



Francis Taylor Building

# Webinar: Covid-19 Regulations: A dose of legal medicine

4 December 2020



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# Webinar: Covid-19 Regulations: A dose of legal medicine

## Local Authority Powers and Designations

Horatio Waller



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## Outline

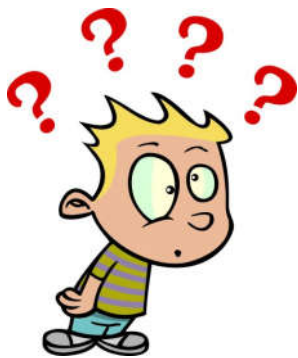
1. Context: why this is a difficult issue
2. Regulations the LA is barred from enforcing
3. The process of 'designating': context
4. The form of a designation
5. Governance arrangements
6. Updating/refreshing designations

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## Why this is a difficult issue



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1. Multiplicity and complexity of regulations
2. Local authorities ('LAs') are barred from enforcing some regulations, so these need to be distinguished
3. Where LAs can have enforcement responsibilities, uncertainty around how to 'designate' officers?
4. Does the LA's governance model / constitution make a difference?
5. Is there a need to refresh or update designations as and when new regulations are implemented?
6. Problem exacerbated by the regularity of the amendment and replacement of the regulations

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## Regulations LA are barred from enforcing (1)

- There are four points/distinctions to be made.
- First, the power of someone to exercise enforcement powers specified in Covid-19 Regulations arises from the closed-list definition of the 'relevant person' or 'authorised person' in the regulations.
- The closed-list is not uniform, so this must be checked carefully. The 'relevant person' definition in the Face Covering Regs does not include a person designated by the local authority, whereas (the last time I checked, in Nov) this was included in the definitions in the other regulations.

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## Regulations LA are barred from enforcing (2)

- Second, just because the local authority has a power to designate someone in respect of enforcement powers, they may not have a power to prosecute. N.b. Prosecution raises additional tricky issues, as a result of the June SoS Designation.
- Third, the various iterations of the lockdown regulations, now the 'All Tiers Regs', all include/included a proviso preventing a person designated by a LA from enforcing rules in relation to gatherings/movement.



## Regulations LA are barred from enforcing (3)

- Fourth, the No 3 Regs (setting out an LA power to create directions) define 'local authority' restrictively such that in two-tier authorities only the upper-tier authority may create directions / designate for enforcement purposes.
- In relation to other Regs a lower-tier authority can 'designate' for enforcement purposes
- No problem, so far as the regulations are concerned, with an upper-tier authority designating someone employed by the lower-tier authority. No caveat in the Regs that the person 'designated' must be employed by the LA.



## The process of designating: context

1. The term 'designate' adopted in the Regulations, in relation to the definition of 'relevant person' or 'authorised person', is a novel term.
2. There is no definition of what is meant by designate in the regulations or Government guidance on how in practice this is to be done.
3. Desirable that delegations are dealt with at a high-level given how frequently the regulations change and the benefits of simplicity.
4. On the other hand, the way the regulations are drafted and the manner in which the SoS drafted his designations strongly suggests a more prescriptive approach is necessary.
5. Thus, relying on a high-level approach creates a risk that



## The definition of relevant / authorised person

- Take the All Tiers, Regs Reg 9. This provides the 'relevant person' with several powers of enforcement.
- The wording implies that an act, to constitute a 'designation', must be focussed / directed to the particular regulations
- Thus need to be able to point to something which is directed to the regulations or which, by virtue of continuity provisions (see later), is to be treated as effective for the particular regulations.



## The definition of relevant / authorised person

- Reg 9(9) provides where material that: *“For the purposes of this regulation— ... (b) “relevant person” means— ... (iii) subject to paragraph (10), a person designated by a local authority for the purposes of this regulation”*
- Reg 9(10) provides: *“A local authority may designate a person for the purposes of this regulation only in relation to—(a) a Tier 1 restriction imposed by Part 2 or 3 of Schedule 1,(b) ....”*



## Designations

- That ‘designation’ must be specific to the regulations is further supported by the continuity/transitional provisions that have been included in recent iterations of regulations.
- These would not have been necessary if a high-level approach was sufficient. They can only mean local authorities must take a prescriptive approach, *at least in the first instance*.
- For example, regulation 10 of the new Local Authority Enforcement Powers (Amendment) Regs states:



*10. A designation made, or treated as made, in exercise of the powers conferred by the following provisions is to be treated as if it had been made in exercise of the powers conferred by regulations 3, 4, 5, 7 or 8, as appropriate, of these Regulations— regulation 9(9)(b), 11(3)(b), 11(9)(a) or 13, as appropriate, of the All Tiers Regulations; regulation 8(16) of the Obligations of Undertakings Regulations; regulation 18(11) of the Collection of Contact Details Regulations; regulation 12(12) of the Self-Isolation Regulations.*

**'treated to be made'**  
– reference to previous continuity provisions

These are the particular provisions



## The form a designation should take

- The above points are directed to the need for the 'designation' to be particular to the regulations in question, or for the need for continuity provisions enable the designation to be treated as if particular to the regulations.
- However the precise form, written / unwritten, the designation takes is not clear.
- Belt and braces, to set down in writing in a formal designation. In that case, if challenged in Court, the written designation can be pointed to as evidence of a delegation.
- Belt and braces would name the particular officers, although it is certainly debatable that describing the officers would be sufficient.



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## Governance arrangements

- Who writes the designation and its precise form will turn on the type of governance arrangements adopted by the local authority and/or its constitution.



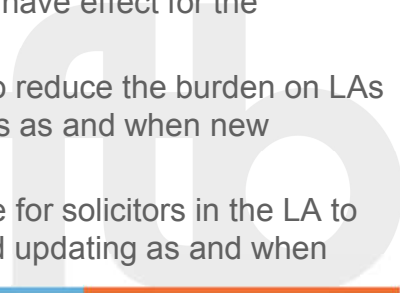
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## Updating/refreshing designations

- The practice of the SoS has been in recent iterations of regulations to create precise continuity/transitional provisions so that designations which had effect for the purposes of previous regulations have effect for the purposes of new regulations.
- The design of this is, I assume, to reduce the burden on LAs of needing to update designations as and when new regulations are created.
- As a matter of approach, sensible for solicitors in the LA to check whether designations need updating as and when new regulations are created



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**Horatio is very happy to give advice upon formal instructions.**

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### Local Authority Powers and Designations

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# **“ENFORCEMENT OF COVID-19 REGULATIONS IN LICENSED PREMISES”**

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*FTB - December 2020*

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## MEP leaps from window as Belgian police raid orgy for breaking coronavirus rules

EU diplomats also arrested and drugs found at 'gang bang' close to city centre police station, as key ally of Viktor Orbán apologises

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A European Parliament source said: “There is nothing wrong to participate in a sex party of any kind. However, such meetings with many people are illegal under the coronavirus laws.

“Being covered by parliamentary immunity does not exempt you from obeying the law.”



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## **PRINCIPAL ENFORCEMENT POWERS: 1 OF 2**

- **LA Enforcement Powers Regs 2020**
- **Summary Review** – s.53A, LA03
- **Individual premises direction** – r.3 of No.3 Regs
- **Nuisance/Disorder Closure Notice/Orders** – s.76-80, Anti-Social Behaviour, Crime & Police Act 2014
- **“Take such action as is necessary”** – r.9(1) of All Tiers Regs



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## PRINCIPAL ENFORCEMENT POWERS: 2 OF 2

- **Prohibition Notice** – r.9(2) of All Tiers Regs
- **Fixed Penalty Notice** – r.11 of of All Tiers Regs & r.4 of Obligations on Undertakings Regs
- **Criminal Proceedings** – r.10 of All Tiers Regs & r.3 Obligations on Undertakings Regs (for business breaches)
- **Health & Safety Prohibition Notices** – involve a risk of serious personal injury - s.21-22 of HSWA 1974
- **Standard Review** – s.51, LA03

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## LOCAL AUTHORITY ENFORCEMENT POWERS REGS.



**The Health Protection (Coronavirus, Restrictions)(Local Authority Enforcement Powers and Amendment) Regulations 2020**

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## **“LA ENFORCEMENT POWERS REGS”**

- **New system** of enforcement powers for designated LA officers (not police) for breaches of certain COVID Regs.
- Into force 2.12.20 (expires in 6 months)
- Made under Public Health (Control of Disease) Act 1984
- Also **amends** existing COVID Regs: No.2 & No.3, International Travel, Collection of Contact Details, Obligations of Undertakings, Self-Isolation.

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## **“LA ENFORCEMENT POWERS REGS”**



*“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.”*

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

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## “LA ENFORCEMENT POWERS REGS”



*“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.”*

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## “LA ENFORCEMENT POWERS REGS”

- Coronavirus Improvement Notice (“CIN”) – reg.3
- Coronavirus Immediate Restriction Notice (“CIRN”) – reg.4
- Coronavirus Restriction Notice (“CRN”) – reg.5
- (OPSS have issued Templates to LA’s).

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## “LA ENFORCEMENT POWERS REGS”

- Obligations of Undertakings Regs: size of bookings, appropriate table distancing, signage re face coverings.
- All Tiers Regs: business closures, opening hours, food and drink sales on premises.
- Collection of Contact Details Regs: QR codes, collecting, retaining & disclosing details, refusing entry.
- Self Isolation – employers duties re isolating workers

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## CORONAVIRUS IMPROVEMENT NOTICES

- LA Officer of opinion:
  - Person **contravening** relevant COVID statutory provision
- And,
  - Requirements of notice **necessary** & **proportionate** to ensure contravention ended or remedied
- (Note: no need for breach to involve risk of exposure to COVID)

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## CORONAVIRUS IMPROVEMENT NOTICES

- CIN must state:
  - Name or premises in contravention
  - Date
  - Officer's opinion
  - Provision being contravened
  - Particulars of reasons for officer's opinion
  - Period for compliance (not less than 48 hrs)

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## CORONAVIRUS IMPROVEMENT NOTICES

- The requirement(s) person must meet to end or remedy contravention.
- Date CIN ceases to have effect
- Consequences of failure to comply (offence punishable by a fine, service of CIRN or CRN)
- Right of appeal to magistrates' court within 28 days

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## CORONAVIRUS IMPROVEMENT NOTICES

- CIN may (not must) include suggestions as to measures which could be taken to comply with requirement.
- Must be reviewed by LA officer at, or as soon as practicable after, end of period notice has effect.



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## CORONAVIRUS IMPROVEMENT NOTICES

- Where contravenor believes he has met requirements - may request LA to review notice.
- LA must then review within 48 hours and withdraw it if satisfied of compliance.
- When CIN expires, LA must carry out review and either:
  - Withdraw notice if compliance, or
  - Issue new CIN, CIRN or CRN.



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## CORONAVIRUS IMMEDIATE RESTRICTION NOTICE

- CIRN may be issued where person contravening COVID provision in circumstances that:
  - make it likely contravention will continue or be repeated

**And,**

- involve risk of exposure to COVID.

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## CORONAVIRUS IMMEDIATE RESTRICTION NOTICE

- CIRN must require :
  - **Closure** of premises (or part of it), and/or
  - Person must **end or remedy** contravention and not repeat or continue it.
- Any requirement must be **necessary & proportionate** for purpose of minimising risk of exposure to COVID.

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## **CORONAVIRUS IMMEDIATE RESTRICTION NOTICE**

- Requirement in CIRN takes effect:
  - At end of period specified in Notice; or
  - Immediately
- CIRN has effect for 48 hours after issue.
- CIRN must contain particulars set out in reg 4(7))

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## **CORONAVIRUS IMMEDIATE RESTRICTION NOTICE**

- CIRN must be reviewed by LA before it ceases to have effect.
- If contravenor believes requirements no longer necessary may apply for LA review – to be carried out as soon as practicable.
- On review LA must decide if requirement(s) remains necessary (in whole in part).

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## CORONAVIRUS IMMEDIATE RESTRICTION NOTICE

- When CIRN review LA may:
  - Withdraw it
  - Amend
  - Issue new CIRN or CIN or CRN

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## CORONAVIRUS RESTRICTION NOTICE

- LA may issue CRN where:
  - Person has already been issued with a CIN,And,
  - Officer of opinion he has failed to comply and non-compliance involves a risk of exposure to COVID

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## CORONAVIRUS RESTRICTION NOTICE

- CRN must require :
  - **Closure** of premises (or part), and/or
  - Person must **end or remedy** contravention specified in CIN
- Any requirement must be necessary & proportionate for purpose of minimising risk of exposure to COVID

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## CORONAVIRUS RESTRICTION NOTICE

- Requirement in CRN takes effect:
  - At end of period specified in Notice; or
  - Immediately
- CRN has effect for 7 days after issue.
- CRN must contain particulars set out in reg 5(7)

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## **CORONAVIRUS RESTRICTION NOTICE**

- CRN must be reviewed by LA before it ceases to have effect.
- If contravenor believes requirements no longer necessary may apply for LA review.
- LA review to be carried out as soon as practicable, but in any event within 48hrs or expiry of notice (whichever is earlier)

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## **CORONAVIRUS RESTRICTION NOTICE**

- On review LA must decide if requirement(s) remains necessary (in whole in part).
- LA may:
  - Withdraw it
  - Amend or issue new notice.
  - Issue new CRN or CIN or CIRN

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## CORONAVIRUS RESTRICTION NOTICE

- On review LA must decide if requirement(s) remains necessary (in whole in part).
- LA may:
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  - Amend
  - Issue new CRN or CIN or CIRN

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## “ESSENTIAL INFRASTRUCTURE”

- Notices cannot be issued for “essential infrastructure” – undefined.
- But see examples in No.3 Regs and Guidance:

<https://www.gov.uk/government/publications/local-authority-powers-to-impose-restrictions-under-coronavirus-regulations/local-authority-powers-to-impose-restrictions-health-protection-coronavirus-restrictions-england-no3-regulations-2020>

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## OFFENCES

- Summary Offence to fail to comply with CIN, CIRN or CRN – “without reasonable excuse”.
- Unlimited fine
- Power of arrest without warrant under s.24 PACE – reasons extended to include maintaining public health and public order.

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## OFFENCES

- LA or CPS can prosecute.
- Company officer can be liable (if consent, connivance, neglect)
- Usual 6 month time limit to lay information: s.127 MCA 1980

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## **FIXED PENALTY NOTICES**

- FPN if officer reasonably believes person (aged 18 or over) has committed an offence under these Regs.
- Only one FPN may be issued for failure to comply with a single Notice.
- £2,000 for failing to comply with CIN
- £4,000 for failing to comply with CIRN or CRN

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## **FIXED PENALTY NOTICES**

- If FPN issued – no prosecution for 28 days or if paid.
- Details of FPN – see r.8(7)
- Sanction for non-payment of FPN is prosecution

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## APPEALS

- Appeal to magistrates' court by person to whom (any) Notice issued against:
  - The Notice
  - Decision on a review of that notice
- 28 days to appeal from date of Notice or date of notification of review decision.

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## DESIGNATION

- 16 June 2020 designation of local authorities as “specified authority” for purposes of COVID regs rolls over
- Designation Letter, Matt Hancock, S o S Health:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/897632/Designations\\_under\\_the\\_Health\\_Protection\\_Coronavirus\\_Restrictions\\_\\_England\\_Regulations\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897632/Designations_under_the_Health_Protection_Coronavirus_Restrictions__England_Regulations_2020.pdf)
- Ensure sub-delegation to individual officers

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## **All Reasonable Measures : tidying up the Coronavirus, Restrictions Regulations and the law of unintended consequences**

Charles Holland

4 December 2020



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## Source of Gathering Restrictions

- No. 1 Regulations 26/3/20
- No. 2 Regulations 4/7/20 – from 14/9/20 rule of 6
- NENW Regulations 17/9/20 – rule of 2 indoors
- Three Tier Regulations 14/10/20
- No. 4 Regulations (Lockdown 2.0) 5/11/20
- All Tiers Regulations 2/11/20
- **Restrictions on *participants* in gathering plus organisers/managers for some 30+ gatherings**

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## Obligations of Undertakings Regulations

- 17/9/20 – “Obligations of Hospitality Undertakings” – regulation 2(1)

### Restrictions on undertakings

2.—(1) A person responsible for carrying on a business of a public house, café, restaurant or other relevant business must, during the emergency period, take all reasonable measures to ensure that—

- no bookings for a table are accepted for a group of more than six persons unless one of the exemptions in regulation 5 of the Principal Regulations applies;
- no persons are admitted to the premises in a group of more than six, unless one of the exemptions in regulation 5 of the Principal Regulations applies;
- no person in one qualifying group mingles with any person in another qualifying group where this is not permitted under the Principal Regulations;
- an appropriate distance is maintained between tables occupied by different qualifying groups.

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## Obligations of Undertakings Regulations

- 28/9/20 – “Obligations of Hospitality Undertakings” – regulation 1A

### [F1 Restrictions in relation to relevant premises

1A.—(1) A person who operates or occupies relevant premises must, during the emergency period, take all reasonable measures to ensure that—

- (a) no bookings are accepted for a group of more than six persons unless one of the exemptions in regulation 5 of the Principal Regulations applies;
- (b) no persons are admitted to the premises in a group of more than six, unless one of the exemptions in regulation 5 of the Principal Regulations applies;
- (c) no person joins another group or otherwise acts in a way which would contravene the Principal Regulations.

(2) In this regulation, “relevant premises” has the same meaning as in the Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020.]



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## “Relevant premises”

- Collection of Contact Details Regulations, r.4
- “relevant premises” means a set of premises, **whether indoors or outdoors**, that are operated or occupied wholly or partly for the purpose of providing a service or an activity listed in the Schedule directly to an individual who wishes to access that service or participate in that activity.



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## “Relevant premises”

1. Provision of food & drink for consumption on premises
2. Leisure & tourism services provided by/at 13 categories of premises including “heritage locations and other attractions open to the public, “indoor sport and leisure centres”, “outdoor swimming pools”, public libraries
3. Close physical contact services
4. Community / youth centres & village halls

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## 1A O/A amended to correspond with tiers

- 14/10/20
- 1A(1) Tier 1 – rule of 6
- 1A(1A) Tier 2 – rule of 6 / rule of 2
- 1A(1B) Tier 3 – rule of 6 / rule of 2
- bookings, admittance and “otherwise acts in a way which would contravene” relevant regulations

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## 1A O/A remains as is during Lockdown 2.0

- 4/11/20-1/12/20 – a Nightingale Regulation
- 1A(1) Tier 1 – rule of 6
- 1A(1A) Tier 2 – rule of 6 / rule of 2
- 1A(1B) Tier 3 – rule of 6 / rule of 2



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## LA Enforcement Powers Regulations giveth...

- Relevant statutory provisions for purposes of CIN/CIRN/CRN include:

“regulation 1A (size of bookings) of the Obligations of Undertakings Regulations”



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## And the All Tiers Regulations taketh away...

- Para 4(3) of Schedule 5 amends regulation 1A  
Obligations of Undertakings Regulations

(c) “omit paragraph (1B)”



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## And the All Tiers Regulations taketh away...

- 2/12/20 onwards
- 1A(1) Tier 1 – rule of 6
- 1A(1A) Tier 2 – rule of 6 / rule of 2
- ~~1A(1B) Tier 3 – rule of 6 / rule of 2~~



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## Unintended consequences?

- But there's no hospitality in Tier 3?
- ~~1. Provision of food & drink for consumption on premises~~
  2. Leisure & tourism services provided by/at 13 categories of premises including "heritage locations and other attractions open to the public, "indoor sport and leisure centres", "outdoor swimming pools", public libraries
  3. Close physical contact services
  4. Community / youth centres & village halls

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## Unintended consequences?

- S.7 Metropolitan Carriage Act 1869
- "If any unlicensed hackney or stage carriage plies for hire, the owner of such carriage shall be liable to a penalty not exceeding £5 for every day during which such unlicensed carriage plies... The driver also shall ... be liable to like penalty unless he proves that he was ignorant of the fact of the carriage being an unlicensed carriage"

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## Unintended consequences?

- S.7 Metropolitan Carriage Act 1869 as amended\*  
“If any unlicensed hackney ~~or stage~~ carriage plies for hire, the owner of such carriage shall be liable to a penalty not exceeding £5 for every day during which such unlicensed carriage plies... The driver also shall ... be liable to like penalty unless he proves that he was ignorant of the fact of the carriage being an unlicensed carriage”

\*Statute Law (Repeals) Act 1976

## Unintended consequences?





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## All Reasonable Measures : tidying up the Coronavirus, Restrictions Regulations and the law of unintended consequences



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