

SHERIDANS



Legal risks and duties of care when returning to play

Guidance note in the context of coronavirus

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Introduction

This guidance note is for the benefit of all sports and physical activity providers. It's designed to provide guidance on some of the legal issues arising, or that may arise, from the 'return to play and activity' in light of coronavirus (Covid-19). These issues include the duties of care owed; practical steps to discharge those duties of care; and the significance of risk assessments and insurance in the context of the phased return.

The guidance note ultimately seeks to strike a balance between two competing, but equally important, objectives. Firstly, it is designed to act as a high-level, practical and accessible set of guidance for all SAPAPs, notwithstanding the wide and diverse range of stakeholder groups that make up the above list, and the differing environments that each group will operate in.

Secondly, the guidance note is aimed at providing sufficiently clear, relevant and in-depth guidance which will ultimately allow each SAPAP to better understand: (a) the duties of care that exist in the context of RTP; and (b) the steps they should be taking to discharge those duties and mitigate the associated risks. It is also designed to have any practical concerns and questions clarified and answered – including in relation to legal and liability issues.

The guidance note does not constitute legal advice and is not a substitute for such. SAPAPs should seek independent legal advice, if required, and depending on their (or the) relevant circumstances.

Terminology

For the purposes of the guidance note, the following terms shall have the following meanings:

- “**coronavirus**” refers to the ongoing global pandemic known as the coronavirus disease 2019 (Covid-19).
- ‘**Return to play and activity**’ shall be referred to as “**RTP**”.
- “**SAPAPs**” refers to sports and physical activity providers, including all bodies and organisations which provide sport and/or physical activity opportunities at recreational and/or grassroots level in England. SAPAPs may include:
 - national governing bodies (**NGBs**)
 - sports clubs (**clubs**)
 - other sporting and physical activity providers, including organisations that deliver physical activity as part of a wider suite of functions (such as charities or community groups)¹ (**activity providers**)
 - competitions (**competitions**)
 - other sporting bodies and organisations including county and regional associations.
- “**Participants**” may include:
 - employees
 - staff members
 - volunteers
 - members
 - players
 - match officials
 - parents
 - coaches
 - other participants of sporting or physical activity.

¹ This is an important stakeholder group and includes more 'informal' physical activity providers outside of the more 'traditional' sport setting (e.g. charities, community groups and providers of physical activity sessions in care homes or as part of walking groups or as part of a wider suite of functions).

Executive summary

In order to safely transition to RTP, a SAPAP should focus on putting the key building blocks in place to ensure that its duty of care has been discharged correctly and proportionately, and to the appropriate standard of care.

A SAPAP should firstly understand its duty of care – i.e. a duty to take all measures that are reasonable in the circumstances to ensure the health, safety, wellbeing and welfare of all Participants involved in the relevant sport or physical activity.

To ensure that all reasonable steps are being taken and its duty of care is being discharged, and to the requisite standard of care, SAPAPs should ensure the following:

1. that the advice of the UK Government and public health authorities has been followed
2. that the bespoke guidance and protocols issued by the relevant NGB, federation and/or umbrella organisation (if applicable) have been followed
3. that a full and proper COVID-19 specific risk assessment has been carried out (and that the practical considerations at [Section 3](#) have been followed).

SAPAPs should be aware that a higher duty of care, and standard of care, is owed by sporting and physical activity organisations to children (under 18s) and adults at risk. The carrying out of any risk assessments, and the preparation of guidance and protocols, should bear this higher duty and standard in mind.

In addition, understanding a SAPAP's insurance position is essential and SAPAPs should liaise directly with their insurers and insurance advisers before the RTP process begins, to ensure that the relevant sport or physical activity is adequately insured and to ascertain whether any additional steps are required.

'Opt in' and consent forms can be a useful way of bringing guidance, and the roles and responsibilities of individuals in the context of RTP, to their attention. However, they do not discharge a SAPAP's duty of care; and they do not enable a SAPAP to simply exclude liability.

Finally, as part of the RTP process, SAPAPs may be collecting personal information which they would not typically collect, including for the purposes of ensuring the health and wellbeing of all Participants, in line with the SAPAP's ongoing duty of care. In this context, it is important that SAPAPs comply with all applicable data protection laws and they should be aware of specific requirements relating to health data.

Contents

The guidance note shall comprise the following nine sections:

1. Understanding duties of care	6
2. Discharging duties of care	8
3. Risk assessments: some practical considerations	10
4. Insurance	14
5. Liability of participants and other stakeholders (including board members, committee members and business owners,)	16
6. 'Opting in' and waiving liability	20
7. Liability issues if an individual(s) contracts the virus following RTP	24
8. Safeguarding and disability	28
9. Data privacy and management	32

Section 1:

Understanding duties of care

Fundamentally, a SAPAP's 'duty of care' is to take all measures that are **reasonable** in the circumstances to ensure participants will be safe in participating in the relevant sport or physical activity, or safe in relation to the relevant role the participant is playing (they could be a volunteer, staff member or employee, for example). It is, in other words, the duty to ensure the health, safety, wellbeing and welfare of all participants.

This is not a new concept, nor is it specific to coronavirus. The duty requires that participants' safety is paramount when following, and constructing, safety regulations, guidance and protocols. For example, where SAPAPs are employers, or deploying volunteers, they have a duty to ensure that employees and volunteers have a safe working environment and safe system of working. SAPAPs' duty of care is, however, particularly significant in the current environment and as we enter the RTP phase.

A SAPAP's duty of care exists in two main ways:

1. a **moral** duty of care
2. a **legal** duty of care.

A SAPAP's **moral** duty of care is as set out above: to protect the safety and welfare of participants. [Section 2](#) will consider what will be required to discharge this duty. A SAPAP's **legal** duty of care will be reflected by requirements contained in the relevant regulations, applicable laws, guidance and protocols. Those requirements will set the standard of care for SAPAPs.

First and foremost, therefore, SAPAPs should understand and be aware of the up-to-date guidance issued by both government and public health authorities. The [UK Government's guidance](#) ('Coronavirus (Covid-19): guidance on the phased return of sport and recreation' ²) should be the starting point for all SAPAPs in order to understand the duties it has towards its participants, and the associated standard of care, in the context of RTP.

For NGBs, for example, it is important to ensure that any guidance issued to members and other Participants within the NGB's regulatory and governance framework are consistent with the UK Government guidance. For clubs and activity providers, whilst it's likely the guidance of the relevant NGB will incorporate and reflect the UK Government guidance, it is incumbent on all organisations to be aware of the current position.

[Sections 2](#) and [3](#) set out what is required for SAPAPs to discharge their duties of care, and will consider how liability will be determined when coronavirus-related issues arise.

² Note this Government guidance was published on 13 May 2020 and last updated on 1 June, 2020. Please note that Government guidance is continually being updated.

Other legal duties

SAPAPs, and in particular clubs and activity providers which provide facilities, should be aware of the possibility of criminal liability under health and safety regulations ³. Health and safety law imposes on employers the responsibility to protect workers and others (including volunteers) from risk to their health and safety. A failure to discharge this responsibility which causes a risk of harm to employees or volunteers is sufficient to trigger an offence under health and safety legislation ⁴. Employers should therefore diligently follow the latest public health advice and implement suitable control measures to mitigate the spread of coronavirus. The same applies to those SAPAPs which deploy volunteers.

In extreme cases, it's possible that an offence of corporate manslaughter could be committed by the failure to provide sufficient protective measures to employees (or volunteers).

³ Including the Health and Safety at Work etc Act 1974; The Management of Health and Safety at Work Regulations 1999; The Workplace (Health Safety and Welfare) Regulations 1992; The Provision and use of Work Equipment Regulations 1998; The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995; and The Personal Protective Equipment at Work Regulations 1992.

⁴ Further detail on the duties imposed and the ways these can be discharged can be found in the Health and Safety Executive's extensive library of resources and information, including a dedicated section on workplaces and coronavirus.

Section 2:

Discharging duties of care

Standard of care

The requisite standard of care owed by SAPAPs in the context of coronavirus and RTP will ultimately be reflected in the guidance and protocols issued by the Government⁵, public health authorities, NGBs and (if applicable) international federations. SAPAPs must therefore review and apply the guidance and protocols relevant to them. Note that the guidance of Government and public health authorities should be treated broadly and may include, for example, official public guidance issued which relates to restrictions specific to regions or territories⁶.

Reasonable steps

To discharge a SAPAP's duties of care, it must ensure that reasonable steps are being taken to protect the health, safety, wellbeing and welfare of participants⁷.

The starting point in relation to the taking of reasonable steps should be the guidance, protocols and directions issued by relevant authorities: i.e. Government, public health authorities, NGBs and (if applicable) international federations. However, in the context of RTP, coronavirus-specific **risk assessments** are central.

A good risk assessment does not eradicate the risk of liability but if it's reasonable, in line with relevant guidance, and delivered properly then it will reduce those risks significantly.

Checklist: discharging duties of care

- Taking reasonable steps
- In line with official guidance and protocols, and UK law
- Carrying out coronavirus-specific risk assessments
- Implementing a sport-specific response
- Implementing a proportionate response

⁵ The official Government guidance should be the starting point for any SAPAP, but for some non-traditional sports sector SAPAPs, clearly there may be relevant guidance issued by public bodies which is specific to the nature of the SAPAP (for example, non-departmental public bodies such as Natural England).

⁶ One example would be if guidance related specifically to clubs or activity providers in central London, for example.

⁷ Note that health and safety regulations provide that employers must make risk assessments and specify controls to reduce risks.

When carrying out its risk assessments, constructing guidance and protocols, and implementing its response, SAPAPs should consider the following objectives:

- Any response should be **coronavirus-specific**: coronavirus is a known risk and any risk assessment must relate specifically to the potential transmission of coronavirus.
 - As discussed above, any SAPAP protocols and guidance should be compliant, and in line, with **official coronavirus-specific guidance** issued by the Government and public health authorities, including the World Health Organisation. The same applies for relevant UK laws, including employment, health and safety, data protection and any coronavirus-specific legislation.
 - Any response should be **sport or activity-specific**: i.e. it should be in line with the sport or activity-specific guidance and protocols issued by the relevant NGB, international federation or other umbrella or affiliate body (as applicable). The Government guidance makes it clear that it's for individual NGBs and facility providers to develop their own specific guidance and bespoke protocols. Therefore, a club which is affiliated to an NGB should follow and implement the specific guidance and protocols issued by the NGB to which it is a member (rather than creating a bespoke protocol from scratch itself), albeit the club would still clearly need to carry out its own bespoke risk assessment. The same applies
- for activity providers which are part of an umbrella or member body. Other activity providers, however, which don't fall under any such umbrella, should develop their own bespoke protocols. If a SAPAP (and the relevant activity being provided) does not sit under an NGB, federation or other umbrella or affiliate body, then the relevant SAPAP must follow Government guidance, as well as the guidance of any relevant facility(-ies), when creating its own bespoke protocol.
- Any response should be **proportionate**: following its risk assessment, its response should be proportionate (i.e. it should go far enough to meet the relevant standard of care but should not go so far as to become a disproportionate barrier to participation).

Section 3: Risk assessments – some practical considerations

It would be sensible and prudent for SAPAPs to seek expert medical advice when carrying out coronavirus-specific risk assessments, and these technical considerations are outside the scope of this guidance note. Clubs, in particular, should consider seeking advice directly from its relevant NGB, which in turn should have taken appropriate medical advice.

Some larger NGBs have their own chief medical officers who will work with those NGBs in the context of RTP, and in particular in the context of elite sport return to training. Where SAPAPs are

responsible for or are delivering elite training programmes, they should therefore ensure that they are following the [Government's guidance on elite sport return to training](#), and that this guidance is tailored to their particular sport.

However, we set out below a number of practical considerations which SAPAPs should bear in mind:

Risk assessments: checklist of practical considerations

- Incorporating specific NGB guidance, directions or policies
- Reviewing and updating existing health and safety policies
- Employer-specific risk assessments
- RTP strategy and coronavirus response plan
- Appointing a coronavirus Officer
- Insurance
- Terms and conditions of membership
- Data management and data privacy
- Staff education or training
- Venues and facilities
- Communications and public health messaging strategy

1. Clubs and activity providers should consider **incorporating specific NGB guidance, directions or policies** into its own protocols. This could include specific guidance relating to travel arrangements, venues and facilities, and matches and competitions^{8,9}. It is worth also noting that RTP protocols should be living and breathing documents which are updated regularly, as new Government and NGB guidance is received and as the situation continues to evolve.
2. SAPAPs should review, take advice on, and update (where necessary) [existing health and safety policies](#), to ensure they are fit-for-purpose in light of RTP, and are in line with guidance and protocols issued by the Government, public health authorities or NGBs.
3. Under health and safety legislation¹⁰, **employers** must conduct a suitable and sufficient [risk assessment](#) of all of the work activities carried out by their employees (including homeworkers), to identify hazards and assess the degree of risk. The same may apply for SAPAPs deploying volunteers. Before RTP, therefore, any SAPAP which is an employer should carry out this assessment and take measures to mitigate any risks identified in a coronavirus context. New requirements imposed on employees and volunteers for the safety of themselves and their colleagues should also be considered: this might relate to ensuring that equipment is cleaned regularly and, as far as is reasonably possible, the working environment was safe for the specific job being undertaken.
4. Clearly, it's more straightforward to create a safe environment for non-contact and physically distant sports (such as golf and tennis) compared to sports requiring close proximity (such as netball and basketball) or physical contact (such as both codes of rugby). Therefore, these issues should all be reviewed on a regular basis and protocols should be specific to the sport or activity at play. Once again, everything should come back to the relevant sport-specific guidance to ensure the SAPAP's response is tailored and proportionate.
5. SAPAPs should formulate, and implement, an **RTP strategy**. This should include a specific **coronavirus response plan** which is catered to deal with any suspected or actual coronavirus cases which arise following the RTP. Advice can be found [here for clubs](#), and [here for leisure/commercial providers](#).
6. SAPAPs should appoint at least one **coronavirus officer** or **operational lead** to take responsibility for managing and coordinating any health and safety issues which arise, as well as providing information and strategic support to members and other participants, and

⁸ Clearly events, matches and competitions will be further along the RTP timeline for most sports, but it's sensible and prudent to ensure that sufficient planning is carried out in advance. This process should involve the relevant SAPAP's coronavirus officer(s) or operational lead(s), local and governmental health officials, the relevant NGB, and representatives from other SAPAPs (e.g. clubs, activity providers and competitions). [World Rugby's guide 'Safe Return to Rugby – in the Context of Covid-19 Pandemic'](#) contains comprehensive advice and recommendations for a gradual return to training and matches, and is a useful resource, albeit naturally would need to be tailored as every sport is different, and has different levels of physical interaction.

⁹ Note that [interim guidance](#) on conducting risk assessments at sports events was issued by the WHO on 14 April 2020, and is accompanied by an interactive risk assessment tool.

¹⁰ [The Health and Safety at Work Act etc 1974](#)

implementing official guidance. Ideally the individual(s) should have operational knowledge or at least have access to clinical advice. NGBs should ideally appoint a coronavirus ‘chief medical officer’, or at the very least have access to suitable medical advice, to deal with coronavirus risk assessments and policy developments, and deal with the management of suspected and actual cases.

7. SAPAPs should carefully consider its **insurance** policies as set out at [Section 4](#).
8. SAPAPs, in particular clubs and NGBs, should revisit the **terms and conditions of membership** with its individual members, and consider whether any changes are required. If so, these should be communicated clearly and in writing to all affected members.
9. SAPAPs should consider its **data management** functions and any **data privacy** risks arising from RTP and associated coronavirus issues, as set out in detail at [Section 9](#).
10. SAPAPs should consider whether any **education or training** with employees, staff and volunteers is required (either virtually or in line with social distancing guidelines).
11. All **venues and facilities** at which sport and physical activity takes place will require a [specific coronavirus risk assessment](#) to be undertaken before any RTP can commence. Whilst this will require a sport-specific approach, and should be in line with relevant official and NGB guidance, some of the

matters which should be considered to mitigate risk and ensure all reasonable steps are being taken to discharge the SAPAP’s duties include the following:

- a. upgrading of facilities to comply with hygiene standards
 - b. ensuring there are separate exit and entry areas with hand washing and sanitising stations
 - c. ensuring that hand sanitisers are dispersed throughout the venue or facility
 - d. ensuring there’s an appropriate supply of personal protective equipment (PPE)
 - e. ensuring there is [appropriate public health signage](#) displayed
 - f. providing for a dedicated isolation area for management of participants who become unwell
 - g. ensuring venues and facilities have been deep cleaned prior to re-opening
 - h. ensuring use of changing rooms and showers has been fully suspended.
12. Implementing a clear **communications and public health messaging strategy** is critical. This relates to both internal communications (i.e. how protocols and guidance are communicated to members and participants, and how these individuals are kept updated); and also external communications (i.e. the communications between NGBs, clubs, activity providers, competitions and participants, as well as government agencies, public authorities and other relevant stakeholders, including the media).

Question 1: as a SAPAP we understand the importance of carrying out a risk assessment, but what are the legal consequences if we fail to carry out the assessment correctly?

Risk assessments must be carried out to ensure reasonable steps are being taken to ensure the health and safety of individuals. If a risk assessment is not carried out correctly it’s possible that the standard of care reflected by the relevant bespoke NGB or federation guidance and protocols will not be met (or that parts of the relevant guidance or protocols will not be capable of being met). In this scenario, it would be a case of whether or not, objectively, the SAPAP either: (a) acted reasonably but still got the risk assessment wrong; or (b) acted recklessly, perhaps by ignoring certain parts of relevant guidance.

SAPAPs should refer to [Section 4](#) when considering whether claims would be covered by insurance policies.

Question 2: as a SAPAP, there is a desire to get our sport back up and running and facilitate access for participants; however, the fear of liability and legal risk is holding us back and could become a barrier to participation.

Fear should not be a barrier and should not prevent RTP, provided the key building blocks are put in place to ensure that the duty of care has been discharged correctly and proportionately, and to the appropriate standard of care, i.e.:

- i. ensuring that the advice of the UK Government and public health authorities has been followed
- ii. ensuring the bespoke guidance and protocols issued by the relevant NGB or federation have been followed
- iii. carrying out a full and proper risk assessment.

SAPAPs should refer to [Section 2](#) for the key considerations when applying the standard of care, including in relation to proportionality and taking a sport or activity-specific approach.

Question 3: what about clubs or community organisations which offer multiple sports, such as a disability sports club or youth club? Would they need to carry out risk assessments for multiple sports?

Ultimately any such body would need to take proportionate steps, which would involve the carrying out of proportionate risk assessments. If a SAPAP provided or offered a range of different sports, it would be sensible and prudent for them to consult, and implement, the guidance distributed by the NGB for each relevant sport.

Section 4: Insurance

Understanding a SAPAP's insurance¹¹ position is essential.

SAPAPs should liaise directly with their insurers and insurance advisers (this could be, for example, the relevant insurance broker) before the RTP process begins. This is to ensure that the relevant sport or physical activity is adequately insured^{12,13}; and to ascertain whether any additional steps are required. This also applies to freelance coaches (including yoga teachers) and personal trainers.

RTP should not take place until the insurance position is clear

It should be noted that this section of the guidance note is designed to provide some high-level guidance only on the key issues to consider from a liability and risk perspective. Specialist advice should be sought from the SAPAP's broker, or from the insurer direct..

Checklist: liaising with insurers/insurance brokers

- Do existing policies cover coronavirus?
- Are insurers comfortable that cover will be provided if the relevant SAPAP follows official guidance when it moves to RTP?
- Are board directors covered by existing policies?
- Are all participants covered by existing policies?
- Are additional premiums or 'top up' policies necessary?

Clubs which are affiliated with an NGB may benefit from the relevant NGB's insurance (which will likely have been collectively negotiated by the NGB).

If this is the case, clubs should, as a starting point, contact their NGB prior to RTP for clarification in relation to the matters raised in this section.

¹¹ There is no guarantee that a SAPAP's existing policies will adequately cover the current pandemic. Premiums for appropriate 'top-up' insurance may be necessary.

¹² SAPAPs should have particular regard to its Employers' liability, Professional Indemnity, Public Liability and Occupier's liability policies; as well as directors' and officers' insurance policies.

¹³ Notwithstanding coronavirus, employers (and those deploying volunteers) are required under UK law to have appropriate insurance against liability for personal injury or disease suffered by their employees (and volunteers) in the course of their employment, subject to the conditions and exemptions in that legislation. Failure to have appropriate insurance in place is a criminal offence punishable by a fine.

Key insurance considerations for clubs

1. If a club is affiliated to an NGB and the relevant NGB has adequate and wide-ranging cover in place, then the club will still need to take reasonable steps to ensure it has discharged its duty of care.
2. If a club isn't covered by its NGB's insurance, it will need to ensure its own policies are sufficient before moving to RTP, as well as of course taking reasonable steps to ensure it has discharged its duty of care.
3. **Having insurance cover in place does not in itself discharge duties of care: SAPAPs will still need to take reasonable steps to discharge their duty and protect the health and safety of participants. The provision of cover by insurers is likely to be conditional on these steps being taken.**

Key insurance considerations for activity providers

1. If an activity provider is affiliated to an umbrella or affiliate body and the relevant body has adequate and wide-ranging cover in place, then the activity provider will still need to take reasonable steps to ensure it's discharged its duty of care.
2. If an activity provider isn't covered by its umbrella body's insurance (or doesn't have an umbrella body), it will need to ensure its own insurance policies are sufficient before moving to RTP, as well as of course taking reasonable steps to ensure it has discharged its duty of care.
3. **Having insurance cover in place doesn't, in itself, discharge duties of care: SAPAPs will still need to take reasonable steps to discharge their duty and protect the health and safety of participants. The provision of cover by insurers is likely to be conditional on these steps being taken.**

Section 5: Liability of individual participants and board/committee members

One of the key threads running through this guidance note is that SAPAPs which are the providers of an activity or a facility, or which are employers (or rely on volunteers) have a duty to take reasonable steps to protect the health and safety of employees, volunteers

and other participants. As a starting point, this duty lies with the organisation itself. That said, the potential liability of individuals should be considered (and is particularly important to consider if the SAPAP is an unincorporated body).

Question 4: how can SAPAPs best seek to mitigate the liability of employees, volunteers, staff and board/committee members in connection with 'return to play'?

Firstly, it's vital that all participants, including board/committee members, are appropriately educated on the relevant guidance so as to enable them to take informed decisions.

Secondly, insurance policies should be carefully reviewed, in particular Employers' Liability, Public Liability and Occupier's Liability and any directors and officers insurance¹⁴. As set out in [Section 4](#), it is incumbent on SAPAPs to liaise with insurers/insurance brokers before any return to play or activity commences to ensure that insurance cover is adequate and no further steps are required in that regard.

When it comes to SAPAPs' board/committee members it should be noted they will have certain common law and codified duties of care to the company. Indeed, two of these duties are in line with the need to discharge duties proportionately. For example, a director must promote the success of the company (which could mean taking steps to get a club or activity provider up and running and providing a service) but he or she must also exercise reasonable care, skill and diligence in their decision making (which would involve taking reasonable steps to protect the health and safety of participants in getting the club or activity provider back up and running). In an RTP context this goes back to the point raised in [Section 3](#) about ensuring a balanced response.

Personal liability of directors is relatively rare¹⁵ in the context of incorporated organisations (it would generally be the company itself that would be the subject of any claim).

Thirdly, the board or committee of any SAPAP should consider sensible and proactive steps are taken from a governance perspective, including the following:

- Holding regular meetings and publishing regular briefings on the crisis updating participants as to the work being carried out by the relevant SAPAP and its board/committee
- Taking detailed minutes of any decisions taken and action plans implemented
- Continually reviewing, and updating as necessary, contingency and operational plans, as well as policies and guidelines
- Ensuring that a robust communications strategy is in place
- Considering whether any internal or external resources and expertise should be sought to ensure the board/committee is sufficiently informed.

¹⁴ Absent (or in addition to) insurance it is also possible for the company to indemnify directors against claims by third parties.

¹⁵ A detailed analysis of the potential personal liability of directors is outside of the scope of this guidance note; however, it's possible for directors to have personal liability in certain circumstances, including in the context of company health and safety breaches; discrimination claims; and data protection breaches.

Question 5: if a SAPAP's guidance or protocols are found to be flawed, what does this mean for the board/committee and its members?

Clearly, directors carry significant responsibility as they're charged with making the decisions for and steering the SAPAP. If directors ensure that all relevant Government guidance and protocols (or, if applicable, NGB guidance or protocols) are being followed (and incorporated into its own guidance and protocols) then it's likely that duties in this regard will be discharged.

Directors' and Officers' insurance policies, as well as Employers' Liability and Public Liability, should be carefully reviewed and it will be sensible and prudent to liaise thoroughly with insurers/insurance brokers to ensure these individuals will be covered. As set out at footnote 12, it's also possible for the company to indemnify directors against third party claims. There's further discussion on the liability of board/committee members at [Section 4](#).

Question 6: what about the liability of a SAPAP's volunteers?

Ordinarily, the acts or omissions of volunteers would be covered under Employers' Liability Policies, but SAPAPs should review its insurance policies and liaise with insurers/insurance brokers to get full visibility on the scope of its cover.

Like all participants, volunteers should be educated as to the relevant guidance so as to enable them to take informed decisions depending on their role.

Some volunteers perform board or committee roles, in which case they could be directors. Please see [questions 4 and 5](#).

Question 7: how is risk and liability shared amongst the various stakeholders that make up a particular sports ecosystem (for example, a NGB, county and regional associations, and clubs)? Will this change depending on which stakeholder is responsible for delivery?

Proximity of relationship is key. The originating duty is owed by the SAPAP to take reasonable steps. As set out above, reasonable steps ought to be discharged if the SAPAP follows the appropriate guidance which, in the context of the 'usual' sporting ecosystem, is likely to have been provided further up the pyramid¹⁶ (say regional associations and before them the NGB) depending on the precise governance structure.

The relationship between an NGB and a participant may not ordinarily be sufficiently proximate (unless, for example, the NGB has a direct relationship with the participant in the context of a competition, or if the participant is, say, a pathway or professional athlete returning to training). However, that's not to say that because of an NGB's role in providing the guidance and protocols they would not assume a duty to ensure the guidance and protocols are correct, in line with government guidance and up to date.

Risk and liability can therefore shift 'up and down' the ecosystem depending on the role the various stakeholders play in providing the guidance/protocols and delivering and executing the guidance/protocols. Everyone has a responsibility within that ecosystem. When the guidance is disseminated, the club must apply it, and the participants must follow it. In the context of health and safety everyone assumes a level of responsibility.

Question 8: if, for example, a club is unincorporated, does this change the position on liability?

If a club is unincorporated, personal liability is more likely – as the company has no separate legal personality. In this scenario it would be important to review Employers' Liability and Public Liability policies and any directors and officers policies, and liaise with insurers/insurance brokers as necessary.

¹⁶ In the context of sports in which guidance or protocols are filtered down the framework we would still recommend that clubs consult their NGB directly and review the relevant NGB guidance, which is likely to be published, rather than necessarily rely on advice from local or regional bodies or associations.

Section 6:

Opting in and waiving liability

'Opt in' and consent forms don't discharge the SAPAPs duty of care; and it doesn't enable the SAPAP to simply exclude liability, albeit it may assist with ensuring that, say, an athlete understands they're assuming a risk in the context of RTP. It's also a useful way to bring guidance, and the roles and

responsibilities of athletes in the context of RTP, to their attention.

We address this matter, and others relevant to 'opt in' procedures, by reference to specific questions provided to Sport England.

Question 9: what can a SAPAP ask or not ask employees, staff and volunteers to do?

Firstly, a SAPAP can bring the guidance issued by the relevant SAPAP (whether a club, activity provider or NGB) to the relevant individual's attention, and ask relevant individuals to discharge their own duties to take reasonable precautions and follow that guidance, and remind them of these duties on a regular basis (both verbally and in writing). If an individual disregards guidance or acts recklessly and they contract coronavirus, the relevant individual may be said to have contributed to, or even caused, their illness.

Secondly, it's possible, and in some cases recommended, to ask the individual to ['opt in' and sign a consent form](#), and in which context explain the risks they'd be assuming in the context of RTP. However, it's not possible to force an individual to 'opt in', as explained further at questions 10 and 11.

Thirdly, and more generally, a SAPAP can ask employees, staff and volunteers to be open, honest and transparent about any underlying health conditions which may be affected by coronavirus.

Question 10: what about what a SAPAP cannot ask individuals to do? For example, can a SAPAP force a Participant to 'opt in' and sign a disclaimer in relation to the health risks posed by coronavirus before returning to activity?

First and foremost, SAPAPs can place a requirement on participants to 'opt in' before being able to return to activity. In other words, a SAPAP can require an individual who wants to return to a particular activity to sign an 'opt in' form before being permitted to do so. If an individual refuses to opt in, then they are effectively choosing to not return to the activity.

That said, it's not possible to compel individuals to return to activity and they'll be entitled to refuse to 'opt in' due to concerns surrounding coronavirus, or indeed any other reasons, if they so wish.

As further discussed in [question 11](#), SAPAPs should be aware that asking participants to 'opt in' is, however, limited, because whilst it highlights to participants their responsibilities to follow guidance and policies etc., it does not absolve a SAPAP of its legal responsibilities and duties of care.

Question 11: is asking a participant to 'opt in' and sign a disclaimer a means of a SAPAP reducing or removing some liability? Would the relevant SAPAP still be liable for providing a safe environment?

It is in many ways understandable that SAPAPs may seek to obtain a relevant participant's signed consent as a logical and attractive means of disclaiming a SAPAP's potential liability.¹⁷ Indeed, some insurers may require it.

However, whilst asking an individual to 'opt in' can be useful, it doesn't change the fact that each and every SAPAP has a duty of care to maintain a safe environment for its participants.

In addition, it's not possible to 'waive' or 'contract' out of a duty of care owed to protect health and safety by getting individuals to sign a 'disclaimer' or 'consent form'. In so far as they exclude or restrict liability for death or personal injury resulting from negligence, they will be void¹⁸. In so far as they exclude or restrict liability for other types of loss (such as financial loss), they will be subject to the statutory requirement of reasonableness.¹⁹

In the right context, though, 'opt in's or disclaimers are a useful means to bring guidance and the individual's responsibilities to their attention and the fact that in participating there is a risk of contracting coronavirus, and that they do so at their own risk.

Ultimately, however, a SAPAP's primary objective should be to discharge its duty of care rather than rely on disclaimers, which have no real legal effect (other than as a means of potentially apportioning responsibility in certain contexts).

Question 12: if a participant chooses not to 'opt in', or not to follow SAPAP guidance, what should the SAPAP do??

Firstly, and as discussed at [question 10](#), any individual who does not opt in and/or refuses to follow the SAPAP guidance (whether an 'opt-in' is used or not) should not be permitted to participate or attend the relevant facility. Following, and complying with, the guidance and policies of the relevant SAPAP is a critical requirement for any participant to return to an activity.

If the SAPAP has placed a requirement on participants to 'opt in', then only individuals who have done so in writing will be entitled to participate. If the SAPAP requires certain guidance, policies and procedures to be followed and complied with, and an individual fails or refuses to do so, then they shouldn't be allowed to participate in the relevant activity.

¹⁷ SAPAPs should refer to this article by John Mehrzad QC and Joseph Bryan of the Littleton Sports Law Group for further discussion of 'opting in' and the legal position: <https://littletonchambers.com/articles-webinars/project-restart-or-a-false-start-can-professional-sports-clubs-compel-their-players-to-return-to-the-pitch-and-waive-health-and-safety-liability/>.

¹⁸ This is by reason of s. 2(1) of the Unfair Contract Terms Act 1977.

¹⁹ Depending on the wording of the disclaimer, it may also fall foul of other statutory 'voiding' provisions.

Section 7: Liability issues if an individual(s) contracts coronavirus following RTP

It should be noted at the outset that even if, in this context, a SAPAP failed to discharge its duty of care, that doesn't necessarily mean it'll be liable for the injury or loss or illness suffered by the participant. Firstly, there may be issues as to the participant's role (did the participant follow guidance; or did the

participant act recklessly?). Secondly, it's of course possible that a participant could've contracted coronavirus from another environment or facility. Establishing that the acts or omissions of a SAPAP caused²⁰ the participant to contract coronavirus may not therefore be straightforward.

Question 13: what is the position from a liability perspective if a club, activity provider or participant follows exactly the guidance and protocols issued by the relevant SAPAP above them in the stakeholder chain, but an individual contracts the virus?²¹

There's inevitably a risk that even if all reasonable steps are taken to discharge a duty of care, the virus could be transmitted, for example, at a sporting or activity facility. The relevant club or activity provider in this scenario is unlikely to be liable provided it has taken all reasonable steps to protect the health and safety of participants, as outlined at [Sections 2](#) and [3](#).

It's also worth noting that there is an assumption of risk on the part of any individual who agrees to participate in a particular sport or activity. Any such individual has a duty to follow the guidance that's been issued and will therefore assume a degree of risk. This assumption of risk, alongside what the individual is expected to do in accordance with guidance, should be set out in any 'opt in' or consent letter or any missive issued by a SAPAP to its Participants.

Any claim would, in all likelihood, be brought against the relevant club or activity provider, assuming the relevant organisation is an incorporated entity. The prospects of any such claim succeeding will be contingent on whether the relevant club or activity provider took reasonable steps to protect the individual's health and safety in the context of coronavirus, and such reasonable steps would clearly include following NGB guidance or protocols (if applicable) or if no such guidance or protocols exist, Government guidance. Insurance is a key consideration in this context (see [Section 4](#)).

²⁰ This is often referred to as 'causation' or the causal link.

²¹ Should a scenario arise whereby no affiliate body or professional body exists above the relevant SAPAP in the stakeholder chain (e.g. in the context of non-traditional sports sector organisations such as Falls Prevention activities; Walk for Health; personal trainers; and ante and post-natal specialists) then the first port of call for guidance should be that which has been issued by the Government.

Question 14: what's the position from a liability perspective if a club or activity provider firmly and correctly applies the guidance of an NGB or federation, but that guidance is proved to be insufficient or defective?

It is reasonable for a club or activity provider, for example, to follow the guidance or protocols issued by an NGB or an international federation (if applicable). In these circumstances it would be arguable that the club or activity provider still acted reasonably in following the guidance or protocols issued even if such guidance or protocols were insufficient unless it would've been obviously clear to the club or activity provider that such guidance or protocol was defective.

If, however, the relevant club or activity provider creates its own guidance it'll be deemed to have taken primary responsibility, and if such guidance is flawed or deemed to be flawed or inconsistent with, for example, NGB, federation or Government guidance, then any liability would likely rest with the club or activity provider.

If guidance or protocols are provided by NGBs, it's likely the relevant NGB, federation or the authority also has a duty of care. If the guidance/protocol issued is ultimately proved to amount to an insufficient response, then the issuer may be in breach of its duty of care because by issuing guidance or protocols it'll have created a sufficiently proximate relationship with the relevant participant. See also the discussion at [question 7](#).

Further, SAPAPs should consider the insurance considerations at [Section 4](#).

Question 15: what if a participant (whether an employee, staff member or volunteer) tries, but fails, to implement a SAPAP's guidance correctly which results in him/her and/or another individual(s) contracting the virus?

Any bespoke guidance or protocols should be communicated clearly to all relevant participants, including sufficient clarity around what steps individuals are required to take. Provided this is done by the relevant SAPAP, and the guidance itself is sufficient, it's likely that this'll amount to reasonable steps in the context of discharging its duty of care.

If an individual fails to follow the guidance issued by a SAPAP or 'gets it wrong', it'll be a case of assessing where responsibility for getting it wrong rests. That assessment will ultimately turn on the facts but if the SAPAP did all it could, acted reasonably, then it's possible that that the individual concerned (i.e. the relevant employee or volunteer) could be deemed to have contributed to, or caused, the illness.

Question 16: what if the scenario at [question 14](#) applies, but the relevant SAPAP's guidance is proved to be insufficient or defective?

If the relevant SAPAP's guidance is insufficient or ineffective, and if the relevant SAPAP owes a duty of care to the participant, then it may have breached its duty of care in issuing defective guidance. As set out above, whether the relevant SAPAP is therefore liable for any illness suffered by the participant arising from any breach of duty will turn on whether the breach caused the illness, or whether the participant may have contracted elsewhere, or played in role in the contracting of the illness by his or her own acts or omissions.

Clearly there will be a number of liability issues to consider here. The considerations on causation at [question 13](#) will be important, as will the insurance implications at [Section 4](#).

Question 17: what should SAPAPs be aware of in the context of participants coming back to sport who either: (a) have not had coronavirus (i.e. there is a need and duty to mitigate the risk of them contracting the virus); or (b) have had coronavirus and are in 'recovery' (i.e. there is a need and duty to manage a responsible and sensible transition back into physical activity)?

Whilst at elite level there should be strict and detailed protocols in place for a return to elite level training which will ordinarily involve testing, at grassroots or recreational level, however, each individual participant's condition will not necessarily be clear cut, not least because not everyone will have been tested for coronavirus.

As such, SAPAPs, in the context of both (a) and (b), must come back to the same principle of taking reasonable steps to protect the health and safety of all participants, whether they have had coronavirus or not, and those steps are, or should be, laid out in sport or activity-specific guidance or protocols and then followed.

From a practical perspective: firstly, each SAPAPs guidance (whether their own guidance is based on government guidance, or that of its NGB) should make clear that participants must take responsibility for managing their health and that of other participants; and secondly, participants should be asked to communicate any individual health issues on an ongoing basis.

Section 8: Safeguarding and disability

SAPAPs should be aware that, notwithstanding coronavirus, there's a higher duty of care, and standard of care, owed by sporting and physical activity organisations to children (under 18s) and adults at risk.²²

From a safeguarding perspective, SAPAPs should pay particular attention to their duties to protect the health, safety, welfare and wellbeing of children and *adults at risk* in the context of RTP. The *CPSU (Child Protection in Sport Unit)'s Standards For Safeguarding and Protecting Young People in Sport (2018)* identify what SAPAPs need to do in relation to child protection and SAPAPs should carefully review the *extensive guidance on the CPSU website* as a starting point. The Ann Craft Trust provide a *framework for Safeguarding Adults* at risk and provide *guidance on RTP*.

The carrying out of any risk assessments, and the preparation of guidance and protocols, should bear this higher duty and standard in mind. Particular consideration should be given to children with learning difficulties or known medical conditions which may make them more vulnerable than the average child to foreseeable risk of not just coronavirus, but harm more generally.

SAPAPs should also be aware of the recent changes to DBS procedures in light of coronavirus, as set out in the CPSU guidance.

If you think a child is in immediate danger or requires medical attention, you should call the emergency services on 999. If you're worried about a child, even if you're unsure, you can speak to the *NSPCC helpline* about your concerns on 0808 800 5000 or email help@nspcc.org.uk

Please continue to recommend *Childline* to the young people in your activities on 0800 1111.

²² For example, the Occupiers' Liability Act 1957 requires that an occupier must be prepared for children to be less careful than adults would be in a similar situation. This should be borne in mind in the context of any risk assessments or protocols.

Question 18: is safeguarding still relevant when conducting online activities?

Absolutely.²³ In light of the coronavirus environment, it's possible that many SAPAPs are either already actively carrying out activities with children and adults at risk online, or are considering doing so. SAPAPs (for example, clubs and activity providers) which are *providing online activities or offering sessions digitally* (which has become a common occurrence), need to be particularly aware of the welfare and wellbeing of their participants.

One suggested approach is to have both a 'moderator' and an 'instructor' for each online session.

The role of the moderator could include responsibilities such as:²⁴

- providing a password to all participants to ensure only invited guests can access the session
- providing a 'waiting room', to ensure only participants who have been 'approved' by the moderator can access and join the session
- avoiding publishing or sharing meeting links, passwords and codes via social media (sending via email is preferable as reduces the risk of unwanted circulation)
- using robust privacy and confidentiality settings
- issuing codes of conducts for all participants and attendees in advance. This sets expectations and reduces risks and concerns around, for example, cyber *bullying*.

²³ We would recommend reading this article on safeguarding and coronavirus: <https://www.anncrafttrust.org/whaat-does-covid-19-mean-for-safeguarding-in-sport/>.

²⁴ See more detail in the article referenced above.

Question 19: what are the key considerations for disability sport and physical activity?

As SAPAPs begin to return to play in the current coronavirus landscape, they should be aware of the legal protections afforded to disabled participants.

Under the Equality Act 2010, SAPAPs must make “reasonable adjustments” for disabled Participants; and SAPAPs should consider whether they need to make further changes to the way in which they’re providing their services during coronavirus, to meet this requirement. In this regard it may be beneficial for SAPAPs to consult with their disabled participants in order to get a better idea of how they might make such adjustments in the current coronavirus climate.

When considering different RTP solutions, SAPAPs should also ensure that they don’t discriminate against participants because of their disability. For example, any alterations made to facilities, services and operations as a result of coronavirus – for example, taking out accessible facilities or altering circulation routes – shouldn’t create new barriers for disabled users.

As with all participants, SAPAPs should take care to ensure they discharge their duty of care towards disabled participants. Ultimately, this means that SAPAPs must take reasonable steps to ensure disabled participants will be safe in participating in the relevant sport or physical activity.

Question 20: what about other individuals at risk? Whether those who’ve been shielding from coronavirus, are in a high-risk category, or have underlying health conditions that make them particularly vulnerable: how should SAPAPs seek to ensure these high-risk individuals are able to RTP safely?

Clearly there’s an obligation and duty on SAPAPs to adapt and adjust their guidance and protocols to ensure they’re meeting specific requirements relating to individuals who are at particular risk in light of coronavirus and RTP.

However, any measures must be proportionate, and SAPAPs should seek to ensure the RTP for all participants, including those who fall into the above risk categories, is as smooth as possible, provided of course that the environment is safe.

Ultimately there’s an important balance to strike. It’s incumbent on SAPAPs to ensure sport and physical activity is as accessible and inclusive as possible, for not just high-risk participants but all minority groups, despite the challenges posed by coronavirus. Clearly we don’t want participants’ ability to return to activity to be compromised or unduly affected by coronavirus-specific measures put in place, or ‘fear’ generally.

[We Are Undefeatable Health Conditions and Physical Activity Impact of Covid-19 Insight Pack](#) provides key information to help SAPAPs consider how to support people with health conditions to get and remain active and return to play. More information, support and guidance can be found on the [We Are Undefeatable website](#).

That said, obviously this will need to be balanced with the importance of discharging duties of care and making all reasonable adjustments in light of the additional and heightened risks. For example, clearly there will be times when RTP won’t be possible for certain individuals due to serious underlying health conditions.

Section 9:

Data privacy and management

In an effort to manage and implement a safe RTP process, SAPAPs may be collecting personal information which they would not typically collect, including information pertaining to individuals' health. This may include asking participants whether they're experiencing coronavirus symptoms, asking about underlying health conditions, or asking about specific coronavirus test results.

Collecting such information is likely to play an important role in ensuring the health and well-being of all participants, in line with the SAPAP's ongoing duty of care. For example, asking participants whether they are experiencing coronavirus symptoms will likely inform a SAPAP's ability to create a safe RTP environment. Further, information

about participants' underlying health conditions may help to inform any risk assessments carried out (see [Section 3](#) for further detail).

In this context, it is important that SAPAPs comply with all applicable data protection laws; including the EU General Data Protection Regulation (**GDPR**) and the UK Data Protection Act 2018. In particular, SAPAPs should be aware of the strict requirements relating to health data, which is given the status of 'special category data' under data protection law. For example, in order to lawfully process health data, SAPAPs must be able to rely on one of the 'conditions' under Article 9 GDPR.

associated with coronavirus, and (ii) the steps that it can take to mitigate such risks. A DPIA may also help to inform the changes needed in any data protection-related documentation, such as privacy notices (see further, below). A sample DPIA template can be found on the [ICO's website](#).

Key consideration – independent legal advice

- Data protection law imposes strict obligations on the collection, processing, storing and transferring of personal data, and to the extent that SAPAPs are concerned about their compliance with data protection law they should seek independent legal advice.

Data protection impact assessments

SAPAPs should carry out a data protection impact assessment (**DPIA**) before collecting any personal data relating to coronavirus²⁵. Carrying out a DPIA will assist SAPAPs in identifying: (i) the additional data protection risks

²⁵ In certain circumstances carrying out a DPIA is required by data protection law.

Privacy notices

SAPAPs should ensure they have suitably robust privacy notices in place which provide all necessary information regarding the collection and processing of personal data. To the extent that new categories of personal data are being collected and processed as a result of coronavirus, SAPAPs should update their privacy notices accordingly.

Data security

The GDPR requires appropriate security measures are put in place to protect the personal data being held. SAPAPs should therefore ensure all personal data is stored securely and is adequately safeguarded. Access to such information should be on a 'need-to-know' basis and consideration should also be given as to whether the personal data can be partially anonymised.

Transparency

SAPAPs should be clear, open and honest with participants about how and why they intend to use their personal data. This is particularly important for personal data relating to participants' health. It may be beneficial for SAPAPs to provide participants with the opportunity to discuss the collection and processing of any such data.

Data minimisation

A key principle of data protection law is 'data minimisation'. In essence, this means no more information should be collected than is required for the specified purpose. SAPAPs should take a sensible approach when asking participants to provide personal information and if SAPAPs are in any doubt as to what personal data they can collect, then they should obtain independent legal advice.

Delete when no longer needed
Data protection law requires that personal data is deleted once it's no longer required. SAPAPs should periodically review the data it holds and ensure it deletes any personal data it's collected in relation to coronavirus once the information is no longer required.

For more information about the contents of this guidance note, please email Sheridans Sports Group on: sportsgroup@sheridans.co.uk or Sport England on: returntoplay@sportengland.org

Question 21: can SAPAPs inform participants of coronavirus cases?

In short, yes. Data protection laws will not prevent SAPAPs from informing participants about relevant potential or confirmed coronavirus cases. In this regard, SAPAPs should bear in mind their overriding 'duty of care' – i.e. the duty to ensure the health, safety and welfare of all participants. However, where SAPAPs do inform Participants about potential or confirmed coronavirus cases, care should be taken not to communicate more information than is strictly necessary and individual names shouldn't be disclosed where possible.

