

Coronavirus (COVID-19): local authority directions

Guidance for local authorities on giving directions relating to specified premises, events and public outdoor places in response to threats posed by COVID-19.

18 September 2020

Overview

The Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020 were made and laid on 27 August 2020, coming into force on 28 August 2020.

The following guidance applies from 28 August 2020. This guidance is issued under regulation 2(1) of the Regulations. Local authorities must have regard to this guidance when exercising their functions under the Regulations.

These measures expire on 31 January 2021 but the Scottish Ministers must review the need for these regulations at least once every 42 days, with the first review being carried out by 9 October 2020.

Using these powers

Purpose of a direction

Regulation 3(1) provides that a local authority may give a direction if the authority considers that both of the following conditions are met —

- that the direction is necessary for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection by coronavirus in the local authority's area, and
- that the prohibitions, requirements or restrictions imposed by the direction are a proportionate means of achieving that purpose.

In very simple terms this means there must be a clear coronavirus-related public health issue which it is necessary for the direction to address in a proportionate way.

The Regulations give local authorities the power to make direction relating to individual premises (regulation 5); direction relating to events (regulation 6); and directions relating to public outdoor spaces (regulation 7). Where a local authority gives a direction relating to a public outdoor space, it must take all reasonable steps to prevent or restrict access to the place in accordance with the direction.

When can a direction be issued

Scottish Ministers expect that these powers are used as a last resort, and reasonable effort must be made to resolve the issue in partnership with the premises owner or event organiser beforehand. Regulations 5(8), 6(6) and 7(5) require a local authority to take reasonable steps to give advance notice of the direction to those affected by it.

The four Es model (engage, explain, encourage and then enforce) should be used by local authorities when considering the use of these powers. Local authorities should not, generally, impose a condition until they have tried to engage, explain and encourage compliance with a premises owner or event organiser. The enforcement step should not be used unless they have exhausted other routes and considered whether conditions to be applied are necessary, proportionate, practical, and achievable.

Who can issue a direction

Under these Regulations, a local authority may give a direction where the conditions in regulation 3(1) are met. Given these powers are specifically for public health purposes, directions should only be issued by an appropriate officer within a local authority. Such an officer must be capable of identifying the public health issue that is being caused by the activity or practice that is being undertaken.

Regulation 4 gives a power to Scottish Ministers to give a direction to a local authority requiring the authority to give a direction, if the Scottish Ministers consider that the conditions in regulation 3(1) are met. If the Scottish Ministers consider that one or both of the conditions are no longer met, the Scottish Ministers must direct the local authority to revoke the direction, either with or without replacement.

Determining if a direction is required

A local authority must consider the necessity and proportionality of any measures being imposed on a business, event or public outdoor space. Reaching a decision on this will require consideration of current public health advice, published Scottish Government guidance, and current Regulations that are in force in relation to Coronavirus. Sources include:

Scotland's Coronavirus route map particularly the supporting evidence documents - <https://www.gov.scot/collections/coronavirus-covid-19-scotlands-route-map/>

Details of current guidance including sector specific documents - <https://www.gov.scot/coronavirus-covid-19/>

The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 (which may be amended from time to time) - <https://www.legislation.gov.uk/ssi/2020/279/contents/made>

During outbreaks very specific and localised information may also arise from Test and Protect data. Circumstances may arise where the Incident Management Team may request an early and specific intervention by the local authority. Under such circumstances it is incumbent on the Incident Management Team to provide the evidence necessary to enable the Local Authority to take quick action.

What form should a direction take?

Any direction issued under these powers should as a minimum provide the following information in a clear and descriptive manner –

- the public health issue being addressed
- that the direction is considered necessary and proportionate under regulation 3(1) of the Regulations,
- the prohibitions, requirements, or restrictions which are being applied
- the date and time it is to have effect, and the date and time it expires (in the case of directions relating to premises and directions relating to public outdoor places, this must be no later than 21 days after it takes effect)
- advice on steps the business can take to rectify the issues and get revocation of the Direction considered
- the appeals process – the Regulations require the direction to provide details of the right of appeal to a sheriff and the time within which such an appeal may be brought.

The appeals process

In these Regulations the appeals process against a direction is not described.

Therefore, if a business or person wishes to appeal, then a summary application ([Form 1](#)) must be lodged with the Sheriff Clerk within 21 days, although the Sheriff may permit late applications where there is good reason. A summary application must be in the prescribed form of an initial writ for which a court fee would be payable. See <https://www.scotcourts.gov.uk/rules-and-practice/fees/sheriff-court-fees> for details of the fees applicable.

The Sheriff will consider whether the Direction has been applied for a reason that is allowed by the Regulations, and is a reasonable and proportionate response to the circumstances. If the Sheriff finds this not to be the case, then the Direction will be quashed.

For the avoidance of doubt, a Direction remains in force during an appeals process.

Enforcement of a direction

Local authorities should designate officials for enforcement purposes. These local authority designated officers should include officers who are appropriately trained and qualified for undertaking some form of enforcement action, including but not limited to, Environment Health Officers (EHOs) and Trading Standards Officers.

Local authority designated officers may take such action as is necessary to enforce a direction. They may give a prohibition notice to a person if the officer reasonably believes that a person is contravening a direction, and that it is necessary and proportionate to give the prohibition notice for the purpose of preventing that person from continuing to do so.

Constables may also take such action as is necessary to enforce a direction. They have enforcement powers under regulation 11.

Offences and fixed penalty notices

Regulation 12 sets out various offences. A person who contravenes a direction commits an offence. It is a defence to a charge of committing an offence to show that the person, in the circumstances, had a reasonable excuse. An offence is punishable on summary conviction by a fine not exceeding the statutory maximum.

Regulation 13 provides that a constable may issue a fixed penalty notice to anyone that the constable reasonably believes has committed an offence under the Regulations and is aged 18 or over.

Engagement with other regulators

Local authorities should ensure that they have arrangements in place to provide notice to other regulators of their intention to issue a direction. For example some complex premises may require to be shut down in a certain manner for other safety reasons, and care should be taken to ensure that the terms of a Direction does not cause other implications. Where applicable, engagement with those other regulators, such as the Health and Safety Executive must take place before issuing the Direction. This will ensure any other important safety considerations and evidence is factored into the content of the Direction before it is issued by the Local Authority.

Under these Regulations, Police Scotland also have powers to enforce any Direction issued. It is therefore essential the issuing Local Authority notifies the Chief Constable Police Service of Scotland (Police Scotland) of any Direction issued, revoked and replaced, or revoked without replacement. Such a notification should include a copy of the Direction where one is being issued or replaced. It is also vital that Police Scotland are immediately notified of any revocations. Without appropriate notifications Police Scotland won't be able to undertake enforcement action in relation to a Direction.

Reviewing a direction

The Regulations require the Local Authority to review the need for a Direction at least once every 7 days. The review should determine if the conditions in regulation 3(1) that led to the Direction being issued remain unchanged. Where they are unchanged then the Direction should remain in place, and if change such that one or both of the conditions is no longer met, then the Direction must be revoked. This can be revoked without replacement, or it can be replaced with a new Direction to reflect the evolving circumstances in relation to which the local authority considers that the regulation 3(1) conditions are met. Each review should be documented in an appropriate manner so that there is a clear audit trail of Local Authority decision making.

Reporting

Local Authorities must notify the Scottish Ministers when a direction has been issued as soon as reasonably practical after it has been issued. They must also notify neighbouring Local Authorities whose area is adjacent to their area, including the relevant county or district council in England where applicable.

Local Authorities should also put in place arrangements to notify all the relevant parties of the outcome of each 7 day review of a Direction. This should include the business or person affected by the direction.

Local Authorities should also consider arrangements to ensure each Direction is brought to the attention of persons who may be affected by it, or its revocation. This may vary greatly depending on the individual circumstances at the time, and therefore Local Authorities may need to adopt an adaptable approach to this.

Regulation 9 provides that where a local authority gives a direction on a person specified by name, it must be given in writing to that person and may be published in such other manner as the local authority considers appropriate to bring to the attention of other people who may be affected by it. In any other case, a direction must be published on the local authority's website, and may be published in such other manner as the local authority considers appropriate.

Publication history

This guidance is reviewed and updated as required. Please ensure you use the latest version.

This guidance was first published on 18 September 2020.