9.2. **Application by public health authorities.** Contact tracing is normally carried out manually by public health authorities. This is a process where cases are interviewed in order to determine who they remember being in contact with from 48 hours before symptom onset and up to the point of self-isolation and diagnosis. Longer contact duration and closer proximity means a higher risk of infection. This process relies on the recall of the case by the patients – who may be very ill at the time of interview – both in terms of who they have met and the proximity and duration of that meeting, as well as the ability to produce names and phone numbers of these people (or ‘contacts’). Such manual processes rely on the patient’s memory and obviously cannot trace individuals who have been in contact with the patient but are who are unknown to him/her.²²
- 9.3. **Digital tools such as mobile apps with tracing functionalities** can be of substantial support in this process, identifying both known and unknown contacts of a confirmed case and possibly help in their follow up, in particular in settings with large numbers of cases where public health authorities can get overwhelmed. Such functionalities can help identify more contacts and speed up the overall process substantially, which is of essence in this pandemic. The functionality in such apps, if rolled out on a large scale so that they reach well over 50% of the population, could be useful for Member States to rapidly detect contacts of cases, collect information on these contacts and to inform contacts on the need for follow-up and testing if required. In addition, the apps can provide contacts of COVID-19 cases with the information on how to reduce the risk of further transmission and advice on what to do if they develop symptoms.²³

Deployment in other countries

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

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

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



- 9.4. To date, technology-augmented tracking and tracing has been deployed in **China** and **Singapore**.²⁴
- 9.5. **South Korea** has been highly effective from a public health standpoint, but their model of contact tracing involves a high degree of organisation between different agencies, and a very high intrusion of privacy. The model known as the Covid-19 Smart Management System, run by South Korea's Center for Disease Control and their tracing system uses data from 28 different organisations such as the credit finance association, three smartphone companies and 22 credit card companies to trace the movement of individuals with Covid-19.
- 9.6. **European Union.** The EU's eHealth Network publication recommends that a form of this technology should be developed for use in EU nation-states, although it currently envisages the collection of data on a voluntary basis only.²⁵ The common EU toolbox sets out their key principles for apps for this purpose which are that they be: voluntary, approved by the national health authority, privacy preserving with personal data securely encrypted and that they are dismantled as soon as no longer needed. It may be felt this is a useful document in analysing what different member states have done and are doing and what principles the UK should consider. The European model is to use apps that are fit for purpose, compliant with applicable laws and respect the fundamental right and freedoms of the EU.
- 9.7. In **Germany**, researchers have rolled out an app that allows users of fitness-tracking devices to donate their data to authorities, while another pending application taps into Bluetooth signals to detect the Bluetooth devices of people who have potential infections. Under pressure from the German parliament, a new paragraph in the country's Infection Protection Act that would have made mobile phone providers hand over GPS data to health authorities — was ultimately dropped. After German local media reported that police in some federal states had been given lists of patients with COVID-19, the disease caused by the virus, regional watchdogs intervened to ban the practice.
- 9.8. **France.** The Guardian has reported that France publicly called for Apple and Google to lower protections for privacy to allow their proposed app to work²⁶ and there may be similar issues for the proposed NHSX app.
- 9.9. **Poland** is pursuing mandatory tracking apps.²⁷

Legal considerations flowing from this policy option

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

²⁵ eHealth Network, 'Mobile applications to support contact tracing in the EU's fight against COVID-19: Common EU Toolbox for Member States'. 15 April 2020. p. 7

²⁶ Guardian 21st April 2020

²⁷ <https://www.politico.com/news/2020/04/16/coronavirus-triggers-soul-searching-on-privacy-in-germany-192044>



- 9.10. **Discrimination of people unable to access smartphones.** Consideration should be given to the needs of persons who are not able to access the smartphone technology platforms on which the app would operate. A relevant recent experience is the process for application for permanent residency for EU citizens, which was only available on limited platforms, excluding many individuals from the process until local authorities and the third sector made technology available for them.
- 9.11. **Medical devices legislation** It is possible that an app that had any diagnostic function would be a “medical device” under EU law and require regulatory approval.
- 9.12. **Data protection.** As with mass-testing, any technology based approach will require the large scale collection of personal data and must therefore involve consideration of the UK data protection legislation (including GDPR and the Data Protection Act 2018) general and in the context of Brexit (**see above**).
- 9.13. **Privacy implications.** Technology enabled tracking is a substantially more intrusive approach than mass-testing. It will require careful consideration of the data privacy and other relevant legislation in the following areas:
1. The automated collection of personal data using individuals’ devices.
 2. The central role of private technology companies.
 3. Such technology companies may transmit such data to be processed on servers outside of countries bound by the European data protection framework.
 4. The approach is more susceptible to hacking and data breaches.
 5. The approach is more susceptible to the sale or transfer of personal to third parties without the individual’s knowledge.
 6. It is seen by some privacy experts as representing a significant step towards the ‘surveillance state’.
- 9.14. **Tech tracking and centralization or de-centralisation.** There are competing arguments around whether de-centralisation or a centralised system better protects citizens’ rights in the field of app contact tracing.
- 9.15. **Private companies setting privacy standards.** Given the reliance on a small group of tech companies, there is the risk that the standards of privacy and data protection are effectively set by commercial entities, such as Google and Apple, which are not democratically accountable. See for example [the Guardian article](#) which claims Apple is setting limits on an NHS contact tracing app. It cannot be right that US tech companies are the arbiter of privacy standards in relation to the collection of UK citizens’ personal data, or that we have extremely limited oversight over how these companies may use the personal data collected on such apps.



- 9.16. Apple and Google's decentralised approach was designed in the US which has a more deregulated approach to data protection and does not have a public national health service. In such a context a de-centralised approach to collecting personal data has the distinct advantage of being less susceptible to hacking or abuse.
- 9.17. Apple and Google would argue they are seeking more data protection and less state centralisation of data which could all be breached in one incident or be misused. However, this approach may not be appropriate in a more regulated European context. It may also prevent, for example, the NHS using aggregated tracking data to improve and enhance its tracking capabilities.
- 9.18. **Steps to protect personal health data**, Labour should seek to ensure that there are adequate mechanisms to protect UK citizens' health data whichever app developers or tech companies are involved in collecting this data. Labour should call on the government to impose contractual conditions and/or legislation to ensure that UK citizens' health data shared during this time is "not for sale" and that tech companies cannot sell or otherwise use it to further their commercial ends.
- 9.19. **ICO guidance on coronavirus**. It may be helpful to note that in the [ICO guidance on coronavirus](#) the ICO confirms that in its view public bodies may require additional collection and sharing of personal data to protect against serious threats to public health. This could involve tech-tracking. The ICO has also issued [a statement](#) suggesting it is advising the government about how to lawfully use tracking apps. As set out earlier, we expect the government to publish any advice it has received from the ICO so we can check whether such advice is being adhered to. Equally, the ICO's approach has been known to be subject to challenge in the courts - most recently in connection with CCTV and facial recognition use by police forces- so Labour should not be afraid to challenge the ICO's approach where it feels this is unduly lenient on the government.
- 9.20. **Data Privacy Impact Assessments**. Tech-tracking involves substantial intrusion on citizens' privacy which needs to be balanced against the public health benefits. We would expect that a comprehensive Data Privacy Impact Assessment is carried out by the government or NHS which is then published and scrutinized to ensure that adequate safeguards are built into the process.
- 9.21. Debate is raging on what approach is appropriate in this context. It is our view that data protection legislation would not prohibit this policy option provided that it is carefully designed, an appropriate balancing test is carried out and documented, data subjects' rights are respected (e.g. subject access requests are provided for) and that the approach is appropriately and accurately described in a privacy statement given to users at the outset (e.g. downloading or first use of an app).
- 9.22. **Legally binding assurances by the government on use of data**. Under GDPR, data should not be processed for purposes which are incompatible with the initial purposes for which the data was collected. We call on the government to give legally binding assurances that it meets these commitments under data protection law, and not process the data for



any purposes other than public health purposes. (In other words, avoiding “mission creep”).

- 9.23. **Using data for future public health purposes.** Labour could encourage the government to ensure that the health data collected is of a high enough quality, and collected widely enough, that it could be used in the NHS to drive NHS improvements in future years. This would need to be done through aggregation and anonymisation. These sorts of datasets are invaluable to train ‘AI’ tech which could be used to drive NHS improvements in future. We note that the scientific and higher education sector in the UK has substantial expertise in considering these questions in the context of scientific research (sometimes in the form of ethics committees/bodies) and their advice should be sought by the government to enable the lawful and ethical use of the data collected.
- 9.24. However, on the other hand, some may feel the public should be assured that all data will be promptly destroyed after the pandemic. Such an approach could potentially be more effective in ensuring a high degree of public co-operation and consent (given the more than 50% co-operation required).
- 9.25. **Retention periods.** The data would need to be deleted in line with agreed retention periods. Given the extraordinary circumstances, we would call on the government to give (equally extraordinary) assurances that such data would be held securely and to set out what safeguards would be in place to protect against slippage into a ‘surveillance state’. Again, without such assurances there may not be adequate take-up of this option.
- 9.26. **Security.** A further concern we would have around this option is whether the use of Bluetooth is an adequately secure method for transmission of personal data in tech tracking; if it considered to be insecure, what other privacy mechanisms (such as short retention period) could be used to mitigate against such risk?

Data protection principles

- 9.27. Data protection legislation is substantial and complex. Depending on the approach taken, the following data protection principles may come into play:
1. **Privacy Policy.** There should be a privacy notice on the app(s) ensuring that citizens know what will be done with data submitted on the app and which entities will process it.
 2. **Lawful basis.** Health data is special category data so there will need to be a lawful basis and a condition identified for it to be processed. In this context such processing is very likely to be lawful - **however** a policy document should be in place. Labour could call on the government to publish its relevant policy document.
 3. **Data sharing requirements.** There should be clarity about which entities will process/ receive the data.



4. **Purpose Limitation Principle.** Personal data must only be used for purposes compatible with the original purposes for which it was collected.
 5. **Security.** The data should be stored very securely (encrypted at rest and in transit for example). Access should be restricted on a need- to- know basis. Consider data breaches.
 6. **Data Minimisation principle.** No more data should be collected than needed. Data could be aggregated and anonymised to create datasets for secondary usage e.g. to improve health systems or analyse coronavirus after the fact. Data retention periods should be strict and data should be deleted in line with the agreed data retention period.
 7. **Data subjects' rights.** The government/NHS bodies should put in place governance arrangements and additional resource to ensure UK citizens' rights under data protection law are met. For example, honouring subject access requests or the right to rectify or the right to be forgotten. Again, there are exemptions to these rights which need to be considered. There may be enhanced litigation risks around an intrusive track-tracing policy.
- 9.28. **Data gathering by employers.** Labour should be aware that a number of employers are considering how they can support the gathering of data through such tracking apps. The ICO has confirmed in its coronavirus guidance note that in its view, employers may share information about staff with authorities for public health purposes - but they cannot require staff to implement or use any tracking app.

10. REQUIRING INDIVIDUALS OUTSIDE THE HOME TO PRODUCE IMMUNITY PASSPORTS ON DEMAND

Description of what this policy option entails

- 10.1. This policy option involves individuals being issued by health authorities with a certificate of immunity, if the science supports such, (on the basis of having already contracted and recovered from the virus). These could take the form of a hard copy document or card, or a virtual passport displayed on an app.
- 10.2. It is very important to note that on 24 April 2020, the WHO warned that *"there is currently no evidence that people who have recovered from COVID-19 and have antibodies are protected from a second infection."* As such, unless and until it is established that the previous exposure to COVID-19 provides immunity, the concept of an immunity passport idea is potentially dangerous.²⁸

Legal considerations flowing from this policy option

²⁸ <https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19>



- 10.3. **Amending the Coronavirus Regulations.** Regulation 6 could be amended to state people could not be outside of the house without either a reasonable excuse, or a valid immunity passport. Thought would need to be given, from the start, to ensuring that the system is accessible and fair to all groups and human rights are considered. Care needs to be taken that the practical implementation of any such immunity passport scheme does not exclude people for example who choose not to own or cannot operate smartphones or are unable to read.
- 10.4. **Grounds for the police to stop people to request information.** Many police powers rely on the concept of 'reasonable suspicion', i.e. that the police need some objective basis before stopping someone, to search or question them. There is no generalised legal presumption that members of the public must answer questions when asked on a street by an officer. If immunity passports are to be enforced police powers need looking at, as a basis of 'reasonable suspicion' will not work. The police will need legal powers to stop people and request to see their immunity passport, to ask them for their name, date of birth and home address, all without the need for reasonable suspicion. There would need to be a legal duty on members of the public to provide details and show their passport (or provide a regulation 6 reasonable excuse) if they are outside their household.
- 10.5. **Precedents for such police powers.** There are precedents for the police having the power to demand to see certain papers, and to require people to disclose their dates of birth (for example s.164 of the Road Traffic Act 1988) in relation to driving licences. The change is that the police will be stopping many more people, and with no objective justification for the stop. It may well be there is consent for this, in the current crisis, but this is a significant change to the current relationship between the population and the police.
- 10.6. **Proportionality and discrimination.** There will need to be safeguards to ensure that no one group feels (or is) disproportionately targeted. That could be around recording ethnicity or other data, akin to stop and search, or it could be that the practice is there are checkpoints where absolutely everybody is checked as they pass through, or both. Human rights lawyers could advise police at the stage of preparing guidance as to just how the police operate any checks (rather than litigation after the event). In the case of regulation 6 governing movement, useful guidance from the college of police is now helping to provide uniform sensible interpretations that are more likely to be human rights compliant (before that date the press had reported some police forces had threatened to search people's shopping to check it was essential, or set up road blocks to prevent people driving to take exercise).
- 10.7. **Duty to provide personal information.** There would need to be a duty on everyone, outside their own household, to provide when asked by a police officer (thought should be given to whether other persons/officials should be added to the list) an immunity certificate, and their personal details, name, date of birth and address. Not providing those personal details, and either an immunity certificate, or a reasonable excuse under regulation 6, could be a summary only criminal offence, punishable by a fine. As per the regulations there could also be a fixed penalty notice.



- 10.8. **Subsequent provision of immunity certificate.** The harshness of this rule, criminalising anyone who may simply have honestly forgotten their certificate that day (or probably phone as it would likely be digital) could potentially be mitigated by setting out that there is a defence to that offence if an immunity certificate is subsequently provided within 72 hours after the request was made, there would of course need to be a practical method of doing so, (again s.164 provides a model of a defence of providing it subsequently). Depending on the balance to be struck, there could also be a further defence that it is not reasonable to either show the immunity certificate on request, nor provide it within 72 hours, perhaps with the burden being on the defendant to show why it is not reasonable (once the Crown have proved the defendant was in a public place, and refused the request/not provided any certificate within 72 hours).
- 10.9. **Facial recognition.** Another possibility the government are apparently exploring is facial recognition, this would potentially alleviate the need to carry certificates, but there would still have to be police powers to stop and ask people to submit to having their face checked, and a duty on people to agree and (depending on how the system works) to provide details, with criminal sanctions, as above, for not complying.

Considerations of legal mechanisms for enforcement of restrictions

- 10.10. **Protection for employees.** One legal issue arising from the restrictions currently in place concerns the position of employees committing prima facie breaches of restrictions in pursuance of the orders of unscrupulous employers.
- 10.11. It may be prudent to consider additional protection for employees by providing that employees have either a complete defence or are able to present as a mitigating factor to a breach of restriction the fact that their employer directed or encouraged them to do so. In tandem, one could provide for civil liability for the employer for the inducement of such a breach.
- 10.12. One could consider extending the reach of the existing victimisation protections (e.g. in discrimination and health and safety rules) to provide that an employee may not be victimised by the employer as a result of anything the employer discovers as a result of COVID related monitoring. We recommend that any protections that are introduced are extended to limb (b) workers alongside traditional employees.
- 10.13. In addition, any relaxation of lockdown restrictions as they impact on the employer/employee relationship should provide an employee with a defence not only for breach of any government restriction or obligation if they reasonably believed their employer had directed or encouraged them to do so, but also for breach of any restriction or obligation imposed by their employer if they reasonably believed government advice had directed or encouraged them to do so. This would cover the converse situation where an employer directed or encouraged an employee to return to work, but an employee reasonably believed that government guidance directed or encouraged them not to do so. This is a situation which is occurring now under current lockdown rules.

Potential legal challenges in relation to data protection



- 10.14. UK citizens could challenge any breach of data protection law or of their right to privacy, in connection with the options (e) and (f), by bringing a claim through the courts. Case law has established the right (i) to claim damages for the tort of breach of privacy, (ii) for the tort of misuse of private information, while GDPR provides a statutory right to claim compensation for breach of data protection law. These recourses could potentially be available to individual claimants or classes of claimant depending on the facts.
- 10.15. In *Gulati*, damages were found to be available for the tort of misuse of private information, even if the claimant suffered no pecuniary loss or distress. In *Lloyd v Google*, in 2019, the Court of Appeal found that it was possible to bring a class action against Google to claim damages for loss of control of data - even if a claimant has suffered no pecuniary loss and in distress. This was found to be linked to the need to provide a remedy where claimants' fundamental rights are infringed.
- 10.16. Questions remain as to whether such claims could potentially fail in the context of coronavirus, on public policy grounds. That may turn on the facts and on whether the defendant was the government, or an NHS body, or a private tech company (a claimant might be more likely to succeed against the latter).

11. CONCLUSIONS

This document aims to capture some of the key considerations. However, it is a working draft and it will need to evolve following input from other sources and as the situation evolves.