

# Crime Newsletter

## An update to our clients during the COVID-19 crisis from the Crime Team at Guildhall Chambers

### Introduction

We hope you and your families are safe and well.

These are unsettling times. We are social animals. Like you, we miss being together. We miss going to court and the camaraderie of the robing room. We miss the person-to-person contact with our clients. We miss Horts (other pubs were available).

But, like many of you, we are working. We are attending court hearings remotely around the Circuit. Ray Tully shares with us his views on remote hearings, the challenges and warns us about the future. Following our first webinar, David Scutt and I have produced here articles on the Coronavirus Act 2020 and The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (as amended). We have also included links to materials you will find useful.

We hope you will find this informative and interesting. As ever, if there are specific matters you'd like us to include in a webinar or seminar, please do not hesitate to let us know.

We remain committed to providing you with the best service we can. We are here to help, barristers and clerks. Please do not hesitate to contact us if you think we may be able to do so in any way.

Finally, follow government advice, stay at home, protect the NHS, save lives and please keep well.

Christopher Quinlan QC, Team Head

Lucy Northeast, Senior Practice Manager

If you missed our recent webinar hosted by Christopher Quinlan QC and David Scutt 'Criminal Offences and Police Powers during the Coronavirus Crisis' you can download the slides [here](#).



# There May Be Trouble Ahead...

There may just be one or two of you out there who are old enough to recall the Morecambe and Wise Christmas Special in which Angela Rippon appeared at a desk reading the News in sombre tones, only for an Orchestra to strike up as she then emerged from behind her desk to reveal she was dressed very differently from the waist down – before strutting her stuff with Eric and Ernie in a spoof of the classic Fred & Ginger number ‘Let’s Face the Music and Dance’. Those of us working from home, attired entirely appropriately from the waist up whilst staring at the camera of our laptops, may know exactly how she felt. (If you missed out first time round, give yourself a treat; [www.bbc.co.uk/programmes/p00bpkwp](http://www.bbc.co.uk/programmes/p00bpkwp))

These are strange times. Hands up if a month ago you’d even heard of Skype for Business / Microsoft Teams or Zoom – let alone grappled with adjusting your background settings when video conferencing.

It has been a bumpy ride over the last few weeks. The Criminal Justice System more than any other area of the law, depends upon Court Hearings that take place in public and involve oral advocacy. The restrictions placed upon the courts have brought difficulties. Cases are not being tried in the Crown Courts. We are doing our best with remote technical solutions to make the system work. The CVP has been used for the first time in Leeds and may be available to us, though we know not when. Hopefully, that will help facilitate meaningful conferences with our clients in custody. I know from speaking to many of you how the disruption has inflicted real damage to your businesses and organisations.

## So what is the current state of play and how are things likely to play out in the weeks and months ahead of us?

The short answer is that nobody truly knows – but there are various ideas circulating:

The Lord Chancellor and the Lord Chief Justice have set up a committee to consider when and how jury trials might again get up and running. The committee is headed by Mr Justice Edis and contains representatives drawn from all interested parties including the Bar Council, CBA and Law Society. (I note that according to social media reports the Committee includes Bristol’s very own Ian Kelcey as a representative of Solicitors). We will have to await a report by the committee – but it does not have the feel of something that will be putting forward any swift solutions.

I (remotely) attended a recent meeting of the CBA National Executive Committee during which some of the ideas currently in circulation were kicked around.

Some of you may have read about the experiment conducted by Justice and Oxford University Academics into the potential for conducting a wholly ‘remote’ jury trial. This involved actors playing the parts of the defendant and jurors, with the ‘trial’ overseen by a senior retired Judge and conducted by two Silks. When I first heard about the scheme, I thought it seemed completely mad cap – and more worryingly, potentially dangerous.

We all share an instinctive wish to find creative solutions. It’s part of the DNA of any advocate that we want to help. The danger in collaborating with such experiments is they may well be used in the future as ‘proof’ that a carefully calibrated justice system, built up over the centuries can be dismantled in favour of ‘remote’ justice – which just happens to be cheaper. Even if some of the participants think they may be demonstrating the implausibility of such a scheme, that is no guarantee as to how it will be viewed by The Treasury and MOJ – particularly when faced with a hefty rise in the National Debt. I am afraid that co-operation with such experiments may be somewhat naïve.

The truth of course is that even if there was an appetite on the part of some to move to remote jury trials, no such scheme could be brought into being in the short-term. It’s perhaps possible to envisage that the idea might be aired as a PR stunt for the odd high profile trial here or there (to give the impression that the wheels of justice are still turning), but beyond that it has no substance.

## So what other ideas are being mooted?

Some have suggested the temporary introduction of ‘Diplock Courts’ (as used in Northern Ireland during ‘The Troubles’). These would allow for Judge only trials. Thankfully, there does not appear to much of an appetite for such a drastic solution that would so seriously undermine our civil liberties.

It has been pointed out that during the Second World War the Administration of Justice (Emergency Provisions) Act 1939 allowed for jury trials to be conducted using just 7 jurors. Might this offer a possible way forward? It should be noted that even during the War these provisions did not apply to murders – or other serious cases. Depending upon how long the current lockdown goes on for, it is possible that this idea may yet gain some traction. It would allow for some social distancing by jurors. There has even been talk of using other public buildings which might allow for even greater spacing – or even the use of two Courts for a single trial allowing for greater jury separation.

As we go to press the Lord Chief Justice and Lord Chancellor have taken to the media airways. They have confirmed that all of these “radical” options are under active consideration. They have spoken of the possibility of ‘some’ trials’ being up and running within a month. However, they are both clear that none of these options offer a realistic long-term solution.

The truth is that the more you think about the practicalities of what is involved in any jury trial, the less likely it seems that there will be solution until the wider problems resulting from the virus have been addressed. Whatever the level of reassurance provided, can we really expect prospective jurors to run the risks associated with coming to (often unclean) Crown Court and mixing with others?

As I sat at my desk the other day, staring at my screen awaiting an email from the Court to invite me to join yet another remote hearing, I found myself feeling completely discombobulated. There is a feeling of no longer being in control. Like all of you, I have spent a professional lifetime getting to court in good time for any hearing, so that I can meet my client / police / witnesses, meet my opponent, check in with the Court, sit in the Courtroom ahead of my hearing to gauge the mood of my Judge and pick up on any pointers that might be of use when my case eventually gets called on. These benefits are all lost when conducting a hearing remotely in front of a laptop in my study. They are important. They allow us to better represent our clients. That is so even in the most straightforward of Pre-Trial hearings. There is no adequate substitute to turning up at Court.

For now, we’ll continue to muddle through and do our best to keep the CJS operative – all be it, on life support. I trust we will never lose sight of just how important it is for us to conduct our advocacy in the same courtroom, at the same time and in public. Hopefully our goodwill will not be used against us in the future.

Until a satisfactory solution emerges, I can do no better than offer you the wise words of Irving Berlin:

*Before the Fiddlers have fled  
Before they ask us to pay the bill  
And whilst we still have the chance  
Let’s face the music and dance*

(suitably attired from the waist up)

Ray Tully

# Schedule 21, Part 2 of the Coronavirus Act 2020

Schedule 21, Part 2<sup>1</sup> of the Coronavirus Act 2020 came into force on 26 March 2020 and will expire after two years (subject to 'alteration' provisions). The Coronavirus Act 2020 revokes the Health Protection (Coronavirus) Regulations 2020 (which came into force on 10 February 2020)<sup>2</sup>.

This article is intended to provide a short summary of the powers created under Schedule 21, Part 2. It deals only with powers applicable to England and concentrates on the powers vested in public health officers and police officers.

The powers are set out and dealt with in paragraphs 4 to 17 of Part 2. They are vested in public health officers, police officers and immigration officers and fall into three categories:

1. the power to direct or remove potentially infectious persons to a suitable place for screening and assessment (paragraphs 6 and 7);
2. powers exercisable once a potentially infectious person is at a suitable place for screening and assessment (paragraphs 8 to 13);
3. powers exercisable after screening and assessment (paragraphs 14 to 17).

These powers apply during the "transmission control period" which can be activated and deactivated by declaration/revocation by the Secretary of State for Health. The current transmission control period commenced on 26 March 2020.

A "potentially infectious person" is defined in paragraph 2 as:

- a person who is, or may be, infected or contaminated with coronavirus, and there is a risk that the person might infect or contaminate others with coronavirus; or,
- a person who has been in an "infected area" (a country or territory outside the UK) within the 14 days preceding that time.

"Public health officers" are defined in paragraph 3. Police Guidance (issued on 3 April 2020) advises officers to contact their local health protection team (who are on call 24 hours) to find out who their local public health officer is<sup>3</sup>.

THE POWER TO DIRECT OR REMOVE POTENTIALLY INFECTIOUS PERSONS TO A SUITABLE PLACE FOR SCREENING AND ASSESSMENT (paras 6 and 7):

A public health officer, police constable or immigration officer who has reasonable grounds to suspect<sup>4</sup> that a person is potentially infectious may:

- a. direct that person to go immediately to a place specified in the direction which is suitable for screening and assessment; OR
- b. remove the person to a place suitable for screening and assessment.

A public health officer exercising this power may request a police constable to remove a person to a place suitable for screening and assessment, and the police constable may then do so<sup>5</sup>.

There are conditions applicable to police officers and immigration officers in the exercise of this power:

1. They MUST, before exercising the power to direct or remove a potentially infectious person, consult a public health officer unless it is impractical to do so; AND

2. They must consider it necessary and proportionate to exercise the power<sup>7</sup>:

- in the interests of the potentially infected person; or
- for the protection of other people; or
- for the maintenance of public health; AND

3. They must inform the person of the reason for directing or removing them and that it is an offence to fail, without reasonable excuse, to comply with the direction or, where the person is removed, to abscond.

Police Guidance issued on 3 April 2020 by the National Police Chief's Council and The College of Policing contains the 'mantra': *Support Public Health – exceptional powers for exceptional circumstances only*.

The Guidance continues:

*"If a constable has reasonable grounds to suspect a person is potentially infectious they may direct or remove that person to a place suitable for screening and assessment or keep the person at that place until a public health officer can undertake the screening and assessment. This should be the absolute exception.*

*Remember: Engage, Explain, Encourage, Enforce. Enforcement is your last option.*

*Police officers should obtain advice from a PHO when considering whether they have reasonable grounds (because they are not medical practitioners). Advice can be given over the telephone. CV symptoms can be vague and it is important we do not turn to these powers in haste if we see someone with a cough or temperature.*

*There are powers afforded to you under the Act to direct and remove a potentially infectious person to a medical facility for screening and assessment. You must tell them the reason for the instruction and that it is an offence to fail to comply. But your first response should be to advise them: 'you need to go to hospital for treatment/testing' ... 'you need to go home and seek medical advice, call 111'*

*Or with the prior advice of a public health officer, you could take them to hospital or a prearranged medical facility as a suitable place for testing*

*Note: A 'suitable place for testing', is similar to a 'place of safety' under the Mental Health Act 1983 in that there is not an exhaustive list of places. The public health officer would need to determine where a suitable place is and most likely this will be a medical facility or potentially someone's home, we should avoid custody suites being used for this purpose.*

*All this activity should be pre-planned with medical practitioners and contingencies and risks discussed – there should be local procedures in place ..."*

POWERS EXERCISABLE ONCE A POTENTIALLY INFECTIOUS PERSONS IS AT A SUITABLE PLACE FOR SCREENING AND ASSESSMENT (paras 8 to 13):

These powers can only be exercised if a public health officer:

1. has reasonable grounds to suspect that a person is potentially infectious; AND
2. considers that it is necessary and proportionate to exercise the powers:

1. Affecting England only (other Parts affect Scotland, Wales and Northern Ireland)  
2. Any offences committed between 10 February 2020 and 26 March 2020 will be dealt with under the 'old' regulations  
3. gov.uk/guidance/contacts-phe-health-protection-teams

4. Equivalent to section 24, PACE  
5. para 6(2)(c)  
6. para 7(5)  
7. para 7(3)

- in the interests of the potentially infectious person;
- for the protection of other people; or
- for the maintenance of public health.

If conditions 1) and 2) are met, then a public health officer may:

- require the potentially infectious person to remain at the place for a period not exceeding 24 hours – the person must be informed of the reason for imposing the requirement, the maximum period of time that the person may be required to stay there and that it is an offence to fail to comply with the requirement;
- require the potentially infectious person to be screened and assessed (includes taking a biological sample/providing information) and impose other requirements (eg production of documents/provision of contact details);
- if it is considered appropriate for the purposes of screening and assessment:
  - direct the person to go immediately to another suitable place;
  - remove the person to another suitable place; or
  - request a police constable to remove the person to another suitable place.

EXCEPTIONALLY (see the Police Guidance) – where a person is at a place for screening and assessment and a police constable has reasonable grounds to suspect that the person is potentially infectious they may keep that person at that place until a public health officer can exercise the functions under paragraphs 9 to 11 for a period not exceeding 24 hours (in the case of a police constable).

If EVEN MORE EXCEPTIONALLY if it has not been reasonably practicable for a public health officer to exercise their powers under paragraphs 9 to 11 an officer of the rank of Superintendent (or above) can consent to (authorise) detention for (up to) another 24 hours.

(In the case of immigration officers – these time periods are 3 hours extendable [by a chief immigration officer] to a further 9 hours).

POWERS EXERCISABLE AFTER SCREENING AND ASSESSMENT (paragraphs 14 to 17):

A public health officer may impose requirements and restrictions in circumstances where:

- a person has been assessed and screened by a public health officer and EITHER the screening has confirmed that the person is infected/contaminated by Coronavirus OR the screening was inconclusive; or
- a person has been assessed by a public health officer and the officer has reasonable grounds to suspect that the person is potentially infectious.

If this applies, a public health officer may impose such requirements and restrictions on the person as they consider necessary and proportionate:

- in the interests of the potentially infectious person;
- for the protection of other people; or
- for the maintenance of public health.

Potential requirements include (this is a non-exhaustive list):

- to provide information to the public health officer or any specified person;
- to provide details by which the person may be contacted during a specified period;
- to go for the purposes of further assessment or screening to a

specified place suitable for those purposes and do anything that may be required under paragraph 10(1);

- to remain at a specified place (which may be a place suitable for screening and assessment) for a specified period;
- to remain at a specified place in isolation from others for a specified period.

When deciding whether to impose requirement(s) to remain at a specified place for a specified period and/or to remain at a specified place in isolation for a specified period (last two bullets) - the public health officer must have regard to the person's wellbeing and personal circumstances.

Potential restrictions include (again, a non-exhaustive list):

- a restriction on the person's movements or travel (within or outside the UK);
- a restriction on the person's activities (including work/business);
- a restriction on the person's contact with other persons or with other specified persons.

Where a public health officer imposes a requirement or restriction, they must inform the person of the reason for so doing and that it is an offence not to comply.

Requirements to remain and restrictions must not exceed 14 days. In any event the public health officer must assess the person within 48 hours and reconsider whether it is necessary and proportionate to continue to impose the requirement or restriction.

Following any reconsideration, a public health officer may revoke a requirement to remain or substitute a different specified period (which, again, must not exceed 14 days).

A requirement to remain may be enforced:

- by a police constable or public health officer removing the person to the place;
- by a police constable or public health officer keeping the person at the place; or
- if the person absconds, by a police constable taking the person into custody and returning them to that place or another place specified by a public health officer.

Police Guidance (see above) states:

*"In consultation with a public health officer, a constable may keep a person at a place suitable for screening and assessment for up to 24 hours. This can be extended by a superintendent (or above) by another 24 hours, if the constable thinks it's necessary and proportionate to do so. We do not anticipate officers routinely guarding patients for this length of time, we expect hospital security staff to undertake this role or to replace the officer at the earliest opportunity.*

*Your job as a police officer is to be there if the detained person does not comply with the requests of a public health officer ... Custody is a last resort.*

*You should not be acting unless Public Health give you clear, unequivocal guidance that the individual with whom you are dealing either has the virus or they are at risk, in which case it is appropriate to act*

*Our advice is to never act without the prior advice of Public Health, but the Act does make provision for you to do so of your own accord, therefore it is ultimately the decision of your chief constable how these provisions are to operate for you locally.*

*In operational practice, there are two states (1) prior to testing and (2) post testing; police officers have a greater justification for intervention if the individual in question has been subject to a positive test for coronavirus.*



*We are developing operational scenarios to assist you, but we see several scenarios that may present themselves where this may become more challenging. This may be when dealing with instances where:*

1. *one party alleges the other has coronavirus, as part of some other dispute.*
2. *someone alleges the presence of coronavirus, for some immediate apparent gain, such as accommodation.*
3. *someone alleges they have coronavirus to avoid some other sanction.*
4. *at the point of release from custody you suspect the detainee has coronavirus (untested), but there is no lawful power to detain them any further.*

*In each instance there is no reason you cannot seek advice from a public health officer even if this is remotely.*

*We don't expect you to use these powers in the course of ordinary duty and you really shouldn't unless asked by a public health officer."*

#### CHILDREN (defined as persons under 18) (paragraph 18):

An individual who has responsibility for a child (defined as an individual with custody or charge of the child for the time being or parental responsibility for the child) must:

1. so far as reasonably practicable, secure that the child complies with any direction, instruction, requirement or restriction given to or imposed on the child;
2. provide to the person exercising a power under Schedule 21 such information and assistance in relation to the child as is reasonably necessary and practicable in the circumstances.

A power to direct or require a child to go to a place may instead be exercised by directing or requiring an individual who has responsibility for the child to take the child to that place.

The powers under paragraph 10 (screening and assessment) or paragraph 14 (requirements and restrictions) can only be exercised in the presence of the individual who has responsibility for a child or, in the absence of such a person, an adult that is considered to be appropriate (having regard to the views of the child).

**Where a power is exercisable in relation to a child, but the child is not accompanied by an adult with responsibility for the child, the person by whom the power is exercisable must:**

- if practicable contact an individual who has responsibility for the child before the power is exercised; or
- if that is not practicable, take reasonable steps after the power has been exercised to contact such an individual and inform them of any exercise of the power in relation to the child.

#### **OFFENCES (para 23):**

1. *A person commits an offence if the person—*
  - a. *fails without reasonable excuse to comply with any direction, reasonable instruction, requirement or restriction given to or imposed on the person under this Part of this Schedule,*
  - b. *fails without reasonable excuse to comply with a duty under paragraph 18(1) or (2) (duties of individuals who have responsibility for a child),*
  - c. *absconds or attempts to abscond while being removed to or kept at a place under this Part of this Schedule,*
  - d. *knowingly provides false or misleading information in response to a requirement to provide information under this Part of this Schedule or otherwise in connection with the exercise of any power under this Part of this Schedule, or*

- e. *obstructs a person who is exercising or attempting to exercise a power conferred by this Part of this Schedule.*
2. *A person guilty of an offence under this paragraph is liable on summary conviction to a fine not exceeding level 3 on the standard scale."*

Police Guidance (issued on 3 April 2020):

*"If an individual commits any of these offences, then simply follow the ordinary criminal justice process.*

*We must reiterate the appropriate place for sick individuals is a medical facility, custody will always be a last resort.*

*Medical advice should always form part of your planning."*

#### **APPEALS (paragraph 17):**

A person made subject to a requirement or restriction (paragraph 14) may appeal against it (or any variation of it or any extension of the period) to a Magistrate's Court.

As of 30 March 2020, Magistrates' Courts are only hearing a limited category of cases (including "civil applications relating to public health legislation") – this is assumed to include appeals under paragraph 17

#### **Ancillary Powers (paragraph 20):**

- a. A public health officer, police constable or immigration officer may give reasonable instructions to a person in connection with:
  - a direction given under Part 2 of Schedule 21
  - removing a person or keeping a person at a place under a power conferred under Part 2 of Schedule 21

In giving reasonable instructions – they must inform the person of the reason for the instruction and that it is a criminal offence not to comply with it;

- b. a power to remove a person to a place includes a power to keep the person for a reasonable period pending their removal;
- c. a police constable or immigration officer may use reasonable force, if necessary, in the exercise of a power conferred by Part 2 of Schedule 21;
- d. a police constable may enter any place for the purpose of exercising a power conferred by Part 2 of Schedule 21.

## Conclusion

The media/social media contains very few examples/comments in respect of the exercise of these particular powers.

#### **There may be a number of reasons for this:**

- they are being exercised (by and large) sensibly, reasonably and proportionately;
- potentially infected persons will, almost certainly, **want** to be tested;
- the basic requirement for public health officers to be involved at all stages (save in very exceptional circumstances) is a powerful 'moderating' factor.

#### **BUT - this example of a wrongful prosecution is shocking**

According to **the report** a young man in Oxford, apparently visiting his vulnerable mother, was prosecuted pursuant to Paragraph 67 of Schedule 21. He entered a guilty plea and he was fined.

The police had no reason to believe that he was a potentially infected person and, on that basis, Schedule 21 simply couldn't have applied – what's more, paragraph 67 applies only to Wales (not Oxford)!! The conviction was set aside when, it seems, realisation dawned.

David Scutt

# THE HEALTH PROTECTION (CORONAVIRUS, RESTRICTIONS) (ENGLAND) REGULATIONS 2020 (as amended)<sup>1</sup>

1. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ('the Regulations') were created under powers granted by the Public Health (Control of Disease) Act 1984<sup>2</sup> ('the 1984 Act'). They were made by Secretary of State for Health, came into force at 13.00 on 26 March 2020 and then laid before Parliament at 14.30 the same day. Similar regulations have been enacted elsewhere in the United Kingdom<sup>3</sup>.
2. They remain in force for six months<sup>4</sup> and must be reviewed at least once every twenty-one days. The first review was on 16 April 2020 and the next no later than 7 May 2020. They were amended by the coming into force at 11.00 on 22 April of The Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020. Reference to the Regulations hereafter is as amended unless otherwise stated.
3. Section 45(1) of the 1984 Act empowers the appropriate Minister (Matt Hancock) by regulations to make *"provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales"* [emphasis added]. The preamble to the Regulations states that they are made *"in response to the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in England"*.
4. In summary the Regulations impose
  - a. Requirements to close premises and businesses and also to cease trading during the emergency period<sup>5</sup>;
  - b. Restrictions on movement<sup>6</sup>; and
  - c. Restrictions on gatherings<sup>7</sup>.
5. In what the Secretary of State for Health expressly states (in the preamble) to be a proportionate response to the pandemic, the Regulations remove or strictly curtail our inalienable
  - a. Freedom to ply certain types of a business or trade;
  - b. Freedom of movement;
  - c. Freedom to worship; and
  - d. Right to assemble.
6. They create criminal offences. The Regulations have been neither debated nor scrutinised by Parliament.
7. You will be familiar with how they have impacted on your daily lives. Social and other media have brought us stories of how they have been interpreted by police forces across the country. No brave constable tried to separate me from my Easter eggs as I loaded them into my shopping trolley. I have walked, free, with my dogs, dodging the wheezing joggers and coughing cyclists. What is the actual law? Let's look in a little more depth.

## Regulations 4 & 5 – closure of businesses

8. Regulation 4 requires the closure of specified businesses in which food and drinks are sold for consumption on the premises. It permits the sale of the same to be consumed off premises. The relevant businesses are listed in Part 1, Schedule 2 and include restaurants, cafes, bars and public houses. Businesses listed in

part 2 of Schedule 2 must cease to carry on business during the emergency period. Those businesses include cinemas, nightclubs, gyms, spas, indoor fitness studios and playgrounds.

9. Regulation 5 imposes further restrictions on businesses. They require the provision of certain goods and services only off premises<sup>8</sup>; the closure (except for limited specified purposes) of businesses providing holiday accommodation<sup>9</sup>, places of worship<sup>10</sup>, community centres<sup>11</sup>, and crematoriums<sup>12</sup>.

## Regulation 6 – restrictions on movement

10. This provision has excited most media attention and comment. As originally enacted Regulation 6(1) mandated that *"during the emergency period no person may leave the place where they are living without reasonable excuse"*. No doubt in response to commentary pointing out that it related only to point of departure from one's home, by amendment on 22 April it was extended to leave or *"to be outside of"*. It does not apply to the homeless<sup>13</sup>. The expression *"where they are living"* is not defined but does include any garden, yard, passage, stairs, garage, outhouse or other appurtenance<sup>14</sup> of such premises<sup>15</sup>.
11. This gives regulatory force to the government's advice to stay (at) home. This is the regulation police are purporting to apply when they interrupt you about your daily business away from your home. Regulation 6(2) provides a non-exhaustive definition of *"without reasonable excuse"*. It includes thirteen examples of what will reasonably excuse being away from home. They include *"to obtain basic necessities... for those in the same household (including any pets or animals in the household) or for vulnerable persons"*<sup>16</sup>; *"to take exercise either alone or with other members of their household"*<sup>17</sup>; *"to seek medical assistance"*<sup>18</sup>; and *"to travel for the purposes of work... where it is not reasonably possible for that person to work... from the place where they are living"*<sup>19</sup>. It is sensible to suppose that any other stated reason will be interpreted by reference to those examples.
12. You do not need to spend long reading the Regulations to conclude they are, in places, vague and open to interpretation. While it is not difficult to see why the person stopped by police who said he was going to buy a 'spliff' was deemed to be in breach of (at least) regulation 6, other journeys may not be so clear cut. What is a basic necessity? Is it different from a necessity? Am I in breach if I exercise away from my home more than once a day? What if I drive from Bristol to Minehead to walk my dog on the beach or to (say) Pensford (from Bristol) to collect dog food? Fortunately, there is no oxygen restriction.
13. As you will know, police whose task it is to enforce the Regulations, have been issued with guidance on these difficult issues. The police do not make the law; but you've more chance of persuading an officer that what you are doing is reasonable if it complies with guidance they should be applying. The National Police Chiefs' Council and College of Policing issued guidance on 26 March, amended five days later on 31 March 2020. It is entitled *"COVID-19 – Policing brief in response to Coronavirus Government Legislation"* and declares that the initial police response should be to *"to encourage voluntary compliance"*. It espouses application of the four Es<sup>20</sup>: Engage, Explain, Encourage and Enforce, in that order. As the document rightly states, neither the Regulations nor the Coronavirus Act 2020 explicitly confer any powers on police officers to stop vehicles or enter premises.

1. With apologies to The Shamen.

2. ss.45C(1), (3)(c), (4)(d), 45F(2) and 45P.

3. Emergency powers to deal with the spread of infection are set out in different pieces of legislation for the four nations.

4. Reg. 12(1).

5. Regs. 4 and 5

6. Reg. 6

7. Reg. 7

8. Reg. 5(1), (2)

9. Reg. 5(4)

10. Reg. 5(5), (6)

11. Reg. 5(7)

14. As I identified in the introduction to this article, and the document states, the purpose of these new powers is to save lives. It is not, for example, public order legislation designed to prevent and to punish public disorder. It is public health legislation; its purpose is to prevent, protecting against, control the spread of an infectious disease, namely coronavirus. I suggest its provisions should be interpreted by reference to that purpose. In the interpretation and enforcement of the Regulations, it is time for at least one, and possibly two of the qualities advocated in *LSI*. Further, since they create crime, any ambiguity should be resolved in favour of the subject.
15. The National Police Chiefs' Council has also published a document entitled *"What constitutes a reasonable excuse to leave the place where you live?"*. It contains examples of what the Council suggests will and will not amount to a reasonable excuse. It is well worth reading. For example, it considers likely to be reasonable buying several days' worth of food, including *"luxury items and alcohol"*; *likely not to be reasonable "buying paint and brushes, simply to redecorate a kitchen"*. As for exercise, likely to be reasonable includes *"going for a run or cycle or practicing yoga"* and *"exercising more than once per day - the only relevant consideration is whether repeated exercise on the same day can be considered a 'reasonable excuse' for leaving home"*. Likely to be unreasonable is *"driving for a prolonged period with only brief exercise"*. It draws no distinction between key or essential workers and non-key or non-essential workers. It does not take a great philosopher to appreciate little is certain and there is much scope for argument.

## Regulation 7 - restrictions on gatherings

16. Regulation 7 prohibits the gathering in a public place of more than two people, unless (1) they are members of the same household, (2) where the gathering is for essential work purposes or (3) to attend a funeral. It also allows for such gatherings, where reasonably necessary, in order to move to a new house or provide care or assistance to a vulnerable person, or to provide emergency assistance or to participate in legal proceedings.

## Enforcement

17. Regulation 8(1) enables a *"relevant person"* (police officer, a police community support officer, someone designated by Local Authority) to take *"such action as is necessary to enforce any requirement"*. Enforcement of Regulation 4 and 5 will be through service of a prohibition notice to the relevant person who, it is reasonably believed, is contravening the restriction<sup>21</sup>.
18. Where a relevant person considers that a person is outside the place where they live, without a reasonable excuse, they may direct that person to return, or to remove them, to the place where they live<sup>22</sup>. There are express powers in relation to children and those accompanying a child. In respect of gatherings of three (3) or more people, they can direct the gathering to disperse or to direct or remove them to the place where they are living. Use of the enforcement powers must be necessary and proportionate and where use of force is permitted, it must be no more than is reasonable.

## Criminal offences

19. The police touchstone should be the four Es. They should not be seeking to move any mountain to issue a FPN or to prosecute. However, the Regulations do create summary offences punishable with a fine in three situations:
- Contravention of a requirement without a reasonable excuse<sup>23</sup>;
  - Obstruction, without reasonable excuse, of a person carrying out a function under the regulations<sup>24</sup>; and
  - Contravention of a prohibition notice or direction or reasonable instruction given to a person under regulation 8 without reasonable excuse<sup>25</sup>.
20. There is a power to deal with breaches by way of a Fixed Penalty Notice ('FPN'). There is no obligation to accept one. If not accepted, a prosecution may follow. If accepted liability for the offence is discharged by paying a fine. It is £60 if paid within 28 days; reduced to £30 if paid within 14 days; and doubled for subsequent offences to a maximum of £960. Police also have discretion not to offer a FPN where the offence is so serious that it merits a prosecution or where there has been repeated offending.

## Conclusion

21. A health crisis like this compels us to confront uncomfortable things. We are reminded, if ever we needed, that we are not forever people. Together, we will emerge, let's hope safe and perhaps more tolerant of each other and appreciative of the freedoms we enjoy.

## Christopher Quinlan QC



12. Reg. 5(8), (9)

13. Reg. 6(4)

14. As they are fond of saying in Cotham

15. Reg. 6(3)

16. Reg. 6(2)(a)

17. Reg. 6(2)(b)

18. Reg. 6(2)(c)

19. Reg. 6(2)(f)

20. We distance ourselves from any suggestions that Es are good.

21. Reg. 8(2)

22. Reg. 8(4)

23. Reg. 9(1)

24. Reg. 9(2)

25. Reg. 9(3)

# Useful Links

## Law

### **Public Health (Control of Disease) Act 1984**

[www.legislation.gov.uk/ukpga/1984/22](http://www.legislation.gov.uk/ukpga/1984/22)

### **Coronavirus Act 2020**

[www.legislation.gov.uk/ukpga/2020/7/contents/enacted](http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted)

### **The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020**

[www.legislation.gov.uk/uksi/2020/350/contents/made](http://www.legislation.gov.uk/uksi/2020/350/contents/made)

### **The Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020**

[www.legislation.gov.uk/uksi/2020/447/made](http://www.legislation.gov.uk/uksi/2020/447/made)

## Police Guidance

### **National Police Chiefs' Council ('NPCC'), 31/3/20**

[www.college.police.uk/Documents/COVID-19-Police-brief-in-response-to-Coronavirus-Government-Legislation.pdf](http://www.college.police.uk/Documents/COVID-19-Police-brief-in-response-to-Coronavirus-Government-Legislation.pdf)

### **National Police Chiefs' Council ('NPCC'), 28/4/20**

[www.college.police.uk/Documents/COVID-19-Policing-Brief-Health-Regs-280420.pdf](http://www.college.police.uk/Documents/COVID-19-Policing-Brief-Health-Regs-280420.pdf)

### **NPCC, 3/4/20**

[www.college.police.uk/What-we-do/Support/Health-safety/Documents/Coronavirus-Act-2020-030420-public.pdf](http://www.college.police.uk/What-we-do/Support/Health-safety/Documents/Coronavirus-Act-2020-030420-public.pdf)

### **College of Policing 3/4/20**

[www.college.police.uk/What-we-do/Support/Health-safety/Pages/Coronavirus-Act-2020.aspx](http://www.college.police.uk/What-we-do/Support/Health-safety/Pages/Coronavirus-Act-2020.aspx)

### **College of Policing 9/4/20**

[www.college.police.uk/What-we-do/Support/Health-safety/Pages/Covid-19.aspx](http://www.college.police.uk/What-we-do/Support/Health-safety/Pages/Covid-19.aspx)

## CPS

### **Coronavirus-related updates**

[www.cps.gov.uk/coronavirus-related-updates](http://www.cps.gov.uk/coronavirus-related-updates)

## UK Government

[www.gov.uk/coronavirus](http://www.gov.uk/coronavirus)



# Guildhall Crime Team

			
Richard Smith QC	Andrew Langdon QC	Christopher Quinlan QC	Anna Vigars QC
			
Ian Fenny	Ray Tully	Nicolas Gerasimidis	David Scutt
			
Charles Thomas	Virginia Cornwall	Stephen Dent	Brendon Moorhouse
			
Mark Worsley	Ramin Pakrooh	Jenny Tallentire	Pushpanjali Gohil



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# Guildhall Crime Team



Tara Wolfe



James Haskell



Susan Cavender



Mary Cowe



Samuel Jones



Caighli Taylor



Gregory Gordon



Alistair Haggerty



Grace Flynn



Nicholas Lee

## Practice Managers



Lucy Northeast  
Senior Practice Manager  
[lucy@guildhallchambers.co.uk](mailto:lucy@guildhallchambers.co.uk)



Grant Bidwell  
Practice Manager  
[grant.bidwell@guildhallchambers.co.uk](mailto:grant.bidwell@guildhallchambers.co.uk)



Shannon Winstone  
Assistant Practice Manager  
[shannon.winstone@guildhallchambers.co.uk](mailto:shannon.winstone@guildhallchambers.co.uk)



Elena Brake  
Assistant Practice Manager  
[elena.brake@guildhallchambers.co.uk](mailto:elena.brake@guildhallchambers.co.uk)



Michael Cregg  
Assistant Practice Manager  
[michael.cregg@guildhallchambers.co.uk](mailto:michael.cregg@guildhallchambers.co.uk)