

NEW LOCAL AUTHORITY COVID ENFORCEMENT POWERS

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Introduction

A suite of new additional local authority COVID related enforcement powers came into force on 2 December 2020 on the making of the snappily titled [The Health Protection \(Coronavirus, Restrictions\) \(Local Authority Enforcement Powers and Amendment\) \(England\) Regulations 2020](#). In a reversal of recent practice, non-statutory [Government Guidance](#) followed two days later on 4 December.

They introduce a trident of new Notices, each of which has a different effect: Coronavirus Improvement Notices (“CIN”), Coronavirus Restriction Notices (“CRN”) and Coronavirus Immediate Restriction Notices (“CIRN”). (Save for the appropriate homonym “SIN”, the other acronyms are mildly disappointing).

The Guidance states their purpose:

These tools will enable local authorities to take targeted action against unsafe premises and will help to avoid further sector-wide restrictions, thus keeping the majority of safe premises open.

The Local Government Association, who played a leading role in bringing these powers into existence, says to like effect:¹

¹ <https://www.local.gov.uk/parliament/briefings-and-responses/health-protection-coronavirus-restrictions-local-authority>

“It is important that councils can take rapid action against businesses breaking the rules, to help prevent the spread of the virus and support those organisations which have worked hard to keep their premises safe.”

The [Office for Product Safety and Standards](#) (OPSS) has sent to local authorities a suite of templates for issuing Notices (including Fixed Penalty Notices) under these regulations.

The new regulations have been made under the Public Health (Control of Disease) Act 1984, in common with most of the relevant COVID related regulations that presently dictate our personal and professional lives.

The notices are based in part on the existing health and safety regime under the Health & Safety at Work etc. Act 1974 (HSWA). The HSWA regime has been used, the Government explains, so that local authority officers will have some familiarity with the new regime.

The powers are likely to be an extremely useful tool when it is necessary for local authorities to enforce against premises breaching relevant COVID provisions.

The regulations apply only to England and expire 6 months from introduction. They can only be exercised by local authorities and not by police or other regulators. However, when police discover relevant breaches, as is often the case, they can be expected to provide the evidence to justify the use of the powers by their local authority partners.

This article summarises the new powers. Before doing so, consideration of more general principles on the use of enforcement powers by local authorities may prove valuable.

Enforcement: a matter of discretion

In a famous exchange in the House of Commons in 1951², the Attorney-General, Sir Hartley Shawcross (who a political wit once referred to as “Sir Shortly Floor-cross”, given his pragmatic political principles³), observed:

It has never been the rule in this country—I hope it never will be—that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should intervene to prosecute, amongst other cases: wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration.

The public interest, as a dominant consideration in all local authority enforcement action, remains an essential factor. In more modern times it is reflected in the [Regulators Code](#) (2014) whose principles are expressly referred to in the Guidance for these new COVID powers. These principles can, briefly, be stated as follows:

- Regulators should carry out their activities in a way that supports those they regulate to comply and grow.
- Regulators should provide simple and straightforward ways to engage with those they regulate and hear their views.
- Regulators should base their regulatory activities on risk.
- Regulators should share information about compliance and risk.

² <https://api.parliament.uk/historic-hansard/commons/1951/jan/29/prosecutions-attorney-generals>

³ Sir Hartley was also the UK’s Chief Prosecutor at the Nuremberg Trials in 1945-6.

- Regulators should ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply.
- Regulators should ensure that their approach to their regulatory activities is transparent.

Many local authorities will also have their own Enforcement Policies, which often adopt the two-pronged test set out in the Crown Prosecution Service's [Code for Crown Prosecutors](#), namely:

- Is there enough evidence against the defendant to provide a realistic prospect of conviction?
- Is it in the public interest to bring the case to Court?

This approach to enforcement - only if necessary and proportionate, and only if it serves the public interest – flows through the whole local authority enforcement framework, not least in relation to licensed premises. If a quiet word with a licensee will achieve the necessary improvements, then that is to be preferred to formal enforcement action. So, for example, the Section 182 Guidance to the Licensing Act 2003 states (at §11.10):

*Where authorised persons and responsible authorities have concerns about problems identified at premises, it is good practice for them to give licence holders **early warning** of their concerns and the need for improvement, and where possible they should **advise** the licence or certificate holder of the steps they need to take to address those concerns. A **failure** by the holder to respond to such warnings is expected to lead to a decision to apply for a review. **Co-operation at a local level in promoting the licensing objectives should be encouraged and reviews should not be used to undermine this co-operation.***

A spirit of partnership between regulators and the regulated is to be encouraged. As the s.182 Guidance observes at (§8.48): “*All parties are expected to work*

together in partnership to ensure that the licensing objectives are promoted collectively.”

Similar pleas for a proportionate and understanding response by regulators during the COVID pandemic, particularly given the vast and potentially existential challenges it has created for the hospitality industry, have been made by the Institute of Licensing in their [COVID-19 Protocol](#), by the [Local Government Association](#), and by Kit Malthouse MP, the Minister of State for Crime and Policing, in his [letter](#) to Chairs of Licensing Committees in April 2020.

Likewise, police forces across the country have adopted “the 4 Es” approach to enforcement during the pandemic: Engage, Explain, Encourage, Enforce.

In relation to the new enforcement powers addressed in this article, the [LGA](#) state:

“Enforcement tools will be used as a last resort for example when there is ongoing or wilful non-compliance. Effective enforcement requires councils to have the right tools at their disposal to incentivise businesses to improve their compliance or face significant penalties if they do not.”

This can all be summed up in the Churchillian phrase, “jaw jaw is better than war war”. It is only at the point that talk and engagement fails that enforcement takes over.

With that extended caveat, we now turn to the powers themselves.

What breaches are relevant?

The new powers can only be exercised where there has been a contravention of a relevant COVID-related statutory provision. These are set out in full in regulation 2. They include most of the provisions applying to business premises one would expect under the [Obligations of Undertakings Regulations](#), the [All Tiers Regulations](#), the [Collection of Contact Details Regulations](#), and the [Self-Isolation Regulations](#).

In summary, these include breaches of the following obligations and requirements to:

- take reasonable steps not to accept bookings, admit groups or allow persons to join groups or interact, in a way that offends the gatherings rules;
- keep appropriate distance between tables in hospitality premises;
- display a notice or otherwise ensure persons entering the relevant area are given the relevant information about the rules on face coverings, that information being that they need to wear one unless an exemption applies;
- prohibit a person responsible for a business from preventing or seeking to prevent any person at their premises from wearing a face covering where they must do so;
- restrict any business from providing a waterpipe for the consumption of tobacco or other substances or a device for the inhalation of nicotine or other substances (including for shisha);
- ensure that orders for food or drink for consumption on the premises are only taken at hours and in a manner permitted by the All Tiers regulations
- operate, or not to operate, at certain hours or at all in line with the All Tiers regulations;
- close businesses providing alcohol for consumption on the premises without a substantial meal in Tier 2;

- display an NHS QR code in a relevant premises for the collection of contact details;
- request certain details from an individual, or at least one member of a group, when they seek to enter a relevant premises and have not scanned the NHS QR code;
- request the details of an individual and the one member of staff, volunteer or person providing the service, where an individual will only come into contact with that person;
- require hospitality businesses or premises to refuse entry to individuals or groups who do not provide the required details;
- require businesses or premises to retain this information securely for 21 days and disclose those details when requested to do so by a public health officer;
- require an employer not to knowingly allow a worker who must self-isolate to attend work other than at the designated place of isolation, during the period of isolation.

The three types of Notices that can be issued are considered below.

Coronavirus Improvement Notice

A Coronavirus Improvement Notice (“CIN”) can be issued, under regulation 3, by a local authority when a business is failing to fulfil a provision set out in the relevant coronavirus regulations. This will often be the first step for local authority enforcement officers to encourage businesses to remedy unsafe practices.

A CIN may be issued to a person where a local authority officer is of the opinion that:

- the person is contravening one or more of the relevant statutory provisions;

and,

- the requirement or requirements of the notice are necessary and proportionate to ensure that the contravention is, or contraventions are, ended or remedied.

The CIN will be applied for a minimum of 48-hours, giving time for the contravenor to put things right, in response to the improvement notice, prior to further enforcement action being taken that may have the effect of closing the offending premises. There is no maximum period stated within the regulations. Local authorities will exercise their discretion as to how long the CIN should apply for in each individual case. In some cases, this may be a matter of weeks, in others, months, so long as it does not go over the 6-month period the regulations are in force for.

Regulation 3(3) provides minimum requirements for what the CIN must state:

- the name of the person to whom it is issued or, where it is not possible to obtain the name, the premises to which it relates;
- the date on, and time at, which the notice is issued;
- the local authority designated officer's opinion;
- the relevant statutory provision or provisions that the officer is of the opinion is or are being contravened;
- particulars of the reasons for the officer's opinion;
- a requirement or requirements that the person to whom the notice is issued must meet to end or remedy the contravention or contraventions;

- the period within which any requirement or requirements must be met, such period ending not earlier than 48 hours from the time at which the notice is issued;
- the date on and time at which the notice ceases to have effect, being the date on and time at which the last of any periods specified ends;
- a statement explaining that failure to comply with the notice is an offence, conviction for which is punishable by a fine and may result in the serving of a Coronavirus Immediate Restriction Notice or a Coronavirus Restriction Notice;
- details of the right to appeal to a magistrates' court, and the time within which any appeal may be brought.

A CIN may (but need not) include suggestions as to the measures which could be taken to ensure that any requirement or requirements is or are met.

In common with the other Notices, there is a process requiring the designated local authority officer to "review" the CIN. This review takes place in one of two scenarios:

- Unilaterally by the local authority at, or as soon as practicable after, the end of the period for which the notice has effect.

Or,

- Where, before the end of the period for which the notice has effect, a person to whom a CIN has been issued believes that all requirements in the notice have been met, that person may request the local authority to review the notice. This review must take place within 48 hours of the request being received.

In carrying out either type of review, the local authority must:

- Decide whether the CIN has been complied with and, if so, withdraw the notice; and
- Notify the person to whom the notice was issued of that decision and that person's right of appeal to a magistrates' court, and the time within which such an appeal may be brought.

On review, if the circumstances still require it, the local authority may issue a new CIN or a Coronavirus Immediate Restriction Notice or a Coronavirus Restriction Notice to the same person. Therefore, there can be a rolling series of enforcement measures taken if the first CIN is not adequately complied with.

Coronavirus Restriction Notices

A Coronavirus Restriction Notice ("CRN") may be issued by a local authority, under regulation 5, if:

- a person has failed to comply with the Improvement Notice ("CIN", as considered above);
- and,
- an officer is of the opinion that the person has failed to comply with the notice;
- and,
- the non-compliance involves a risk of exposure to coronavirus.

A CRN must require either or both of the following:

- the closure of the premises, or part of the premises;

- that the person to whom the notice is issued must end or remedy the contravention or contraventions specified in the Coronavirus Improvement Notice.

Given the contravenor has already failed to comply with the CIN, it is likely that the requirement will be to close the premises in most cases.

Any requirement in a CRN must be necessary and proportionate for the purpose of “minimising the risk of exposure to coronavirus”. This test is different to the test for issuing the initial CIN, since it adds the “risk of exposure” threshold. So, whilst a premises failing to abide by restrictions on people gathering in prohibited large numbers at premises, or failing to abide by curfews or enforcing the wearing of face coverings, may well increase the risk of exposure to coronavirus justifying the issue of a CRN, the same may not be true where a premises has, for example, simply failed to display the QR code or put up a notice regarding face coverings in accordance with regulations. Each case will be judged on its merits, but local authorities will need to be able to justify that the breach did have the likely effect of increasing exposure to coronavirus. In most cases this will not be difficult to do. This same requirement also applies to Immediate Restriction Notices (considered further below).

The requirements in the CRN taken effect either at the end of a specified period in the Notice (e.g. the premises must close in 24 hours) or, if no such period is specified, it takes effect immediately.

Since the premises in receipt of a CRN will already have been given the opportunity to comply with an Improvement Notice, and has failed to do so, the duration of a CRN, even one which closes the premises, is a fixed period of 7 days (not more or less, at first). This will serve as a useful encouragement to non-compliant premises to raise their game in response to warnings contained within the previously issued Improvement Notice if they wish to avoid a significant period of closure.

The Notice itself must contain the information set out in regulation 5(7) which echoes, but is not identical to, the requirements for a CIN.

As with CIN's there is a dual route to review the CRN. A review must take place as soon as practicable after a request by the recipient made before it expires. This review must be conducted within 48-hours or before the notice ceases to have effect, whichever is earlier.

In the absence of a request by the recipient of the CRN, the local authority must in any event review the CRN before the notice ceases to have effect. Having considered the review, the local authority must then decide whether the requirements remain necessary and, if none of the requirements are necessary, withdraw the notice. Alternatively, if some, but not all of them remain necessary, the CRN may be amended or withdrawn, and a new notice issued. On review, if the local authority is of the opinion that it is necessary and proportionate, it may also issue a new CRN (potentially closing the premises for a further 7 days) or issue an Improvement Notice or Immediate Restriction Notice.

This provides local authorities with a range of flexible enforcement options at the end of the 7-day closure period that meet the needs of the case.

Coronavirus Immediate Restriction Notices

A Coronavirus Immediate Restriction Notice ("CIRN") may be issued by a local authority, under regulation 4, where rapid action is needed to close a premises or restrict an activity to stop the spread of the virus, without first issuing a CIN to stop the spread of the virus. As with CRN's, any requirement in a CIRN must be necessary and proportionate for the purpose of "minimising the risk of exposure to coronavirus".

The CIRN may be issued where an officer is of the opinion that the person is contravening one or more of the relevant statutory provisions in circumstances that:

- make it likely that the contravention will continue or be repeated;

and,

- that contravention involves, or would involve if continued or repeated, a risk of exposure to coronavirus.

A CIRN must require either or both of the following (which are similar to the requirements in the case of a CRN):

- the closure of the premises, or part of the premises;
- that the person to whom the notice is issued must end or remedy the contravention or contraventions or, as the case may be, that that person must ensure that the contravention or contraventions will not be repeated or continued (or both).

Given a CIRN may be issued without the opportunity an Improvement Notice provides for the contravenor to remedy the breach, its effect is more time limited than a CRN. The CIRN has effect for a fixed period of 48 hours after the time it is issued. However, this 48-hour period may take effect at the end of a specified period or, if no such period is specified, immediately. Therefore, there can be an in-built, “Sword of Damocles” style, pause to a CIRN coming into effect if a local authority believes that may concentrate the contravenor’s mind and have the desired effect.

The information that must be included in the Notice is set out in regulation 4(7).

The dual system of review of the Notice also applies.

The CIRN must be reviewed by a local authority before the notice ceases to have effect. Alternatively, if the recipient believes the Notice is no longer necessary, they

can request a review by the local authority. That review must be carried out “as soon as practicable” (given the Notice only lasts for 48 hours).

On carrying out the review, the local authority must decide whether the requirements remain necessary. If not, they must withdraw the notice. If some, but not all, remain necessary, the Notice can be amended or withdrawn and re-issued. The local authority may then issue a new CIRN, or CIN or CRN if justified.

Essential Infrastructure

No notices under these provisions may be issued in relation to “essential infrastructure”. Helpfully, this phrase is left undefined in these regulations. But, as a guide, local authorities may wish to have regard to the examples of essential infrastructure provided in the separate [Guidance](#) issued in relation to the [No.3 Regulations](#). It is respectfully suggested that Notices are not issued in relation to nuclear power stations, airports, hospitals, rail terminals, police stations or town halls, as examples.

Offences and Fixed Penalty Notices

It is a summary offence to fail to comply with a CIN, CIRN or CRN “without reasonable excuse”. In the magistrates court an unlimited fine is available by way of sentence.

The local authority or Crown Prosecution Service may instigate a prosecution. The usual 6-month time limit for laying an information in the magistrates’ court applies by virtue of s.127 of the Magistrates’ Courts Act 1980.

Company officers may be also be personally criminal liable if the offence has taken place with their consent, connivance or due to their neglect.

As an alternative to prosecution, under the now familiar system of Fixed Penalty Notices, FPN’s may be issued if an officer reasonably believes a person (aged over 18) has committed an offence under these regulations. Only one FPN may be issued for failure to comply with a single Notice, so repeated breaches of the same notice can only attract one FPN. It may well be the case that further FPN’s

can be issued if further Notices are issued at the expiry of the first one and then breached again.

The fixed penalty amount is £2,000 for failing to comply with a CIN or £4,000 for failing to comply with a CIRN or CRN.

Once a FPN is issued there can be no prosecution for 28 days after it is issued, or if it is paid. This gives time for payment, failing which the sanction is prosecution.

If a breach is particularly severe, local authorities are permitted to proceed straight to a prosecution with issuing a FPN so that the Court can punish the offender commensurately with the crime. Local authorities must ensure the available evidence is sufficient to convince a Court that an offence has been committed to the high criminal standard, namely that the Court can be “sure” of guilt or, as sometimes expressed, “beyond reasonable doubt”.

Appeals

The recipient of any type of Notices under these regulations can appeal its issue to the magistrates’ court. A similar appeal lies against a local authority’s decision made on review of the Notice. The appeal must be launched within 28 days from the date of the Notice or notification of the decision on review. The local authority will be the Respondent to the appeal.

Following an appeal, the local authority may withdraw a Notice.

The Guidance to the regulations, but not the regulations themselves, suggest that “*where an appeal is made and is successful, compensation may be awarded by the magistrates’ court*”. The statutory basis for this assertion is presently unclear.

Investigative Powers

The regulations extend the police’s powers of arrest without warrant to reasons that include the purposes of maintaining public health and public order. This power does not apply to local authority officers.

The powers of entry and investigation for local authority officers to support the issuing of a Notice under these regulations are set out in s.61-62 of the Public Health (Control of Diseases) Act 1984. These include provisions enabling “*any proper officer of a relevant health protection authority*” (on producing authority if so required) a right to enter any premises at all reasonable hours for the purposes of ascertaining whether there is, or has been, any contravention of a relevant provision of this Act”. A properly designated local authority officer would fall within this definition. This right to enter does not extend to a private dwelling in the absence of a court warrant.

Designations

It is important that local authorities ensure that any officer who issues a Notice, or takes other steps, under these regulations has been expressly delegated to do so in line with the authority’s scheme of delegation. The ideal position is that each individual officer is delegated powers by name to act under these regulations. However, it may be sufficient for the delegation to give a more general description, for example, applying to all environmental health or licensing officers, as appropriate.

Conclusion

These new powers provide an extremely useful and efficient tool for local authorities in dealing with COVID related breaches by businesses. They are additional to other existing tools in the local authority and police’s armament. As with all enforcement powers they should be used only when necessary and proportionately.