

Rapid Review of Covid-19 related Fixed Penalty Notices

This is the biggest opportunity we will ever have to understand the hidden values that shape human nature, that create global diversities, and drive evolutionary change.

The traditional model of top down, authoritarian government is simply no longer accepted as relevant by the majority of the young people most likely to break the very regulations which are in place to protect them.

The forces that influence and shape individuals, that connect people within organizations and across communities, and which secure the rise and fall of nations and cultures must all be understood if we truly wish to bring our country along with us. This is about creating change within the very desires and designs of human systems and 21st century leadership. This is about making relevance, relevant.

Summary

At the Cabinet sub-committee on justice meeting on 30 September, ministers requested a rapid appraisal of the use of Fixed Penalty Notices (FPN) for different elements of the Covid regime and consideration of whether the use of such FPN's is a fair and effective way to drive desired behaviours.

Initial analysis has identified that

- The majority of Fixed Penalty Notices escalate from £60 for a 1st offence and double up to £1920 for a sixth offence.
- Such penalties suggest that a potentially life-endangering action by an individual is no more serious than a parking offence.
- Organising an unlicensed music event has a penalty of £10,000
- Breach of Passenger Information Regulations have FPN's of £4000
- There are no offences related to self-isolation in the event of a positive coronavirus test in Wales, nor any legal basis to remain in isolation if symptomatic of the virus. This is not the case in Scotland or in England.
- There is a requirement in Wales to isolate following international travel from certain countries, subject to a £1000 FPN per offence.
- No FPN's have been issued in Wales for (OR IS IT THAT THESE ARE NOT OFFENCES IN Wales?) participation in indoor gatherings or outdoor gatherings of any size.
- 22,672 FPN's have been issued by the police in Wales since 27 March up to and including 21st September. This equals 14% of all FPN's issued on an England and Wales basis
- The majority of all FPN's issued in both England and Wales relate to offences concerning restrictions of movement
- 76% of FPN's issued in Wales were to males
- In both England and Wales those aged between 18-24 are most likely to receive a FPN; followed by those aged 25-29 and then those aged 30-34.

- In Wales, those aged below 35 received 67% of all FPN's.
- 85% of FPN's in Wales (79% in England) were issued to people who self-identified as white
- 10% of FPN's in Wales (12% in England) were issued to people who self-identified as Asian and Chinese
- 2% of FPN's in Wales (5% in England) were issued to people who self-identified as Black
- 36.5% of FPN's in Wales remain unpaid compared to over half in England
- Reasons' for non-payment of FPN's are not known but could include
 - disagreement with the offence and a desire to be heard in court
 - confusion over the lack of messaging consistent with the law
 - alleged breaches of Articles 7 and 8 of the Human Rights Act (the right to no punishment without law and the right to private and family life)
 - individual interpretation of the concept of reasonableness varying from the subjective judgment of an enforcement officer
 - lack of financial resources to pay a fine
 - disbelief that the justice system will catch up with the offender
 - lack of legal advice, especially in relation to the seriousness of a prosecution compared to an FPN
 - frustration at apparent discriminatory behaviours arising from the non-enforcement of messages which the government has issued as being 'the rules' when in fact there is no underlying legislation, eg lack of action on social distancing.
- The existing FPN regime appears insufficient to deter a cohort of predominantly young males in Wales from breaking regulations
- It is not known whether FPN's issued reflect the level of behaviour which is in breach of the Covid regulations or if young male offending behaviour is easier for enforcement officers to identify
- It seems that some of the least risky (because they are outdoors) but easiest to identify offending behaviours most in the public eye have attracted the greatest number of FPN's whilst harder enforcement actions involving workplaces have not. Further information is needed to confirm this.
- It is not known how many FPN's have been issued to residents of Wales in England, or residents of England in Wales and the extent, if any, to which different legislation either side of the border could cause such offenders to accidentally transgress the regulations.
- It is not known why there have been no enforcement actions taken for illegal private gatherings in Wales, whether indoors or outdoors.
- A detailed analysis of FPN's issued in Wales is needed to identify any specific key events which may cause a surge in offending. This may be weather related, due to the imposition of new restrictions, or for other reasons.
- Meetings with stakeholders to include the police, transport police, and cohorts of people most likely to be at risk of offending should be undertaken to identify the reason for offending behaviour.

- However, the focus for future work should prioritise those behaviours which are most likely to spread the virus to a great number of people, including indoor and outdoor gatherings of people who are not self-isolating.
- Different communication messages need to be developed which resonant with different and personal value systems (Matt Hancock's 'don't kill your Granny' was the closest and only example to date). It needs to be recognised that harnessing an intrinsic motivation to comply with key regulations will be more powerful than any FPN and also bring more people alongside the government than enforcement action alone.
- There is grave concern that the people who are least at risk of acquiring coronavirus because they live alone and self-isolate, are at immediate risk this winter of long term mental health problems if they are not permitted to form an extended 'support bubble' (England's terms) with one other household, wherever it is located.
- These most vulnerable people may have limited contacts in their immediate locality, may have been recently bereaved or lost employment, and may not have local people who they wish to invite into their home, trusting only very few people not to carry the virus to them.
- An approach needs to be developed which avoids long term life damaging and potentially life-limiting harm to mental health that will arise from prolonged, indefinite exclusion and isolation. This is an identified Human Rights issue compounded by evidence that others have been permitted to get together to 'protest' over topical issues of the day, yet at far greater risk of spreading the virus in the community.
- But it is far more than that: 'don't kill your Granny' style messages will backfire on the wider population if the severity of restrictions themselves cause severe harm this winter
- To avoid unacceptable pressures, the test of what is a reasonable excuse for an apparent breach of a rule should not and must not be solely open to the determination of individual enforcement officers.
- Court pressures mean that court hearings and backlogs could make covid regulation prosecutions long, drawn out and costly actions.
- Could there be an option for mediation when deciding whether someone has a reasonable excuse for an apparent breach of a Wales regulation?
- Some Welsh citizens do not have reliable access to the internet, to Welsh TV channels or to newspapers - this is especially the case for those self-isolating in remote areas. Constantly changing regulations, advice, guidelines and interviews may therefore not be sufficiently available to all before they come into force.
- Greater clarity consistency certainty and predictability and a coherent structure about lockdown measures across Wales is needed.
- Inconsistent messaging from UK government has already lost public support - the United Kingdom, according to the latest YouGov survey, has the lowest level of belief in the world that the government is handling coronavirus related issues very or somewhat well.

- Developing a distinct, coherent, transparently evidence based yet person centred approach in Wales will differentiate the government in Wales from that in England.
- The focus needs to ensure that easy enforcement and the issue of many FPN's do not compromise more difficult targeted actions including in the workplace.
- Difficult issues need to be explored openly and clearly
- Discrete and determined local lockdown situations supported by clear evidence from TTP data will explain the rationale for public actions.
- Equality issues and impact assessments need to a) be undertaken and b) consider not only the impact of *taking* an action but also the impact of *not taking* an action.

Key Questions:

Are FPN's appropriate or do they send the wrong message and trivialise potentially life endangering actions?

Should the six stages of FPN remain or should it be '2 strikes and you are out'?

To what extent should individuals be held accountable for their actions?

Should organisers of illegal gatherings whether indoors or in a garden or in any other public place be faced with separate penalties to attendees. If so, how are they to be identified?

How do we engage to the best effect with people with different value systems, for example with those who may prioritise religion, family, business, community or global action etc above the law?

What action should be taken against businesses that have poor practises and how fast should it be taken?

How quickly should a closed down business be allowed to reopen and what steps must it take?

Are LA Environmental Health Officers content that they have the powers they need?

How do we decide that the cost-benefit to an individual or business of compliance with the regulations is justified when we do not know them and can only generalise?

What constitutes a reasonable excuse, how is it evidenced and how can people have confidence that they will not be wrongly persecuted and/or prosecuted for acting in good faith?

What would be the benefits of using the same terms / nomenclature as used in England?

Are the people making decisions about the regulations sufficiently representative of the citizens of Wales, ethnicity, age, wealth/ poverty, health, gender etc? If not, how do we make sure that life changing decisions are taken in a more inclusive manner?

Are we confident that people understand the law in Wales and what constitutes a crime (Article 7 HRA)?

If not, what more can be done to make the law in Wales even more transparent and clear?

Are we confident that the Human Rights of people in Wales are not being disproportionately and adversely impacted?

What more could we do to help those most at risk of isolation this winter?

How do we understand the views of different sectors of society and how the regulations are impacting them? What analysis and consultations are needed?

How vulnerable to judicial review are we already? How can we reduce that risk?

What level of discretion should enforcing authorities have which does not risk legal challenge?

Which organisations are most likely to challenge our actions? How can we be more inclusive of them at even earlier stages?

Background Information

Appendix 1 contains a complete list of all Coronavirus legislation and associated offences, penalties and the relevant enforcement authority for Wales, Scotland, England and some local lockdown areas in England (Emma's table).

Excluding offences related to courts and diagnostic laboratories, FPN's in Wales typically have a reduction for early payment and are summarised in brief below:

Offence for a person who, without reasonable excuse, contravenes:	FPN
<ul style="list-style-type: none"> • Closure of certain businesses or services • Restrictions on licensed premises • Requirement to work from home where practicable • Requirement to wear face covering on public transport • Requirement to wear face covering in certain indoor public places • Restriction on indoor gatherings • Restriction on outdoor gatherings • Restriction on organising certain unlicensed music events* • Requirement to stay within local health protection area • Offence for a person who obstructs, without reasonable excuse, any person carrying out a function under these Regulations • closure of business following premises closure notice, • no entry of closed business without reasonable excuse • removes, obscures or damages a notice or sign required to be displayed publicising premises improvement and closure notices • a direction given by an enforcement officer: <ul style="list-style-type: none"> not to board public transport service, not to enter premises to disperse gathering, return and remove person in the gathering to where they are living to return to place where living and remove to that place to follow instructions as necessary in relation to indoor and outdoor gatherings where a child is present • a direction given by the operator of a public transport service, an employee of the operator or a person authorised by the operator or • fails to comply with a compliance notice given by an enforcement office 	<p>£ 60 1st offence £120 2nd offence £240 3rd offence £480 4th offence £960 5th offence £1920 6th & subsequent offences</p> <p>* restriction on organising certain unlicensed music events) – the FPN amount must be £10,000</p>

<ul style="list-style-type: none"> • a requirement to provide passenger information to the Secretary of State electronically as soon as reasonably practicable on arriving in Wales; • a requirement to provide updated passenger information when subject to an isolation requirement. 	
<p>Offences related to requirement to isolate following International Travel</p> <ul style="list-style-type: none"> • a requirement to travel directly to and not leave a specified premise in Wales or in a part of the UK other than Wales when subject to an isolation requirement; • a requirement for a person with responsibility for a child subject to these Regulations to take all reasonable measures to ensure that the child complies with a requirement imposed on the child 	£1000 per offence
The Health Protection (Coronavirus, Public Health Information for Persons Travelling to Wales) Regulations 2020	£4000

Initial apparent anomalies and issues include:

- **the lack of any equivalent in Wales to the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020/1045**, which includes a range of offences in Regs 2-9, mainly linked to the failure to self-isolate following notification of positive test or close contact with a positive case; duties to notify employers of requirement; duty on employer to take steps following notification by an employee; failure to follow directions of an authorised person enforcing the regulations. This absence in Wales contrasts with the requirement to isolate following international travel, which is subject to a £1000 per offence FPN
- **the nominal nature of the staggered scale of increasing FPN's in Wales**, with six offences being required until payment of the maximum sum of £1920. This perhaps sends a message that transgression of covid legislation is little more serious than a parking fine, has no long term implications on the criminal record of an individual and therefore is something the government itself views as trivial.
- **Lack of any enforcement powers for social distancing in Wales.** Indeed, only in Scotland is there any FPN related to social distancing *and that applies to businesses failing to take measures to ensure it CHECK*

Fixed penalty notices issued under COVID-19 emergency health regulations by police forces in England and Wales.

Appendix 2 contains the National Police Chiefs' Council report issued on 30 September on "Fixed penalty notices issued under COVID-19 emergency health regulations by police forces in England and Wales". It is important to note that in Wales, FPN's must be issued by an enforcement officer and that an "Enforcement officer" means a police officer, police community support officer, a person designated by Welsh Ministers or a local authority. The data in Appendix 2 and presented below relates solely to FPNs issued by the police and in particular will therefore not identify enforcement actions undertaken by local authority environmental health officers.

The tables within the National Police Chief's report are subject to ongoing updating and revision and currently indicate that:

- 2, 672 FPN's recorded as having been issued in Wales between Friday 27th March and Monday 21st September equate to about 14% of the all England and Wales total.
- The great majority of FPN's issued in both England and Wales related to offences associated with contravention of a requirement as to restriction of movement during the emergency period.
- Approximately 76% of FPN's issued in Wales were to males.
- In Wales, as in England, the group aged 18-24 is most likely to receive an FPN, followed by the age group 25-29 and then 30-34. Between them, these three age groups account for 67% of all FPN's issued in Wales.
- Of those FPNs where the individual issued with the notice in Wales had a self-identified ethnicity recorded:
 - 85% in Wales (79% in England) were issued to people who self-identified as White,
 - 10% in Wales (12% in England) were issued to Asian and Chinese people and
 - 2% in Wales (5% in England) to those identifying as Black.

KAS TO CHECK: how proportionate are these figures to the population aged 18 +?

Non-payment of FPN's

Non-payment of FPN's in England is greater than in Wales with over half of FPN's issued in England remaining unpaid, compared to 36.5% of FPN's unpaid in Wales¹. The reasons for not paying the FPN's in either country remain to be identified. They could, inter alia, include:

- inconsistent and constantly changing messaging from government causing anger, confusion and a lack of clarity over what the law actually is. This is particularly important given that Article 7 of the Human Rights Act concerns the need for governments to be clear about what constitutes an offence. Whilst some individuals will seek 'their day in court' regardless, others may be so frustrated at witnessing what they believe to be breaches of the law due solely to repeated government messages (for example as relates to requirements to socially distance distancing) without any enforcement action being taken. Not realising that social distancing is not a legal requirement, such individuals may develop a very jaundiced view of criminal justice victimising them and unfairly not being applied to others;
- the question of what constitutes the test of reasonableness and so a dispute with the legitimacy of the fine itself;
- a lack of financial resources to pay the fine;
- a disbelief that the justice system will be able to prosecute successfully (this is especially relevant given that the Crown Prosecution Service has not been able to prosecute many covid related cases² and that in any event, a decision to prosecute must always be proportionate. It is difficult to see how an offence arising on a mass scale yet only subject to a £60 FPN would, if unpaid, result in a proportionate decision to prosecute as a priority when compared to more serious offences with greater penalties, including potential imprisonment, notwithstanding that under the Interim CPS Charging Protocol – Covid-19 crisis response³, all Covid Related cases are the highest priority)
- lack of legal advice about the implications of accepting a fixed penalty notice compared to a prosecution.

¹ 8,441 of 15,982 FPN's are unpaid in England compared to 972 of 2,664 FPN's in Wales.
<https://news.npcc.police.uk/releases/crime-is-close-to-pre-lockdown-levels-and-fines-given-to-the-public-rise-as-new-regulations-are-introduced-1>

² <https://www.independent.co.uk/news/uk/home-news/coronavirus-act-unlawful-prosecutions-review-uk-a9516566.html>

³ https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Interim-CPS-Charging-Protocol-Covid-19-crisis-response.pdf

Factors which may underlie or influence existing non-compliance with the COVID-19 emergency health regulations by certain categories of offender

The information provided above on penalty regimes and FPN's issued to date suggests at first sight that the deterrent impact of an FPN is insufficient to ensure compliance with the Covid-19 regulations in Wales, especially by young males and especially involving a breach of travel restrictions.

However, there are many unknowns associated with such an assumption. Firstly, is enforcement action being targeted correctly? For example:

- It is not known if there is any pattern to the issue of FPN's and whether the majority were issued in connection with very few high profile incidents (eg the mass Ogmore Beach 'brawl' reported on 28 August). This appears unlikely given that Chart 1 in Appendix 2 shows a very low level - near zero - of FPN's issued from 3rd July onwards, i.e. once the strict phases of lockdown in Wales started to ease⁴. This then raises the question, how have the police acted when there has been a clear disregard for social distancing? (The answer to this is that only in Scotland is there a legal duty to maintain social distancing, so the police in Wales are powerless to take enforcement action if groups are too close).
- Are the police prioritising areas of high public concern and easy enforcement (illegal travel and outdoor gatherings) rather than activities which could pose a greater risk to health but involve entry to business premises, (in April when police forces in Wales objected to the potential need for them to consider for enforcement social distancing measures within factories⁵);
- It is not known how many FPN's related to non-residents of Wales, nor how many residents of Wales incurred penalties travelling to England and whether such individuals were caught by variances in the legislation between the two countries;
- Are younger people being targeted to a disproportionate amount by the police for potential enforcement?
- To what extent are enforcement actions for illegal private gatherings tempered by concern of allegations of adverse publicity, racism and bias?

To gain greater understanding of these issues, there needs to be

a) detailed analysis of the FPN's issued to determine if specific key events triggered the majority of penalties. Such events might not only be the brawls referred

⁴ <https://www.itv.com/news/wales/2020-07-03/the-key-dates-you-need-to-know-as-lockdown-is-eased-further-in-wales>

⁵ <https://www.bbc.co.uk/news/uk-wales-politics-52213177>

to but also loss of confidence in government more generally following the apparent absence of punishment for some high profile breaches of regulations.

b) meetings with stakeholders such as the police, transport police and environmental health officers, and potentially surveys of those groups considered most likely to offend to understand the reasons for their behaviour. There could be many reasons for offences, ranging from combatting depression and despair following job losses, to boredom and continued perceived wealth following payment of salary under the furlough scheme making it viable not only to travel to offend but also to pay any associated fines without concern for the financial impact.

In addition whilst 67% of FPN's were issued to people below the age of 34, that still leaves a third of FPN's being issued to those aged 35 and above. Again, ideally a statistical analysis would identify if such FPN's for older offenders have any particular characteristics.

Consideration of the factors which may influence any failure to comply with the Covid-19 emergency health regulations

Human Rights and the consequences of any offending behaviour.

As winter approaches, many individuals living alone will feel especially vulnerable due to their individual circumstances. A pragmatic, reasonable, flexible and tolerant approach becomes vital if an individual's Human Rights are to be protected because generalised legislation may fundamentally remove the rights of some to respect for their private and family life, including with unmarried partners, their home and their correspondence. These are protected rights under the Human Rights Act (Article 8) and whilst in some circumstances it is possible to restrict these rights, and these circumstances include public safety and the protection of health, generalised legislation brought forward without consultation, debate or scrutiny is unlikely to sufficiently identify those who may be most vulnerable as a result of the removal of their rights.

For some people who feel particularly vulnerable to covid-19, irrespective of the current scientific understanding of the disease, self-isolation whether in remote, rural areas of Wales or in the very heart of a dense conurbation, has been a coping strategy made possible by home deliveries, potentially ordered by others. Many people who live alone will not have local friends or neighbours they can see, due to the vulnerability of such other individuals, personal choice or indeed because they are new to an area. Preventing what could be someone's only remaining relatives or friends from visiting them, at a time when, for their own personal reasons they feel compelled to self-isolate, raises serious Human Rights issues.

Some people will be especially vulnerable to enforced isolation due to recent bereavement, chronic illness or travel restrictions. It is not an exaggeration to state that for such people, they have already faced extensive and enforced periods of

isolation far in excess of those experienced by prisoners in solitary confinement in the United Kingdom who at least have some daily contact with a prison guard.

Writing in the forward to 'Deep Custody: Segregation Units and Close Supervision Centres in England and Wales⁶', independent research facilitated by the prison service, Lord Woolf, Chair of the Prison Reform Trust and a former Lord Chief Justice, said:

"Segregation, though it may sometimes be necessary, must not be prolonged or indefinite. Care must be taken to avoid, as far as is possible, the damage to mental health that exclusion will bring. Equally, care should be taken to avoid the use of segregation as a holding operation (for people who should be transferred swiftly and humanely to a secure hospital or psychiatric unit.)"

The indefinite nature of being prevented from seeing a friend or relative who may need to visit from other parts of the United Kingdom will, for some precipitate mental health conditions.

Undiagnosed mental health issues have the potential to be seriously detrimental to an individual's wellbeing and health, and may have lifelong, or indeed life-limiting, consequences. Those at most risk of loneliness and indeed suicide due to enforced isolation will conversely be at least risk of suffering covid and will have the greatest desire to ensure that any visitor does not convey the virus to them.

The picture painted above is deliberately stark to make clear that there may be compelling, reasonable grounds for individuals to break covid-19 regulations. Being of a subjective nature, it is not possible for the police to decide what constitutes a reasonable excuse to break regulations and nor should it be. Nor should individuals fear being fined or prosecuted for caring for others.

In the circumstances outlined above, the potential adverse impact of any offending behaviour in spreading the virus is minimal and restricted to very few individuals who take a conscious decision to meet.

Yet despite the compassionate reasons for such travel, the legislation and guidance is not at all clear on whether such a meeting is a permitted activity with the recent removal of the rights for extended households to meet – *unless located in the same county*. Something which is impossible for many who have retired to Wales, or moved around Wales for work.

Contrast the above situation which has potential adverse impact on very few people with 'the right to protest'. Individuals have a legal right to organise a protest, protected by the rights to freedom of expression and freedom of association (Articles 10 and 11 of the European Convention on Human Rights).

The public perceived that mass protests related to Black Lives Matter, Extinction Rebellion and others breached coronavirus regulations and yet were completely tolerated by potential enforcement agencies with protestors travelling on public

⁶ http://www.prisonreformtrust.org.uk/Portals/0/Documents/deep_custody_111215.pdf

transport across the country. These mass protests did not result in mass FPN's yet risked totally undermining all of the efforts and sacrifices undertaken by the most vulnerable of individuals in the preceding months.

Such inconsistency risks totally undermining the cultural norm of British Society which previously has been to comply with the law and the police. It provides individuals with the licence they need to interpret what they hear about the law, the 'rules' and the guidance (none of which correlate) with what they feel is reasonable for them to do and legitimises an individual approach to the rule of law and to justice.

The genie is very much out of the bottle and for the public sector to regain the confidence of the public, to regain trust and belief in the need for restrictive legislation, a new approach needs to be developed.