



The message is: 'You need to self-isolate'. This is the notification you get if you have used the NHS Covid-19 smartphone app and someone else who has checked in at the same venue within a certain time span has tested positive for Covid. The word 'need' is interesting. It can be used and taken to mean a benign suggestion such as 'you need a drink' or 'you need to get some rest'. Alternatively, it can have a mandatory connotation which is clearly the way it is intended in respect of Covid.

### The new regime

Nearly all legal restrictions relating to Covid were due to have ended on 19 July 2021. However, the strongest possible 'advice' is now in force from the government. It may be the 'right' thing to do is to follow the advice as regards, for example, wearing a mask on a crowded train.

This change in regime gives an opportunity to begin to consider how our legal system has been used or adapted in the face of an undoubted crisis. The figures are stark. In the Second World War we lost about 60,000 civilians in bombing by the Luftwaffe. The British and our main air force allies (US and Polish) operations resulted in about 600,000 German civilian fatalities. Our Covid deaths exceed 150,000. One can see how desperate measures were needed. However, as with the last war, the war on the virus had to be on a legal basis (see *Liversidge v Anderson* [1942] AC 206).

The concern is that the public can be confused between legal requirements and advice; particularly if the 'advice' is strongly (and intentionally so) worded. The confusion is probably intended. I am not criticising the government which has done a good job (not least with vaccinations) to deal with the situation; my only point is to illustrate what is Covid law and Covid myth.

### The legalities

When the scheme was introduced, the former Health Secretary Matt Hancock said, in September 2020, that a request to self-isolate as a result of the app was not a 'legal requirement'. The idea that the requirement, or assumed requirement, has the force of law has become another Covid myth as was the belief that legislation referred to a 'substantial meal' (see 'Talkback: is guidance just guidance or not?', *NLJ*, 5 February 2021, p8).

There are, of course, legal requirements as to self-isolation in respect of, for example, international travel under the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations (SI 2020/582).

### Apps & regs

General rules as to self-isolation are contained in the Health Protection (Coronavirus Restrictions) (Self-Isolation) (England) Regulations (2020/1045). The fact this legal requirement does not apply to the NHS app is made clear in regs 2A and 2B, both of which commence: 'This Regulation applies where an adult is notified by a relevant person,

other than by means of the NHS Covid-19 smartphone app developed and operated by the Secretary of State...'

One can see the reason for the distinction. Under the Regulations, the notification by a relevant person is that: 'They have had close contact with someone who has tested positive for Coronavirus.' This will have been as a result of a much clearer connection between the infected person and the person notified. In the case of the NHS app, it is much more rough and ready. For example, it notifies where someone uses the app to check in at a pub and someone who subsequently tests positive does the same thing half an hour later and sits in an entirely different area of the pub.

The legislation relating to the NHS app were in the Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 (2020/1005) (revoked this week).

Regulation 4 defined a QR Code as 'a dynamic quick response (QR) code developed by, or on behalf of, and issued by the Secretary of State'. Regulation 6(1) provided: 'A relevant person must in an appropriate place display and make available a QR code at relevant premises that they occupy or operate with a view to achieving the aim in paragraph (2).'

This provided: 'The aim is to enable an individual who seeks to enter the relevant premises in a case set out in Regulation 9 and has a smartphone in their possession to scan the QR code with that smartphone on or immediately after, they enter the premises.'

Regulation 7 dealt with a situation where a person has not got a smartphone.

None of this is to argue against the civic duty on people to take steps, including taking into account non-legally binding guidance, in order to prevent the spread of the infection. However, with the self-isolation legal requirements being extended to 16 August 2021, the precise limit of the legal (as opposed to voluntary) provisions should be clear.

### The drafters

Through this situation, a particular group of people should be recognised. The draftpersons (a term utilised by Francis Bennion in his book, *Bennion on Statutory Interpretation*) in the government departments (mainly health) in all four parts of our United Kingdom have obviously worked very long hours to produce the vast set of regulations needed to implement no doubt ever-changing policy decisions at very short notice.

The above only applies to English law but I recognise the lawyers working in the other three jurisdictions may have similar views.

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