

IOLIS

Legal Services

COVID19 – Organised Activities

Outdoor Activity Return

20TH APRIL 2021

This advice will require updating as and when further announcements are made, and the law and government guidance are updated. You should ensure that this document is still current and applicable before acting or relying upon it.

wsa
Welsh Sports Association
Cymdeithas Chwaraeon Cymru

IMPORTANT – PLEASE READ

It is vital that everyone understands that none of the measures to control the spread of Covid-19 should ever interfere with or put at risk people's health and safety. In the event of any type of emergency, be it a fire, an accident, an injury, at no time should a concern for any rule or law cause any delay in the response to an emergency or the treatment of any casualty.

Delaying first aid treatment due to a concern about proximity to another person may result in unnecessary suffering or a poorer outcome, even a fatality.

First aid and emergency response staff should keep their knowledge up to date. First aid kits should be stocked with a good level of PPE such as masks, gloves, and face shields. These items will reduce any risk to those administering first aid.

The additional work involved in covid security must not reduce the effectiveness and implementation of safeguarding procedures. Never be tempted to take short cuts with safeguarding procedures. The current pandemic and pressure on facilities and staff may provide opportunities for those that would seek to harm children and others at risk to gain access to them.

Background

We have been asked to produce some written considerations on the statute and guidance and how this applies to the requirements for social distancing during activities outdoors.

This written guidance is time sensitive. It has been based on the current statute that came into force on the 12th of April 2021 - The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020, as amended¹. Any changes to this statute may affect the validity of this guidance. This guidance applies from the 25th of April. Prior to this date organised activities are NOT ALLOWED.

It is important to understand that the meaning of the age of any child is the chronological age. There is no easement for people with developmental delays or disabilities. In such cases, however, there is the duty to make reasonable adjustments and as such, the need or likelihood for people with developmental disabilities to break social distancing rules should not present any issue. There is also reference in the Welsh Government advice on social distancing² to the ability of a person to understand the meaning and implication of social distancing and breaching it.

Statutory Rules

Regulated Premises

We must therefore consider any controlled space in which an organised activity is to take place to be regulated by the statute. Under Section 16 of the act, there is a requirement to take all reasonable measures to maintain a distance of 2 metres between people on a regulated premises, with the exception of members of the same household or between a carer and a cared-for person. There is also a requirement to undertake a risk assessment.

It is specifically set out that a measure to mitigate risk should be not carrying out the activity at all. As this is in statute, this must be a consideration, however it must be stressed that activities may still take place if any potential or likely breaches of distancing do not pose a significant risk to participants of staff.

Restrictions on Numbers

For the purposes of the organising of an event, there are limits on the numbers that may attend an event. The numbers vary according to the alert level that is current and whether it is indoor or outdoor. This 'headcount' limit does not include children under 11 nor does it include any person attending as a carer for another. The current limit at alert level 3 and 2

¹ <https://gov.wales/sites/default/files/publications/2021-04/11-april-the-health-protection-coronavirus-restrictions-no-5-wales-regulations-2020.pdf>

² <https://gov.wales/taking-all-reasonable-measures-minimise-risk-exposure-coronavirus-workplaces-and-premises-open#section-40075>

for outdoor activities is 30 people. It must be noted that the part of the statute (Schedule 3 part 2) that deals with this restriction states the following regarding maximum numbers:

not counting persons under the age of 11 or persons working, or providing voluntary services, at the event.

We do find, however, in the specific sector guidance for sport, that coaches and match officials that are on the field of play must be counted as participating.

The maximum numbers do not apply to an outdoor organised activity for the development or well-being of children (those under 18 years of age). This applies to gatherings in public places in the statute and is also permitted under the sport sector guidance. Organiser must, however, consider the activity risk assessments carefully.

The Meaning of Close Contact

The statute gives us a definition of “close contact” in s.5.1:

In this Part, “close contact” means contact that a contact tracer considers may lead to a risk of infection or contamination with coronavirus, including—

- (a) having face-to-face contact with a person at a distance of less than 1 metre;*
- (b) spending more than 15 minutes within 2 metres of a person;*

This section deals with the requirement to isolate and is not directly applicable to sector guidance but does provide a useful definition for us to understand the meaning.

Definition of an Outdoor Space

There have been some questions regarding the use of covers such as marquees or gazebos and what might constitute an ‘indoor space’ should sides be added to eliminate the effects of wind and rain.

An outdoor space is defined under the Smoke-free Premises and Vehicles (Wales) Regulations 2020 s.3³. Any structure that is classed as enclosed or substantially enclosed will be an indoor space under the covid regulations. Substantially enclosed means having walls that cover more than 50% of the area of the sides of the structure, this includes any windows or doors that can be closed. We would therefore suggest that the use of sides to a gazebo or marquee should be done so minimally and no more than 50% of the square footage of the vertical sides should be covered. This should be given careful consideration if the marquee is oblong or has more than four sides.

Summary of Statutory Restrictions

The statute sets out limits on the numbers that may attend an organised activity, this is clear and without any particular issue.

³ <https://www.legislation.gov.uk/wsi/2020/1211/regulation/3/made>

The statute also sets out the requirements for maintaining social distancing of 2 metres between all person upon or in a regulated premises. There are exceptions to this requirement set out in various Welsh Government guidance documents

While there are no statutory provisions that will allow children to breach the distancing rules, we can reasonably rely on other guidance issued by Welsh Government that sets out the circumstantial relaxation of the strict distancing law in the case of both children and sport and other leisure activities.

All activity organisers must carry out a risk assessment.

Guidance

Flexibility of Distancing Rules

Within the sport, recreation and leisure guidance⁴ issued by the Welsh Government we find differing circumstances may have varying levels of easement from distancing rules. An activity may breach social distancing rules if it is unavoidable during play. In Section 5: Organised activities and team sports a framework for developing bespoke guidance we find the following:

Mitigating actions

Where participants are likely to be in close proximity (within 2m) or in contact, efforts should be made to limit this contact if it cannot be avoided altogether, and organisers and National Governing Bodies should consider all reasonable measures to prevent the spread of the virus, including whether the activity really needs to proceed...

This clearly sets out that in the framework of gameplay, in light of due consideration and the undertaking of a risk assessment, that breaching of the statutory requirement of distancing is supported.

The guidance is also allowing distancing to be breached in the case of children, especially those under 11. In the Organised children's outdoor activity: frequently asked questions document⁵, which is the most recent guidance at the point of writing, it allows for contact to take place during activities for children (all those under 18) however we stress that this applies only to contact between children and not contact between children and adults.

The frequent use of phrases such as 'cannot be avoided' and 'where possible' when discussing distancing during 'play', allows us to make a reasonable assumption that there is an exemption to the absolute statutory requirements to distance. The statute directs us to have regard to the supplementary guidance that Welsh Ministers are issuing in s.18(1).

⁴ <https://gov.wales/sport-recreation-and-leisure-guidance-phased-return-html>

⁵ <https://gov.wales/organised-childrens-outdoor-activity-frequently-asked-questions>

It is then entirely reasonable to follow the remainder of the sport specific guidance and rely upon the risk assessments and oversight of an appropriate NGB or general good practice. The guidance, in the team sport framework gives the following advice

Key principles - during activity

Physical distancing in play

All activities must adhere to physical distancing throughout warm-ups and avoid equipment sharing. The sport specific action plan must address the issue of how the sport can best mitigate the risk of lack of physical distancing in competitive matches and training.

Having completed the droplet transmission risk assessment each sport may introduce 'COVID-19 adaptations' to lower the frequency of activities that cannot be done whilst physically distanced. Avoid unnecessary breaking of physical distancing such as pre-game handshakes, huddles, and celebrations.

Physical distancing during breaks and post-game

All participants must remain physically distanced during breaks in play with spaced areas for equipment and refreshment storage for each individual including officials and substitutes. Coaching staff and substitutes, should, for example, spread out and avoid sharing a dug-out or bench if physical distancing cannot be observed.

Water bottles or other refreshment containers, should in no circumstances be shared. Participants are advised to bring their own, in a named container.

After activity participants must maintain physical distancing for social interaction.

This is the clearest indication that we can find that suggests the allowance of a reasonable breach of social distancing rules during an activity ***as long as the risk assessment does not consider the likelihood of harm and/or infection transmission to be unacceptably high.***

Organisations should therefore be certain of risk assessments and control the size and nature of groups undertaking any activity. It should not follow that the maximum numbers should be allowed in every circumstance.

NGBs or the officer responsible for the activity must consider the implications of their decisions very carefully. All decisions must be based on sound risk assessment and in accordance with current guidance, and as we would additionally recommend, such risk assessments should involve suitable medically qualified experts on the transmission and risks from Covid-19 where possible. The degree of proximity and / or contact that an NGB or responsible officer will allow, will be relied upon by member and non-member organisations in their sector. This will place a burden of responsibility under a common law duty of care

upon the NGB or responsible officer. It is a risk that each NGB or organisation should be suitably insured for.

Should an NGB or other organisation be found to have been negligent or reckless in allowing a particular activity or mode of operation, they may be subject to a criminal proceeding and the officers of the organisation may be personally criminally liable.

Shared Equipment

Some team activities involve the use of a shared ball. Within this set of activities, we can break up the sharing of the ball into two groups, handled and non-handled ball sharing.

Non-handled ball sports

Risk assessments should examine the possibility of Covid-19 transmission via the ball. Although the handling of a ball in football, for example, is minimal, it still occurs during throw-ins and there is a degree of handling by each goalkeeper. Measures should be put in place to reduce any risk presented by this limited contact. It may be that some modified rules are introduced, or game play is modified to reduce any risk.

Handled ball sports

Many shared ball sports have a high degree of ball handling. Rugby, by its very nature, has a high degree of ball handling, as well as a high degree of physical contact during normal play.

Other sports such as netball and basketball also have a high level of ball handling and again, measures should be taken to reduce the risk of transmission of Covid-19. Such measures may involve good and frequent hand hygiene, frequent ball changes and cleaning, reduced team numbers, and modified rules.

Other Risk Reduction Measures

Welsh Government have made available lateral flow testing kits available to everyone who is unable to work from home. There will be sufficient kits for two tests per week which is considered optimum. Test kits are available via local authority testing centres. Details can be found here:

<https://gov.wales/get-rapid-lateral-flow-covid-19-tests-if-you-do-not-have-symptoms>

There is not sufficient information available at present to determine the exact requirements for 'working'. As such, we suggest that given volunteering is generally classed as working when considering such matters as visa applications, that volunteers consider themselves working and collect test kits from the designated locations. We do not, however, suggest that volunteers mislead anyone should they be asked. It is permissible for an organisation to hold details of the results from staff. It would not be correct for any organisation to seek the results of any participant or member of the public as there is no lawful reason to hold this medical data about them.

Event locations

Outdoor spaces that constitute a ‘regulated premises’

When operating from a regulated premises, the premises must be on the list of those allowed to open. It is useful to understand what a regulated premises translates into when considering outside spaces. Schedule 7 of the current statute lists the type of premises that are regulated:

36. Sports or exercise facilities, including indoor fitness studios and gyms.
37. Swimming pools.
38. Sports courts, bowling greens, golf courses and enclosed sports grounds or pitches (whether outdoors or indoors).

Be careful not to confuse an *enclosed space* with an *indoor space*. Some examples of enclosed outdoor sports spaces are tennis courts that are fenced off, fenced football pitches and other multi-function spaces, golf driving ranges, expanses of water that have limited access via a gateway or similar, gated private slipways, private river landings, though the river itself is not ‘enclosed’, any form of open topped stadia such as athletic or cycling tracks etc.

Events in ‘Public Spaces’

There is currently limited guidance on the use of outdoor public spaces as venues for organised activities. We need to be mindful of the relevant parts of the statute. In schedule 2 part 2, s.4(3)(b) we find the following requirement:

a reasonable excuse [to organise an event] includes where the person has taken all reasonable measures to ensure that no more than 15 or 30 people are in attendance, as the case may be;

It is therefore incumbent upon the organiser to be able to control the numbers that participate when having no ability to control entry onto a premises. This will be of varying degrees of difficulty depending on what and where the event is. Group exercise in a park, for example, that uses no special equipment could be subjected to an uncontrolled expansion by passers by deciding to join in and thus become part of the group. In a case like this, the organiser, having assessed the risk of this occurring, would most likely conclude to not go ahead.

We would see similar considerations when looking at any water activity that takes place from a public beach. Much would depend on the weather, day of the week, whether it is a school holiday etc.

Events that are not static in location

Examples of events that are not ‘located’ would be road races (cycling or running), triathlons, coastal long-distance sailing, and other similar events. Such events are still controlled under the statute and are subject to the maximum numbers. The idea of a staggered start to allow the maximum number overall to be exceeded is not currently

permitted. To hold an event such as those listed and to exceed the current limits, an organiser will require permission from Welsh Government to do so.

Multiple Groups in a space

The sport specific guidance allows simultaneous groups to operate in a space as long as the space is large enough for the groups to operate independently and distanced from each other. A good example of this would be a park with two football or rugby pitches. Two groups could operate, one on each pitch if they stay separate. Participants must not be permitted to go between the two groups and care should be taken when booking spaces to ensure that there will not be undue congestion upon arrival and departure.

It is the requirement for the groups to be, and remain, separate that will mean this idea cannot easily be used to run multiple groups of contestants along a fixed course if there is the possibility that the leaders from a subsequent group will mix with the tail enders from previous groups.

There must also be a consideration of multiple events throughout a given time period. Having waves or staggered starts needs to be carefully thought out and planned. The current guidance makes this point:

Events involving waves or staggered starts should not be allowed if there is any risk the 30 person limit is breached during any stage of the activity.

If the arrival and departure location of an activity are different, running multiple waves or groups can be achievable. With a condensed or limited space, it is likely to be more difficult and an organiser needs to factor in any delays. Delays are often inevitable, and this could cause a build-up of numbers that may quickly exceed the permitted maximum. There must be sufficient time between each wave to allow the previous group to clear the facility and depart safely. Organisers should also be mindful of the increase in vehicular and pedestrian traffic in the neighbourhood.

It will also cause an increased infection risk if social distancing becomes difficult to maintain. It could possibly lead to enforcement action and potentially tarnish the reputation of the organisation.

The focus must always be on a manageable situation and delivering a safe experience for participants. Risk assessments must explore scenarios where there are delays and hold-ups. There should also be consideration of the possible consequences of needing to evacuate a facility in an emergency as well as the potential increased pressure on emergency services. Bluntly, there are no prizes for the maximum number of participants in one day.

Summary

The recent announcements regarding the easing of restrictions and the return to activity in various sectors is welcome but we need to keep a close watch for changes in both the statute and the guidance. It must be remembered that 'having regards' for the guidance is an integral part of the statute.

The approach by individual NGBs and organisations is likely to be varied. This is not to say that any approach is either right or wrong. Much will depend on the exact circumstances and the appetite for risk that the officers of any organisation will have.

None of this opinion extends to any school setting. School settings operate under different rules and laws. It is important that NGBs and organisations do not apply school setting requirements to any activity as they are not legally applicable unless they are under the control of a recognised school setting.

This advice will require updating as and when further announcements are made, and the law and guidance are updated. Readers of this advice should ensure that it is still current and applicable.

Each organisation must clearly understand that they are responsible for their own actions. This document is provided for guidance only and will not be universally applicable to all circumstances. Organisations and facilities must be primarily guided by their risk assessments. This guidance is not issued by Welsh Government and as such cannot be used in defence of any action brought for a breach of rules against an organisation.