



Licensing in the COVID era

A recording of this webinar and the slides will be available on our website

15 October 2020

Overview



**“Al fresco”
licensing**

**Novel forms of
licensing**

**Remote hearings
and decision-
making**

**Enforcing
public health
restrictions**

**Safer public
transport**



“Al fresco” licensing

How do we regulate licensable activities outdoors?

Introduction



Contact tracing



- Scan code/enter manually.
- Retain for 21 days.
- Ensure have staff records.
- Fine of up to £10,000.



- Data protection issues:
 - Only collect what you **need**.
 - Tell customers **why** you are collecting their data.
 - Keep customer information **secure**.
 - Use the information **only** for tracing.
 - Only keep the information as long as is **necessary**.

Pavement licensing (1)



- Previous approach under s.115E Highways Act 1980 was relatively drawn out.
- New 'Pavement licence' (ss.1-10 Business and Planning Act 2020) authorises the holder to put removable furniture on part of the public highway for one of two purposes:
 - For the license holder to sell or serve food or drink supplied from or in connection with their premises; or
 - For the use by customers to consume food or drink from the licence holder's premises.
- The food or drink must be supplied from premises which are used or proposed to be used as:
 - A public house, wine bar or other drinking establishment, or
 - Otherwise used for the sale of food or drink for the consumption on the premises.

Pavement licensing (2)



- LAs will be required to act speedily in response to applications:
 - Adopt standard electronic application forms (s.2(1)(a)-(b) BPA 2020)
 - Decide on an appropriate fee of no more than £100 (s.2(1)(c))
 - Undertake public consultation (7 days) beginning the day after receipt of the application (s.2(3)-(4))
 - Formally determine or reject the application after consultation period (7 days) has expired (s.3(3))
 - Where local authority does not make a determination within the 7-day determination period following the 7-day consultation period, the licence is deemed to have been granted (s. 3(9)).

Pavement licensing (3)



- Some additional points to note:
 - Breach of condition = revocation or notice to remedy.
 - Risk to public safety may result in revocation (s. 6(3) BPA 2020).
 - Granted for 3 months minimum.
 - Lapses on 30 September 2021 (s.4).
 - Deemed planning permission.

Late night refreshment



- Business considering diversification – aimed at late night cafés, takeaway food outlets and petrol stations selling food.
- Hot food or hot drink between 11pm and 5am (see Sch. 2 to LA 2003).
- Alcohol sales excluded.



Off-sales – what's changed?



- Off-sales = the sale by retail of alcohol for consumption off the licensed premises.
- s 11 Business and Planning Act 2020 amends the Licensing Act 2003 until 30 September 2021 to treat premises licences as if they authorised off-sales as long as they're made at a pre-cut off time (11pm) when the licensed premises are open for the purposes of selling alcohol for consumption on the premises. (NB effect of 10pm curfew introduced last month).
- The change excludes:
 - licensees who have had an off-sales application refused or had off-sales permission excluded by variation or review within the last three years.
 - Organisations with club premises certificates, which must seek permission from the licensing authority.

Off-sales – what's changed?



- The provisions also apply the following conditions to pre-existing off-sales permissions:
 - Setting off-sales hours to match on-sales hours
 - Allowing off-sales in open containers
 - Allowing deliveries of alcohol.

Balance between relaxation and regulation



- New summary off-sales review process safeguards against the fact that the permission has not been considered by responsible authorities before being granted:
 - Responsible authorities can apply for a review on grounds relevant to the licensing objectives.
 - The licensing authority must consider whether interim steps are necessary within 48 hours (eg modify the conditions, exclude or suspend off-sales).
 - Must determine the review within 28 days.
- Pre-existing permissions/conditions are outside the scope of the summary off-sales review process.

The need for licensees to prevent ASB/nuisance



- The purpose of the amendment was not to encourage congregation near licensed premises.
- If you're going to sell alcohol in open containers, it's wise to give thought to where customers are going to go to consume it and what you can do to influence that decision.
- Do everything you can to minimize the risk of ASB by off-sales customers:
 - Is there a PSPO in force nearby? Consider "soft" action to influence customer behaviour eg posters to advise customers that their alcohol could be seized or disposed of if they are caught consuming it in a PSPO area.
 - Licensees "*may be held to account if misbehaviour might reasonably have been foreseen*" (20.2, Alcohol licensing: guidance on new temporary off-sales permissions)

Plan for the future!



- There's nothing stopping an application being made now to make the off-sales permission permanent – don't wait until September 2021!
- Key document:
[Guidance for temporary alcohol licensing provisions](#)

Outdoor events – what's allowed?



- Keep abreast of the ever-changing tiers! The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020.
- (In tier 1) outdoor events organized by businesses, charities and public bodies in a public outdoor place are not limited to a specific number of attendees and can go ahead provided the organizer has (**para 5-6, sch 1**):
 - Carried out a thorough risk assessment which would satisfy the requirements of regulation 3 of the Management of Health and Safety at Work Regulations 1999;
 - Taken all reasonable steps to mitigate the risk of viral transmission, taking the risk assessment into account, and in line with COVID-19 Secure Guidance.

The grouse shooting exemption (!)



- In tier 1, outdoor gatherings are also allowed where: (**para 3(1), sch 1**)
 - 1) The gathering takes place in either public or private outdoor space
 - 2) They are for the purpose of a “relevant outdoor activity”
 - 3) the organizer has:
 - Carried out a thorough risk assessment which would satisfy the requirements of regulation 3 of the Management of Health and Safety at Work Regulations 1999;
 - taken all reasonable steps to mitigate the risk of viral transmission, taking the risk assessment into account, and in line with COVID-19 Secure Guidance.
- “Relevant outdoor activity” means a physical activity which is carried on outdoors and for which a licence, permit or certificate issued by a public body (other than a licence permitting a person to drive a motor vehicle in the United Kingdom or a licence to serve food or alcohol) to carry on the activity, or for any of the equipment used for the purposes of the activity, must be held by—
 - (a) the gathering organiser, or
 - (b) any person taking part in the activity.

Covid secure guidance (1) – performing arts



- Working safely during coronavirus – performing arts ([link](#)):
 - Eg drive-in performances: only allowing cars to park sufficiently far apart to ensure social distancing is maintained, for example by clearly marking available parking spaces.
 - Where items are offered for customer use, so for example a picnic blanket or seating, this should be done only where they can be collected from an appropriate distance and with hygiene measures in place (for example, through the availability of hand sanitiser). Such items should be thoroughly cleaned before being offered for re-use.
 - Discouraging or avoiding activities or features that are likely to encourage audience behaviours increasing transmission risk, such as crowding, clustering, communal dancing and physical contact outside of household groups or support bubbles.

Covid secure guidance (2) – sport



- Elite sport - return to competition: safe return of spectators ([link](#)) (**NB Draft Guidance only which is now bound to change**) – under which selected pilot events with spectators were supposed to operate.
- Government U-turn on the 1 October date for the trial return of spectators means there is now no way of knowing when fans will be allowed back to both indoor and outdoor sporting events.

How will the Licensing Act apply to licence applications for outdoor events?



- Likely to be a change in the focus of which of the four objectives is relevant for outdoor events.
- Given that “health” is not one of the four licensing objectives, refusal of an event licence because of covid concerns is likely to relate to the “public safety” OR “public nuisance”:
 - See eg a recent decision to revoke a bar’s licence by reference to both these objectives for COVID related reasons.

Council power to refuse permission for an event



- The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020 give councils powers to issue directions to prohibit events from taking place where there is a serious or imminent threat of coronavirus transmission eg a local COVID spike.
- Three conditions for issuing a direction:
 - Direction responds to serious and imminent threat to public health.
 - Direction is necessary to prevent, protect against, control or provide a public health response to spread of COVID.
 - Restrictions imposed by direction are proportionate means of achieving purpose.



Novel forms of licensing

How will the licensed trade respond to greater restrictions?



An existential threat

An existential threat



What you told us

Your answers show that:

- you are a creative person and enjoy coming up with new ways of doing things
- you like to lead other people and are good at taking control of situations
- you are sociable and find it easy to understand people

Because of your answers, we could not recommend any job categories. You might want to [go through the assessment again](#) to check that your responses were correct.



**How will the licensed trade
evolve?**

How will the licensed trade evolve?



**SHOULD I
LICENCE
THAT?**



How will the licensed trade evolve?



**Exhibition
of a film**

**Drive-in
cinemas**

**Regulated
entertainment**



How will the licensed trade evolve?



Sale of alcohol

**Streetfood
markets**

**Late night
refreshment**



How will the licensed trade evolve?



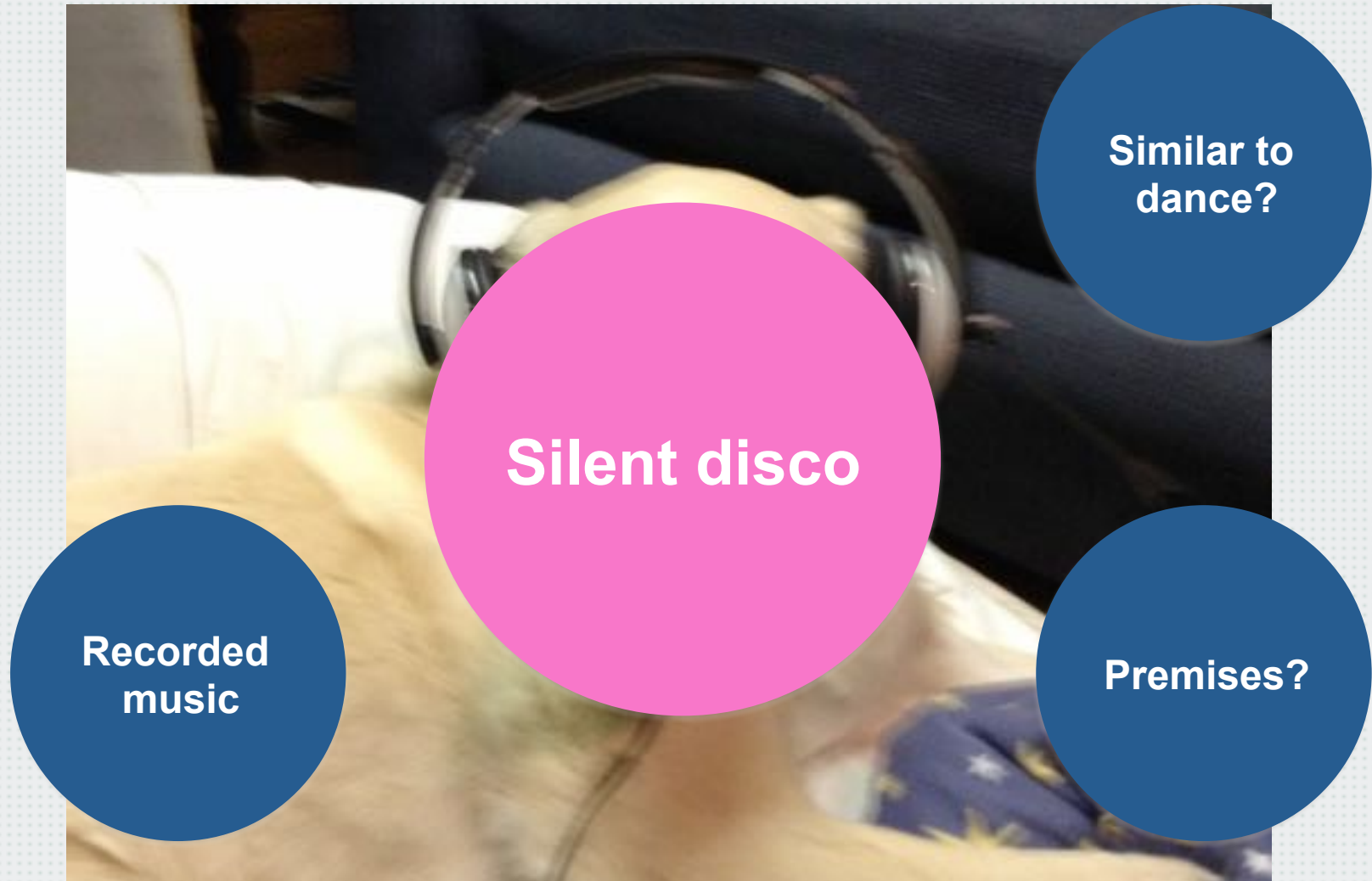
How will the licensed trade evolve?



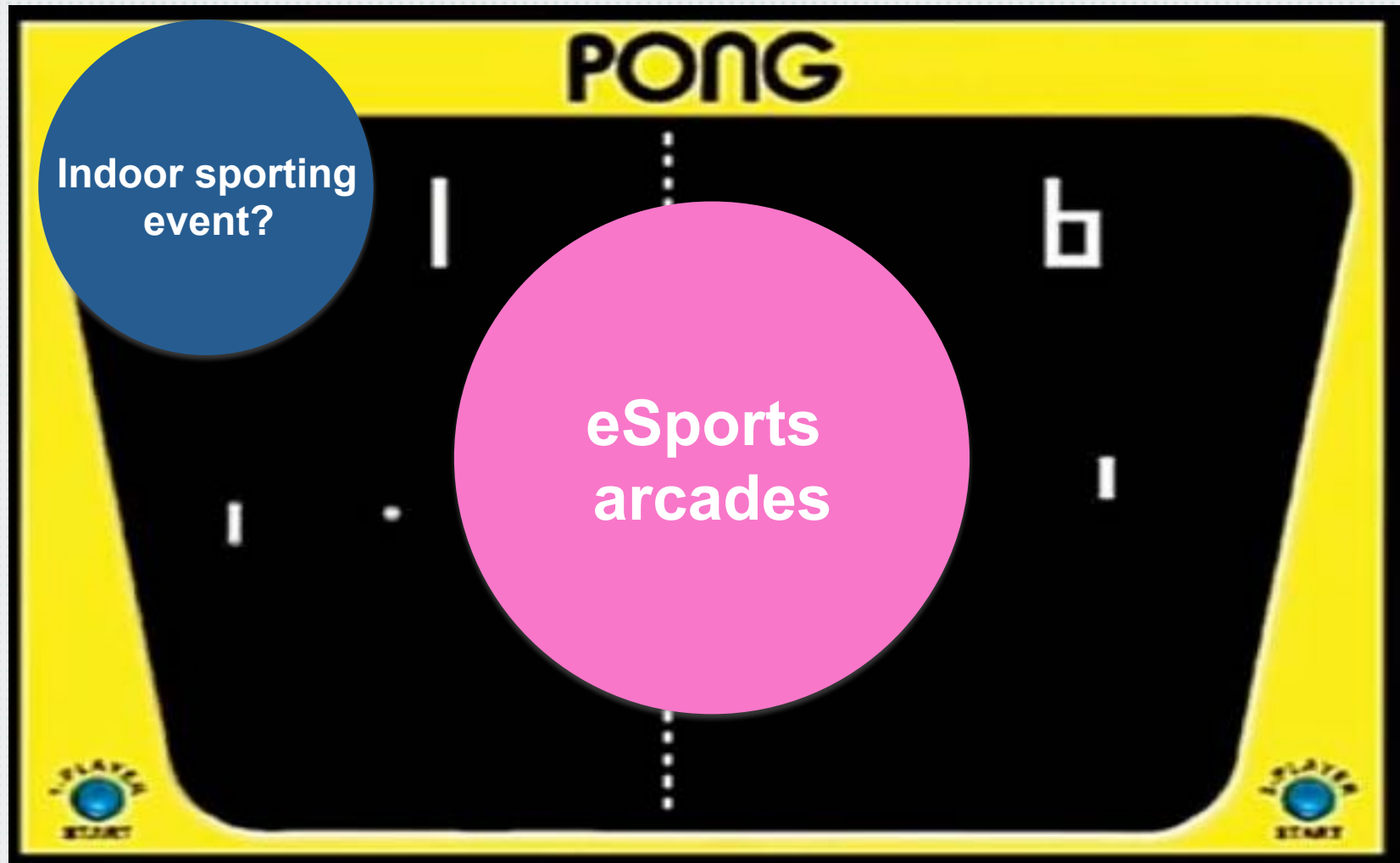
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How will the licensed trade evolve?



How will the licensed trade evolve?





Remote hearings and decision making

Making fair and lawful decisions virtually

Remote hearings: setting the scene



LA 2003 +
LA 2003 (Hearing)
Regs 2005

&

s. 78 of the
Coronavirus Act
2020

&

Flexibility
Regs 2020

Meetings can be held remotely

Public/press access can be remote

May make SOs for remote attendance

Hold/alter meetings without further
notice

Remote hearings: rules of procedure



**Rules of
Procedure**

Make/amend standing orders

What does Constitution say?

Protocols

Good etiquette

**Urgent
Decisions**

Delegated powers



Before the hearing

BEFORE THE HEARING



- Where compliance with specific requirements (e.g. method of advertisement) is not feasible, aim to use **best practicable method** instead.
- Procedural defects will not automatically invalidate a licensing determination provided there has been substantial compliance with the relevant procedures (see *Jeyeanthan* [1999] EWCA Civ 1465; and *R (Akin (t/a Efes Snooker Club) v Stratford Magistrates' Court* [2014] EWHC 4633)
- **Key question:** Is there any prejudice? Care must be taken to **cure any resulting prejudice** in so far as possible: See regs. 31 and 32 of Licensing Act 2003 (Hearings) Regulations 2005.



COMPLIANCE

BEFORE THE HEARING



- There is **no lawful power**, even during this emergency period, for Licensing Authorities to delegate decision-making to Officers where relevant representations have been received in response to an application.
- Promote (on your websites or through other means) the use of online applications as the **default position** as well as online representations.

**“VIRTUAL” AS
THE NEW
NORMAL**

BEFORE THE HEARING – PUBLIC PARTICIPATION



- Have a protocol in place and use a consistent protocol for participation.
- Early notification of remote forum.
- Late evidence – usual rules apply.
- Agenda Documents should all be accessible online/digitally, in a format and pagination common to all participants. The Coronavirus Regulations (Reg.15) confirm that it is sufficient for Agenda Papers to be published only on the website of the Council.

BEFORE THE HEARING – PUBLIC PARTICIPATION



Some suggestions:

- Encourage parties to **submit by email written submissions, at least 24 hours before the hearing is due to start**, summarising the points they wish to make at a hearing and the outstanding issues.

(likely to help with efficient running of hearing)

- Remind parties that, even where an application has attracted representations, applications **can be determined without the need for a hearing** where all parties consent to dispense with a hearing – Reg 9



At the hearing



AT THE HEARING (1) – ADJOURNMENTS?

- No change to the rules – hearings can be adjourned (but not indefinitely): Regs 11-13
- General rule: coronavirus should not be a reason to adjourn:

The regulations do allow for many hearings to be deferred during the period of social distancing. However, my view is that hearings should proceed, wherever possible. As you

- Hearings can *definitely* be ‘in public’ *and* remote: Flexibility Regulations, Reg. 5
- Managing remote hearings



AT THE HEARING (2) – Questions and Cross-Examination

- Basic rule: Reg. 23 – no cross-exam unless ‘required’
 - Less likely to be satisfied if remote hearing
- Questions:
 - Better by submissions?
 - Time-lag
 - Mechanism for getting attention – ‘hand up’





AT THE HEARING (3) – Excluding the public

- Two powers to exclude the public from hearings:
 - Reg.14(2) – where in the public interest
 - Reg 25 – where disruptive
- Public Interest: legal advice, sensitive information, ongoing investigation
 - Private meeting/breakout room/separate channel (whatsapp?)
- Disruptive: password protect?
 - NB Reg 25 requires removed person to submit information in **writing**





AT THE HEARING (4) – Deliberations, and the Decision

- Usually done in private (unless Camden!), so:
 - End meeting, and start new 'private' meeting?
 - Breakout rooms function in Zoom?
- Decision: Reg 26(2) – must make determination within 5 working days, & notify 'forthwith'
 - More justification for making/notifying decision later?
 - Practical difficulty re time for deliberation – waiting around?
 - Summary by e-mail?





Practical tips

Hosting and webcasting the meeting



Choose a video conferencing platform



Webcast the meeting



Preparing for and managing the hearing



Preparation

- Ensure all participants familiar with protocol
- Identify speakers in advance
- Written evidence and submissions sent before the meeting

Security settings/permissions

- Carefully control permissions
- Use email invitations to limit meeting participants

Contingency plans

- Plan for dealing with IT problems and disruption



Enforcing public health restrictions

New responsibilities for local authorities



- WHO declared the Coronavirus outbreak to be a “pandemic” on 27 March 2020
- Worldwide deaths, 1,073, 973 (as at 12.10.20)
- UK deaths 42,760 (as at 12.10.20)
- Spread through respiratory droplets but also through contact with contaminated surfaces and materials
- Hence the need for enhanced cleaning and social distancing

Sources of powers



- Public Health (Control of Disease) Act 1984, The Health Protection (Part 2A Orders) Regulations 2010
- Health Protection (Coronavirus, Restrictions) (England) (No.3) Regulations 2020
- Anti-social Behaviour, Crime and Policing Act 2014
- The Health Protection (Local Authority Powers) Regulations 2010: local authorities have a limited power to request persons or groups of persons to do or refrain from doing anything by serving a notice for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination which presents or could present significant harm to public health

Public Health (Control of Disease) Act 1984, The Health Protection (Part 2A Orders) Regulations 2010



- Powers to order health measures in relation to premises – s.45I
- LA to apply to the Magistrates' Court
- Maximum of 28 days, can be extended
- A justice of the peace may make an order under subsection (2) in relation to premises if the justice is satisfied that—
 - (a) the premises are or may be infected or contaminated,
 - (b) the infection or contamination is one which presents or could present significant harm to human health,
 - (c) there is a risk that the premises might infect or contaminate humans, and
 - (d) it is necessary to make the order in order to remove or reduce that risk.
- The order may impose in relation to the premises one or more of the following restrictions or requirements—
 - (a) that the premises be closed;
 - (b) that, in the case of a conveyance or movable structure, the conveyance or structure be detained;
 - (c) that the premises be disinfected or decontaminated;
 - (d) that, in the case of a building, conveyance or structure, the premises be destroyed.

Health Protection (Coronavirus, Restrictions) (England) (No.3) Regulations 2020



- Into force 12.01am on 18.7.20
- Exercised by upper tier LAs – see reg 1(4) for definitions
(in 2- tier areas, County councils), in single tier areas, the unitary or district council, LBCs, Common Council of the City of London, the Council of the Isles of Scilly
- Allows LAs to
 - restrict access to or close premises
 - prohibit certain events (or types of event) from taking place
 - Restrict access to, or to close, public outdoor places (or types of outdoor places) – defined in reg. 1(4)



- Conditions to be met:
 - In response to a serious and imminent threat to public health
 - 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
 - the prohibitions, requirements or restrictions imposed by the direction are a proportionate means of achieving that purpose.
- Must notify SoS and review every 7 days



Closure/access – reg. 4

- Close premises
- Restrict access
- Restrictions on the location of persons in the premises
- Imposed on owners, occupiers or anyone else involved in managing entry/ departure
- Can restrict numbers of people, purpose of use, facilities
- No directions permitted in respect of essential infrastructure, various transport, which would prevent a change-over of crew (reg 4(3))

Events – reg. 5



- Owner, occupier of premises, organisers, any other person involved in holding an event reg. 5(5)
- Can include a direction requiring those attending to be informed about any prohibitions, requirement or restrictions imposed in relation to the holding of it
- A person whose only involvement is attending is not a “any other person involved in holding an event” reg.5(6)

Outdoor public places – reg. 6



- Allows directions which imposes prohibitions, requirements or restrictions in relation to a specified public outdoor place or public outdoor place of a specified description
- Right to appeal to a magistrates court by way of a complaint MCA 1980
- LA required to take reasonable steps to give advance notice to a person carrying on a business in premises within the public place,
- LA required to take reasonable steps to ensure the direction is brought to the attention of any person who owns, occupies or is responsible for any land or premises in a public outdoor place to which the direction relates.



Enforcement and offences

Reg 12 – enforcement

- LA or constable may “take such action as is necessary to enforce a direction under reg. 4(1), 5(1) or 6(1)
- Prohibition notice
- Reg 5 events: Direction to stop the event, direct a person to leave, remove a person from the event

Reg. 13 - offences

- Contravening a direction under 4(1), 5(1), 6(1) or 12
- Obstructing a person carrying out a function under the regs
- Summary conviction – fine
- Body corporate with “consent or connivance” or attributable to neglect, both officer and the body corporate are guilty of the offence

Reg 14 – FPNs

- £100 (£50 if paid within 14 days), up to £3200 for 6th offence and any subsequent one

Anti-Social Behaviour Crime and Policing Act 2014



- Community Protection Notices, ss.43 - 58

<https://cornerstonebarristers.com/news/video-1-community-protection-notices/>

- Closure powers, ss.79 -93

<https://cornerstonebarristers.com/news/video-2-locking-down-anti-social-behaviour-closure-orders/>

Possible uses for CPNs



- | | |
|--|--|
| <ul style="list-style-type: none">▪ Pedi-cabs▪ Sex workers▪ Begging and Homelessness▪ Street drinking▪ Gang activity▪ Legal Highs▪ Dogs▪ Encampments▪ Environmental concerns▪ Anti-social Busking▪ Irresponsible retailers | <ul style="list-style-type: none">▪ Street vending▪ Bird feeding▪ Bonfires▪ Rogue landlords▪ Illegal business▪ Children's Homes▪ Feeding birds▪ Private landlords▪ Boy (or girl) racers▪ Graffiti▪ Housing |
|--|--|

The legal framework – an outline



A CPN is a notice which imposes requirements upon the body or individual to whom it is issued

The test:

Detrimental effect, or a persistent or continuing nature, on the quality of life of those in the locality

The process:

- CPW followed by
- CPN
- Powers to take remedial action or seek a remedial order from the Court
- Court can order forfeiture of items used to in the commission of an offence (namely failing to comply with the CPN)
- Can only issue to those aged 16 or over see s.43(1)
- An appeal process exists



Closure orders

- A single power to close **all** types of premises:
 - Residential
 - Commercial
 - Owner-occupied
 - Licensed
- Police and local authority (only) can apply
- Unlike the old closure powers, the statutory guidance no longer says the powers must be used as a 'last resort'
- *Leary v Chief Const West Midlands* [2012] EWHC 639 (Admin) [23]: no duty to exhaust lesser options before applying for closure
- Can close for up to three months, and extend for a further three months, maximum six months overall (though no bar to subsequent applications)
- Intended to be a quick remedy to provide immediate respite
- Two stage process – closure notice followed by an application to the court for a closure order



Test for Magistrates' Court

- Can prohibit access to EVERYONE for up to three months (including those habitually resident and the owner) **OR** “partial” closure
- The test, s.80(5):
 - A person has engaged or (if the CO is not made) is likely to engage in **disorderly, offensive or criminal behaviour** on the premises, or
 - The use of the premises has resulted or (if the order is not made) is likely to result in **serious nuisance** to members of the public, or
 - There has been or (if the CO is not made) likely to be **disorder** near those premises associated with the use of those premises
- In addition, the court must be satisfied that it is **necessary** to close the premises

Further reading



Contact details



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Safer public transport

Regulating taxis and e-scooter rentals

Safer Transport



Overview

Taxis

E-scooters

Cycle Schemes

Safer Transport



Taxis

**Social
Distancing**

Face Coverings

**Hygiene and
Safety**

**Cleaning and
waste disposal**

Safer Transport



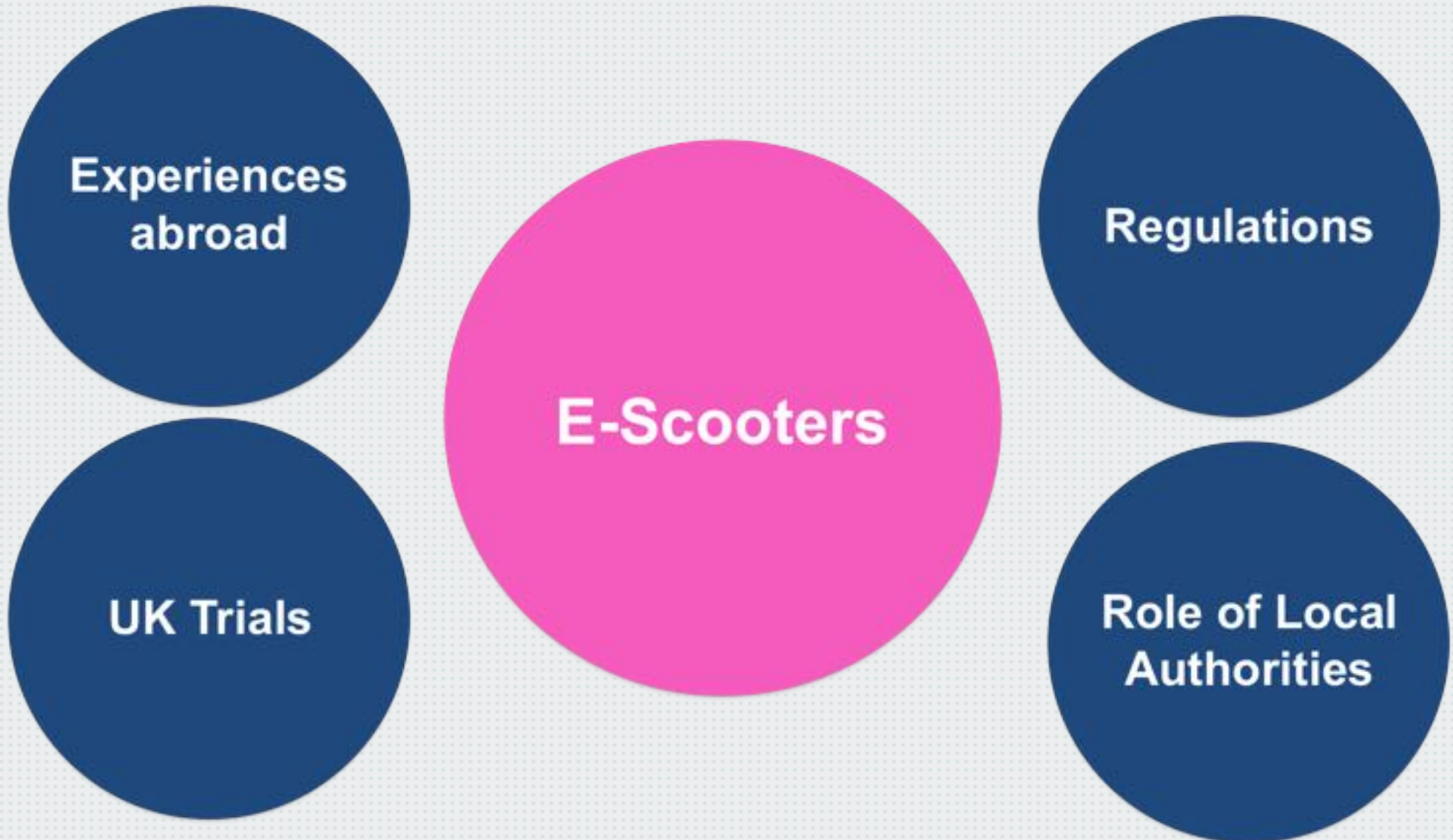
E-Scooters

Taxis

E-Scooters

Cycle Schemes

Safer Transport



Safer Transport



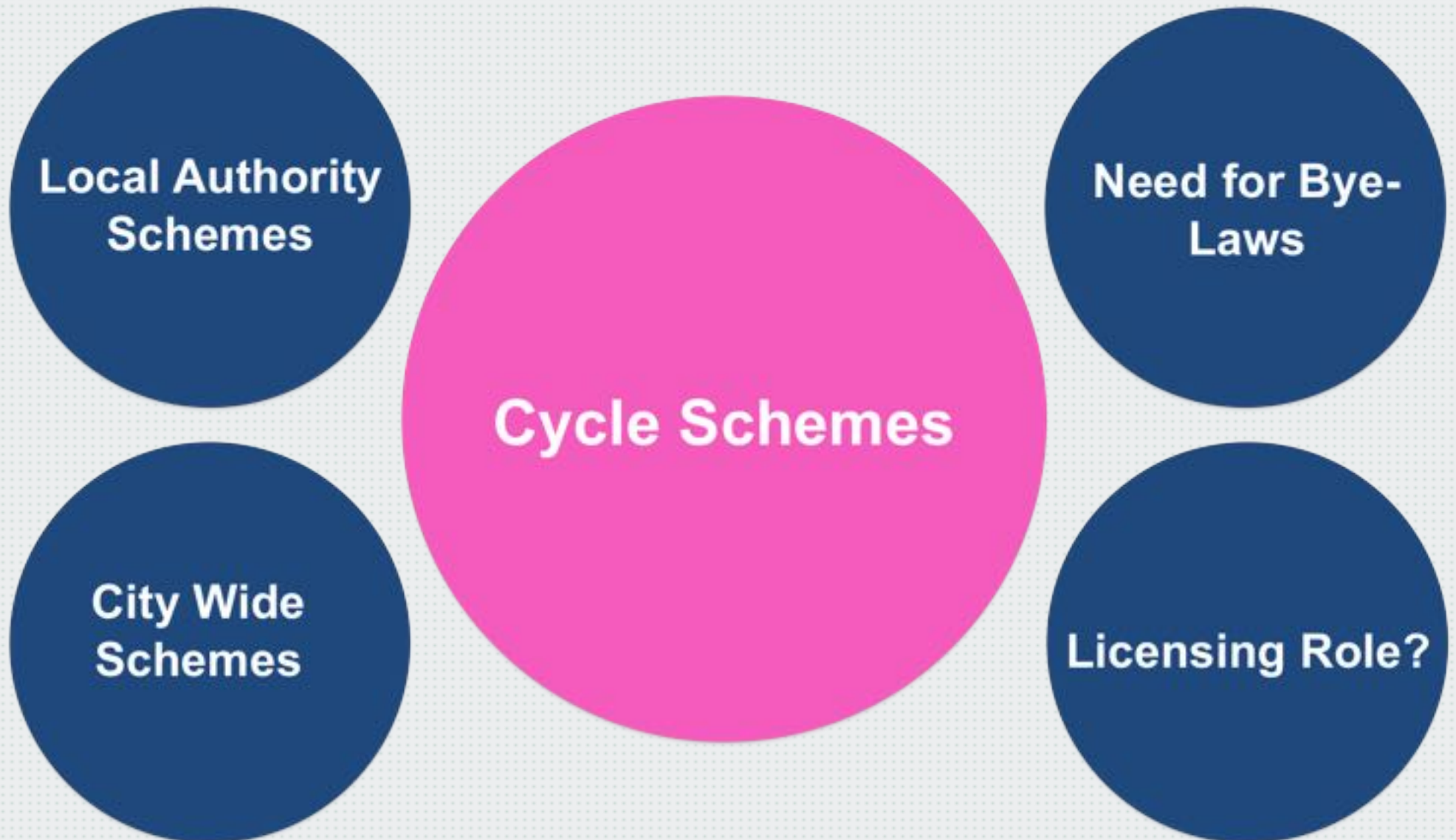
Overview

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Any questions?





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