

Coronavirus Act 2020 and the powers of the government to manage individuals infected with Covid-19: How will it affect those who fall ill? (UPDATE)

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The Coronavirus Act 2020 (“the Act”) came into force on 25th March 2020. Among other things, the Act confers powers on public health officers, constables, and immigration officers to enable them to manage potentially infectious persons during the Covid-19 crisis. Schedule 21 of the Act contains provisions that enable the relevant officials to exercise their powers in respect of individuals in England, Wales and Scotland. This article will only focus on Part 2 of Schedule 21, which pertains to the powers of the government in England.

When can the government exercise the powers under the Act?

(a) A declaration of risk is required

The powers are exercisable upon a “declaration of risk of coronavirus” (“the declaration”). A declaration may be made at any time if the Secretary of State is of the view that (i) the incidence or transmission of coronavirus constitutes a serious threat to public health and (ii) the powers conferred by the Act in relation to potentially infectious individuals will be an *effective way of delaying or preventing* significant further transmission. Where the Secretary of State ceases to be of the opinion that the above criteria are met, he or she *must* revoke the declaration. Prior to making or revoking the declaration, the Secretary of State must consult the Chief Medical Officer or any of the Deputy Chief Medical Officers of the Department of Health and Social Care. For the declaration to have legal effect, it must be published online (i.e. on the government website) and must subsequently be published in the London Gazette. A declaration can be made on more than one occasion, and the Act does not contain a limit on how many times the Secretary of State can do so, as long as the relevant criteria under the Act is met.

(b) The Secretary of state does not have an obligation to make a declaration

It is notable that the Secretary of State has a discretion on whether to make a declaration under the relevant provisions. However, the declaration *must* be revoked once the Secretary of State is satisfied that the risk is no longer present and/or the relevant measures are no longer effective in delaying or slowing transmission. The making or revocation of a declaration is a crucial step in the fight against the virus, as the wording of the Act suggests that the powers cannot be exercised in the absence of a declaration.

(c) Duration

The Act does not provide for a minimum or maximum duration of the 'transmission control period', i.e. the period between the making and revocation of a declaration. Theoretically, this means that the 'transmission control period' could last for as long as the Secretary of State is satisfied that there is a risk of coronavirus, and the relevant measures are needed to delay or slow significant further transmission.

What measures can the government take when a declaration is made and will enforce those measures?

(a) Potentially infected individuals can be removed and placed in places suitable for screening and assessment

Public health officers, constables and immigration officers have the power to direct or remove persons to a place suitable for screening and assessment, where they have reasonable grounds to suspect that a person is potentially infectious. This power is only exercisable if it is necessary and proportionate to do so (i) in the interests of the said person, (ii) for the protection of other people, or (iii) for the maintenance of public health. Where a public health officer, constable, or immigration officer exercises the powers conferred by the Act, they must inform the relevant individual of the following:

- (i) The reason for their direction or removal to a relevant place for screening or assessment, and

- (ii) That failure to comply with such directions constitutes an offence.

To exercise the powers, a relevant official must have 'reasonable grounds to suspect' that a person is potentially infectious. The Act does not provide additional information on what constitutes 'reasonable grounds to suspect', but case law - particularly in the context of criminal law and cases involving deprivation of liberty – suggests that there must be a factual basis for the suspicion. However, there is a wide degree of executive discretion; it is anticipated that individuals exercising the power may do so where a potentially infectious person displays one or more of the recognised symptoms or has been in contact with a confirmed case. Where the decision to direct or remove is made by a constable or immigration officer, they must – if practicable to do so – consult with a public health officer prior to exercising these powers.

(b) What could happen once a potentially infectious person is taken to a place suitable for screening or assessment

A public health officer may require a potentially infectious person to remain at a place suitable for screening or assessment for up to 48 hours, if it is deemed necessary and proportionate, whether because it is in the interests of that person, or for the protection of other people. The potentially infectious person must be informed of the reason for this requirement, the maximum period they are required to remain there, as well as that failure to comply with the requirement is an offence. Public health officers and constables have powers of enforcement in case of non-compliance.

A public health officer may impose a requirement on an individual to be screened and assessed, which could include providing biological samples for testing (i.e. blood, urine, swabs), answering questions about their health, travel history, and contact with others, produce relevant documents that will enable to trace contacts, as well contact details of others he or she may have come into contact with. The following requirements may be imposed on a person after screening or assessment:

- (i) Direction or removal to another suitable place;
- (ii) Requirement to remain at a specified place for a specified period of time;
- (iii) Requirement to remain in isolation for a specified period of time;
- (iv) Requirement to provide his or her contact details;
- (v) Requirement to attend a further screening or assessment.

Any specified period of time may not exceed 14 days (unless necessary and proportionate to extend, subject to a mandatory further health assessment and review after 48 hours and - if extended further – subject to review every 24 hours). If a period is extended after an initial restriction is imposed, that period – unless it pertains to a requirement to remain in self-isolation – cannot exceed 14 days.

Further restrictions that can be imposed after screening and assessment include travel restrictions, restrictions on contact with certain individuals, as well as restrictions on certain activities. It is important to note that at all times, public health officers have a duty to inform affected persons of the reasons why restrictions are imposed, the length of time these restrictions are valid for, as well as the consequences of non-compliance. Decisions to impose restrictions on an individual, or any further decisions to extend the period of a restriction, are appealable to the magistrates' court.

(c) The powers of constables and immigration officers

Constables and immigration officers have the same powers as public health officials in directing and removing potentially infectious individuals to a place suitable for screening and assessment. Constables also have enforcement powers where affected individuals refuse to comply with requirements and directions when at the place of screening and assessment. In addition, a constable or immigration officer can keep a potentially infectious person at a place suitable for screening and assessment until a public health officer can review them. A potentially infectious person cannot be kept at such a place for longer than 24 hours by a constable, or longer than 3 hours by an immigration officer. There is also a requirement on constables and immigration officers to consult with a public health officer, if possible, prior to exercising their powers. This is coupled with the requirement to explain the reasons, length of time, and consequences of failure to comply.

Can the powers be exercised to detain a child?

The abovementioned powers are also exercisable against children. However, any directions given in line with the powers exercisable under the Act must be given to an individual who has responsibility for the relevant child. If there is no suitable adult with responsibility for a child, the relevant official – prior to exercising the powers under the Act – must (if

practicable) contact an individual who has responsibility for the child, or appoint an individual that the relevant official considers to appropriate (having regard to the views of the child). If the above steps cannot be taken practicably, then the official exercising the power must take all reasonable steps after exercising the power to inform the relevant adult. Any rights of appeal are exercisable by the adult with responsibility for the child.

Are there are any formalities in respect of the directions, instructions, or requirements imposed on potentially infectious individuals?

Any direction, instruction, or requirement under Part 2 of Schedule 21 must be given or imposed orally or in writing. Where an instruction, requirement, or direction is given orally by a public health officer after assessment, the relevant public health officer must as soon as is reasonably possible provide a notice in writing.

Who will be affected?

Those who will be affected by the measures are 'potentially infectious persons', both adults and children. The Act defines a 'potentially infectious person' as (i) any person who *is* or *may be* infected or contaminated with coronavirus, and there is a risk that the person might infect or contaminate others, and/or (ii) anyone who has been in an infected area with the 14 days preceding that time. The wording of the Act suggests that this applies to both confirmed and unconfirmed cases (i.e. those who exhibit symptoms, but have not been tested), as well as 'infected' and 'contaminated' individuals, i.e. individuals who have tested positive for the virus, but potentially also those who have had contact with confirmed cases.

Who will be affected? What will be the effects of non-compliance?

A person will commit an offence in the following circumstances:

- (i) Where a person fails without reasonable excuse to comply with any direction, requirement or condition imposed on them by a person or authority exercising the powers contained in Part 2, Schedule 21.

- (ii) Where a person fails without reasonable excuse to comply with any of the prescribed duties of individuals who have responsibility for a child (see paragraph 18 (1) and (2)).
- (iii) Where a person absconds or attempts to abscond while being removed or kept at a suitable place, as described above.
- (iv) Where a person knowingly provides false or misleading information in response to a requirement to do so.
- (v) Where a person obstructs another who is exercising or attempting to exercise a power conferred by the Act.

A person who is found guilty of any of the above offences will be liable on summary conviction to a fine not exceeding £1000.

The Coronavirus Act and individual rights

Schedule 21 of the Act potentially engages articles 5 and 8 of the European Convention on Human Rights ('ECHR'), as it confers powers on agents of the state to deprive affected individuals of their liberty for short or longer periods of time, as well as impose restrictions on movement (not all restrictions on movement fall within the ambit of article 5 ECHR), and make relevant requests for information, potentially interfering with an individual's right to privacy. However, most human rights are qualified, i.e. there are prescribed exceptions and situations in which the government can interfere with such rights; for example, where there is a national emergency. The following observations can be made in relation to the measures proposed by the government:

- Article 5 ECHR provides for a number of exceptions to the general rule that nobody shall be deprived of their liberty. One such exception is where an individual is detained lawfully for the prevention of the spreading of an infectious disease. Thus, powers to remove and detain potentially infectious individuals will not necessarily breach article 5.
- Article 8 ECHR, which safeguards the right to privacy and family life, allows for exceptional circumstances in which the right can be interfered with where it would be in the interests of public safety. In the context of a serious public health crisis, requests to provide further information and contact details of key individuals (to enable the relevant authorities to contain the spread of the virus) will not necessarily breach article 8.

- All interference with individual rights must be necessary and proportionate, whatever the circumstances. This means that the powers of the government must be exercised in a manner which is not excessive and the relevant interference is proportionate to the harm it seeks to prevent. The measures introduced by the Act are necessary to respond to one of the biggest public health crises in a century. Their proportionality will depend on the facts of each case, and how the powers are subsequently exercised.
- The Act provides for a right of appeal, which individuals can rely on if any of the restrictions imposed on them are disproportionate. The exercise of powers conferred on the Secretary of State and other government arms are subject to judicial review in the usual way.
- Slightly concerning is the fact that the Act has an expiry period of 2 years, with a possibility for extending the duration of the Act for another 6 months (a so-called ‘sunset clause’). Some have argued that this is a disproportionately long period of time for an Act that effectively amounts to emergency legislation, especially where the power to amend the expiry date lies in the hands of Ministers, not Parliament.

In conclusion, even though the Act has introduced measures which are both necessary and proportionate to enable the government to manage the worst public health crisis in a generation, the duration of such measures, and the manner in which the relevant powers are exercised, will need to be scrutinised continuously to ensure that the rights of individuals are not disproportionately interfered with.

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