

GENERAL CRIME BRIEFING NOTE

Offences and Powers relating to Potentially Infectious Persons under the Coronavirus Act 2020

Date: 30 March 2020

Statute: Coronavirus Act 2020, section 51 and schedule 21.

Contact at QEB: Philip Stott

On 25 March 2020, the Coronavirus Act 2020 ('the 2020 Act') received Royal Assent and became law. It will remain in force for 2 years from that date, unless extended. This briefing note summarises some of the new offences created by the 2020 Act to combat the infectious threat posed by close contact between people.

This note deals with Section 51 and Schedule 21 of the 2020 Act which confer powers in relation to potentially infectious persons in a transmission control period. A separate note has addressed Section 52 and Schedule 22 which confer powers to issue directions in relation to events, gatherings and premises. Both notes only address those powers in so far as they relate to the law of England, although similar provisions have been enacted in respect of all four home nations. A further update from QEB has addressed the amended court procedure in relation to remote participation in the criminal justice system.

What are Potentially Infectious Persons and Transmission Control Periods?

Under Schedule 21, a 'potentially infectious person' is someone who either (a) is, or may be, infected with coronavirus and there is a risk that the person might infect others with coronavirus, or (b) has been in an infected area in the past 14 days. An 'infected area' is a country, territory or area that is outside the United Kingdom and that has been designated as such by a Secretary of State.

If a Secretary of State is of the view that (a) the coronavirus constitutes a serious and imminent threat to public health in England, and (b) the powers under Part 2 of Schedule 21 would be an effective means of delaying or preventing significant further infection in England, then they may make a declaration under paragraph 4 to that effect. That begins a 'transmission control period' under paragraph 5. When the Secretary of State is no longer of that view, they must revoke the declaration and the transmission control period will end.

Part 2 of Schedule 21 addresses the new powers exercisable in England in such a period.

Under the transitional arrangements in Part 2 of Schedule 21, the declaration made by the Health Secretary on 10 February 2020 has effect for the purposes of paragraph 4 of the 2020 Act. We are therefore currently in a 'transmission control period' for the purposes of the Act.

What are the powers conferred by Part 2 of Schedule 21?

They are extremely wide-ranging.

If, during a transmission control period, a public health officer ('PHO'), has reasonable grounds to suspect that someone is potentially infectious, then the PHO may direct that the person goes immediately to a place suitable for screening and assessment, or remove (or have a constable remove) the person to such a place. The PHO must be of the view that such actions are necessary and proportionate for the interests of the person themselves, for the protection of other people or for the maintenance of public health. The PHO must inform the person of the reason for the direction or removal, and that it is an offence to fail to comply with a direction or to abscond after a removal. Identical powers may be exercised by an immigration officer in the course of exercising any of their functions, or by a constable.

(A PHO is an officer of the Secretary of State designated by the Secretary of State for the purposes of Schedule 21, or a registered public health consultant¹ who is so designated.)

When at a place for screening or assessment, a person may be directed by a PHO to remain there for up to 48 hours or go to another suitable place, to submit to screening and assessment, to provide samples and to answer questions or produce documents about their health and other relevant matters (including travel history and contact with other persons). A PHO may also direct or remove a person to another suitable place for those purposes but the PHO must again inform the person of the reason and that it is an offence to fail to comply. When at another such place, the 48-hour limit begins afresh.

An immigration officer may also keep a person at a place for screening and assessment for up to 3 hours, and a constable may keep a person at such a place for up to 24 hours, until such time as a PHO can exercise their functions as described above. Those respective periods can be extended for a further 9 hours by a chief immigration officer, or for a further 24 hours by a police officer of the rank of superintendent or above.

If a person is confirmed by a screening to be infected with coronavirus, or a PHO has reasonable grounds, following an assessment, to suspect such infection, then the PHO may under paragraph 14 of Schedule 21 impose such requirements and restrictions as the PHO considers necessary and proportionate in the interests of the infected person, for the protection of other people, or for the maintenance of public health. Those include requirements to provide information, contact details, further screening, to remain at a specified place for a period, to remain at a specified place in isolation from others and/or to restrict travel, activities (including business activities) and contact with other persons.

¹ Not defined in the 2020 Act, but presumably a person registered as such in a professional register overseen or run by the Professional Standards Authority for Health and Social Care

A PHO must have regard to a person's well-being and personal circumstances when making decisions under paragraph 14 and again, the officer must inform the person affected of the reason for the requirements and restrictions and that it is an offence not to comply with them.

The requirements or restrictions under paragraph 14 may last for up to 14 days, with a mandatory review after every 48 hours. If a PHO suspects that the person will be potentially infectious at the end of the 14 days, then the restrictions or requirements may, if necessary and proportionate, be extended for a further 14 days, with a mandatory review after every 24 hours.

Those restrictions and requirements under paragraph 14 may be enforced by a constable or PHO removing a person to, or keeping a person at, the specified place, and, if a person absconds, by a constable taking them into custody and returning them to a specified place.

All directions, instructions, requirements or restrictions may be given orally or in writing. A restriction or requirement by a PHO under paragraph 14 must be followed as soon as reasonably practicable by a notice in writing.

A PHO, constable or immigration officer may give reasonable instructions to a person in connection with any direction or removal under Part 2 of Schedule 21, but they must inform the person of the reason for the instruction, and that it is an offence to fail to comply.

An individual who has responsibility (custody or charge for the time being, or parental responsibility within the meaning of the Children Act 1989) for a child (someone under the age of 18) must, so far as is reasonably practicable, secure that the child complies with any direction, instruction, requirement or restriction given to or imposed on a child under Part 2 of Schedule 21. Where a power is exercised in respect of a child who is **not** accompanied by an individual who has responsibility for them, the person exercising the power must contact such an individual before exercising the power (or if not reasonably practicable, take reasonable steps to contact such an individual afterwards) and inform that individual of what has occurred.

Any person exercising a power under Part 2 of Schedule 21 must have regard to any relevant guidance issued (before or after the passing of the 2020 Act) by a Secretary of State, and any advice given by a PHO in relation to any particular case.

Reasonable force may be used, if necessary, in exercising any power conferred by Part 2 of Schedule 21.

A person on whom a requirement or restriction is imposed under paragraph 14 may appeal against it or any variation or extension to a Magistrates' Court which may confirm, modify or quash the restriction or requirement in question.

There is, however, no statutory right of appeal regarding the exercise of powers available under Part 2 of Schedule 21. As such, the normal powers of judicial review would appear to

be applicable to any issues arising, albeit that the High Court would undoubtedly weigh the particular consequences of a public health emergency very carefully in the balance on any such review.

What are the provisions for appeal in the Magistrates' Court?

The provisions are not specified. It would appear that it would be an exercise of the Magistrates' Courts civil jurisdiction, despite potentially engaging the liberty of the subject.

If so, the relevant test and procedure may be similar to that applicable under licensing appeals like, for example, section 11 of the Private Security Industry Act 2001, which has analogous provisions concerning appeal to the Magistrates' Court (see *SIA v Stewart & Sansara* [2007] EWHC 2338).

The provisions of Article 6(1) (right to fair trial) of the European Convention on Human Rights would undoubtedly be engaged on any appeal, along with Article 2 (right to life), 5 (right to liberty and security) 8 (right to respect for private and family life and one's home) and 11 (right to association).

What criminal offences are created in respect of Part 2 of Schedule 21?

Under paragraph 23 a person commits an offence they

- a) fail without reasonable excuse to comply with any direction, reasonable instruction, requirement or restriction given to or imposed on the person under Part 2 of Schedule 21
- b) fails without reasonable excuse to comply with a duty under paragraph 18(1) or (2)
- c) absconds or attempts to abscond while being removed to or kept at a place under Part 2 of Schedule 21
- d) knowingly provide false or misleading information in response to a requirement to provide information under Part 2 of Schedule 21 or otherwise in connection with the exercise of any power under Part 2 of Schedule 21, or
- e) obstruct a person who is exercising or attempting to exercise a power conferred by Part 2 of Schedule 21.

The offence is punishable by a fine only, up to a maximum of level 3 on the standard scale - currently £1,000.

Under the Powers of Criminal Courts (Sentencing) Act 2000, if the offender is under 14, the maximum fine shall not exceed £250. There are also powers under s.137 of the 2000 Act for a Court to order that a fine imposed on an offender aged 18 should be paid by a parent or guardian.

It may be the case that a failure by a relevant PHO, constable or immigration officer materially to comply with the strict requirements of the Act in exercising any power to impose a direction, instruction, requirement or restriction would afford a defence to an allegation of a crime under paragraph 23.

For example, a failure to inform a person of the reason for the exercise of the power, and the fact that it is an offence to comply, might render the exercise of the power unlawful. Similarly, a substantial failure to follow relevant guidance might render also the relevant officer's actions invalid. The Magistrates' Courts will have to determine what parts of the Act are fundamental to the lawful exercise of these far-reaching powers against the backdrop of a public health emergency requiring the urgent identification and isolation of infectious persons.

This briefing note was produced by Philip Stott. This note should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website <http://www.qebholliswhiteman.co.uk>.