



## Guidance on “THE Guidance”: A personal view

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### The end of “ambience”?

Over an early morning coffee I caught this on the BBC Scotland website – “*Music ban 'kiss of death for restaurant ambience'*” - a response to the “bans” imposed by the “Coronavirus (COVID-19): tourism and hospitality sector guidance”, authorised by the **Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020** (SSI 2020/279)\*.

### The Restrictions Regulations

For the purpose of minimising the risk of exposure to Coronavirus, Regulation 5(1) (a) requires measures to ensure, where reasonably practicable, maintenance of the required distance, admission in sufficiently small numbers and maintenance of the required distance between people in queues for the premises.

Regulation 5(1)(b) requires other reasonably practicable measures to be taken for the same purpose. This includes, “measures which limit close face to face interaction and maintain hygiene” such as - changing the layout of premises or controlling use of entrances, passageways, stairs and lifts, or installing barriers or screens.”

Regulation 7 is the basis for the Guidance on measures which should be taken in accordance with Regulation 5(1)(b). Anyone carrying on a

business “must have regard to” this Guidance.

The measures behind the BBC story, included measures on “no background music and televisions on mute and sub-titled”, loud behaviour, queue management and mandatory collection of customer/visitor contact details. These are in addition to existing measures on physical distancing/capacity. Measures will be premises dependent. The Guidance lists relevant considerations including practicality; health and safety and the balancing of cost with risk reduction. Risk assessments are expected.

Regulation 7(3) excludes the enforcement of the Guidance via Regulation 14 where a “relevant person” can issue a Prohibition Notice in relation to a breach of “any requirement.” The Guidance **only** relates to Regulation 5(1)(b). While a failure, absent a reasonable excuse, to meet a requirement under Regulation 5(1)(a) *is* an offence under Regulation 15(1), Regulation 5(1)(b) is **not** backed by criminal law enforcement. A failure to follow Guidance is **not** a criminal offence.

There is no power to enforce the duty to have regard to the Guidance and yet the reference to Guidance which one “*must have regard to*” appears to be mandatory.

Are you **still** with me?

## Guidance with “Attitude”?

The law moved again with the **Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) (Regulations) 2020** (SSI 262/2020) (the “Directions Regulations”) which gives local authorities and Scottish Ministers power to issue Directions to businesses.

Local authorities must now have regard to the Guidance issued under the Restrictions Regulations as to how *they* exercise their functions *under* the Directions Regulations - Regulation 2(3)(b). They must also have regard to any *other* Guidance issued by the Ministers on the *exercise* of their functions *under* the Directions Regulations (Regulation 2(1)). The Ministers can issue Directions to a local authority on the exercise of their functions (Regulation 4). So there are two types of Guidance to which the local authority must have regard. Are you *really still with me?*

A local authority can issue a Direction under Regulation 3, 5 or 6 if specified conditions are met on matters general to their area or which are premises or event specific. A premises Direction can relate to closure, entry or location of persons. There is a right of appeal to the Sheriff, it has to be assumed by implication from the section 3(p) of the Sheriff Courts (Scotland) Act 1907, by way of summary application. A Direction must give details of that right and where there are both Ministerial and local authority Directions in play, an application must be served on both.

A Direction lasts for 21 days. There is no power of interim recall. An appeal, to be of value, would need to take place within that timeframe. Directions can be enforced by a relevant person under Regulation 11. Under Regulation 12, a failure to follow such a Direction is an offence, subject to a reasonable excuse defence (itself subject to a list of reasonable excuses).

As a Direction may have been issued because the local authority took that Guidance into account, these Regulations come closer, albeit indirectly, to criminalising how a business might have approached the Guidance under the Restrictions Regulations.

Could a defence include the argument that any Direction was unlawful even if one had not

appealed that Direction? Space does not allow me to explore this but *Boddington v British Transport Police* [1998] UKHL 13 might assist. Mr Boddington was able to raise, as a defence to his breach of a byelaw, the very lawfulness of that byelaw.

Moreover unlike the Guidance under the Licensing (Scotland) Act 2005 this Guidance has never been approved by the Scottish Parliament. Space precludes an exploration of the constitutional propriety, but given that the Guidance now has a role in the criminal law enforcement, might this also feature in any defence to such action?

## Guidance on THE Guidance

Businesses and local authorities must have regard to the Guidance. I venture these propositions:

- It should not be read as if it was a statute. It is “*not drafted in the tight way in which a statute is drafted. ....[they are] not... intended to be legally binding documents in the strict sense. ....[R]esort will be needed to elements of value judgment ...*” - *R( On the Application of JD Wetherspoon plc) v Guildford Borough Council* [2006] EWHC 815 (Admin).
- A duty to “have regard to” a thing, is a duty to consider that thing. It is not a requirement to make that thing the only priority, or the top priority.
- The above cannot be taken too far. A decision maker must have a clear and case-specific reason for departure as it “*cannot be ignored and it must be taken into account as its very purpose is to be influential*” (*Letts, R (on the application of) v The Lord Chancellor & Ors* [2015] EWHC 402 (Admin).
- “Have regard to” involves a greater degree of consideration than merely to “consult”... but plainly does not mean....”follow”, or “slavishly obey” - *R. (on the application of London Oratory School Governors) v Schools Adjudicator* [2015] EWHC 1012 (Admin) (“LO”).
- Departure must be based on “clear reasons.” “Good reasons” is **not** the test. LO said that “*Clear reasons are “objectively proper or legitimate reasons. The introduction of “good” rendered any departure to the risk of being unduly subjective.*” The test of “clear

reasons“ was adopted in a housing law guidance context by the Supreme Court in *NZolameso v City of Westminster* [2015] UKSC 22.

- Context has a role. LO said “*the legislative background or context of the document under consideration is important....*” In the instant case the background is the minimisation of the risk of exposure to Coronavirus.
- The extent of any discretion to depart from National Guidance depends upon the nature of the Guidance in question, the greater the quality and detail of it and the more that it took into account the interests of those likely to be affected by it - *R (Mohammed Mohsan Ali) v London Borough of Newham* [2012] EWHC 2970 (Admin).
- A clearly reasoned departure should also address **why** the *rationale* behind a provision in the Guidance did not apply.
- The Guidance does not cover everything but the duty to comply with Regulation 5(1) (b) remains.

Are you **really sure** you are **still** with me? If not perhaps you can join me over Zoom for a large espresso?

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**\*Editor’s note:**

The issue of guidance by Scottish Ministers was originally authorised by the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (SSI 2020/103) as amended.

The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 (SSI 2020/279) revoke these Regulations with effect from 14 September 2020 but carry over the original guidance provisions.

This article was originally published prior to the introduction of the new Regulations and has been adjusted accordingly with new statutory references .

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