Francis Taylor Building

The Rules for Independence Day and Beyond

The Health Protection (Coronavirus, Restrictions) (No. 2) England Regulations 2020 (S.I. 2020 No. 684) and associated guidance

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Glossary of Terms and Abbreviations

		Doc ref
Bars Guide	Shorthand for the BEIS guide relating to Restaurants, pubs, bars and takeaway services that forms part of the Working Safely Guidance.	1.11
EHO	Environmental Health Officer	
the FAQs	Shorthand for the Cabinet Office guidance "Coronavirus outbreak FAQs: what you can and can't do"	1.11
HSE	Health and Safety Executive	
HSWA	Health and Safety at Work etc. Act 1974	
PACE	Police and Criminal Evidence Act 1984	
MHSWR	Management of Health and Safety at Work Regulations 1999	
SEV	sexual entertainment venue as defined in paragraph 2A of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982	
Working Safely Guidance	Shorthand for the BEIS guidance applying to England on "Working safely during coronavirus (COVID-19)", consisting of 12 guides.	1.11

1. *Introduction*

1.1. With what has become the usual essay-crisis timing, the regulations to remove the closure restrictions that had been imposed on English restaurants, cafes, bars and public houses to prevent the spread of coronavirus were published at around 3.25pm on Friday 3 July 2020: just in time for "Independence Day" on Saturday 4 July 2020.

1.2. Those regulations are The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (S.I. 2020 No. 684).

1.3. As the "No. 2" in the title indicates, these regulations supersede what went before, The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 2020 No. 350). Those regulations in turn had gone through four sets of amendments (S.I. 2020 Nos. 447, 500, 558 and 588) and, when first published, had themselves superseded the initial regulatory instrument, The Health Protection (Coronavirus, Business Closure) England Regulations 2020 (S.I. 2020 No. 327), published on 21 March 2020.

1.4. It has been a bewildering time for all affected, with **seven** sets of regulatory regimes over a 17 week period, six of those iterations dealing not just with business closures but restrictions on movement and gatherings.

1.5. Movement restrictions have now gone. The latest regulations are concerned with the closure of premises and businesses, restrictions on gatherings and a (new) power to restrict access to public places.

1.6. All seven regulations were made by Secretary of State in exercise of powers conferred by the Public Health (Control of Disease) Act 1984.

1.7. For each and every regulation, the Secretary of State certified for the purposes of the emergency procedure found in section 45R of the Act that he was of the opinion that, by reason of urgency, it was necessary to make the relevant statutory instrument without a draft having been laid before, and approved by Parliament.

1.8. This might have very well been the case in relation to the first regulations, made at 2pm on Saturday 21 March 2020, the day after the Prime Minister's 5pm announcement that "We are collectively telling pubs, bars and restaurants to close tonight as soon as they reasonably can, and not to open tomorrow".

1.9. It more difficult to discern, however, where the urgency for the latest regulations was given that the 4 July "Independence Day" re-opening was announced by the Prime Minister during the 23 June 2020 press conference, some 10 days before the regulations eventually emerged. With the benefit of hindsight, it is obvious that the guidance published on 24 June 2020 had been written with knowledge of the thrust of the new regulations. Yet no draft regulation was promulgated before the Friday afternoon publication, and much of the sector and its regulators were obliged to repeatedly refresh the new legislation page of the National Archives website to find out what the precise law might be the following day. Some sort of consultation with stakeholders might have avoided some of the many idiosyncrasies found in all the various versions of the regulations (such as references to business categories with opaque legal meaning - "nightclubs" anyone?). But, more significantly, rule by unpredictable last minute Ministerial diktat is not a habit that governments should be getting into.

1.10. That being said, the latest regulations are liberalising in the sense that they sweep away many previous restrictions: they may be harsh and illiberal, but not as harsh and illiberal as what has gone before. Significant categories of premises have been allowed to reopen. The intrusive set of Orwellian restrictions on movement and gatherings has been significantly relaxed.

1.11. However, this regulatory relaxation needs to be considered in the context of a wave (if not a tsunami) of non-statutory government guidance. Soon after the latest regulations emerged, so - inevitably - did guidance on the regulations, "Closing certain businesses and venues in England" (a misleadingly narrow title). Updates also came to previous suites of guidance published in anticipation of the new regulations, including, but not limited to:

- Working safely during coronavirus (COVID-19), published by the Department for Business, Energy and Industrial Strategy ("BEIS") ("the Working Safely Guidance") in updated form on 3 July 2020, which is made up of 12 sub-guides for different types of work ("the Working Safely Guidance"), to be applied on a "pick n' mix" basis depending on the make-up of a business, including:
    - 5 steps to working safely (the 5 main steps for all businesses);
    - Restaurants, pubs, bars and takeaway services (the 44 page document which is rapidly becoming the licensed trade COVID-19 bible) ("the Bars Guide");
    - Hotels and other guest accommodation;
    - The visitor economy ("Guidance for people who work in hotels and guest accommodation, indoor and outdoor attractions, and business events and consumer shows");
- Staying alert and safe (social distancing), published by the Cabinet Office in updated form on 3 July 2020 - includes guidance to individuals on social distancing;
- Meeting people from outside your household, published by the Department of Health and Social Care ("DHSC") in updated form on 4 July 2020 - more guidance to individuals on social distancing;
- COVID-19: Guidance for small marriages and civil partnerships, published by Ministry of Housing, Communities & Local Government ("MHCLG") in updated form on 4 July 2020;
- COVID-19: Guidance for the safe use of places of worship during the pandemic, published by MHCLG in updated form on 4 July 2020;
- COVID-19: Guidance for the safe use of multi-purpose community facilities, published by MHCLG in updated form on 6 July 2020.
- Coronavirus outbreak FAQs: what you can and can't do, published by the Cabinet Office in updated form on 6 July 2020 ("the FAQs").
- Guidance for the public on the phased return of outdoor sport and recreation in England, published by DCMS in updated form on 7 July 2020.

1.12. We suggest that stakeholders in the licensed sector regularly monitor (as a minimum) the BEIS guidance. It is good practice to download and retain guidance documents when updated in order to know what the guidance was at any given point in time.

1.13. At the start of lockdown, there was much (often eminent) criticism of guidance going beyond regulatory requirements, the classic example being the Cabinet Office's guidance of 23 March 2020 stating that exercise could only be taken outside the home once a day, when the regulations in force imposed no such numerical limit (the offending guidance being withdrawn following an intimated judicial review challenge).

1.14. Guidance is now playing a different role. Instead of being used to beef up regulations, the approach announced on 23 March 2020 is to remove regulatory prohibitions and instead - so far as individuals are concerned - to trust their "common sense" and "continued cooperation and good judgment" to "do the right thing" (albeit the right thing as set out in minute detail in reams of guidance). A not dissimilar approach has been taken to businesses and other organisations: the government has moved away from specific coronavirus-related regulation to the underlying duties found in health and safety legislation, the primary statute being the Health and Safety at Work etc Act 1974 ("HSWA"), with the onus on the operators of workplaces and other premises to undertake and implement their own risk assessments (already required of employers under the Management of Health and Safety at Work Regulations 1999 ("MHSWR")) with regard to COVID-19 risks (but once again with pages and pages of guidance).

1.15. Care needs to be taken to distinguish between:

- law (the latest regulations as well as existing health and safety legislation);
- statutory guidance and codes of practice (for example the Health and Safety Executive's approved codes of practice) where law prescribes the status of the guidance etc;
- non-statutory guidance as how to comply with the law (for example Working Safely Guidance);
- non-statutory guidance on how to be a good citizen (much of the Cabinet Office's guidance on "Staying alert").

1.16. The purpose of this document is to provide a short introduction to latest regulations and some answers to frequently asked questions and answers.

1.17. This is a dynamic document produced at some haste. It will be updated as the regulations are (inevitably) amended, guidance is (inevitably) updated and its application in practice (inevitably) throws up issues and (hopefully) some answers. **The authors encourage feedback.**

1.18. The document is not, and is not intended to constitute legal advice. It is for general informational purposes only. The views expressed are of the authors writing in their individual capacities only. All liability with respect to actions taken or not taken based on the content of the document is expressly disclaimed.

2. *What businesses were allowed to open on 4 July 2020?*

2.1. Using the numbering and - where indicated in italics - the wording of Schedule 2 of the former regulations, and comparing with the new regulations which revoked them, the following business could open on 4 July 2020:

1. *Restaurants, including restaurants and dining rooms in hotels or members' clubs*.

2. *Cafes, including workplace canteens* not subject to the "no practical alternative" exception (which had not had to close).

3. *Bars, including bars in hotels or members' clubs.*

4. *Public houses.*

5. *Cinemas* (n.b. *drive-in cinemas* had been permitted from 15 June 2020).

6. *Theatres.*

8. *Bingo halls.*

9. *Concert halls.*

10. *Museums and galleries* (n.b. *retail galleries, where the majority of the art on display is for sale* had been permitted from 15 June 2020).

14. *Hair salons and barbers* (see item 7(1) in the new regulations for the corresponding carve-out).

17. Outdoor *skating rinks.*

18. ~~*Indoor fitness studios, gyms, swimming pools, bowling alleys*~~, *amusement arcades* ~~*or soft play areas*~~ *or other indoor leisure centres or facilities, including indoor games, recreation and entertainment venues.*

(continued closures shown by striking out, but full paragraph shown to give context)

19. *Funfairs (whether outdoors or indoors) theme parks and adventure parks and activities.*

20. *Playgrounds and outdoor gyms.*

23A. *Social clubs.*

23B. *Model villages.*

23C. *Indoor attractions (within the meaning given in paragraph 23E(2)) at aquariums, zoos, safari parks, farms, wildlife centres and any place where animals are exhibited to the public as an attraction.*

23E

(1) Indoor attractions at visitor attractions such as—

(a) botanical or other gardens, biomes or greenhouses;

(b) heritage sites or film studios;

(c) landmarks, including observation wheels or viewing platforms.

(2) For the purposes of sub-paragraph (1), an "indoor attraction" means those parts of a venue, including visitor centres but not including toilets for visitors, which—

(a) would be considered to be enclosed or substantially enclosed for the purposes of section 2 of the Health Act 2006 under the Smoke Free (Premises and Enforcement) Regulations 2006; and

(b) are, in normal times, open for members of the public to visit for the purposes of recreation, whether or not for payment.

3. *What businesses must remain closed?*

3.1. Regulation 4(1) provides that a person responsible for carrying on a business or providing a service which is listed in Schedule 2 of the Regulations must cease to carry on that business or to provide that service during the emergency period.

3.2. Schedule 2 lists 17 categories of businesses. They are:

1. Nightclubs.

2.

(1) Dance halls, discotheques, and any other venue which—

(a) opens at night,

(b) has a dance floor or other space for dancing by members of the public (and for these purposes members of the venue in question are to be considered members of the public);

(c) provides music, whether live or recorded, for dancing.

(2) A business does not fall within paragraph (1) if it ceases to provide music and dancing.

3.

(1) Sexual entertainment venues and hostess bars.

(2) For the purposes of this paragraph—

(a) *"sexual entertainment venue" has the meaning given in paragraph 2A of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982;*

(b) *"hostess bar" has the meaning given in paragraph 3B of that Schedule).*

4. *Casinos.*

5. *Nail bars and salons.*

6. *Tanning booths and salons.*

7.

(1) *Spas, and beauty salons, and for these purposes, "beauty salon" includes any premises providing beauty services including cosmetic, aesthetic and wellness treatments.*

(2) *Sub-paragraph (1) does not require the closure of a hairdresser or barber which does not provide other beauty services within sub-paragraph (1).*

8. *Massage parlours.*

9. *Tattoo parlours.*

10. *Body and skin piercing services.*

11. *Indoor skating rinks.*

12. *Indoor and outdoor swimming pools, including water parks.*

13. *Indoor play areas, including soft play areas.*

14. *Indoor fitness and dance studios.*

15. *Indoor gyms and sports courts and facilities.*

16. *Bowling alleys.*

17.

(1) *Conference centres and exhibition halls, so far as they are used to host conferences, exhibitions or trade shows other than conferences or events which are attended only by employees of the person who owns or is responsible for running the conference centre or exhibition hall.*

(2) *For the purposes of this paragraph, a "trade show" is an event held to bring together members of a particular industry to display, demonstrate and discuss their latest products and services with members of the public.*

3.3. Difficulties arise because much of the terminology is in plain - rather than legal - English.

3.4. The revoked regulations can be an aid to interpretation - seeing what has come out of the earlier requirements can be helpful to determine what has stayed in. However, the terminology of the two sets of regulations differs in places, requiring some application of judgment to see where the line falls.

4. *What are nightclubs and how do they interrelate with "dance halls" etc?*

4.1. Licensing practitioners raised their collective eyebrows when the earlier regulations required the closure of "nightclubs" as a category. There is no concept in licensing law of a "nightclub", and hitherto it had only featured as a legislative creature in the Town and Country Planning (Use Classes) Order 1987 as a sui generis use (so not within A4 (Drinking establishment) or D2 (Assembly and leisure) use).

4.2. Since the coming into force of the Licensing Act 2003, the boundary between pubs, bars and nightclubs became significantly blurred, leading to "hybrid" premises and a practical flexibility which some wags considered might blend into legal flexibility for the purposes of these regulations, with suggestions that a "nightclub" is a bar with valid business interruption insurance, and a "bar" is a nightclub that wants to open on 4 July.

4.3. The debate has probably been rendered academic by the inclusion of the new "dance halls etc" category at item 2 of the schedule of businesses subject to closure:

> *(1) Dance halls, discotheques, and any other venue which—*
>
> *(a) opens at night,*
>
> *(b) has a dance floor or other space for dancing by members of the public (and for these purposes members of the venue in question are to be considered members of the public);*
>
> *(c) provides music, whether live or recorded, for dancing.*
>
> *(2) A business does not fall within paragraph (1) if it ceases to provide music and dancing.*

4.4. It is not entirely clear whether the triumvirate of conditions in sub-paragraphs (a)-(c) (i.e. opens at night, has a dance floor or other space for dancing and provides music for dancing) apply to all of the identified premises - dance halls, discotheques, and any other venue, or just to "any other venue". If the former, then dance halls and discotheques which open other than at night are not subject to closure. Given that the regulation is made in response to the serious and imminent threat to public health which is posed by the spread of coronavirus, which (so far as we are aware) spreads as easily during the day than at night, we think it is likely that a court would interpret the category as encompassing both night-time and day-time dance halls and discotheques.

4.5. We note in passing that "night" is not defined. There is significant scope for debate as to when night might begin and end.

4.6. The paragraph (b) qualification can be met not only by a venue with a laid out dance floor but also to one that has some "other place for dancing". We do not consider that this is likely to catch people dancing between tables spontaneously - such space is not "for dancing".

4.7. The type of music being provided may be relevant in establishing whether the paragraph (c) qualification is met. Music "for dancing" may include a live DJ playing dance music, but is unlikely to encompass a string quartet simply playing background music for an audience's listening pleasure.

4.8. The insertion of this new category constitutes regulatory acceptance that businesses can repurpose to move out of a closure category. It recognises the economic imperative of allowing the hospitality sector to reopen whilst seeking to avoid the risks where there is loud music and dancing. Those risks are identified in the "Entertainment" section of the Bars Guide [4.5] as follows:

> *All venues should ensure that steps are taken to avoid people needing to unduly raise their voices to each other. This includes, but is not limited to, refraining from playing music or broadcasts that may encourage shouting, including if played at a volume that makes normal conversation difficult. This is because of the potential for increased risk of transmission, particularly from aerosol transmission. We will develop further guidance, based on scientific evidence, to enable these activities as soon as possible. You should take similar steps to prevent other close contact activities, such as communal dancing.*
>
> *Steps that will usually be needed:*
> *…*
>
> - *Preventing entertainment, such as broadcasts, that is likely to encourage audience behaviours increasing transmission risk. For example, loud background music, communal dancing, group singing or chanting.*
>
> - *Reconfiguring indoor entertainment spaces to ensure customers are seated rather than standing. **For example, repurposing dance floors for customer seating.***
>
> (emphasis added)

4.9. The legitimacy of "repurposing" business use is also inherent - it is submitted - in the wording of the Regulation 4 obligation, which, despite the heading "Requirement to close premises and businesses, is not to close premises but to "cease to carry on that business or provide that service".

4.10. The exemption in 2(2) is unhappily worded. Most dance halls, discotheques etc do not provide "dancing", they provide "facilities for dancing". No doubt a purposive interpretation would imply those words.

5. *What is a sexual entertainment venue?*

5.1. Sexual entertainment venues ("SEVs") had not featured in the earlier closure regulations, but "sexual entertainment venues and hostess bars" were added to the list of businesses subject to closure in paragraph 3 of Schedule 2 to the latest regulations.

5.2. This was to the disappointment of some lap-dancing club operators, who considered that a wholly seated low capacity venue with entertainment provided from a conditioned minimum distance over a short period of time (the length of a pop song), with an absence of speaking was - on a risk assessment basis - COVID-19 secure.

5.3. For the purposes of the paragraph, "sexual entertainment venue" has the meaning given in paragraph 2A of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982. This provides:

> *(1) In this Schedule "sexual entertainment venue" means any premises at which relevant entertainment is provided before a live audience for the financial gain of the organiser or the entertainer.*
>
> *(2) In this paragraph "relevant entertainment" means—*
>
> *(a) any live performance; or*
>
> *(b) any live display of nudity;*
>
> *which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).*
> *….*
>
> *(14) In this paragraph—*
>
> *"audience" includes an audience of one;*
>
> *"display of nudity" means—*
>
> *(a) in the case of a woman, exposure of her nipples, pubic area, genitals or anus; and*
>
> *(b) in the case of a man, exposure of his pubic area, genitals or anus;*
>
> *"the organiser", in relation to the provision of relevant entertainment at premises, means any person who is responsible for the organisation or management of—*
>
> *(a) the relevant entertainment; or*
>
> *(b) the premises;*
>
> *"premises" includes any vessel, vehicle or stall but does not include any private dwelling to which the public is not admitted;*
> *…*
>
> *and for the purposes of sub-paragraphs (1) and (2) it does not matter whether the financial gain arises directly or indirectly from the performance or display of nudity.*

5.4. It seems likely that, as with dances halls and discotheques, premises which are licensed under Schedule 3 of the 1982 Act can "repurpose" as bars not subject to closure by the simple expedient of not providing relevant entertainment. If the relevant entertainment is not there, then it can be said not to be a SEV.

5.5. It is common in some localities for public houses to hold SEV licences for occasional use - public houses in Newcastle providing match day "strippers" are one such example.

5.6. SEVs do not include sex cinemas, sex shops and hostess bars. Nor do they include premises which provide only infrequent sexual entertainment within the meaning of paragraph 2A(3)(b), which excludes from the regime:

> *… premises at which the provision of relevant entertainment as mentioned in sub-paragraph (1) is such that, at the time in question and including any relevant entertainment which is being so provided at that time—*
>
> *(i) there have not been more than eleven occasions on which relevant entertainment has been so provided which fall (wholly or partly) within the period of 12 months ending with that time;*
>
> *(ii) no such occasion has lasted for more than 24 hours; and*
>
> *(iii) no such occasion has begun within the period of one month beginning with the end of any previous occasion on which relevant entertainment has been so provided (whether or not that previous occasion falls within the 12 month period mentioned in sub-paragraph (i));*

5.7. This leads to a curious anomaly that venues whose provision of sexual entertainment falls outside the SEV regulations by virtue of its occasional nature are not required to close by these regulations.

5.8. Whilst there are opposing views as to the width of the statutory definition of SEV, in general premises such as saunas, fetish and sex clubs, and swingers' clubs ought to be considered to be SEVs. These premises therefore should be within the effect of the closure regulations.

6. *The unlicensed sex industry*

6.1. One consequence of the historical unwillingness of the legislature to be seen to "condone" the sex industry by regulating the same by a scheme of licensing is that many of its well-established elements fall outside the closure provisions because they are not considered to be SEVs.

6.2. Premises such as brothels, and services provided by sex workers and escort agencies have not in general been subject to regulation under the 1982 Act.

7. *How should businesses that do not have to close approach the guidance?*

7.1. The starting point is BEIS's "5 steps to working safely".

7.2. The preamble states that the Working Safely Guidance requires consideration of all the guides in the suite that are relevant to the workplace in question: so, the pick n' mix approach. This is consistent with bespoke risk assessment.

7.3. The 5 steps are:

1. *Carry out a COVID-19 risk assessment.*
2. *Develop cleaning, handwashing and hygiene procedures.*
3. *Help people work from home.*
4. *Maintain 2m social distancing, where possible.*
5. *Where people cannot be 2m apart, manage risk.*

7.4. The COVID-19 risk assessment is step one. This signifies its importance.

7.5. The risk assessment should be undertaken in line with HSE guidance. This is found on the HSE website and includes specific guidance on "Working safely during the coronavirus (COVID-19) outbreak" including the undertaking of risk assessments.

7.6. It follows, therefore, that risk assessment should be undertaken in line with HSE and the Working Safely Guidance.

7.7. The importance of the individual risk assessment cannot be over-emphasised. MHSWR require employers to put in place arrangements to control health and safety risks. As a minimum, employers should have the processes and procedures required to meet the legal requirements, including:

- A written health and safety policy (if five or more people are employed).
- Assessments of the risks to employees, contractors, customers, partners, and any other people who could be affected by the employer's activities, with a record the significant findings in writing (five or more people are employed). Any risk assessment must be 'suitable and sufficient' (regulation 3 MHSWR).
- Implementation of arrangements for the effective planning, organisation, control, monitoring and review of the preventive and protective measures that come from risk assessment.
- Access to competent health and safety advice.
- Provision of employees with information about the risks in the workplace and how they are protected.
- Instruction and training for employees in how to deal with the risks.
- Ensuring adequate and appropriate supervision is in place

- Consultation with employees about their risks at work and current preventive and protective measures.

7.8. The Working Safely Guidance supplements the existing HSE Guidance on the undertaking of risk.

7.9. The core duties under MHSWR include the undertaking of a risk assessment (regulation 3), and to make and give effect to such arrangements as are appropriate, having regard to the nature of the employer's activities and the size of its undertaking, for the effective planning, organisation, control, monitoring and review of the preventive and protective measures (regulation 5).

7.10. The Working Safely Guidance is - in our experience to date - being frequently misconstrued by stakeholders in the licensing sector as a set of rules, whereas it is - as it states on its face, no more than guidance as to how to comply with existing statutory obligations (so under MHSWR and elsewhere). So, for example, the Bars Guide states under "How to use this guidance":

> *This document sets out guidance on how to open workplaces safely while minimising the risk of spreading COVID-19. It gives practical considerations of how this can be applied in the workplace.*
>
> ***Each business will need to translate this into the specific actions it needs to take, depending on the nature of their business, including the size and type of business, how it is organised, operated, managed and regulated.*** *They will also need to monitor these measures to make sure they continue to protect customers and workers.*
>
> *This guidance does not supersede any legal obligations relating to health and safety, entertainment licensing and regulations, employment or equalities and it is important that as a business or an employer you continue to comply with your existing obligations, including those relating to individuals with protected characteristics. It contains non-statutory guidance to take into account when complying with these existing obligations. When considering how to apply this guidance, take into account agency workers, contractors and other people, as well as your employees.*
>
> ***To help you decide which actions to take, you must carry out an appropriate COVID-19 risk assessment, just as you would for other health and safety related hazards. This risk assessment must be done in consultation with unions or workers.***
>
> (first emphasis added; second emphasis as original)

7.11. The HSE is the statutory body with the general duty to do such things and make such arrangements as it considers appropriate for the general purpose of Part 1 HSWA (s.11). It makes arrangements for the enforcement of health & safety legislation (s.18) and may appoint inspectors (s.19(1)) who have enforcement powers (s.20) including the power to issue prohibition notices. Many local authority environmental health departments will have officers with delegated powers under HSWA.

7.12. It is HSE inspectors and local authority EHOs with the appropriate authorisation who enforce the duties under HSWA and MHSWR. It is *not* the role of the police or local authority licensing officers to do so.

7.13. We have some concerns that some police and licensing authority officers are involving themselves in health and safety matters without authorisation. It is understandable that roles should become confused given the pace and volume of guidance emerging from central government, and the historically close relationship between the licensed sector and police and licensing authority officers. But we feel it is important to emphasise that regulators should take care not to trespass into areas over which they have no jurisdiction, nor - insofar as they may properly consider the guidance - to treat it is if it consists of a catalogue of statutory requirements.

8. *Snooker and pool*

8.1. The previous set of regulations required the closure of both:

> *18. Indoor fitness studios, gyms, swimming pools, bowling alleys, amusement arcades or soft play areas or other indoor leisure centres or facilities, including indoor games, recreation and entertainment venues*[3rd]
>
> and
>
> *20. Playgrounds, indoor*[2nd] *sports courts, ~~and outdoor gyms~~*[1st] *outdoor gyms and outdoor swimming pools*[1st].
>
> (amendments shown marked up)

8.2. The latest list of businesses subject to closure replaces these earlier categories (as underlined above) with a narrower description than before (at 15): "Indoor gyms and sports courts and facilities." There is now no specific restrictions relating to indoor games, recreation and entertainment venues, outdoor gyms and outdoor swimming pools.

8.3. In our view, on the face of the regulations, a snooker club or a pool hall is not an indoor sports facility. It is more happily described as an indoor leisure facility - something removed from the requirement to close.

8.4. This was not initially the view taken by some government departments. On 30 June 2020 a DCMS spokesperson informed the English Partnership for Snooker and Billiards and the World Professional Billiards and Snooker Association that the department considered snooker to be an indoor sport use. However, this was contradicted by the FAQs issued by the Cabinet Office on 6 July 2020, which guidance states that "snooker halls" are permitted to reopen as they fall within the wider category of "entertainment centres".

8.5. Whilst the FAQs guidance reaches the conclusion that snooker clubs may now reopen by a different route to ourselves, the result is the same: they can open.

8.6. If snooker clubs are now no longer subject to the closure regulations, what of pool in pubs? Pubs of course do not have to close, but can customers use their pool tables? If snooker halls are permitted to reopen then it must surely follow that there is no prohibition on other cue-sports taking place in pubs, subject to there being a properly conducted COVID-19 risk assessment.

8.7. The Bar Guide provides that "Steps that will usually be needed" include:

> *Managing the entry of customers, and the number of customers at a venue, so that all indoor customers are seated with appropriate distancing, and those outdoors have appropriately spaced seating or standing room. This is to ensure that the venue, including areas of congestion does not become overcrowded. Managing entry numbers can be done, for example, through reservation systems, social distancing markings, having customers queue at a safe distance for toilets or bringing payment machines to customers, where possible.*

8.8. This is a step that will "usually" - not inevitably - be needed, and if the risk identified from standing customers (congestion) can be removed so as to produce a satisfactory risk assessment, then there should be no reason why the facility of a pool table should not be made available to customers.

8.9. However, it appears that The Morning Advertiser took the matter up with BEIS, who - it reported on 3 July 2020 - "clarified" that permitting customers to play games indoors "is not in the spirit" of the Bars Guide. The report continued:

> *What's more, BEIS pointed to section two of the [Bars Guide] which outlines that pubs should enable customers to remain seated as much as possible while in hospitality venues.*

8.10. Further passages of the Bar Guide were referred to including "Keeping indoor and soft play areas closed" as a "Step that will usually be required" [2.1], "Reducing the number of surfaces touched by both staff and customers" [2.2] and not encouraging activities "which could result in boisterous behaviour" [4.5], including raised voices.

8.11. This "clarification" should be treated with caution:

- The source is not identified.
- It fails to deal with the revocation of closure provisions of businesses that provide "indoor games" by the new regulations.
- It refers to the "spirit" of the Bars Guide when that document is guidance on how to risk assess in accordance with MHSWR.
- So the "clarification" in fact subverts the intent of the Bars Guide which is for operators to risk assess their individual operations by taking a blanket approach with the Guide does not provide for.

8.12. In our view there does not seem any basis for the suggestion that the risk assessment in the Bars Guide inevitably means pool tables are not permissible in bars.

9. *What about hybrid businesses?*

9.1. As in previous iterations of the regulations, if a business subject to the closure provisions forms part of a larger business, it is only necessary to close the part subject to the closure provisions.

10. *What may closed premises still be used for?*

10.1. The requirement to cease carrying on certain businesses or providing certain services does not prevent the use of:

- any suitable premises used for the business or service to host blood donation sessions;
- facilities for training by elite sportspersons, including indoor fitness studios, gyms, sports courts, indoor or outdoor swimming pools and other indoor leisure centres;
- indoor fitness and dance studios by professional dancers and choreographers (a person who "derives their living" from dance, or from choreographing dance).

10.2. Self-contained shops, cafés and restaurants contained in closed business can continue to trade so long as they can be accessed other than from the premises used for the closed premises.

11. *What are the restrictions on gatherings?*

11.1. Regulation 5 sets out the restrictions on gatherings.

Absolute prohibition on gatherings of more than 30 persons in a private dwelling

11.1. No person may participate in a gathering which consists of more than 30 persons and which takes place in a private dwelling (including a houseboat).

11.2. A private dwelling includes any garden, yard, passage, stair, outhouse, or other appurtenance of the dwelling. Hotels and various categories of institutional accommodation are not private dwellings.

11.3. There is a gathering when two or more people are present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other. So a large household (perhaps with a large staff) would not be a gathering.

Absolute prohibition on gatherings of more than 30 persons for indoor rave

11.4. No person may participate in a gathering which consists of more than 30 persons, takes place indoors and would be a gathering of a kind mentioned in s.63(1) of the Criminal Justice and Public Order Act 1994 if it took place on land in the open air (so, a rave).

Restrictions on gatherings of more than 30 on a vessel or certain public outdoor places

11.5. Gatherings of 30 or more people that take place:

- on a vessel (not being used for public transport), or
- in a public outdoor place (unless it is operated by a business, charitable, benevolent or philanthropic institution or a public body as a visitor attraction or is part of premises

used for the operation of a business, charitable, benevolent or philanthropic institution or a public body)

are only lawful if all of the following criteria apply:

- the gathering has been organised by a business, a charitable, benevolent or philanthropic institution, a public body, or a political body; and

- the person responsible for organising the gathering ("the gathering organiser") has carried out a risk assessment which would satisfy the requirements of regulation 3 of MHSWR, whether or not the gathering organiser is subject to those Regulations; and

- the gathering organiser has taken all reasonable measures to limit the risk of transmission of the coronavirus, taking into account the risk assessment. For this purpose any relevant guidance issued by the government must be taken into account.

11.6. A "public outdoor place" means "any outdoor place to which the public have or permitted access, whether on payment or otherwise" and includes land laid out public gardens and recreation grounds, "open country" as defined in s.59 of the National Parks and Access to the Countryside Act 1939, "access land" for the purposes of Part 1 of the Countryside and Rights of Way Act 2000, highway to which the public has access, and Crown land to which the public has access.

11.7. It follows that privately owned land can be a public outdoor place. The test for what is the "public" is probably that in Gardner v. Morris (1961) 59 LGR 187 – can any reputable member of the public enter (upon paying any necessary admission fee)?.

11.8. Further exemptions, so as to permit the gathering apply in other specified circumstances, include in the case of elite sportspersons, or where the gathering is reasonably necessary for work purposes, or for the provision of voluntary or charitable services, or for education or training or to fulfil a legal obligation (such as attending court).

12. *What powers does the Secretary of State have to restrict access to public places?*

12.1. The latest regulations give a new power to the Secretary of State to restrict access to a specified public outdoor place, or to public outdoor places of a specified description, if he considers that giving such a direction responds to a serious and imminent threat to public health, is necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England of the coronavirus and the restrictions are a proportionate means of achieving access.

12.2. A direction may apply 24/7 or at specified times (so a curfew).

12.3. Where a direction is issued, any person other than the responsible local authority and its officers, who owns or is responsible for the restricted area, must take reasonable steps to restrict public access to the area.

12.4. No person may enter or remain in a restricted area without reasonable excuse. The regulations give some examples of what a reasonable excuse might be.

12.5. Owners and occupiers have a right of appeal to the magistrates' courts against the making of a direction.

13. *What enforcement powers are available under the Regulations?*

13.1. A relevant person may take such action as is necessary to enforce any requirement imposed by regulations 4 (closure), 5 (restrictions on gathering) and 6(10) and (11) (restricting public access to restricted area or entering a restricted area).

13.2. A relevant person is:

- a constable;
- a PCSO;
- a person designated by the Secretary of State for the purposes of the regulation (which includes designations made under previous regulations);
- (for the purposes only of enforcing closure restrictions) a person designated by a local authority.

13.3. Breaches of the closure requirements can be dealt with by a prohibition notice.

13.4. Breaches of the gathering requirements can be dealt with by directions to disperse or return home, or by removal of persons from gatherings, including by use of reasonable force.

13.5. Repeated failures by children to comply with gathering requirements or restriction orders can be dealt with by directions to those with responsibility for the child in question.

14. *What offences do the Regulations create?*

14.1. It is an offence to contravene, without reasonable excuse, the closure requirement in regulation 4, the restrictions on gatherings in regulation 5 and the requirements to restrict public access to restricted areas or enter restricted areas.

14.2. Offences are punishable on summary conviction by an (unlimited) fine.

14.3. Prosecutions may be brought by the CPS any person designated by the Secretary of State: regulation 10. It should also be borne in mind that s.64 of the 1984 Act restricts the right to prosecute offences created by regulations under it to a relevant public health authority, a body whose function it is to enforce the regulation and the person who made the regulation in question.

14.4. For offences under the regulation, the reasons for which a constable may arrest without warrant set out in s.24 of the Police and Criminal Evidence Act 1984 are extended to include "to maintain public health" and "to maintain public order".

14.5. A fixed penalty notice regime is found in regulation 9.

15. *What other enforcement powers might be used?*

Closure notices under s.76 of the Anti-social Behaviour, Crime and Policing Act 2014

15.1. There have been recent reports of the police issuing closure notices under s.76 of the Anti-social Behaviour, Crime and Policing Act 2014 in respect of public houses considered not to be "adhering" to social distancing guidelines.

15.2. A closure notice under the 2014 Act may be issued if a police officer of at least the rank of inspector, or the local authority, is satisfied on reasonable grounds:

> *(a) that the use of particular premises has resulted, or (if the notice is not issued) is likely soon to result, in nuisance to members of the public, or*
>
> *(b) that there has been, or (if the notice is not issued) is likely soon to be, disorder near those premises associated with the use of those premises,*
>
> *and that the notice is necessary to prevent the nuisance or disorder from continuing, recurring or occurring.*

15.3. Public nuisance has its origins in common law. It remains a criminal offence at common law punishable with up to life imprisonment (*R.* v. *Rimmington & Goldstein* [2006] 1 A.C. 459). The foreseeability of harm may be a proper consideration in this context, but each case will be fact-specific.

15.4. There is authority that exposing in the public streets a person suffering from an infectious disease makes out the offence: *R.* v. *Vantandillo* (1815) 105 E.R. 762 (V carried a child while infected with smallpox along a narrow *cul de sac* accessing a school, where two children caught the disease and died).

15.5. In Managers of the Metropolitan Asylum District v. Hill (1881) 6 App. Cas. 193 Lord Blackburn said at 204:

> *Those who have the charge of a sick person, if he is helpless (whether the disease be infectious or not) are, at Common Law, under a legal obligation to do, to the best of their ability, what is necessary for the preservation of the sick person. And the sick person, if not helpless, is bound to do so for his own sake. When the disease is infectious, there is a legal obligation on the sick person, and on those who have the custody of him, not to do anything that can be avoided which shall tend to spread the infection; and if either do so, as by bringing the infected person into a public thoroughfare, it is an indictable offence, though it will be a defence to an indictment if it can be shewn that there was a sufficient cause to excuse what is primâ facie wrong…*

15.6. The ONS estimated than an average of 1 in 2,200 individuals within the community population in England had COVID-19 at any given time between 14 and 27 June 2020. Many infected persons will be self-isolating. In any given hospitality premises (usually operating at a much lower capacity), the chances of any person having infectious COVID-19 is therefore present but slim (hence, no doubt, the decision to permit the reopening of those premises). There are arguments on either side as to whether flouting social distancing guidelines by a venue may - of itself - constitute a public nuisance.

Reviews under the Licensing Act 2003

15.7. Premises with the benefit of premises licences granted under the Licensing Act 2003 may be subject to reviews on grounds of conflict with one of more of the four licensing objectives, namely:

- the prevention of crime and disorder
- public safety
- the prevention of public nuisance
- the protection of children from harm

15.8. Public safety is less wide than "public health" and is treated (for instance) by the s.182 guidance as concerning [2.7]

> *This concerns the safety of people using the relevant premises rather than public health which is addressed in other legislation. Physical safety includes the prevention of accidents and injuries and other immediate harms that can result from alcohol consumption such as unconsciousness or alcohol poisoning.*

15.9. The public nuisance (and possibly prevention of children from harm) objective may also be engaged by a breach of the regulations or social distancing requirements, given the risk of spreading an infectious and potentially fatal disease (for which see the previous section).

15.10. Summary Reviews have been instigated on this basis by police under the previous closure regulations that have resulted in the revocation of the premises licence.

Closure Order under s.160 of the Licensing Act 2003

15.11. Where there is, or is expected to be, disorder a magistrates' court may make an order requiring all licensed premises (or those operating under a temporary event notice) which are situated at or near the place of the disorder or expected disorder to close for a period not exceeding 24 hours.

15.12. The application can only be made by a senior police officer of superintendent rank or above.

15.13. This power, it should be noted, is limited to instances of "disorder" and not to otherwise peaceful congregations of people, even if there is an identified breach of the closure regulations.

Injunction under s.111 of the Local Government Act 1972

15.14. It may be possible for an authority to apply for a civil injunction to ensure premises that are breaking the provisions either abide by the law or remain closed under threat of a penal sanction.

Health and Safety at Work legislation

15.15. An overview of the notices available to inspectors under the HSWA can be found on HSE's website. A full consideration of health and safety offences is outside the scope of this

document, although we have briefly dealt with the role of risk assessments, the HSE, inspectors and properly authorised local authority EHOs at question 7 above.