

First Minister

TEST AND PROTECT: SELF ISOLATION – LEGAL REQUIREMENT

Purpose

1. To provide rapid advice on the UK Government decision to make self-isolation in Test and Trace a legal requirement enforced by fines of up to £10,000.

Priority

2. Immediate.

Background

3. The UK Government has today trailed an announcement that from 28 September, self-isolation of index cases and close contacts identified in Test and Trace will be legally obligated to self-isolate through new regulations, which will introduce fines for non-compliance of up to £10,000.

4. Officials participated in a conference call on the afternoon of Thursday 17 September arranged by the Cabinet Office C-19 Taskforce and involving the Department of Health and Social Care and representatives of the devolved administrations. UK Government counterparts at that time outlined a proposed policy direction anticipated to be introduced in two to three weeks', to expand the current limited pilot of financial support to isolate to an England-wide scheme; and at the same point, to make compliance with instructions to self-isolate a legal requirement. They invited us to continue dialogue on what elements of that package could be introduced consistently across the four nations, and stated that policy options had not been put to UK Ministers at that point.

5. The emerging proposal in England to make isolation a legal requirement was highlighted in briefing for the strategic discussion on next steps you held on Friday, with a particular focus on compliance across all the guidance and regulations in place to respond to the pandemic.

6. A note from JP Liddle to the Cabinet Secretaries for Health and for Social Security gave a readout of the call, which focused mainly on the more detailed proposition to extend a financial incentive to isolate in England. I have replicated this in Annex A. Ms Somerville is leading on developing options to implement an equivalent scheme in Scotland.

Discussion

7. Test and Protect is designed as a voluntary compliance model. We want to see people participate willingly and voluntarily in Test & Protect, recognising the importance of taking part in order to protect themselves and each other, just as they have with lockdown restrictions. Individuals are therefore asked to isolate on the basis of health advice rather than as a legal requirement.

8. Public health officers have access to legal powers if they need them to protect the public health. The Coronavirus Act 2020 provides a legal framework relating to “potentially infectious” persons, although the new Section 51 Schedule 21 powers have not yet been used in Scotland. This gives powers to public health officers to require self-isolation of people confirmed to have COVID-19, or of people they reasonably suspect to have been exposed to COVID-19; and powers to the police to enforce that. Failing to comply with such a requirement would be an offence liable on summary conviction to up to 12 months imprisonment or a fine of up to £10,000, or both. Currently, guidance to isolate through Test & Protect is not legally enforceable in this way.

9. The UK Government approach seems to be to introduce a new offence through regulations rather than using their equivalent existing powers in the Coronavirus Act. This potentially allows greater flexibility and specificity, although we have not seen draft regulations at this point. It draws a parallel with the regulations requiring self-isolation for international travellers returning to the UK, which are also enforceable with fines. Similar enforcement requirements and penalties are in place in Scotland, although it is important to note that the levels of fines are less than those in place in England with the maximum of fine for failing to comply with quarantine being £480.

10. I had the opportunity to speak this afternoon with representatives of Police Scotland and SOLACE about the announcement by the UK Government, and implications for next steps on compliance with COVID guidance and regulations across the piece in Scotland. The common view was that although other restrictions and changes to guidance may be needed to address the pandemic in the coming weeks, it would not be proportionate to make self-isolation a legal requirement and would be very difficult to enforce. It would risk undermining the collectivist approach to public messaging informed by behavioural science, could place significant strain on the public health infrastructure responsible for contact tracing, and would create a significant enforcement challenge for police or local authority officers.

11. The concerns about reliable data outlined in my submission of 14 September remain valid: there are significant gaps in our understanding, and we have no relevant Scottish data to show whether or to what extent this is an issue that we need to address, or suggesting that making it law would help. Although experience has shown that moving elements of COVID guidance into regulations has had a positive compliance benefit without significant additional enforcement activity, this has perhaps been through social factors in the community, where it widely understood who should be complying with the requirement to e.g. wear a face mask, and in what settings. That does not apply to self-isolation in most cases. The success of the Protect Scotland app serves to demonstrate that: isolation notices issued through the app are anonymous, and nobody in any public authority knows who has been asked to isolate in this way; and nobody in the community could either.

12. Finally, as highlighted in advice on Friday, the experience of the self-isolation requirement for international travellers is at best mixed, with clear enforcement challenges and no firm evidence of compliance outcomes in that regime. The human rights implications of requiring isolation in this way gives rise to concerns of

deprivation of liberty, and making the law compliant with human rights obligations would inevitably lead to formalised exemptions from isolation that are not a feature of the guidance approach.

Next Steps

13. Measures outlined in my earlier submission, which you endorsed, were:
- That we develop a costed proposal for a self-isolation income support scheme within existing devolved powers in Scotland – further advice was given to Ms Somerville last week, and the Chief Financial Officer has today given you a submission on any consequential that may follow from the UK Government decision to expand their trial scheme across England.
 - That we shift policy in Test and Protect to move from a reactive self-referral for support to isolate to a proactive outbound offer of support from local authorities – advice is being considered by Ms Freeman and we are in discussion with COSLA and SOLACE through the Test and Protect programme on developing a delivery model for that.
 - Strengthening campaign activity to focus on compliance generally – advice from Communications and Marketing was provided; and on business engagement specifically, advice on work taken forward by SCDI on interaction with Test and Protect was provided to Ms Hyslop and Ms Freeman.
 - Clinical advice on the linked issue of self-isolation for international travellers and the prospect of 'test and release' was being prepared – this was offered to Ministers by the Chief Medical Officer.
14. Work continues on these strands. If further and more detailed advice on self-isolation as a legal requirement is required, including options for implementation if Ministers were minded to do so, I can pursue that urgently from tomorrow.

Recommendation

15. On the basis of the discussion above, I recommend that we do not move to replicate the UK Government decision to make self-isolation in Test and Protect a legal requirement at this time. Adherence to self-isolation will be considered as part of the remit of a new compliance group, as outlined in Joe Griffin's submission of 18 September, with a focus on practical measures to improve compliance on the basis of better data.

NR

Testing and Contact Tracing Policy Division, COVID Public Health Directorate

20 September 2020

Copies to:

Deputy First Minister and Cabinet Secretary for Education and Skills
Cabinet Secretary for Health and Sport
Cabinet Secretary for Justice
Cabinet Secretary for Social Security and Older People

Permanent Secretary
DG Health and Social Care
Chief Executive NHS Scotland
DG Strategy and External Affairs

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Chief Medical Officer
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Adam Reid
JP Liddle
Alisdair McIntosh

Pauline Aylesbury

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Liz Lloyd
David Hutchison

TEST AND PROTECT: SELF ISOLATION – LEGAL REQUIREMENT**NOTE OF DISCUSSION WITH CABINET OFFICE OFFICIALS****Self-Isolation Support**

Cabinet Office officials convened a call with officials in the three devolved administrations today on the UK Government's plans to improve compliance with self-isolation in England. This was on a confidential basis as they are still developing this policy and does not represent a finalised UK Government position, but UK Ministers are keen to progress quickly.

There were two areas discussed: incentivising self-isolation for people who face financial hardship, and mandation or enforcement of self-isolation.

Financial hardship – UKG plans in England

UK Government analysis suggests that compliance with self-isolation is as low as 25% [in some areas of England]. Loss of income as a result of self-isolation is considered to be the most significant barrier to address.

UK officials described this as an “incentive payment” – it was not directly an income replacement and would not be described as a benefit. They were keen to maintain the existing SSP rules as standard across both Covid and non-Covid absences from work, and to have a specific Covid scheme because self-isolation is essential to controlling the virus. Local government is seen as the only viable delivery route in England, with additional funding to local authorities to make these payments.

UK officials were interested in the scope for similar arrangements to be introduced across all four nations on a similar timescale and asked what might be required to support this.

Finance

Immediate findings from the pilot show that £13 a day is too low to incentivise compliance, so officials are considering higher rate of payment, likely to be paid as a single lump sum instead of being related to the number of days of isolation.

Cabinet Office and DoHSC officials are in negotiation with Treasury on the funding for this. Though the pilot was funded out of existing budgets in DoHSC, a national roll-out, and any increase in the rate of payment, would require new funding – which would come with consequential. Cabinet Office officials have done modelling on the potential number of people eligible which they agreed to share with us.

Cabinet Office officials asked what analysis had been undertaken by the other administrations. SG officials noted that the existing support for people unable to work – SSP, Universal Credit and furlough – are all reserved, so it had been unexpected that the pilots were on an England-only basis, and our work on this had been limited to the period since the English pilots were announced. We also noted that any new payment scheme would have to be demand-led and that the borrowing powers that are required to manage a demand-led scheme effectively are reserved to the UK Government. gave a brief outline of the approach we have taken to analysis we have carried out using publicly-available data sources – e.g. uptake of Universal Credit, and eligibility for SSP – against our own modelling.

Eligibility

UK officials are considering two options for eligibility – either same as pilot (UC and legacy benefits), or the potential for local authority discretion with an income threshold. They had considered and discounted the option of enhancing SSP to distinguish this support from the general support available to people who are unable to work and to position this new payment as an “incentive”. Otherwise eligibility criteria is similar to the pilot in North West England – someone who is not able to go to work because they have tested positive or because they have been in contact with someone who has tested positive. SG officials raised two questions about this based on our recent experience – people in areas with local restrictions who are asked to self-isolate because they are in the same household as someone who has been a contact, and parents who are caring for children who have been asked to self-isolate. UK officials said they considered these to be within the scope of the groups they were intending to target.

Mandating self-isolation

UK Government is proposing making self-isolation for index cases and close contacts mandatory in England. Currently Test and Trace issues guidance to isolate to those individuals, but that guidance does not have legal force and there are no penalties or legal consequences for not following guidance. The same is true of Test and Protect in Scotland – self-isolation notices are guidance only. A different regime operates for international travellers arriving in the UK, with the requirement to isolate set in regulations and enforceable by fixed penalty notices.

UK officials had not worked through the legislative requirements for the change, but expected it to be introduced in regulations and not primary legislation. They similarly did not have developed views on enforcement mechanisms, attempting to frame instead as a communications change intended to help people e.g. secure time off from employers and encourage them to comply with the requirement knowing it has the weight of law behind it. They did not offer any reflection on the experience of international travellers, either on the enforcement challenges or the compliance outcomes in that regime.

Welsh Government asked about human rights implications, but no analysis given yet: deprivation of liberty was a significant challenge in introducing the Scottish regulations for international travellers, which led to a series of sectoral exemptions, permitted activities while isolating and ultimately the air bridges concept. The current self-isolation guidance for Test and Protect is significantly stronger than the self-isolation regulations for international travellers as a result.

Next Steps

UK agreed to share the modelling and analysis that they have done to date, and asked to have a follow-up discussion on the scope for aligning provisions, and any announcements, in each of the administrations.