

31 July 2021

# Law Commission

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Consultation Response on 14<sup>th</sup> Programme  
of Ideas for Law Reform



# Our idea for reform

Commons is the criminal law firm for social justice. We provide legal advice and representation to people at the police station, at court and for appeals against conviction involving domestic and international cases. We run a flagship crisis navigation service to ensure our clients access services that may be able to support them in a range of other areas of their lives such as housing, mental health, immigration, employment and more. We also engage in project work aimed at improving the law and access to justice.

Since the start of the Coronavirus pandemic in March 2020, more than 150 statutory instruments creating, amending and revoking emergency Coronavirus restrictions have been brought into force [ <https://www.legislation.gov.uk/uksi?title=health%20protection%20coronavirus> ].

The restrictions themselves have flexibility at their core, to the point that the rapidity and frequency of changes caused widespread confusion amongst public, police and politicians. By contrast, something that has seen no flexibility is the system under which breaches of the restrictions are enforced. Persons in breach of the Coronavirus restrictions throughout the pandemic could expect to receive a Fixed Penalty Notice ('FPN'), and if unpaid, risk criminal conviction. There is no appeal system outside of contesting a charge in the criminal courts.

Between November 2020 and May 2021, Commons gathered information and offered advice to members of the public who had been issued an FPN. With funding from the Social Enterprise Support Fund, distributed by UnLtd and in conjunction with the National Lottery Community Fund, we created an online survey tool to help people in need of advice. The tool went live on 23 November 2020. By 5 May 2021 the form had recorded 161 responses. Of these, 36 requested follow-up advice. Of those who requested a follow-up, 15 did not engage further. We offered legal advice and/or representation to 21 users.

Even within this relatively restricted sample size we found persons who:

- Had a viable argument that their FPNs had been wrongly issued but elected payment to avoid risk of criminalisation.
- Were unable to afford the FPN without a payment plan and so unable to avoid criminalisation.
- Had not or were unaware that they had received a FPN and so were denied an opportunity to avoid criminalisation.
- The introduction of the Single Justice Procedure (SJP) adds to this latter concern. The reasons for missed FPNs might equally apply to missed SJP notices.

The no-plea rate for SJP prosecutions under the Coronavirus regulations is a staggering 88% [ <https://questions-statements.parliament.uk/written-questions/detail/2021-01-26/143756> ]. Whilst the reasons for lack of response are unknown, the automatic assumption of guilt is highly problematic. These persons are also assumed to be able to afford the standard fine and costs and if unaware of the requirement to pay a fine may be at risk of imprisonment for non-payment.

Our study also reflected national statistics showing that BAME people were significantly more likely to be issued a fixed penalty notice - 62.5% of our respondents identified as white, compared to 80% of the population

[ <https://news.npcc.police.uk/releases/independent-analysis-of-coronavirus-fines-published> ].

We recommend that the Law Commission consider the structure of appeal concerning FPNs under coronavirus regulations and other laws. The current system whereby accused individuals are required to attend Magistrates' Courts without legal advice via the Single Justice Procedure does not produce fair or just outcomes.

## Case Studies

X is a 20 year old mixed race male. He was stopped outside with two friends late at night on suspicion of being in possession of drugs. He was searched and no drugs were found, but he and his friends were each issued with a fixed penalty notice for £200, reduced to £100 if paid within 14 days, for breaching the regulation limiting outdoor gatherings to two persons at that time. X acknowledged that he had been in breach of the Coronavirus regulations and expressed a willingness to pay the penalty to avoid criminalisation but was in receipt of Universal Credit and unable to pay £100 before the deadline.

C is a 18 year old white male. He attended a gathering at a neighbouring flat of less than 15 people, an offence which at that time would attract a £200 fixed penalty notice. He left his laptop to be used to play music and returned to his flat, after which additional guests arrived taking the attendance above 30. The police were called. A returned to the flat to collect his laptop and was issued with a £10,000 fixed penalty notice. None of the residents of the flat hosting the gathering were issued with fixed penalty notices.

R is a 21 year old white female. She was stopped by the police at a small indoor gathering. She did not receive notification of a fixed penalty notice having been issued, but did receive a single justice procedure notice for being present at an indoor gathering. She intended to apply for an Australian visa and was concerned that a conviction would prevent her from doing so. The police were unwilling/unable to issue a new fixed penalty notice.

## Key insights

The House of Commons and House of Lords Joint Committee on Human Rights' ('JCHR') report titled: "The Government response to covid-19: fixed penalty notices: Fourteenth Report of Session 2019–21 (published 21 April 2021)" raised some key issues that have not been dealt with to date [ <https://committees.parliament.uk/publications/5621/documents/55581/default/> ] Of particular note to the need for law reform, conclusions from the JCHR include:

### Wrongly issued FPNs

*5. CPS data shows that a significant proportion of the cases which go to open court are incorrectly charged. These cases will have been through more safeguards than those penalties dealt with by payment or through the single justice procedure. The NPCC must undertake a review to understand why police are issuing so many incorrect FPNs and then take appropriate action based on that review to prevent such mistakes from occurring in the future. (Paragraph 56)*

*6. It is astonishing that the Coronavirus Act is still being misunderstood and wrongly applied by police to such an extent that every single criminal charge brought under the Act has been brought*

*incorrectly. While the coronavirus Regulations have changed frequently, the Act has not, and there is no reason for such mistakes to continue. (Paragraph 57)*

*7. Far more must be done by Government and police forces to ensure officers understand the Regulations they are asked to enforce. This is crucial to ensure that there is no punishment without law (Article 7 ECHR) and no unjustified interference with individual's right to family and private life (Article 8 ECHR). (Paragraph 62)*

*8. As we noted in our April 2020 Chair's briefing note, and recommended in our September 2020 report, more care must be taken by the Government to distinguish between advice, guidance and the law. The public cannot be expected to know the law if the guidance does not reflect the law, and politicians' statements match neither. It is disappointing that the problem has persisted. (Paragraph 67)*

#### *Inadequate review and appeal process*

*9. The nature and extent of any police reviews prior to the FPN being sent are not transparent. There needs to be a clear internal review process in place before the FPN is issued. Without such a consistent internal review process there are significant risks of the law being misapplied and people penalized for what is actually lawful conduct. (Paragraph 72)*

*10. An informal, unpublicised and seemingly ad hoc process is neither an adequate nor sustainable way of delivering justice. It will necessarily result in unequal outcomes between those who have legal representatives who seek out ways of making such informal approaches to local police forces, and those who do not. Moreover, it appears to rely entirely on legal representatives doing work, often pro bono, to rectify mistakes that the police are not pro-actively rectifying themselves. (Paragraph 81)*

*11. The current review processes are not clear, consistent, or transparent. They are inadequate. The CPS figures show large numbers of incorrectly issued penalties slip through those nets. The Government must now introduce a means of challenging FPNs by way of administrative review or appeal. (Paragraph 83)*

*12. We are concerned that the single justice procedure is an inadequate tool to provide the necessary fair trial protections for people accused of offences that are so poorly understood and lacking in clarity and where so many mistakes have been made by enforcement authorities. (Paragraph 87)*

#### *How many FPNs have been wrongly issued?*

*51. Throughout the pandemic, the CPS has reviewed all cases where a person decided to contest or not pay an FPN and was prosecuted in open court. Since 3 June 2020, and more so since 9 February, many cases have not reached (and will not reach) open court and have not been reviewed by the CPS. This is because the Attorney General passed statutory instruments enabling offences under different coronavirus Regulations to be prosecuted through the single justice procedure. The single justice procedure is where a magistrate (and legal advisor) reads the details of the case and delivers a verdict without hearing from the individual charged. If the individual pleads not guilty or does not want to be dealt with by the single justice procedure, then they will still be prosecuted in open court. The proportion of incorrect charges identified by the CPS is high. It was 25% in January 2021, and 27% in February 2021.*

52. The majority of FPNs are not challenged in such a way as to lead to review by the CPS. For example, in September 2020 while 122 cases were reviewed by the CPS, 929 cases under the coronavirus Regulations were dealt with by the single justice procedure. None of these 929 cases as we understand it were reviewed by the CPS. Given the likelihood of errors, and the numbers of mistakes found by the CPS in the cases they review, it is concerning that so many completed prosecutions lack this safeguard.

#### Challenging an FPN

76. For most people, the main way of arguing that an FPN was wrongly issued is to be prosecuted in court for that offence and to mount a defence during that criminal prosecution. If an individual is not successful in justifying their defence in court (e.g. of a 'reasonable excuse' for being outside), this results in a conviction, a criminal record, and they must pay any fine awarded by the court. The amount or payment method of a fine will be set by the court (rather than the FPN values set by the relevant regulations) and will take into account factors such as personal income and the exact nature of the breach. Fines awarded by a court may therefore be less costly than FPNs. FPNs are normally considered a diversion from the traditional justice system, but because a prosecution in court is the only option available to those who do not wish to pay the FPN, this distinction has been eroded. Kirsty Brimelow QC explained: "fixed penalty notices were set out, and they are set out still in the regulations as a diversion from the criminal justice system. What has developed is that because of the way fixed penalty notices are set up they have become part of the criminal justice system".

77. Under the current system, there is no adequate administrative method for challenging an FPN, but individuals can avoid a criminal record by simply paying an FPN. This strains compliance with ECHR rights, because, the threat of a criminal prosecution creates a strong incentive to not contest an FPN, even if an individual believes it was wrongly issued. As Kirsty Brimelow QC told us: "most people, even if they have been wrongly issued an FPN, will pay the fine rather than risk being prosecuted and then getting a criminal record and conviction, and those without any money are in an impossible situation."

78. Lochlinn Parker, Head of Civil Liberties at ITN Solicitors, also pointed out that when someone contests an FPN in court, they could be left with significant legal costs and this can further dissuade people from contesting even unlawful FPNs: "You will end up paying possibly the same as the fine you may be seeking to avoid in legal fees, which you will not necessarily get back, or at least in whole. A lot of people are left without legal advice and are left vulnerable as a result, and most likely take the fixed penalty notice to avoid the fear of conviction."

#### Informal methods of challenging FPNs

79. We heard evidence from Kirsty Brimelow QC of informal approaches leading to police forces dropping FPNs in some instances: "An informal process has grown up among lawyers whereby we have been writing informally to the specific police force and stating why it has the law wrong, or in some cases that the FPN is not proportionate or just, and asking that it sets it aside. On quite a number of those occasions that has been successful, so we have developed an informal system. An informal system is necessarily arbitrary, and we are seeing a difference in attitudes across different forces. That is not really a sustainable or positive solution, but it is one that we are taking forward. I should add that we are all acting pro bono. It is really a public service, and that should not be happening either when people are already suffering different stresses due to the pandemic itself."

80. Lochlinn Parker additionally told us that a lot of this work was done *pro bono* as legal aid was not available for it: “The potential of having a fine in the magistrates’ court means that it does not meet the interests of justice test and criminal legal aid is not available.”

81. An informal, unpublicised and seemingly *ad hoc* process is neither an adequate nor sustainable way of delivering justice. It will necessarily result in unequal outcomes between those who have legal representatives who seek out ways of making such informal approaches to local police forces, and those who do not. Moreover, it appears to rely entirely on legal representatives doing work, often *pro bono*, to rectify mistakes that the police are not *pro-actively* rectifying themselves.

#### Urgent need for a review mechanism

82. In our September 2020 report, we concluded that “There is currently no realistic way for people to challenge FPNs which can now result in fines of over £10,000 in some cases. This will invariably lead to injustice as members of the public who have been unfairly targeted with an FPN have no means of redress and police will know that their actions are unlikely to be scrutinised”.<sup>86</sup> Our view is unchanged.

83. The current review processes are not clear, consistent, or transparent. They are inadequate. The CPS figures show large numbers of incorrectly issued penalties slip through those nets. The Government must now introduce a means of challenging FPNs by way of administrative review or appeal.

## Conclusion

Reforming the process of appeals in relation to FPNs is vital to:

- fairness, for example, supporting individual and social justice;
- improving the efficiency and/or simplicity of the law, for example, ensuring the law is clearly drafted and coherent to those who need to use it;
- supporting the rule of law, for example, ensuring that the law is transparent;
- improving access to justice, for example, ensuring procedures do not unnecessarily add to complexity or cost.

The Ministry of Justice has so far failed to respond to calls for reform, including following the Joint Committee on Human Rights report. Commons believes that FPN appeals / SJP reform requires an independent eye to fairly assess the landscape. Commons was part of a coalition of organisations working to reform the SJP including APPEAL, Transform Justice, Commons, Big Brother Watch and the Howard League for Penal Reform. A co-signed letter was sent to the Justice Secretary Robert Buckland on 1 June 2021 and can be found here:

<https://bigbrotherwatch.org.uk/wp-content/uploads/2021/06/Single-Justice-Procedure-Joint-letter-June-20212127.pdf>