

# A guide to lockdown law in Scotland

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## 1. Introduction

If you are living in Scotland at present, you will probably know that the Scottish Government has imposed a 'lockdown' to halt the spread of COVID-19. Similar lockdowns are in place in England, Wales and Northern Ireland - and across the world.

To put the lockdown into force in Scotland, the Scottish Government passed a law which requires certain businesses to close and severely restricts the movement of individuals and the holding of public gatherings. It contains penalties and enforcement powers for the police where the lockdown is contravened.

The lockdown has drastic implications for civil liberties. In ordinary times these measures would be inconceivable, and the Scottish Government's view is that they are justified by the ongoing public health emergency.

This post is an attempt to put Scotland's lockdown law into plain English, in order to help people to better understand what the conditions of the lockdown are. It discusses the restrictions on movement and gatherings and the attendant enforcement powers and penalties. For brevity, it does not examine the restrictions on businesses, nor does it look at the law elsewhere in the UK in any detail.

This guide is structured as follows: it first makes two constitutional points which are important to understand the context of the lockdown law in Scotland, it second sets out the legal background to the lockdown in Scotland, and then it explains the provisions of the lockdown law on:

- Requirements for the review and expiry of the lockdown,
- Restrictions on movement,
- Restrictions on gatherings,
- Enforcement of the lockdown,
- Offences, defences and penalties for contravening the lockdown, and
- Fixed penalty notices.

**This is not legal advice. If you are unclear as to what you can and cannot do under the lockdown you should [seek your own legal advice](#).**

## 2. The lockdown and the constitution

To better understand the lockdown law in Scotland, it is important to briefly go through two key constitutional concepts: the rule of law and devolution.

One of the key principles of the [rule of law](#) is that public authorities (e.g. Police Scotland and the Scottish Government) must act lawfully. Public authorities must not act beyond their powers which are set out in law. The rule of law remains firmly in place during the lockdown.

The former UK Supreme Court justice Jonathan Sumption has brought this abstract concept to life with [his criticism of Derbyshire police](#) for stopping people from exercising in the Peak District. His point that the police “have no power to enforce ministers’ preferences but only legal regulations” is one that should be respected during the lockdown.

[Devolution](#) is important in this context too. Scotland has its own parliament and legal system. As will be discussed in the next section below, the Scottish Ministers have passed Regulations which give legal effect to the lockdown in Scotland.

Each of the four nations of the UK have their own lockdown regulations (see here for [England](#), [Wales](#) and [Northern Ireland](#)). While the general content of these regulations is similar – there are also some crucial differences.

For example, in Wales, the law requires people to not leave their home to exercise [more than once per day](#) – this is not a legal requirement in Scotland. And in England, “[any person designated by the Secretary of State](#)” can be given powers to enforce the lockdown law, whereas in Scotland the restrictions on movement and gatherings are enforceable by the police only.

The key devolution point to take onboard is that Scotland has its own particular lockdown law, so any commentary or media coverage you see about lockdown laws in the rest of the UK should be treated with caution in terms of its relevance for Scotland.

## 3. Legal background to the lockdown

The [Coronavirus Act 2020](#) gave the Scottish Ministers powers to make ‘health protection regulations’ in response to COVID-19. This Act is the parent legislation for the lockdown law in Scotland.

The Scottish Ministers have used this power to pass [The Health Protection \(Coronavirus\) \(Restrictions\) \(Scotland\) Regulations 2020](#). These Regulations (now

referred to in this post as ‘the Regulations’) came into force on 26 March 2020. They set out the terms of the lockdown in Scotland.

## **4. The Regulations**

### **a. Review and expiry of the lockdown (Regulations 3 and 11)**

The Scottish Ministers must review the need for the lockdown at least once every 21 days, and the first review must be carried out by 16 April 2020.

As soon as the Scottish Ministers consider that any of the Regulations’ restrictions or requirements are no longer necessary to deal with COVID-19, they must publish a direction terminating that restriction or requirement. The Scottish Ministers can decide to terminate any or all of the terms of the lockdown that are contained in the Regulations.

The Regulations will expire six months after they came into force (by 26 September 2020). This is known as a ‘sunset clause’. The Regulations’ parent legislation also has its own sunset clause ([discussed here](#)).

### **b. Restrictions on movement (Regulation 5)**

Regulation 5 requires that no person may leave the place where they are living, unless they have a ‘reasonable excuse’ for doing so. What is a reasonable excuse is discussed below under the heading ‘offences, defences and penalties’.

The ‘place’ where a person lives for the purposes of the Regulations includes “the premises where they live together with any garden, yard, passage, stair, garage, outhouse or other appurtenance of such premises”. This means that the restrictions on movement do not apply to these areas (as far as they relate to a person’s home).

The restrictions on movement do not apply to people who are homeless. The term ‘homeless’ is not defined in the Regulations. It will usually be clear whether or not a person is homeless. However, if further definition is needed, the term is defined in homelessness law ([the Housing \(Scotland\) Act 1987, Section 24](#)).

### **c. Restrictions on gatherings (Regulation 6)**

Regulation 6 states that “no person may participate in a gathering in a public place of more than two people”, unless the gathering meets any of the following conditions:

*(a) where all the persons in the gathering are members of the same household,*

*(b) where the gathering is essential for work purposes,*

*(c) to attend a funeral, or*

*(d) where reasonably necessary—*

*(i) to facilitate a house move,*

*(ii) to provide care or assistance to a vulnerable person,*

*(iii) to provide emergency assistance, or*

*(iv) to participate in legal proceedings or to fulfil a legal obligation.*

The word 'gathering' is not defined in the Regulations.

Regulation 6 is worded in a way which suggests that there are no exceptions to the restriction on gatherings other than those which are quoted above. It is an offence to contravene the restriction on gatherings in Regulation 6.

However, the Regulations also provide that there is a defence to contravening Regulation 6, where someone can show that they had a 'reasonable excuse'. This is discussed below under the heading 'offences, penalties and defences'.

#### **d. Enforcement (Regulation 7)**

The Regulations give "constables" several powers to enforce the lockdown in respect of the restrictions on movement and gatherings. Who is a 'constable' is [defined in different legislation](#) - effectively this refers to Police Scotland.

The enforcement powers are very broad - they give Police Scotland wide discretion to enforce the lockdown.

They include the powers to:

- Take "such action as is necessary" to enforce any requirement imposed by the Regulations (paragraph 1). This has been described as "[an extremely broad and ill-defined power](#)".
- Give a 'prohibition notice' to a person, where the constable 'reasonably believes that' (a) a person is contravening a requirement of the Regulations, and (b) it is

necessary and proportionate to give the prohibition notice to prevent that person from continuing to contravene the Regulations (paragraph 2). The term 'prohibition notice' is not explained or defined in the Regulations.

- Direct a person to return to the place where they are living or remove that person to the place where they are living (paragraph 3).
- Use "reasonable force, if necessary" to remove a person to the place where they are living (paragraph 4).
- Make similar directions as above in relation to children being accompanied by adults with responsibility for them, and direct any individual with responsibility for a child who is repeatedly failing to comply with Regulation 5 to ensure that the child complies with that restriction (paragraphs 5-6).
- Where the police consider that three or more people are gathered together in contravention of Regulation 6, they may direct the gathering to disperse, direct the individuals to return home or remove any person in the gathering to their home (paragraph 9).
- Use the powers in paragraphs 4 to 7 to disperse gatherings (paragraph 10).
- Where exercising the powers under paras 3, 5, 6 or 9, a constable may give the person concerned any reasonable instructions they consider to be necessary (paragraph 11). No indication is given as to what a 'reasonable instruction' might be.

The powers in Regulation 7, paragraphs 3, 5 and 6 can only be used where a constable "considers that it is a necessary and proportionate means of ensuring compliance with the requirement". The other powers are not affected by this qualification. This is a subjective test, because the constable has to 'consider' that the use of the power would be necessary and proportionate.

In the case of a person who, while out for their exercise in the local park, stops to spend some time feeding the ducks at the pond, it would be difficult to see how a constable could consider it to be necessary and proportionate to intervene in the first instance by using force to return that person to their home. Similarly, if someone steps outside their home once per week to bang a saucepan to show their support for key workers, it would probably be inappropriate to use force.

On the other hand, where a person is taking several trips per day to visit various friends without a good reason, and where they have been warned against doing this by the police, it may then be necessary and proportionate for the police to use force to intervene.

## **e. Offences, defences and penalties (Regulation 8)**

It is an offence for a person to do any of the following:

- Contravene the requirements in Regulations 3 to 7 (including the restrictions on movement and gatherings).
- Obstruct any person carrying out their functions under the Regulations (e.g. the police).
- Contravene a direction given by the Police under Regulation 7, a reasonable instruction given by the police or a prohibition notice given by the police.

A person who commits an offence under the Regulations “is liable, on summary conviction, to a fine not exceeding the statutory maximum”. This means a fine of [up to £10,000](#).

There is a defence available to people charged with committing an offence under the Regulations. The defence is available where someone can show that, in the circumstances, they had a ‘reasonable excuse’ for committing what would otherwise be an offence.

‘Reasonable excuses’ are listed in Regulation 8(5) as including the need:

*(a) to obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household) or for a vulnerable person and supplies for the essential upkeep, maintenance and functioning of the household or the household of a vulnerable person, or to obtain money,*

*(b) to take exercise, either alone or with other members of their household,*

*(c) to seek medical assistance, including to access any of the services referred to in paragraph 37 or 38 of schedule 1,*

*(d) to provide care or assistance to a vulnerable person, including to provide emergency assistance,*

*(e) to donate blood,*

*(f) to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living,*

*(g) to attend a funeral of—*

*(i) a member of the person’s household,*

*(ii) a close family member, or*

*(iii) if no-one within sub-paragraphs (i) or (ii) are attending, a friend,*

*(h) to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings,*

*(i) to access critical public services, including—*

*(i) childcare or educational facilities (where these are still available to the child in relation to whom that person is the parent of, or has parental responsibility for or care of, the child),*

*(ii) social services,*

*(iii) services provided by the Department of Work and Pensions,*

*(iv) services provided to victims (such as victims of crime),*

*(j) in relation to children who do not live in the same household as their parents, or one of their parents, to continue existing arrangements for access to, and contact between, parents and children, and for the purposes of this paragraph, “parent” includes a person who is not a parent of the child, but who has parental responsibility for, or who has care of, the child,*

*(k) in the case of a minister of religion or worship leader, to go to their place of worship,*

*(l) to move house where reasonably necessary,*

*(m) to avoid injury, illness or to escape a risk of harm.*

In addition to the list quoted above, there may be other ‘reasonable excuses’ to leave the home. This is because regulation 8(5) frames the list of reasonable excuses with the wording “a reasonable excuse includes the need...”

The use of the word ‘includes’ suggests that the above list is not exhaustive, so there may be other reasons which are not included on the list which could provide an individual with a ‘reasonable excuse’.

However, anyone who carries out an activity which would contravene the restrictions on movement and gatherings in the belief that they may have a ‘reasonable excuse’ which is not listed in the Regulations, will risk prosecution. We will not have certainty on what may or may not be a reasonable excuse until the courts interpret this part of the Regulations.

## **f. Fixed penalty notices – Regulation 9**

A constable can issue a 'fixed penalty notice' (FPN) to a person who the constable "reasonably believes" has committed an offence. An FPN can only be given to someone aged 16 or over.

An FPN is "a notice offering the person to whom it is issued the opportunity of discharging any liability to conviction for the offence by payment of a fixed penalty in accordance with these Regulations". In other words, when someone is given an FPN, they are offered a choice: either pay a fine and avoid any further liability, or face a potential criminal charge and conviction.

**If you receive an FPN, you have 28 days to decide whether you want to contest it. If you want to challenge an FPN, you should seek legal advice immediately.**

The penalty payable by someone who gets an FPN is £30 until the end of the period of 28 days after the date of the FPN. After 28 days the penalty then rises to £60.

However, if a person has previously received an FPN, then they get no reduction for paying promptly. The penalties rise rapidly with each subsequent FPN. The penalty for the second FPN is £120. Any subsequent FPN penalty doubles, up to a maximum penalty of £960.

The form of an FPN, their effect and the procedure that applies to an FPN are the same as those which apply under Sections 129 to 134 of the [Antisocial Behaviour \(Scotland\) Act 2004](#).

An FPN is required to meet several requirements in terms of what is written on the FPN. An FPN must:

*(a)state the alleged offence;*

*(b)give such particulars of the circumstances alleged to constitute the offence as are necessary to provide reasonable information about it;*

*(c)state the amount of the fixed penalty;*

*(d)state the clerk of the justice of the peace court to whom, and the address at which, the fixed penalty may be paid;*

*(e)inform the person to whom it is given of the right to ask to be tried for the alleged offence and explain how that right may be exercised;*



A constable has the discretion to revoke an FPN where they determine that either: (a) the offence to which the FPN relates was not committed, or (b) the notice ought not to have been issued to the person named in the FPN.