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Alehm calls for appropriate powers to deal with non-covid secure businesses

Environmental Health enforcers and other enforcement colleagues from local councils are routinely visiting businesses to check they are Covid-Secure and to give advice where business precautions are insufficient. There is a significant gap in enforcement powers available to enforcement staff who are not able to deal effectively with the small but significant proportion of businesses that are failing to adequately comply with Covid-Secure requirements. These businesses pose a risk to the public and are likely to cause an increase in local cases which, in the worst situations, could lead to a local outbreak and the need for local lockdowns and outbreak control measures being implemented which would have a much more serious effect on the local business economy. The newly imposed lockdowns and local restrictions in Greater Manchester, Birmingham, Leicester, Blackburn and Oldham are examples where highly restrictive control measures have been introduced to control a significant spike in coronavirus cases.

The specific requirements in the Covid-Secure guidance for business are not legally enforceable and are currently being applied by councils using existing powers under the Health and Safety at Work Act which do not allow local authorities to take swift action to tackle non-compliance. Officers need specific powers to enforce the Covid-Secure guidance equivalent to powers given to enforcers in the devolved administrations. The use of appropriate, targeted legislation in a proportionate, risk based way would deal effectively with the small proportion of rogue businesses that wilfully refuse to meet their obligations and is a much more effective approach to enforcement than to have to rely on the more draconian powers that would be applied in the event of an outbreak.

Steve Miller, Alehm chairman commented “The legislation available to local authorities in England is toothless. It is not a case of locking the door after the horse has bolted, more like constantly trying to recapture the horse each time it escapes. We urge the government to introduce in England equivalent powers to those currently available in Wales.”

[Covid -Secure guidance](#) has been issued for businesses to assist them to operate safely. Local authorities have been tasked with supporting businesses to achieve compliance and in most London Boroughs compliance is around 90-95%. Local authority enforcement teams have been using a range of methods to support businesses, including on line advice, written guidance, phone calls, spot checks and some face-to-face visits. The face-to-face visits are generally intelligence-led, from complaints received from the public (often multiple complaints against the same business) which enables local authorities to identify those businesses that are likely to present the greatest risk to the public and direct their resources appropriately.

However, the Covid-Secure guidance does not have statutory backing and local authorities are faced with using the Health and Safety at Work Act 1974 as the legal framework with which to enforce the standards required to maintain public health and protect the public from Covid 19. The HSE has directed local authorities to give advice to businesses and follow this up by serving statutory improvement notices for failure to comply, which gives a minimum of 21 days in which to complete

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the improvements. Continued failure to meet standards can lead to prosecution for failure to comply with improvement notices or for failure to comply with the offences themselves. This effectively allows businesses to continue to trade whilst remaining non-compliant posing an unacceptable public health risk. The Act cannot be used to deal with members of the public who fail to follow Covid-Secure requirements.

While most businesses are making reasonable attempts to comply with the guidance, a significant proportion are not and there is widespread concern across local authority enforcement teams that the legal powers available are simply not sufficient to deal with this rogue element. Most success is achieved by local authorities making several visits to encourage compliance but even then some businesses are refusing to take any action. Enforcers are uncomfortable using health and safety legislation to enforce non-statutory public health guidance and are concerned that any action they do take against rogues for non-compliance will be successfully challenged in Court.

Examples of unenforceable requirements include contact tracing requirements, social distancing arrangements, restrictions on numbers allowed to sit at individual tables and exceeding the maximum number of people allowed at, for example, a wedding venue. The health and safety sanctions available to enforcers relate to workplace risk alone and are not sufficiently robust to protect wider public health. The most significant enforcement tool available under health and safety legislation, Prohibition Notices, can only be used in the most clear cut cases such as where shielded workers are being required to work unprotected in areas where there are Covid-positive patients. All other sanctions take several weeks to run their course and where local authorities fail to achieve compliance they then need to prepare a prosecution case – this at a time where the Courts themselves are stretched and a delay of many months is inevitable - and very limited resources are available in already over-stretched local authority enforcement teams. In reality prosecution is not currently an effective or practical option available to local authority teams. Any enhanced regulations or increased powers would need to include an alternative sanction to avoid the need for prosecution such as fixed penalty notices and include an offence of obstruction.

Local authorities have found particular problems around compliance in close contact service businesses, particularly barbers and beauty treatments, where practitioners refuse to wear any PPE, posing a risk to themselves and their customers. There is also a lack of compliance in a small proportion of mainly independent pubs, restaurants and cafes. The non-compliant pubs are not implementing contact tracing requirements nor adequately managing social distancing, although in general it is the public that is failing to comply with social distancing requirements, congregating in large groups within a business or spilling out onto the streets and blocking pavements which are not then being effectively managed by the business. Restaurants and cafes have been observed placing tables too close together and there are many complaints about a lack of face masks being worn. Other businesses where problems have been identified are businesses hosting large events such as weddings, shisha bars and some places of worship where social distancing is not being effectively managed.

Many of these incidents are liable to give rise to a spread of Covid 19, especially as we move forward into autumn and a greater proportion of gatherings will take place indoors, but local authorities do not have sufficient powers to take swift protective action in the few cases where their informal interventions have not been effective. Powers have recently been extended to adequately control businesses once an imminent threat to health has been identified in the [Health Protection \(Coronavirus Restrictions\) \(England\) No 3 Regulations 2020](#). This legislation provides wide ranging powers to crack down on emerging incidents where there is a clear risk of infection, but these regulations can only be used where there is clear evidence of an emerging problem, such as a significant increase in cases associated with a business. The support of the local Director of Public

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Health is required before any action can be taken to confirm the imminent health risk to the public. These additional powers are welcome but there remains a significant gap where action cannot be taken to control the spread of the virus and there is a need for additional powers to deal with recalcitrant businesses before they are able to cause a local spike in cases.

More appropriate powers under public health legislation have been granted in both Wales and Scotland. The Welsh regulations would sit well within England's current enforcement arrangements. They give officers the power to serve a Premises Improvement Notice where a business does not comply with Covid-Secure requirements which gives the business at least 48 hours in which to undertake the necessary improvements. There is also the power to serve a Premises Closure Notice to deal with non-compliance with Improvement Notices or to immediately stop business activities, areas within businesses or close the whole business where there is more serious non-compliance which warrant immediate enforcement action. The link to the regulations available to the devolved administrations is below, with specific reference to Regulation 12(2), 17(A) and schedules 5 and 6 of the Welsh Regulations.

[Wales Health Protection Coronavirus no 2 Regulations](#) as amended by the [Wales Coronavirus no 4 Regulations](#)

[Scotland Coronavirus Regulations](#)

All local authority enforcers are required to follow the [Regulators' Code](#), which requires them to ensure all enforcement action is proportionate, transparent and risk based. These additional powers would be applied appropriately in line with the risks posed by individual businesses to help prevent wider spread of the infection and avoid more extensive local control arrangements being required.

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