

## **COVID – 19: Human Rights implications of digital contact tracing technology**

**18 May 2020**

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## Introduction

1. As the UK and devolved Governments explore options for easing lockdown measures, the UK Government has announced plans to release a contact tracing app as part of its “test, track and trace” strategy, which seeks to disrupt the transmission of coronavirus. The app is already being rolled out on the Isle of Wight<sup>i</sup> and is being developed by NHSX<sup>ii</sup>. For the purposes of this paper, the UK Government app will be referred to as the “UK app”.
2. On 4 May, the Scottish Government published its own test, trace, isolate, support strategy.<sup>iii</sup> The Scottish Government has set out plans to enhance existing contact tracing capacity across Scotland, and anticipate that up to 2,000 additional contact tracing staff will be required. Alongside this, the Scottish Government plans to enhance the digital infrastructure that is already in place for public health contact tracing work. The Digital Health and Care Institute are developing a secure web-based tool for the NHS in Scotland which will allow people to input details of those they have been in close contact with, and for these to be sent directly to contact tracing teams. NHS Scotland contact tracing technology will be tested from Monday 18 May.<sup>iv</sup>
3. The UK app uses Bluetooth technology to identify close contacts among other app users. The app would therefore be able to identify someone a person may have been in close proximity to but is unknown to them, such as a person sharing public transport. The Scottish Government has made clear that it is seeking greater involvement in the development on the UK app, in particular how the data will interface with the Scottish approach to tracing. The Scottish Government has stated that the UK app could be an enhancement to contact tracing, but cannot be a substitute for more ‘traditional’ contact tracing methods.
4. Contact tracing apps could clearly be beneficial in easing restrictions and in saving lives. They do, however, raise a number of human rights issues, most obviously around the right to respect

for private and family life as protected by Article 8 of the European Convention on Human Rights (“ECHR”). The use of such technology has the potential to give the state almost unprecedented access to people’s personal information. This shift in relationship between the individual and the state is likely to have implications for human rights and societal norms for years to come and therefore must be given careful consideration. The below recommendations go some way to protect against an erosion of privacy rights both now and in the longer term.

5. This briefing discusses the relevant human rights law and a number of safeguards the Commission considers necessary to ensure human rights compliance. It is not clear at the time of writing whether the Scottish Government will recommend use of the UK app, and indeed they may choose to develop their own tracing app in the coming months. The recommendations are relevant to both the UK and devolved settings.

## **What is contact tracing and how does the app work?**

6. Contact tracing is widely recognised as being essential in efforts to control the coronavirus outbreak. Manual contact tracing involves people with either confirmed or suspected cases of the virus reporting this to NHS contact tracing teams along with the names of people they have come into close contact with in recent days. Those individuals are then contacted and asked to self-isolate, thereby breaking the chain of transmission. It appears that the Scottish Government’s plans centre mainly around manual contact tracing, with a web-based tool being developed to allow people to input the names of their recent contacts and send those to NHS contact tracing teams.<sup>v</sup> This would be done securely, and current data protection and privacy legal standards would, of course, apply. The Commission considers this approach, although not without risk, presents fewer privacy concerns than the use of contact tracing apps.

7. A number of countries have used apps as a means of easing strict lockdown measures, whilst preventing the spread of coronavirus. The UK app uses Bluetooth technology. When an app user reports coronavirus symptoms, other app users who have been in close proximity to that individual are sent a notification and asked to self-isolate. The technology therefore tracks and records an individual's movements and social interactions and then matches those with the movements of other app users to create alerts.
8. At the time of writing, the UK app being trialled uses a 'centralised' model. In a centralised model, data is shared with a central server which then processes and stores the data. Some countries, such as Germany<sup>vi</sup>, have opted for a decentralised model, where most of the data is stored locally on a person's phone and as little data as possible is shared with the State. A report entitled "Human Rights and the Government's Response to Covid-19: Digital Contact Tracing" was published by the Joint Committee on Human Rights at Westminster on 7 May 2020 (the "JCHR report"). The JCHR report explains the different options in detail and highlights that a centralised approach is more open to abuse. A centralised approach has a higher risk of security breaches as data is held in one place and there are concerns that a centralised approach comes with the potential to de-anonymise data and develop profiles of a person's movements and social interactions. Others have argued that a centralised approach brings public health advantages as it would allow the NHS to analyse trends and monitor how the virus is spreading.
9. Contact tracing apps have the potential to store a substantial amount of data around an individual's movements and social interactions, essentially creating a map of a person's private life. This data, if not properly regulated, could reveal a significant amount of detail about a person's private life and has the potential to be used in a number of ways. Although contact tracing apps are being developed in response to a public health crisis, it is not unforeseeable that data could be used for other purposes such as policing and immigration control.

# Human Rights Framework

## Article 8 ECHR

10. As the Commission has set out in its previous briefings<sup>vii</sup>, the coronavirus outbreak presents a threat to public health and a danger to life, particularly for older people or those with underlying health conditions. The state has positive obligations under Article 2 of the ECHR to take reasonable steps to minimise the risk to life posed by the outbreak. That said, those measures must comply with the UK's, and in turn Scotland's, human rights obligations.
11. Article 8 of the ECHR requires respect for private and family life, home and correspondence. Contact tracing apps have the potential to gather a significant amount of data relating most obviously to an individual's movements, contacts and health – they are, by nature, intrusive and constitute an interference with Article 8 ECHR. Article 8 is what is known as a qualified right which means that States can justify interferences with the right as long as they are **in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society**.
12. An interference with a person's Article 8 rights must be in accordance with the law. This means that the interference must have some legal basis in national law, and further that the law must be clear, foreseeable, and accessible.<sup>viii</sup>
13. Article 8(2) ECHR sets out a number of legitimate aims which may justify an interference: "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". The Commission considers that any interference with privacy rights in the form of contact tracing apps would pursue a number of legitimate aims, such as being in the interests of public safety and for the protection of health.

14. Finally, any interferences must be necessary in a democratic society. Generally, interferences will be considered necessary in a democratic society for a legitimate aim if they answer a “pressing social need”, if they are proportionate to the legitimate aim pursued and if the reasons given by national authorities to justify the interference are relevant and sufficient. In terms of assessing proportionality, three main issues are relevant:
- The degree of the interference;
  - Whether there were less intrusive means available; and
  - The procedural safeguards available.<sup>ix</sup>

## **Impact on other human rights**

15. Depending on how data is collected, shared and retained, the use of contact tracing apps could foreseeably engage a number of other human rights beyond Article 8 of the ECHR, for example if they were to be used in policing and immigration control. These include:
- The right to liberty and security (Article 5 ECHR)
  - Due process and the right to a fair trial (Article 6 ECHR)
  - Freedom of expression and association (Articles 10 and 11 ECHR)
  - The principle of non-discrimination (Article 14 ECHR)
16. The JCHR report stresses that the seven data protection principles under the GDPR (EU General Data Protection Regulation) also provide a basis for scrutinising the introduction of contact tracing apps.<sup>x</sup>

## **Recommendations**

### **Primary legislation**

17. The operation of contact tracing apps would involve a significant interference with the right to respect for private and family life. The framework of how contact tracing apps or technology will operate should be set out in primary legislation.

18. Legislation would provide the required legal certainty and foreseeability and would subject proposals to much-needed parliamentary scrutiny. The JCHR report highlights that safeguards being set out in primary legislation would increase public confidence in the technology, leading to increased uptake and improved efficacy. This is particularly important as the success of contact tracing apps depends on widespread use.<sup>xi</sup> The Commission notes that the JCHR has written to the UK Secretary of State for Health and Social Care stressing the need for primary legislation, and has proposed a draft Bill which extends to England and Wales, Scotland and Northern Ireland.<sup>xii</sup>

19. The legislation should address the following issues:

- For what purpose data can be collected. The purpose should be linked only to the prevention of the spread of coronavirus and legislation should be explicit that data cannot be accessed for any other purpose, for example for policing, immigration or social security purposes;
- Limitations around who has access to centrally held data, and under what narrowly-defined circumstances this would be acceptable;
- Prohibition on the sharing of data with third parties;
- Appropriate retention and deletion regime;
- Review and oversight mechanisms;
- Time limitations on when data must be permanently deleted; and
- Confirmation that use of apps is voluntary and an individual's ability to exercise other fundamental freedoms such freedom of expression and assembly once lockdown measures are eased will not be dependent on their use of such technology.

## **Independent oversight**

20. In its previous briefings, the Commission stressed the need for independent oversight of all measures introduced in response to the coronavirus outbreak. The Commission considers the need

for independent oversight is particularly important in response to plans to introduce contact tracing apps. As the JCHR stated in its report, oversight is required around the use, effectiveness and privacy protections of any contact tracing apps and any data associated with digital contact tracing. Adequate enforcement powers will also be required.

## **Non-discrimination**

21. The principles of equality and non-discrimination are central to human rights law and are recognised as norms in both the domestic and international framework. Governments must ensure that the principle of non-discrimination is interpreted and applied consistently by public bodies. The collection, retention and deletion of data should specifically consider the situation of vulnerable or disadvantaged groups, including children, and whether any groups may be disproportionately impacted by the use of contact tracing apps.
22. It should also be borne in mind that certain groups may be less likely to be able to access a contact tracing app, for a variety of reasons including but not limited to poverty, disability or a person's age. This, again, highlights the importance of ensuring that a person's ability to exercise their rights such as freedom of assembly is not contingent on their use of a contact tracing app once lockdown restrictions begin to ease.

## **Conclusion**

23. The coronavirus outbreak has led to the introduction of a number of restrictions on individual freedoms, which themselves impact on a person's enjoyment of their human rights. The use of contact tracing apps as part of a wider strategy may allow the easing of restrictions; however, it is essential that the limits around the use of the technology are set out clearly in law, are proportionate, time-bound and subject to ongoing review and independent scrutiny.



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- <sup>i</sup> [Coronavirus test, track and trace plan launched on Isle of Wight](#), Department of Health and Social Care Press Release, 4 May 2020.
- <sup>ii</sup> NHSX is a joint unit bringing together teams from the UK Department of Health and Social Care, NHS England and NHS Improvement.
- <sup>iii</sup> <https://www.gov.scot/publications/coronavirus-covid-19-test-trace-isolate-support/pages/6/>
- <sup>iv</sup> <https://www.gov.scot/news/contact-tracing-technology-piloted/>
- <sup>v</sup> <https://www.gov.scot/publications/coronavirus-covid-19-test-trace-isolate-support/pages/6/>
- <sup>vi</sup> <https://www.bbc.co.uk/news/technology-52650576>
- <sup>vii</sup> The Scottish Human Rights Commission's briefings have been collated in one section of its website, available here: <https://www.scottishhumanrights.com/covid-19/>
- <sup>viii</sup> *Silver and Others v the United Kingdom* no. 7136/75, 25 March 1983.
- <sup>ix</sup> *S and Marper v the United Kingdom* no 30562/04, 30566/04, 4 December 2008.
- <sup>x</sup> The seven data protection principles are: Data minimisation; Purpose limitation; Storage limitation; Integrity and confidentiality; Lawfulness, fairness and transparency; Accountability and accuracy.
- <sup>xi</sup> A further concern related to uptake is that the app will largely be based on self-reporting of symptoms. As the symptoms of coronavirus could be due to another illness, there is the possibility that an individual will be asked to self-isolate a number of times, with no confirmation that they had been in contact with a confirmed coronavirus patient. The use of contact tracing apps without widespread testing could therefore lead to decreased public confidence and, in turn, decreased uptake over time.
- <sup>xii</sup> <https://committees.parliament.uk/publications/1026/documents/8461/default/>