

Operation Talla – Enforcement Review & Update –Guidance

This document is further to the Op Talla Specialist Capabilities and Civil Contingencies Operational Plan and reviewed in respect of the updated Health Protection Regulations in April 2021. This document was further reviewed and updated as a result of specific guidance issued by the Department of Health on the 29th January 2021 and it will be kept under regular review.

Introduction

The Health Protection Regulations have been made in response to the serious threat to public health which is posed by the spread of Coronavirus (Covid-19) in Northern Ireland. The Regulations are intended to protect the public and reduce the spread of infection and protect the NHS. Since its introduction, the legislation has been subject of numerous amendments, responding to the changing nature of the virus, levels of infection, pressures on the Health Service and the behaviours of the general public. The PSNI and Local Government are ‘designated’ in law and are responsible for enforcing the Regulations along with other designated bodies and persons.

The legislation is in direct response to a health crisis and is informed by the various requirements of the Minister of Health and their Department, as advised by Senior Health Advisors. Whilst the Chief Constable retains operational independence, the PSNI contend that any use of powers in relation to the regulations are more proportionate when informed by public health data and senior medical advice. As such, regular input will be sought in this regard and receive due consideration in strategic decision making and tactical planning.

PSNI further contend that, in order to give effect to the legislation and the associated strategic intent, legal powers are necessary in relation to ascertaining if a breach of the Regulations has occurred and to enable the enforcement of same, as necessary. This position has been consistently made to and accepted by, the NI Executive.

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It should be noted that the vast majority of the public comply voluntarily with the legislation and indeed the associated guidance. Therefore, the following is intended to cater for the small minority of offenders, understanding that retaining public confidence in the Regulations and the policing of them, may require action against those who breach them.

Legislation

The following legislation has been considered:

- The Health Protection (Coronavirus, Restrictions) Regulations (NI) 2021 as amended
- European Convention on Human Rights
- Human Rights Act 1998
- Police (NI) Act 2000
- Police and Criminal Evidence (NI) Order 1989
- Public Health NI Act 1967 Part 1A (as inserted by the Coronavirus Act 2020)
- United Nations Convention on the Rights of the Child ('UNCRC').

Other References

- Report of the OPONI into Policing of BLM Protests.
- Report of Human Rights Advisor to NIPB on Policing Covid Regulations.

Legal Basis

Regulation 20(1) Health Protection (Coronavirus, Restrictions) Regulations (NI) 2021 (as amended) states: *'A relevant person may take any action necessary to establish whether a breach of these regulations has occurred or to enforce any requirement imposed under these Regulations.'*

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Lawful Application of the Regulations

Clearly, the framing of the above regulation is wide ranging. However, to ensure application of this wide ranging regulation is lawful, police must, on each occasion, ensure that its use is not only necessary, but also reasonable and proportionate in all the circumstances. In considering the reasonableness test and proportionality of any action, any proposed action must also be balanced with any interference with the European Convention on Human Rights. Where such interference is identified, the decision to act under the Health Protection Regulations must be shown to be proportionate and **commensurate to the public health risk it seeks to address**. Simply put, lesser breaches judged by their scale, duration or nature where Convention Rights are engaged are unlikely to warrant significant intervention.

In terms of guidance on the terms for decision makers;

Necessity:

Necessity is not defined in all cases, however, the Necessity test in respect of the power of arrest is useful;

The decision whether a particular course is necessary involves, we believe, at least some thought about the different options... Rather, arrest must be believed (on reasonable grounds) to be "the practical and sensible option."

Importantly, the Court rejected the suggestion that in order to be necessary, there must be no feasible or viable alternative or that it must be a matter of last resort.

Reasonableness:

‘Reasonableness’ in law does not only look at what each officer had in their own mind (subjectivity) but also what an ordinary person would regard as being

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reasonable in all of the circumstances (objectivity). Again, arrest case law will tell us the following:

‘The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the... officer.... The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstance’

In terms of recent use of the Health Protection Regulations, it is useful to consider a recent PSNI application for a High Court Injunction and the Court’s decision to support that application authorising police to take ‘such reasonable and proportionate steps’ as are necessary. The Court did not adopt the Regulation 20(1) wording of ‘any action necessary’.

Specific Areas

Stopping & Questioning People in vehicles

Article 180 of the Road Traffic (NI) Order 1981 empowers a uniformed officer to stop a person driving a mechanically propelled vehicle on a public road. There is no requirement that the stop must be for the purposes of a road traffic offence. ‘Stop’ has been held to mean bring the vehicle to a halt for as long as is necessary to allow an officer to exercise whatever additional powers are appropriate.

In this context, the additional power will be the use of Regulation 20(1) to question a person in order to ascertain whether a breach of the Regulations has occurred.

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In the normal use of the Art 180 power, case law has said that it must not be used whimsically or oppressively, and only as a necessary and proportionate response to the prevention of crime.

This is particularly relevant in the current context and must be read in line with all comments in this paper regarding necessity, reasonableness, and justification for use.

Ordinarily where use of Art 180 is reactive and in response to a particular situation on the ground, the officer utilising this power should ensure that the full basis for the use of the power is recorded, as well as BWV of the interaction.

I have however, considered this in the context of the scale of operations required in the current extraordinary circumstances. As a result of these considerations the use of powers will be considered centrally by the Operation Talla Silver Commander and necessity, proportionality and justification will be addressed within operational orders, the taskings contained within those orders and overseen by the **Op Talla Silver Cell**. Officers will then work within that framework and make appropriate judgements in individual circumstances.

In respect of the above, officers should be aware that **it is not an offence** for a person to refuse to answer questions unless there is a legal duty imposed on the person to do so. The Health Protection Regulation 22(2) make it an offence to obstruct a person carrying out a function, but do not go so far as to oblige a person to answer the questions of an officer.

A failure to respond **may** however be a consideration on the part of an officer when deciding whether to use the Reg 20(7) to direct a person home.

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Stopping & Questioning People

Unlike Article 180 above, there is no power to routinely stop and question people outside the provisions of Regulation 20(1) of the Health Protection Regulations.

Whilst, by volume, fewer people are likely to be stopped in this way, it may still be frequently used.

Ordinarily, in line with learning from the ‘Ramsey Judicial Review’ police would seek to record all such instances and create an audit trail.

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Entering Premises and in particular private homes.

In most cases, entry to a private dwelling will only be necessary to establish a breach of, or enforce Regulation 12.

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Legal advice has highlighted that entry to a private dwelling will involve an interference with Art 8 ECHR rights on almost every occasion and, as such, on each occasion **the use of the power must be necessary, proportionate and in accordance with the law.**

For the purposes of entry to a private dwelling under the Health Protection Regulations, there will need to be a consideration of the options available to officers that do not involve forced entry to a dwelling. This is not to say that officers must **needlessly** delay in order to carry out a review of their alternatives, **but an explanation must be available** as to why entry to the property was the required action. This will involve use of the 3 Es, and an explanation as to why each 'E' has thus far failed and why enforcement is required.

In considering the exercise of Regulation 20(1) powers for this purpose, a relevant person should follow the guidance set out above, but in particular should do the following:

- a. Attempt to engage with the owner or occupier of the relevant dwelling and encourage voluntary compliance with the Regulations;
- b. Take all reasonable steps to establish the circumstances within the dwelling without obtaining entry;
- c. Enquire about the presence of children in the dwelling prior to entry and consider any potential steps that could reasonably be taken to protect the welfare of any children;
- d. Seek the consent of the owner or occupier to enter the dwelling.

Use of the power must be made with significant caution. Legal advice has advised that this is a power that should be used **sparingly**. The basis for using the power must be clearly determined and recorded. It will be important to ensure that there is an audit trail for the decision-making and that rationale is available to be provided to the owner of the private dwelling in the event of legal challenge.

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Children

If the relevant person knows or reasonably suspects that a child or children will be affected by action taken under Regulation 20(1), the best interests of the child should be a primary consideration in deciding what, if any, action to take. An assessment of the best interests of the child may include consideration of the health risk posed to them. The relevant person should take any reasonable steps open to them to mitigate any negative effects of Regulation 20(1) action on the welfare of any child.

Process to be followed.

The PSNI has, and continues to be guided by legislation, Public Health advice and guidance produced by the National Police Chiefs Council (NPCC). The NPCC introduced the concept of the 4 Es which has been widely shared in the public domain and demonstrates an incremental approach to ensuring compliance with the Health Protection Regulations.

Officers will assess the individual circumstances and apply the following:

Engage: Officers will initially engage with any individual who may be in breach of the Regulations and encourage voluntary compliance

Explain: officers will give a clear explanation of the Regulations and their application to the circumstances of the individual. In most cases, this will be sufficient to secure voluntary compliance.

Encourage: Where the relevant person encounters resistance, they should take all reasonable steps to encourage the individual(s) to comply. This may include explaining the risks to public health and ongoing pressures on the NHS. It may also include explaining the possible sanctions for breach of Regulations 4 to 6C in accordance with Regulation 8.

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Enforce: officers will only utilise this option when all of the above have failed, all reasonable steps have been taken and there has been a reckless disregard for the Regulations and public health. This will only be done when absolutely necessary.

Enforcement

All enforcement activity relating to the Health Protection Regulations must be pre-authorized by the **Op Talla Silver Cell** (SCC). The SCC Commander (Inspector) will receive a comprehensive briefing on the circumstances presenting and will carefully consider the risk to the public from the activity engaged in, and the efforts that have been tried to secure compliance. The Inspector will also consider the lawfulness, proportionality and necessity of any enforcement activity and, if content, will provide the investigating officer with clear instructions regarding the parameters of the activity authorised and the manner in which it should be conducted. Their rationale and instructions will be recorded electronically and shared with the investigating officer. Officers should record **all** enforcement activity on Body Worn Video devices.

A range of tactical options will be available to the SCC Commander, including a power to enter a private dwelling, however, when engaging an individuals' human rights, the above legal opinion should be taken into consideration **and only such reasonable and proportionate steps should be taken as necessary to ensure compliance**. A consideration of all options will be required before engaging Article 8 HRA and only the minimum amount of force as is necessary will be used to achieve the desired result.

Op Talla Silver Cell will provide a daily overview of all enforcement and operational activity and this will be reviewed by the Gold and Silver Commanders. Any issues arising should be brought to the attention of the Gold or Silver Commander.

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Protest

In the context of policing protests in the pandemic, PSNI is required to have regard to a number of competing legislative provisions. Police are duty bound to detect and prevent crime as per their s32 duties, but are also duty bound as a public body to act in a manner that is compliant with the HRA 1998. Police are further statutorily required to facilitate peaceful protests.

The Health Protection Regulations do not ‘trump’ other legislative provisions. **PSNI must therefore conduct a balancing act between the relevant provisions of the HPR and the competing Convention rights that might be engaged in any given situation.** The ultimate objective is to ensure that any interference with ECHR rights is done so necessarily and proportionately.

PSNI must consider the balancing of competing rights have been addressed. A non-exhaustive list of rights likely to be engaged in this context would include;

- Article 2, Right to Life
- Article 8, Respect for Private and Family Life, home and correspondence.
- Article 10, Freedom of Expression and
- Article 11, Freedom of Assembly & Association
- Article 14 may also be engaged insofar as there is scope for a differential approach to different categories of person. The consideration of ECHR rights must be demonstrated to have been incorporated into an operational response.

In the current version of the HPR (as of 30th April 2021), the Regulation which could be considered to be breached in the organisation and/or participation of a protest is:

- Reg 9 – restriction on gatherings
- **2021 - “Stay home” has been replaced by “Stay local”.**

Each of these will be addressed in turn.

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Reg 9 – Gatherings

At the time of writing, indoor and outdoor gatherings does not apply to to a gathering which is a Rave or large house party (Reg 10), a sporting event (Reg 11) or a gathering in a private dwelling (Reg 12).

- A person may only organise, operate or participate in an **indoor** gathering of more than one household if it consists of no more than 6 persons and no more than 2 households.
- A person may only organise, operate or participate in an **outdoor** gathering which consists of no more than 10 persons and no more than 2 households

Arguably, a gathering of 4 persons from 4 households would still breach this provision and so smaller protests may still fall foul of this Regulation.

Limited exemptions (30 April 2021):

-9 3(a) refers to band practice or rehearsal: providing that-

- the band does not engage in a procession;
- the gathering consists only of the band; and
- the gathering fulfils the conditions in paragraph (5);
- in this regulation “band” means a group of two or more persons each of whom engages in the playing or sounding of a musical instrument or carries a musical instrument for the purpose of playing or sounding it, along with any conductor or instructor.

9 (4) refers to a funeral service, marriage/civil ceremony, educational activity, gathering in a workplace, blood donation/vaccination

Risk assessments are required for the exemptions from gatherings under 9 (3)a and 9 (4).

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At the time at which NIPB's report was written, (but not the time to which it referred) the Regulations had been amended to provide that the ban on gatherings of more than 30 persons *shall not apply to a gathering which is organised or operated for cultural, entertainment, recreational, outdoor sports, social, community, educational, work, legal, religious or political purposes and which fulfils the conditions in paragraph (4)*. Paragraph 4 stipulated the protection measures to be put in place.

Importantly, this exemption was removed in The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 24) Regulations (Northern Ireland) 2020 which came in to force on 26 December 2020. The exemption relating to a gathering for a political purpose is not within the current formulation of the Regulations. This does not mean that the rights to assembly and protest pursuant to Articles 10 and 11 have been removed. These qualified rights remain in place and the extent to which they are interfered with by HPR policing action requires to be considered on a case-by-case basis.

Operational Considerations

The context of each protest is going to be key to the planned response. It will be important to gather as much information as is possible concerning the number and location of planned protests, number of participants, likely presentation of the participants and any cultural sensitivities. This will continue to allow planned operations to occur with strategies written in advance.

It is not to say that enforcement will not be appropriate on any occasion, each event will have to be considered carefully, and on its own individual merits. Key considerations should include;

- The context of the event,
- the presentation of the attendees,

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- the interaction with police and the attempts made to comply with safety precautions
- any cultural sensitivities
- The Scale or Likely scale of the breach and the resultant potential public health risks.
- Any repeated nature of the breach and the resultant potential public health risks.
- Any potential impact on a public health programme and the resultant potential public health risks.

Use of EGT and BWV is imperative. Enforcement should be considered as a last resort, and only where we can outline why the first 3 Es have been deemed to be unsuccessful. Where there is a visible and deliberate effort on behalf of attendees to act unlawfully (for example, public order considerations), this may strengthen the need for enforcement. A detailed decision making log should be retained.

It is important to note that enforcement will encompass not only the issuing of fines, but also invoking the power in Reg 20(7/8) to direct a gathering to disperse and to order a person to return home. Therefore the considerations in respect of necessity and reasonableness as previously outlined will also be relevant to any decision to issue such a direction.

Operational safeguards around enforcement should be utilised. In normal circumstances, SCC will provide such a function. In large, pre-notified events, appropriate arrangements should be put in place. In line with Reg 23, a written notice must (in line with other requirements) *'give reasonably detailed particulars of the circumstances alleged to constitute the offence..'*

Additionally, a written notice (Fixed Penalty Notice) can be issued retrospectively, for a period not exceeding 14 days after the offence. SCC can provide further advice in this respect.

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Specifically, in the current context, there have been protests by groups identifying as ‘pro-life’ in the vicinity of or in relation to Covid-19 Vaccination sites. Generally, to date, protests have been outdoors, the number of participants has been low, and social distancing has been in place. In this format such protests likely pose a low risk to public health and the case for enforcement is unlikely, on balance, to be met.

Of course, if the nature of the protest changes, including direct or indirect interference with those attending for vaccination, such cases can be considered on their own merits. Other public order offences may, on occasion, need to be considered.

Commemorations, **funerals & Sensitive Events**

Recent events have created a specific focus on Commemorative Events. Commemorative events are not exempted under the Health Protection Regulations, nor do they explicitly qualify under areas of ECHR such as Protest discussed above.

Under the regulations for gatherings there is an exemption under 9(4) for funerals: 4) This shall not apply to a gathering which is-(a) a funeral, a service associated with a funeral or an act of worship or belief, in a place of worship, a place where beliefs are practised or a place where funerals take place.

A person attending, or responsible for organising or operating, a funeral or a service associated with a funeral must comply with the guidance for handling the infection risks (NI Direct) when caring for the deceased and managing funerals (issued by the Department of Health but failure to do so does not constitute an offence under regulation 22). The person responsible for organising or operating a funeral or a service associated with a funeral includes the person operating the place where it takes place and the funeral director making the funeral arrangements.

In the guidance it states:

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These regulations require a person attending a funeral, or those responsible for organising or operating the various elements of the funeral process (as detailed in this guidance), to comply with this guidance. Failure to do so is not an offence which attracts a fixed penalty notice or a fine, but does allow a relevant officer to take action to enforce compliance. Such action includes:

- Directing the gathering to disperse;
- Directing anyone in the gathering to return home;
- Removing any person from the gathering;
- Giving a Prohibition Notice

Notwithstanding this, it should be understood that there is a high likelihood that they will be emotional circumstances for those present with the associated potential for feelings to run high.

Accordingly such incidents require sensitive handling, commensurate with the health risks arising.

Whilst many people organising such events or proposing to do so, will liaise with police in advance, allowing for consideration of the various issues, it must be accepted that others may not.

Therefore, in order to fully support operational colleagues, in cases where such commemorative events occur, without notification and come to police attention, they should be referred via **Op Talla Silver Cell** to the Op Talla Silver Commander for consideration prior to any police action being taken.

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Gold/Silver Command

For individual, larger events and policing operations, it may be considered appropriate to implement separate Gold, Silver and Bronze structures to plan and oversee such occurrences. This will only be conducted by accredited officers and they will produce Gold and Silver Plans which will follow the principles of the National Decision Model. It will be the role of the Gold and Silver Commanders, within their Strategies and Tactical Plans, to balance the competing legislative and operational demands and define their parameters accordingly.

It is understood that in the above circumstances, the Silver Commander should not have to refer to **Op Talla Silver Cell** for approval to authorise all enforcement activity, however **Op Talla Silver Cell** should be involved in the planning meetings to advise and ensure that a consistent approach is considered.

#####ENDS#####