

PUBLIC HEALTH ETC. (SCOTLAND) ACT 2008

EXPLANATORY NOTES

THE ACT – OVERVIEW

Part 3

Public Health Investigations

Public health investigations

Section 20 Public health incidents

40. A public health incident exists if one or more of the circumstances described in subsections (2) to (6) occurs; and there are reasonable grounds to suspect that the circumstance is likely to give rise to a significant risk to public health.

Section 21 Public health investigations

41. This section states what a public health investigation is and outlines who may carry out such an investigation. Subsection (2) provides that the Scottish Ministers, a health board competent person, the Common Services Agency, (d)a local authority competent person, or two or more of these acting together, may appoint a person to carry out a public health investigation. In this Part, that person is referred to as an “investigator”. A health board competent person or a local authority competent person may be appointed as an investigator. Subsection (4) enables the investigator to exercise the powers relating to entry to premises in section 22, other investigatory powers in section 23, and powers relating to questioning in section 24.

Investigators’ powers

Section 22 Powers relating to entry to premises

42. This section sets out the powers an investigator may exercise to enter premises when it is considered necessary for the purpose of a public health investigation. The use of the power of entry in relation to a dwellinghouse is subject to section 26. This section allows an investigator, on entering any premises which that investigator has reason to believe it is necessary to enter, to take any other person (including a constable, if there is reasonable cause to expect any serious obstruction in obtaining access); it allows an investigator to take any equipment or materials which might be necessary for the investigation; and to direct that any premises or anything in them be left undisturbed for as long as the investigator considers appropriate. Subsection (2) places an obligation on an investigator who uses these powers to enter unoccupied premises to leave the premises as effectively secured against unauthorised entry as the investigator found them.
43. The powers contained in this section and the rest of Part 3 sit alongside existing powers of investigation in other legislation, and are not intended to supersede these (see section 25(5)). In particular it is not intended that these powers will be used to

investigate incidents arising at nuclear sites, as provision in that area falls outwith the legislative competence of the Scottish Parliament, and existing legislation adequately provides for investigations into such incidents.

Section 23 Other investigatory powers

44. Subsection (1) sets out the investigatory powers being made available to an investigator. The investigator may take measurements and photographs, make recordings which are considered necessary for the investigation, obtain and take samples of any articles or substances found in or on the premises and of the air, water or land in or on the premises or in the vicinity.
45. The investigator also may dismantle or test (g)any article or substance found in the premises under investigation which appears to be the cause of the public health incident, but may not damage or destroy it unless necessary. Where this power is proposed to be used, the person responsible for the premises being investigated may request that the action be taken in the person's presence. In addition, the investigator must consult appropriate persons on the premises to determine what dangers there may be in taking this action.
46. The investigator may ask for the production of any records (including electronic ones) which are necessary for the purposes of an investigation and inspect and take copies of the records. Such records includes those which may not be in the possession of the person but which it is reasonable to require the person to obtain for this purpose. The investigator may make such examination and investigation as may in the circumstances be necessary. Nothing in this section compels any person to produce a document which that person would be entitled to withhold on grounds of legal privilege.

Section 24 Power to ask questions

47. This section provides for a power for investigators to require any person whom the investigator has reason to believe has information relevant to the investigation to answer such questions as the investigator sees fit. A person required to answer questions may nominate one other person to be present during questioning. The only persons who may be present during such questioning are the person (if any) nominated by the person being questioned and any other person authorised by the investigator to be present.
48. The section also states that no answer given by a person being questioned under these powers is admissible in evidence against that person in any criminal proceedings.

Section 25 Supplementary

49. This section provides that an investigator may also require facilities and assistance from any person in relation to any matter or thing which is under that person's control or in respect of which the person has responsibilities.
50. Subsection (3) enables the Scottish Ministers, by regulations, to give such additional powers to investigators as they consider necessary. Regulations will be made by affirmative procedure, except where the Scottish Ministers consider that they need to be made urgently, in which case the procedures in subsections (6) to (10) of section 122 apply. Subsection (5) states that powers outlined in this Part are without prejudice to any other powers conferred on an investigator by this Act or any other enactment, or by any rule of law.

Section 26 Entry to dwellinghouses

51. This section places conditions on the exercise of the power of entry by an investigator proposing to enter a dwellinghouse. The first is that the investigator must give 48 hours' notice of the proposed entry to the occupier of the dwellinghouse. The second is that the dwellinghouse may only be entered if the occupier has consented or a warrant has been

issued under section 27. However, these conditions do not apply where the investigator considers, on reasonable grounds, that there is an emergency, as defined in section 28. Subsection (4) defines “dwellinghouse” as used in this Part.

Section 27 18Public health investigation warrants

52. This section sets out the circumstances in which a sheriff or a justice of the peace may grant a warrant for the purposes of a public health investigation. Subsection (1) lists the circumstances which must exist before a warrant may be applied for and granted: that the investigator has been refused entry to premises or expects to be refused; that the premises are unoccupied; that the occupier is temporarily absent and there is urgency; that an investigator has been prevented from exercising a power (other than the power of entry) or expects to be prevented; or that an application for admission to the premises would defeat the object of the investigation.
53. Subsection (2) states that the sheriff or justice of the peace may authorise the investigator to exercise the power in relation to those premises according to the warrant and to take any other person (including a constable if serious obstruction is expected) as well as any equipment or material required for the purpose for which the power of entry is being exercised. The power of entry under the warrant may be exercised at any time and includes power to use reasonable force to obtain entry. The investigator may also direct that the premises be left undisturbed and may also exercise any other power mentioned in sections 23 to 25.
54. Subsection (3) specifies that a sheriff or justice of the peace must not issue a warrant authorising entry to a dwellinghouse unless the condition requiring 48 hours’ notice has been satisfied and the period of notice has expired. A warrant under this section continues in force until the purpose for which the warrant is issued is fulfilled.

Section 28 Use of powers in emergencies

55. If an investigator, who is entitled to enter premises under section 22, considers that there is an emergency, the premises may be entered at any time, using reasonable force. The investigator need not satisfy the conditions set out in section 26 (entry to dwellinghouses) nor apply for a warrant. The investigator on entering any premises under this section may take any other person (including a constable if serious obstruction is expected) as well as any equipment or material required for the purpose for which the power of entry is being exercised. The investigator may also direct that the premises and anything in or on them may be left undisturbed for as long as the investigator considers appropriate. All other investigatory powers may also be exercised.
56. This section defines an “emergency” as existing if there is a significant risk to public health and the nature of that risk is such that immediate action is necessary to verify the existence of the risk; to determine the cause of the risk; or to take action to prevent, or prevent the spread of, infectious disease or contamination.

Offences

Section 29 Public health investigation offences

57. Subsection (1) lists the offences under this Part of the Act. Subsection (2) sets out the defence in line with other parts of the Act, whereby it is a defence if the person is able to prove that the person exercised all due diligence and took all reasonable steps to avoid committing the offence. Subsection (3) states that where a person (such as a body corporate) commits an offence due to another person’s act or omission, the body corporate may be prosecuted even if the other person is not. This links with section 119 which makes provision generally about the circumstances in which an offence under this Act can be committed by an individual as well as a body corporate.

Compensation

Section 30 Public health investigations: compensation

58. **Section 30** sets out two different situations in which compensation will be paid for loss or damage caused by an investigator (or any other person) exercising certain functions under this Part. In the first situation, compensation will be paid for loss or damage caused by the exercise of the power of entry in section 22, unless the loss or damage is due to the fault of the person who sustained it. In the second situation, compensation will be paid for damage or destruction of an article or substance in the exercise of the power in section 23 unless the article or substance was found to be the cause of the incident. In either case, the person responsible for paying compensation for any damage or loss caused by an investigator or a person authorised by the investigator is the employer of the investigator or of the authorised person, as the case may be. A single arbiter appointed by agreement between the parties to the dispute, or, if such agreement cannot be reached, an arbiter appointed by the sheriff will settle any dispute as to a person's entitlement to compensation and as to the amount of such compensation.