

THE COVID 19 LOCKDOWN as at 1 May 2020

WHAT IS THE LAW, WHAT IS BANNED?

WHAT ARE THE OFFENCES?

POLICE and OTHERS' POWERS OF ENFORCEMENT

1. Index.

- para 2 Rule by law or announcement to a press conference,
Primary power
- para 3 Primary power to make rules Regulations etc.,
- para 4 Power to create Offences,
- Para 5 What the purpose of the Regulations must be,
- Para 6 Restriction and requirements allowed,
- Para 9 Parliamentary control under the primary legislation
Secondary powers
- Para 12 Health Protection (Coronavirus Restriction) England Regulations
- Para 14 duration; the emergency period
- Para 15 Criminal Liability: responsibility for a business
- Para 17 subsidiary businesses
- Para 18 Reg 4; food businesses; consumption on the premises
- Para 23 Reg 4; those non-food businesses required to cease trading
- Para 28 Reg 5; businesses allowed to carry on “remotely”
- Para 30 Reg 5, Holiday businesses, places of religion, community centres, crematoria, cemeteries
- Para 34 Reg 6. The Lockdown; restrictions on movement,
- Para 36 Reg 6. “reasonable excuse”: necessary shopping
- Para 39 Reg 6 “reasonable excuse” exercise
- Para 40 Reg 6. “reasonable excuse” medical assistance, caring for vulnerable, Providing emergency assistance, blood donation
- Para 41 Reg 6. “reasonable excuse” travel to work
What work remains lawful?
- Para 48 Possible future regulation under Coronavirus Act 2020
- Para 49 Reg 6 “reasonable excuse” – various others
- Para 50 Reg 7 Gatherings in a public place
- Para 53 Reg 8 enforcement
- Para 60 Reg 9 offences
- Para 62 Reg 10 Fixed penalty procedure.
- Para 64 general reflections

This article tries to analyse the powers and offences created by the current legislation, at the present date 3 May 2020. It should not be taken as advice on any person's case – which will almost certainly be dependent on its own particular facts.

2. Government and criminal liability is by law and not by what is announced at a press conference, even a Prime Minister's press conference. What is an offence and police powers to enforce criminal law are still controlled by what Parliament has decided or allowed ministers to decide. Lord Sumption's early intervention over the activities of the Derbyshire police has reminded anyone who had forgotten these basic rules in the excitement of a major emergency. Newspapers have delighted in reporting some heavy-handed policing alongside stories of citizens flouting these regulations.
3. There are suggestions in the press that the review due on Thursday 5 May is intended to relax some aspects of the "lockdown". As the intention is to avoid economic hardship become worse any relaxation can be expected to loosen restrictions on businesses.

Outline of the law controlling the lockdown.

4. At the time of writing (3 May 2020) the lockdown law is set by Regulations made under the Public Health (Control of Disease) Act 1984. There is potential for further Regulations under the Coronavirus Act 2020.
5. In the Public Health (Control of Disease) Act 1984 ("PH(CD)A 1984") Parliament gave Government ministers very wide powers to react to public health dangers. In part 2A of the Act Parliament gave the power to the relevant secretary of state, in England and Wales, to make Regulations by a statutory instrument; that is by secondary or delegated legislation not requiring a new act of parliament¹.
6. The Act is quite clear that it allows the Regulations made by statutory instrument to create new offences and provide for the execution and enforcement of the rules made by the Regulations². However, any offence created by the new Regulation cannot be an indictable offence (meaning must be Magistrates' Court only offence) and cannot create an offence with prison as the penalty³; making the realistic penalty a fine. (Non-payment of fines is a different matter, nothing to do with these Regulations, and can end up in a prison sentence). A Magistrates' Court might think about an order restricting an individual's movements; that would need care, as the

¹ Section 45 P Public Health (Control of disease) Act 1984

² Section 45 F

³ Section 45 F (5)

PH(CD)A 1984 specifically does not allow magistrates to create orders that puts a person in isolation or quarantine⁴.

7. Any Regulations made must be for the purpose of
“preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination”.

And may provide for

“imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of or in response to a threat to public health.

8. What are these “restrictions or requirements” the Act allows ministers to make Regulations about? They “include” any Regulations that allow orders to be made concerning⁵

- a. children kept away from school.
- b. holding public events or gatherings
- c. specific provisions for funerals

9. The Act also adds to those three contingencies, Regulations that create “a special restriction or requirements”. What are those? They are Regulations that allow a Magistrate to order that

- individuals to be medically examined, detained in hospital or otherwise isolated and quarantined⁶
- things to be seized isolated or decontaminated or destroyed and corpses to be buried or cremated⁷
- premises be closed, disinfected or indeed destroyed⁸

10. Any restriction or requirement must be “proportionate to what is sought to be achieved by imposing it”⁹

11. The Act makes specific provision for Parliamentary control. The standard procedure is for a draft of such Regulations to be “laid before, and approved by a resolution, of each House of Parliament”¹⁰. Normally the emergency procedure would suffice for 28 days¹¹ and then the Regulations would lapse. However, in reckoning the 28 days

⁴ Section 45 G (2) (d)

⁵ Section 45 C (4)

⁶ Section 45G (2)

⁷ Section 45 H (2)

⁸ Section 45 1 (2)

⁹ Section 45 D

¹⁰ S45Q (4) PH(CD)A 1984

¹¹ S45R(4) – (6) PH(CD)A 1984

no account is to be taken of any time when Parliament is prorogued, dissolved, or adjourned for more than 4 days. Parliament has entrusted the control of Regulations to the judgement of the Health Secretary. We are in the hands of Mr Hancock.

The HEALTH PROTECTION (Coronavirus, Restriction) (England) Regulations 2020/350

12. Made under the Act the HEALTH PROTECTION (Coronavirus, Restriction) (England) Regulations 2020/350 (“the Regulations) came into effect on 26 March 2020.

There have been some relatively minor tweaks and clarifications made under the HEALTH PROTECTION (Coronavirus, Restriction) (England) (Amendment) Regulations 2020/447 effective from 11.00 on 22 April 2020

Breaches of Regulations 4, 5, 6, are 7 are offences¹², if committed “during the emergency period”

The organisation of the Regulations.

13. Regulations 1 and 2 cover commencement etc. and what is revoked by these Regulations
Regulation 3 describes the emergency period when the Regulations are in effect
Regulation 4, with Schedules 2.1, and 2.2 sets out businesses that must close.
Regulation 5, with Schedules 2.3 sets out further restrictions on some businesses
Regulation 6 sets out the restrictions on movement on all persons.
Regulation 7 sets out restrictions on gatherings.
Regulation 8 provides the enforcement powers
Regulation 9 creates offences and gives some limited additional powers to the police.

Regulation 3 Duration: The emergency period

14. The Emergency period started on 26 March at 1 pm¹³. It will end when the Secretary of State publishes a direction to that effect¹⁴. The Secretary of State is required to review the restrictions at least every 3 weeks and may terminate them in whole or in part as he considers necessary¹⁵. Regulations 4 – 7 apply only during the “emergency period”. The Regulations themselves expire after 6 months¹⁶, 26 September 2020; no doubt it is hoped the “emergency period” will be over by then.

¹² HP(CR)(E)R 2020/350 r 9 (1)

¹³ HP(CR)(E)R 2020/350 Preamble, r 3 (1) (a)

¹⁴ HP(CR)(E)R 2020/350 r 3 (1) (b)

¹⁵ HP(CR)(E)R 2020/350 r 3 (3)

¹⁶ HP(CR)(E)R 2020/350 r 12

Criminal liability: Responsibility for a business

15. The Regulations place potential criminal liability on individuals, and also on “a person responsible for carrying on a business”; such people are defined as “includes the owner, proprietor and manager of that business”¹⁷. Note the word “includes”; its meant to be as broad as possible and anyone in any approximately equivalent position to owners, etc may find themselves liable.
16. An additional part of the Regulation attempts to cover subsidiary businesses (the Regulation envisages a business A (covered by the Regulations) forming part of a “larger business” and provides that the person responsible for the “larger business” will comply with business A requirement to close or cease if the “larger business” closes down business A¹⁸

Subsidiary businesses

17. This Regulation revokes and replaces a similar Regulation under the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020/327, which came into effect on 21 March 2020. Offences committed between 21 and 26 March 2020 can still be prosecuted under the previous (short-lived) Regulation¹⁹

Regulation 4. Food business; consumption on the premises.

18. Reg. 4 (1) – (3) ²⁰ covers
 - restaurants, and bars including in hotels and clubs (but not room service²¹)
 - cafes, including cafes and canteens at hospitals, care homes and schools, and (amazing detail) those providing food or drink to the homeless,
 - but not workplace canteens “where there is no practical alternative for staff”
 - public houses
19. Each of these businesses must stop selling food and drink for consumption on the premises and close those parts of the premises where that happens, (including adjacent areas where seating is made available²² for customers).
20. The purpose of these Regulations is to avoid people gathering to eat and drink in premises (as well as benches and tables adjacent to the outlet). This is Regulation in line with the permitted purposes of subsidiary legislation the 1984 Act

¹⁷ HP(CR)(E)R 2020/350 r 1 (3) (b)

¹⁸ HP(CR)(E)R 2020/350 r 4 (6)

¹⁹ HP(CR)(E)R 2020/350 r 2 (2)

²⁰ HP(CR)(E)R 2020/350 r 4 (1), Sch. 2(1)

²¹ HP(CR)(E)R 2020/350 r 4 (2)

²² HP(CR)(E)R 2020/350 r 4 (3)

21. There must be room for disputes about whether there is a practical alternative to a works canteen for any businesses that remain open. Is a 10-minute walk to a food shop practical, but 20-minute walk impracticable?
22. It follows there is nothing here to require fast food takeaway outlets to close (and indeed there is an express exemption for business which provide hot or cold food for consumption off the premises Reg 5 (2)).

Regulation 4. non-Food business in Schedule required to cease business

23. Regulation 4 (4) requires a variety of kinds of business defined in Sch.2.2 to cease carrying on business or provide their services during the emergency
24. The list in Sch. 2.2 sets out 19 types of businesses: cinemas, theatres, nightclubs, bingo halls, concert halls, museums & galleries, casinos, betting shops, spas, nail, beauty, hair sales & barbers, massage parlours, tattoo and piercing parlours, skating rinks, “gyms, swimming pools, bowling alleys, amusement arcades or soft play areas and other indoor leisure centre or facilities”, funfairs, playgrounds sports courts & outdoor gyms and swimming pools, outdoor markets (except for stalls selling food) (and – by amendment – livestock markets), car show rooms and auction houses
25. Again (as with the ban on food consumption on premises) the target of the Regulations evidently is gatherings of people where disease can be spread
26. Culture is not forgotten. Cinemas, theatres, nightclubs, concert halls, museums & galleries, may carry on, but only over the internet or by television or radio broadcast²³
27. Blood donation sessions are still permitted on the premises of all the listed businesses²⁴

Regulation 5 Businesses able to carry on “remotely”

28. Regulation 5 requires businesses
- not specifically listed in Schedule 2 part 3 (businesses at which necessary shopping may continue)
 - but offering goods for sale or hire in a shop
 - or providing “library services”

²³ HP(CR)(E)R 2020/350 r 4 (5)(a)

²⁴ HP(CR)(E)R 2020/350 r 4 (5) (b)

to cease all their business other than via orders received on the internet, phone or post. The business may then operate to make deliveries of goods ordered “or otherwise providing services in response to orders received”. Other than for those purposes the businesses must close premises and cease to allow access to persons which are not required for achieving the remote orders and deliveries,

29. The effect therefore is that

- Customers may order remotely from a shop and have delivered anything they want
- Regulation 5.1 exerts controls over the premises of businesses offering goods for sale or services from a shop. Those premises - unless exempt as listed in Sch. 2.3 – must close unless required to respond to orders received remotely.
- This leaves the question of what other businesses may continue. (considered further below).

Regulation 5. Holiday businesses, places of religion, community centres, crematoria, cemeteries.

30. Some specified non remote “businesses” are to cease activity. These are stern times; holiday lets, including staying in hotels, must cease²⁵. Holiday premises may still be let to those unable to return to their main residence, those moving house, or attending a funeral. They can also be used for the homeless, (and for blood donation sessions!) ²⁶

31. NHS staff and other key workers may be unable to return to their main residence for a variety of reasons, including protecting vulnerable relatives and self-isolation. The provision for funerals is evidently necessary; the Regulations seem strangely fascinated by blood donation.

32. There is also provision that a holiday business can also carry on “for any purpose requested ... by a Local Authority”²⁷. It remains to be seen what requests local authorities may make; should they get around to making requests presumably this will be to fulfil their obligations to provide housing and to assist key workers

33. Places of worship must close except for funerals or to broadcast an act of worship, with exceptions also for food banks or other support for the homeless and vulnerable (and, of course, for blood donation sessions; hurrray!) Similar restriction

²⁵ HP(CR)(E)R 2020/350 r 5 (3)

²⁶ HP(CR)(E)R 2020/350 r 5 (4)

²⁷ HP(CR)(E)R 2020/350 r 5 (4) (d)

on non-religious activities apply to community centres. Crematoria and burial grounds are to be closed except for funerals and burials. So, baptisms etc, marriages are postponed; funerals go ahead (but with restrictions on attendees – see below)

Regulation 6 Restrictions on individual’s movements; persons may not leave where they are living “without reasonable excuse”

34. The Government has attempted to restrict movement. Reg 6, (1) states that during the emergency no one may leave where they are living “without reasonable excuse”²⁸. Where you live includes the gardens, yards, outhouses etc.²⁹ (This restriction – perhaps sensibly – expressly does not apply to the homeless³⁰).

34a. Regulation 6 (1) was amended from 22 April by inserting after the word “leave”, the words “or be outside of” thus making the regulation read

“... no person may leave or be outside of the place where they are living without reasonable excuse”.

The explanatory note sets out what is intended:

“Regulation 6 is amended to clarify that under regulation 6(1), the prohibition applies both to leaving the place where a person is living without reasonable excuse, and also to staying outside that place without reasonable excuse”.

35. The Regulation sets out what will be reasonable excuses, but it is not an exclusive list Reg 6 (2³¹). It will be open to citizens to argue that leaving home was for reasonable excuses not set out in the Regulations.

Regulation 6 “Reasonable excuse”: Necessary shopping

36. Attending the businesses listed in Schedule 2 (3)³² to obtain

a. Obtain basic necessities for

oneself,

members of the household (including pets) and for

vulnerable people, or

²⁸ HP(CR)(E)R 2020/350 r 6 (1)

²⁹ HP(CR)(E)R 2020/350 r 6 (3)

³⁰ HP(CR)(E)R 2020/350 r 6 (4)

³¹ HP(CR)(E)R 2020/350 r 6 (2)

³² HP (CR)(E)R 2020/350 Sch.2.3

- b. “to obtain ... supplies for the essential upkeep, maintenance and functioning of the household”

will be “a reasonable excuse” for leaving the place of abode.

37. The business listed in Schedule 2.3 are

- All food shops from supermarket to corner shops
- off licences
- Pharmacies and chemists
- Newsagents
- Hardware shops
- Petrol stations
- Car repair and MOT services
- Bicycle shops
- Taxi and vehicle hire
- Banks, building societies
- Post offices
- Funeral directors
- Laundrettes
- Many varieties of health business, dentists, opticians
- Vets
- Agricultural supplies
- Storage and distribution facilities for all the above
- Car parks and public toilets

38. The Regulation does not permit unrestricted shopping even in the listed business.

Shopping must be to obtain necessities or for the essential upkeep maintenance and function of a household. Businesses selling the necessities alongside inessentials appear to be free to carry on selling the frivolities of existence – but customers may have to explain why they are out and about buying inessentials.

38.a Additional Reasonable excuse; going to the bank

Visiting the bank or Post Office to get or deposit money was added from 22 April to the activities providing a “reasonable excuse” for being away from the place of abode. Presumably some eagle eyed member of HM Treasury team spotted that the economic downturn caused by “lockdown” might be aggravated by permitting only internet banking.

Regulation 6 “Reasonable excuse”: Exercise

39. Exercise is a reasonable excuse. There is no restriction on the time or occasions; it can be taken with other members of the household³³. Government ministers and newspapers have suggested once a day is the permitted limit for exercise. The Regulation applies no limit.

Regulation 6 “Reasonable excuse”: Seeking Medical assistance, caring for vulnerable people, provide emergency assistance. Blood donation

40. A reasonable excuse for leaving home to go to the doctor and assist the vulnerable. The vulnerable include those over 70, the pregnant and anyone with an underlying health condition³⁴. Schedule 1 lists the underlying health conditions: they include chronic respiratory diseases; chronic heart, kidney or liver diseases; chronic neurological diseases (e.g. Parkinson’s, motor neuron, cerebral palsy); diabetes, spleen problems, weakened immunity from such conditions as AIDS, or the aftermath of chemotherapy; and being overweight with a BMI in excess of 40 (quite chunky – see e.g. <https://www.welenzijn.nl/lichaamssamenstelling-p6368-nl.html>).

People may also venture out to donate blood – naturally.

Regulation 6 “Reasonable excuse”: Travel to Work, including voluntary work

41. This part of the Regulation reads in full:

Reg 6 (2) ... a reasonable excuse includes the need ... (f); to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living.

42. If travel to work furnishes a person with a “reasonable excuse” for leaving the place where he or she lives, it must follow that the work travelled to is permitted under the Regulations.
43. Work travel to which it is not a reasonable excuse will therefore include
- Work or services it is reasonably possible to do or provide from the place a person lives Reg 6 (2) (f)
 - Work for business banned under Regulation 4 (1)– (3) provision of food and drink for consumption on the premises and Regulation 4 (4) listed in Sch.2.2 (cinemas

³³ HP(CR)(E)R 2020/350 r 6 (2) (b)

³⁴ HP(CR)(E)R 2020/350 r 1 (3)

etc.)

- Businesses covered under Regulation 5 (1) as all businesses not listed in Schedule 2.3

“offering goods for sale or for hire in a shop”

unless being carried on by remote ordering and subsequent delivery.

- Regulation 5 (3) & (4) holiday accommodation.
- Regulation 5 (5) – (7) places of worship and community centres.
- Regulation 5 (8) crematoria and burial grounds.

44. Which, in cases defined within the Regulations, leaves permitted travel to work at

- the businesses listed in Schedule 2.3 (those business at which necessary shopping remains is permitted)
- under Regulation 5 (1) the premises used by shops for receiving orders and arranging deliveries
- under Regulation 5 (2) take away food businesses

45. Other businesses not covered by the Regulations,

- Businesses that operate without shops or premises that customers visit. Regulation 5 (1) is limited to the control of businesses offering goods for sale or for hire in a shop. Regulation 5 (1) therefore does not regulate tradespeople such as plumbers, electricians and repairmen without a shop who ply their trade on their customers’ premises.
- Even if tradesmen have a shop as a base, they are entitled carry on. Regulation 5 (1) (a) requires them to
cease ... to provide that service except by [making deliveries] or otherwise providing services in response to orders received [by website, phone or post]
Since tradesmen such as decorators or electricians can be instructed by e.g. phone there is no prohibition on their continuing to work – the wise customer will comply with the Regulation by instructing them remotely.
- Regulation 5 (1) concerns shops; it does not cover workplaces where there are no customers. It therefore does not cover for example building sites. It cannot be said to apply to factories, as it covers only “businesses, not listed on Part 3 of schedule 2, of offering goods for sale or hire in a shop”.

46. The question arises of what, if any, part of the Regulations requires the closure of factories or such workplaces as building sites, or of businesses where goods or services are provided at the customer’s premises. Regulations 4 and 5 provide no ban except to the businesses set out in them. While Regulation 7 forbids gatherings, it only controls gatherings in public places.

47. That essentially leaves the entire burden of any ban on Regulation 6.1 which provides that

“no person may leave the place where they are living without reasonable excuse”.

while Regulation 6.2 makes it a reasonable excuse

“to travel for the purposes of work ... where it is not reasonably possible for that person to work ... from the place where they are living”.

On any sensible construction the wording of those provisions form no sound basis for alleging that a person commits criminal offence by travelling to work at a business of the sort described in paragraph 45 above. Quite apart from the wording itself the Regulation could quite easily have set out limits to permitted work; it does not.

Possible future Regulation concerning workplaces.

48. s 52 and Schedule 22 Coronavirus Act 2020 together grant government power to issue directions on gatherings and premises. Schedule 22 para 6 authorises the issue of

a direction imposing prohibitions, requirements or restrictions in relation to the entry into, departure from, or location of persons in, premises in England

but to date no such direction has been issued.

Under Schedule 22 paras 9 and 10, it will be a summary offence punishable by fine to disobey a direction; companies and company officers who connive in or are negligent in enforcing a direction will be guilty of the offence.

Regulation 6 various others “Reasonable excuse”:

49. You may leave home

- to attend a **funeral** if a member of the deceased’s household or close family member, or indeed as a friend but only a funeral attended by neither of the above categories of person³⁵
- by amendment from 22 April (HP(CR)(E)R 2020/350 r 6 (2) (ga)) it has become lawful to go a burial ground to “pay respects to a member of the person’s household, a family member or friend”. That seems to be intended to cover those who were either not allowed to go to the funeral or could not for some other reason get to the service.

³⁵ HP(CR)(E)R 2020/350 r 6 (2) (g)

- There is an exemption for **legal activities** such as attending court or answering bail or to participate in legal proceedings³⁶. This has largely been overtaken in practice by the courts moving to online or phone.
- You may leave home to **access critical public services**, including as a parent of a child educational services where still available, social services, DWP service³⁷.
- **Child visiting and contact rights** for separated parents are preserved³⁸.
- **Ministers of religion** or worship leaders may attend their (otherwise closed) places of worship³⁹.
- You may also **move house** “where reasonably necessary”⁴⁰ When is it reasonably necessary to move house? When contracts have been exchanged?
- You may also depart to **avoid injury, illness or a risk of harm**⁴¹. As confinement heats up domestic disputes potential victims can depart.

Regulation 7; gatherings in a public place

50. There is a complete ban on more than two people (i.e. 3 people) gathering. This only in a public place⁴². So it is not a measure intended to close workplaces.

51. There are exemptions for public place gatherings

- Where all persons gathered are members of the same household,
- Where it is essential for work purposes,
- for funerals
- it is reasonably necessary to facilitate a house move, to care for a vulnerable person, provide emergency assistance, and to participate in legal proceedings or fulfil a legal occupation.

52. Blood donation must remain a solitary action, or at any rate involve no more than two persons.

Regulation 8: Enforcement.

53. Powers of enforcement are given to “Relevant Persons”; defined as constables, but also includes PCSOs. So far as enforcement of Regulations 4 and 5 are concerned a

³⁶ HP(CR)(E)R 2020/350 r 6 (2) (h)

³⁷ HP(CR)(E)R 2020/350 r 6 (2) (i)

³⁸ HP(CR)(E)R 2020/350 r 6 (2) (j)

³⁹ HP(CR)(E)R 2020/350 r 6 (2) (k)

⁴⁰ HP(CR)(E)R 2020/350 r 6 (2) (l)

⁴¹ HP(CR)(E)R 2020/350 r 6 (2) (m)

⁴² HP(CR)(E)R 2020/350 r 7

local authority may designate persons as “relevant persons”, as may the Secretary of State⁴³

54. These relevant persons may take such action “as are necessary” to enforce Regulations 4, 5 and 7⁴⁴, including the issue of Prohibition Notice⁴⁵
55. Constables and PCSOs (and any persons so designated by the Sec of State) may enforce Regulation 6 (1) (requirement not to leave home without reasonable excuse) by giving to a person outside the place where he or she lives a directions to return, or by removing them there⁴⁶, and may use reasonable force to do so⁴⁷. They may also give reasonable instructions to a person while enforcing the Regulation ⁴⁸
56. The same relevant persons may enforce Regulation 7 (gatherings of 3 or more in public) by directing dispersal or return to place where persons live, or by removing them there, and may use reasonable force to do so⁴⁹. again, relevant persons may give reasonable instructions.
57. A relevant person may issue directions that require a person to return home (or to control a child’s movements) or that require a gathering to disperse only if he or she considers it a necessary and proportionate means of ensuring compliance⁵⁰. This provision may help in defending those at the receiving end of overzealous enforcement arguing along the lines that no reasonable relevant person could have reached the conclusion that the direction was required.
58. There are provisions for enforcement where children are present or repeatedly outside the place where they live⁵¹.
59. The Crown Prosecution Service advice is:

In general, we expect that enforcement of the regulation will be through the issuance of a prohibition notice (for businesses) or by directions (in respect of movement and gatherings). These may be issued to encourage compliance with the regulations or may be issued where an authorised person ‘believes’ that there has been a breach. However, this does not stop an authorised

⁴³ HP(CR)(E)R 2020/350 r 8 (12)

⁴⁴ HP(CR)(E)R 2020/350 r 8 (1)

⁴⁵ HP(CR)(E)R 2020/350 r 8 (2)

⁴⁶ HP(CR)(E)R 2020/350 r 8 (3)

⁴⁷ HP(CR)(E)R 2020/350 r 8 (4)

⁴⁸ HP(CR)(E)R 2020/350 r 8 (11)

⁴⁹ HP(CR)(E)R 2020/350 r 8 (9)

⁵⁰ HP(CR)(E)R 2020/350 r 8 (8)(10)

⁵¹ HP(CR)(E)R 2020/350 r 8 (5)-(7)

person from treating a breach as an offence without first issuing a prohibition notice or giving a direction.

Regulation 9: offences

60. The regulations create criminal offences in three situations:

- Contravention of a requirement without a reasonable excuse.
- Obstruction, without reasonable excuse, of a person carrying out a function under the regulations.
- Contravention of a prohibition notice or direction or reasonable instruction given to a person under regulation 8 without reasonable excuse - regulation 9(3).

61. It is an offence⁵² to

- Without reasonable excuse to contravene a requirement of Regulations 4, 5 7 or 8
- Contravene a requirement of Regulation 6 (which already contains a “reasonable excuse” clause)
- To obstruct, without reasonable excuse, any person carrying out a function under these Regulations
- To contravene, without reasonable excuse, a direction given under Reg 8,
- To fail to comply with a reasonable instruction or prohibition notice given under Reg 8.

59 Police officers are given additional powers of arrest without warrant. In addition to the existing reasons that may make an arrest necessary under s24 PACE 1984 (e.g. ascertaining name/address, allowing prompt and effective investigation, and preventing the investigation being hindered by the disappearance of the suspect). Arrest can now (reg. 9 (7)) also be justified on the grounds of maintenance of public health or public order. (This is a ‘belt and braces’ provision. The existing powers of arrest already included a justification of prevention of physical harm to anyone)

60 Offences may be committed by companies. Company officers who consent or “connive” in the offence, or where the offence is attributable to an officer’s negligence may also be prosecuted⁵³.

⁵² HP(CR)(E)R 2020/350 r 9 (1) – (3)

⁵³ HP(CR)(E)R 2020/350 r 9 (5) & (6)

61 The offence under Regulation 9 is summary, and punishable only by fine. There is no limit on the level of fine⁵⁴. Individuals convicted will have their means considered on the level of fine. Fines of company may well be guided by fines for Health and Safety breaches. Obvious factors will be the flagrancy or otherwise of any breach, the reasons behind it; and the danger the breach poses to public welfare. Deterrent sentencing is likely. However, there is a fixed penalty procedure limiting the level of penalty, but as with Road traffic offences prosecution and conviction takes an offence to a new level.

Regulation 10 Fixed penalty procedure

62 This is a similar procedure that which applies in traffic offences. “Authorised persons” - police officers and PCSO’s, and additionally here persons designated by the Secretary of State or a local Authority (who are operating in their local authority area) may issue a Fixed Penalty notice to anyone the Authorised person reasonably believes has committed an offence under these Regulations and who is aged 18 or over. Payment to a local authority specified in the notice discharges liability to conviction. The payment of £60 within 28 days will put an end to the matter if paid; early payment within 14 days⁵⁵ will reduce the penalty to £30

63 Repeat offenders face a doubling level of penalty for each notice up to the 5th offence, so an absolute maximum per notice of £960

What lies ahead

64 There has to be a review by 7 May 2020. Any tightening of the lockdown will need changes in provision for such measures as

- The closure of all non-necessary business
- Far greater control on persons leaving where they live.

Without a significant “second wave” of infections It is difficult to discern any political will to increase restrictions. On the contrary the preference is for relaxing some parts of the regulations. The “lockdown” is causing serious economic problems for many businesses and people. It is interesting to try to anticipate what alterations will allow greater amount of work but without risking spreading the disease. No doubt there will also be attempts to maintain consent to the restrictions, perhaps by lifting some social interaction currently forbidden

65. One factor that may be of increasing relevance in the future is that as testing become more available it is inevitable that people will discover that they have had Covid-19, and so can reasonably assume that they have immunity. Unless there is strong scientific consensus that immune people can still spread the virus any

⁵⁴ HP(CR)(E)R 2020/350 r 9 (4)

⁵⁵ HP(CR)(E)R 2020/350 r 10

consensus for following the rules is going to evaporate. Will immunity be a “reasonable excuse” or a factor in assessing reasonable excuse? The reasonable excuses listed in the regulation is not determinative Reg 6 (2) reads

“For the purposes of para 1 a reasonable excuse includes the need ...”

David Matthew

7 Bedford Row

London

3 April 2020 and 2 May 2020