

## **Crown Prosecution Service – written evidence (CIC0483)**

### **House of Lords Constitution Committee Inquiry into the Constitutional Implications of COVID-19**

#### **Introduction**

1. This response focusses on the questions raised by the Committee that are relevant to the work of the CPS.

#### **Question**

**What new criminal offences have been introduced as part of the Government's response to the pandemic?**

#### **Answer**

2. Offences relating to the Covid-19 pandemic are contained in the Coronavirus Act 2020 (the Act) and various Coronavirus Regulations (the Regulations), with separate Regulations for England, Wales and local areas.

#### **Coronavirus Act**

3. The offences under the Act relate to:
  - Potentially infectious persons being required to undergo screening (section 51 & schedule 21).
  - Secretary of State declarations and directions in relation to prohibitions, requirements and restrictions on events, gatherings and premises (section 52 & schedule 22). These are distinct from Regulations that place restrictions on gatherings and businesses.
  - Secretary of State directions in relation to the power to suspend the operation and management of an airport, seaport or an international rail terminal (section 50 & schedule 20).

#### **Coronavirus Regulations**

4. Not all Coronavirus Regulations contain criminal offences. As can be seen from the Coronavirus page on the legislation.gov.uk website, there are over 500 Regulations to date, including Amendment Regulations – although these also include Scotland and Northern Ireland – but most do not contain criminal offences.
5. The CPS has produced guidance on the Regulations that apply in England that contain criminal offences, which can be found on the [Prosecution guidance](#) page of the CPS website. For ease of reference, we have provided links to this guidance below, which is updated when any amendments are made to the Regulations:

- [Coronavirus: Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020 effective from 13.00 on 26 March 2020 – 3 July 2020](#)
  - [Coronavirus: Health Protection \(Coronavirus, Restrictions\) \(No.2\) \(England\) Regulations 2020](#)
  - [Coronavirus: Health Protection \(Coronavirus, International Travel and Public Health Information\) \(England\) \(Amendment\) Regulations 2020](#)
  - [Coronavirus: Health Protection \(Coronavirus, Wearing of Face Coverings on Public Transport\) \(England\) Regulations 2020](#)
  - [Coronavirus: The Health Protection \(Coronavirus, Wearing of Face Coverings in a Relevant Place\) \(England\) Regulations 2020](#)
  - [Coronavirus – Regulations affecting Hospitality from 18 September 2020](#)
  - [Coronavirus: Self-Isolation Regulations](#)
  - [Coronavirus: Local Coronavirus Regulations Tier 1](#)
  - [Coronavirus: Local Coronavirus Regulations Tier 2](#)
  - [Coronavirus: Local Coronavirus Regulations Tier 3](#)
  - [Coronavirus: National restrictions on movement, gatherings and businesses, effective from 5 November 2020](#)
  - [Coronavirus - All Tiers Regulations - England - 2020](#)
6. The CPS also works with the Ministry of Justice and the Police National Legal Database (PNLD) to create new National Standard Offence Wordings, for charging purposes, for all new offences under the Coronavirus Regulations. These are placed on the PLND database for access by the police, CPS and HM Courts and Tribunal Service.
  7. Each set of Regulations contains a number of summary only offences that relate to breaches or contraventions of a large number of restrictions, prohibitions, instructions and requirements imposed by the Regulations. These cover, for example, movement outside the home, gatherings, restrictions on businesses and services, face coverings, hospitality, self-isolation and international travel.
  8. The police and other authorised persons may issue a fixed penalty notice (FPN) to anyone aged 18 or over who they reasonably believe has committed an offence under these Regulations. The level of the fine in the fixed penalty notice varies according to the type of breach and whether it is a first or subsequent breach. FPNs can be issued for up to £10,000 for some breaches including, for example, organising or facilitating a house party of more than 30 persons.

## Question

### **Is criminalisation a proportionate, justified and appropriate response?**

## Answer

9. Our answer focusses on the narrower but related issue: what is the approach in practice to prosecution of persons who contravene the Regulations?
10. The CPS does not investigate cases but is referred cases from the police and other investigators. Whether a case is subject to criminal proceedings is therefore firstly subject to the approach of the police.
11. For enforcement of breaches of Coronavirus Regulations, the police have adopted the “Four Es” approach -Engage, Explain, Encourage, Enforce. Since this aims to educate the public and take a proportionate response to enforcement, many contraventions of the Regulations are not met with an FPN. Moreover, prosecutions are very much a last resort, as if the police do issue an

FPN and it is paid within the relevant period, under the Regulations the person cannot be charged with, or convicted of, a criminal offence.

12. In line with the [Director's Guidance on Charging](#), the police are authorised to charge all offences under the Regulations but these are reviewed by the CPS if the CPS assumes responsibility for the case, which will depend on whether the case is charged under the single justice procedure: see below . At this point, the CPS determines whether the alleged offending merits a prosecution and, if so, whether the correct charge has been applied to the offending.

## **The public interest**

13. The approach of the CPS is governed by under The Code for Crown Prosecutors (The Code), which sets out the general principles to be applied when making decisions about prosecutions. Under The Code, a prosecution must only be started or continued if it passes both stages of the Full Code Test. At the first stage, the prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. If this is met, prosecutors must go on to consider the second stage, whether a prosecution is required in the public interest, as it has never been the rule that a prosecution will automatically take place when there is sufficient evidence to prosecute a case.
14. The Code provides a number of questions that prosecutors should consider when deciding the public interest. These questions address: the seriousness of the offence; the suspect's level of culpability, the harm to the victim; the suspect's age and maturity; the impact on the community; whether prosecution is a proportionate response; and whether sources of information require protecting.
15. Prosecutors determine the relevant public interest factors for and against prosecution by considering these questions. These factors, together with any public interest factors set out in relevant guidance or policy issued by the Director of Public Prosecutions enable prosecutors to form an overall assessment of the public interest.
16. The guidance issued on the Coronavirus Regulations contains a section on Charging practice, which addresses the public interest in prosecuting offences under the Regulations. It states:

*Prosecutors are reminded that the issuing of criminal proceedings is likely to have been a matter of last resort ... Given that the offences in the Regulations are related to measures imposed to prevent the spread of infection throughout the UK, and potentially high incidences of serious illness and death, they should be considered serious. A prosecution will therefore likely be required in the public interest in the majority of cases.*

## **The European Convention on Human Rights**

17. The Code also provides that: *Prosecutors must apply the principles of the European Convention on Human Rights, in accordance with the Human Rights Act 1998, at each stage of a case.* In practice this means that when reviewing cases prosecutors must also consider whether any Convention rights might be engaged, including those of victims and witnesses as well as defendants and, if so, whether any interference with a qualified right is lawful and proportionate and therefore justified.
18. The various prohibitions, requirements and restrictions in the Regulations, and the related offences for contravention of these, may engage convention rights under Article 8 (private and family life) and Article 11 (freedom of assembly and association). These are both qualified

rights, which may be legitimately interfered with, in order to protect the wider public interest. The interference must be necessary in a democratic society in the interests of national security or public safety, 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.

19. These rights must therefore be balanced against the rights of others and the wider public interest, including the Article 2 right to life. Article 17 of the Convention also protects against the limitation or destruction of the rights of others by the assertion of an individual's rights.
20. The extent to which the measures set out in the Act and Regulations are necessary will depend on the risk of prevalence of Covid-19 within the community, and where this risk is present the measures are likely to be considered necessary and proportionate in achieving the aims referred to above.
21. For these reasons, interference with A8 or A11 rights is likely to be justified.

## **Question**

**Have the new criminal offences introduced in response to the pandemic been sufficiently clear to the public authorities responsible for their interpretation and enforcement (including the police and the Crown Prosecution Service)?**

## **Answer**

### **Best practice**

22. From a CPS perspective, best practice when introducing legislation that contains new criminal offences, would be to consult with relevant stakeholders, including the CPS, and possibly the wider public over an appropriate time period, so as to clarify the policy aims and develop draft legislation to meet those aims, before introducing the legislation to Parliament, where it would be subjected to scrutiny and debate, prior to it coming into force. It is also desirable that legislation is accompanied by a detailed Explanatory Memorandum, explaining each Regulation or section of an Act, to aid those who are required to understand the legislation.
23. Where legislation contains new criminal offences, the CPS will usually assist with the development of the policy and / or the draft legislation, through close liaison with the government department that is responsible for the legislation. This involvement seeks to ensure, for instance, that any new offences: fill an existing gap in the criminal law; avoid unnecessary overlap with existing offences; are drafted clearly; are fit for purpose, in that it will be possible to obtain evidence to prove the offence; are categorised appropriately, in terms of whether they should be prosecuted in the magistrates' court or Crown Court; and attract an appropriate sentence on conviction. It should be stressed, however, that the final say on these matters is not for the CPS, as it does not create legislation, but for the relevant government department.
24. The CPS will also develop new legal guidance and training in anticipation of any new legislation. By being involved in its development from an early stage, this allows the CPS to have a clearer understanding of the legislation and its policy intent, which aids interpretation and allows us to provide more meaningful guidance and training for prosecutors. We will also work with the police and other investigators, to ensure a consistent approach to the enforcement and prosecution of new offences.
25. Even where best practice is achieved, it is of course not usually the case that the legislation and new criminal offences are readily understood in the same way by all legal practitioners.

Arguments may be heard in court proceedings about the meaning of statutory provisions, which may eventually result in the courts interpreting the provisions and developing a body of case law on the particular area. Therefore, any perceived failures in terms of the Regulations' clarity, and the ability of public authorities to interpret them, needs to be viewed in this context.

## **Coronavirus Regulations**

26. The CPS acknowledges that the imminent threat posed by the Covid-19 pandemic has caused the Government to introduce emergency legislation at short notice in exercise of the powers conferred by the Public Health (Control of Disease) Act 1984. In such circumstances, it is clearly difficult to achieve the "best practice" described above.
27. However, despite the speed with which the various Regulations have been introduced, the CPS has had the opportunity to work with Government Departments and the police to aid our understanding of the policy intent behind the Regulations and to raise any practical difficulties we have encountered in enforcing them. In particular:
  - Prior to the first Health protection Regulations coming into force in March 2020, the CPS viewed and commented on a number of draft Regulations, helping to clarify the text and ironing out any perceived problems. Since this text served as the basis for a number of subsequent Regulations, CPS involvement has ensured that we are able to readily interpret most of the provisions, to assist the police by way of advice, and to enforce them through prosecutions.
  - The CPS continues to support the police and Government Departments by providing feedback on new draft Regulations and Amendments via a legal working group set up under the NPCC Operation Talla response.
  - We also provide ongoing feedback on any statutory provisions that are not clear or prove to be difficult to enforce in practice and could be improved upon. If necessary, these may be the subject of working group discussions with the police and other Government Departments. At times, such provisions have been amended in subsequent Regulations.
  - The CPS also provides feedback to the police on police guidance, which ensures a consistent interpretation of, and approach to, enforcement of the Regulations by the CPS and the police.
28. As a result of this involvement, the CPS has been able to produce and publish the guidance copied above at the same time, or shortly after, any new Regulations or Amendments have been brought into force. We were also able to roll out training for CPS prosecutors shortly after the Act and the first Regulations became law.
29. Prosecutors have therefore had the benefit of guidance and training from an early stage, to aid their understanding of the new offences in the Regulations.

## **Question**

**How should the new measures introduced in response to the pandemic be communicated and explained to those enforcing the rules and members of the public?**

## Answer

30. Please see our answer above to the question on the clarity of new criminal offences.
31. The section on "Best practice" sets out the preferred way in which such measures should be communicated to the CPS. We acknowledge that not all of this was possible due to the pandemic emergency; and that the communications we have received, with the opportunity for feedback, have been reasonable in the circumstances.

## Question

### **What factors led to wrongful arrests and convictions under the emergency powers and how might these have been avoided?**

## Answer

32. As stated above, offences under the Act and Regulations are charged by the police. In the case of the Regulations offences, this will usually be after the non-payment of a FPN fine.
33. The Coronavirus Act came into force on 25 March 2020 and the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 came into force the following day (these Regulations were revoked on 4 July 2020 and 11 July 2020 respectively).
34. Offences under these Regulation were, as of 3 June 2020, 'specified' by the Attorney General to enable the Single Justice Procedure (SJP) to be utilised to initiate proceedings. The SJP procedure applies solely to summary only, non-imprisonable offences, where the defendant is 18 years or over when charged. The procedure allows the defendant to indicate their plea through the post and a single justice will determine the level of fine on the papers. The CPS only become involved in the SJP if and when a defendant pleads not guilty. Therefore, any offences under the Regulations indicated above, which result in a guilty plea, will not be dealt with by the CPS.
35. All offences under other subsequent Coronavirus Regulations have not been specified by the Attorney General and so are not subject to the SJP, and are dealt with by the CPS post-charge.
36. CPS prosecutors therefore review:
  - All police charged offences under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and under the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, which result in a not guilty plea;
  - All police charged offences under all other Coronavirus Regulations, regardless of plea; and
  - All police charged offences under the Coronavirus Act, regardless of plea.
37. Although the CPS reviews police charged cases, there is an initial burden on the police to supervise and to check their charging decisions as they are made, and the CPS has no role at this stage.
38. Since the beginning of April 2020 the CPS has separately reviewed all finalised cases which were charged under the Act or the Regulations. The CPS publishes the results of these monthly reviews on its website. The latest review publication is for October 2020 and can be accessed [here](#).
39. The reviews reveal the following examples of incorrect charges:
  - Offences under Welsh Regulations charged in England.

- Offences under English Regulations charged in Wales.
- Some charges failed on evidential grounds, such as the charging of homeless people being outside without a reasonable excuse.
- As stated above, the offences charged under the Act had insufficient evidence that the defendant was potentially infectious.

40. When the CPS began its monthly review of charges, a strong onus was placed on the police to put supervising officers in charge of decision-making at police stations and elsewhere, as any errors in the charging of Coronavirus offences under the Regulations or the Act are made initially at this point in the prosecution process. Any future scrutiny of errors in charging therefore needs to focus on this stage of proceedings.

42. To mitigate the risk of any incorrectly charged cases reaching court, the CPS has put in place an internal safeguard: a triage check is carried out by a supervising lawyer on our first handling of cases, which is usually the day after the police charge the case, and will take place before a case is called on in court. It is important to note that the CPS is only in a position to grip errors after charge, which will sometimes be on the very next day, at court, following an overnight remand in custody.

43. The CPS remains committed to reviewing all offences charged under the Coronavirus Act and Regulations for as long as necessary, to ensure the new laws are being applied consistently and appropriately.

*23/12/2020*