

The Health Protection (Coronavirus Restrictions)(Wales) Regulations 2020

This note is prepared for Assembly Members following the decisions of the Business Committee on 27 March 2020 and 3 April 2020 regarding the temporary handling of statutory instruments laid before the Assembly.

Summary

Note: These Regulations have been amended by the Health Protection (Coronavirus Restrictions) (Wales) (Amendment) Regulations 2020 ("the Amendment Regulations"), which came into force at 12.01 a.m. on 7 April 2020.

These Regulations are made in response to the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 which causes the disease known as COVID-19 or "coronavirus".

These Regulations are made under section 45C(1), (3)(c), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984 ("the 1984 Act"). The purpose of these regulations is to:

- put restrictions on the movement of individuals, setting out circumstances in which they may leave the place where they live and preventing gatherings of groups of more than two people, except in certain circumstances; and
- require the closure of certain businesses and impose requirements on other businesses, as well as duties to close certain public footpaths and land, to protect against the risks to public health arising from coronavirus.

The Regulations revoke the Health Protection (Coronavirus, Business Closure) (Wales) Regulations 2020 ("the Business Closure Regulations") and the Health Protection (Coronavirus: Closure of Leisure Businesses, Footpaths and Access Land) (Wales) Regulations 2020 ("the Leisure Businesses Regulations").

Similar regulations have been made in respect of England under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ("the English Regulations").

Procedure

Made Affirmative: the Regulations have already been made, but require Assembly approval for them to stay into force for more than 28 days.

Further Points to Note

The following points are noted in respect of these Regulations.

1. Timing of laying before the Assembly

These Regulations came into force on 26 March at 4:00p.m., but they were laid after this time (27 March). No notification has been provided in relation to this delay to explain why these Regulations could not be laid before they came into force.



Laying before the Assembly is an important part of access to justice and the rule of law. The statutory arrangements for laying before the Assembly are part of the required formal measures by which publicity is assured. Once a statutory instrument has been made, it is law from that point (although whether it is law in force is a matter for the commencement arrangements).

In these unprecedented times, it is appreciated that the Welsh Government is working under extreme pressure. It is also acknowledged that the First Minister made reference to some of the restrictions imposed by these Regulations during media briefings taking place before these Regulations were made, thereby providing some notice to the Assembly and the public of the law.

However, as the Welsh Government has not provided its explanation for the delay, Members may wish to seek clarification on this point from the Welsh Government.

2. Human Rights

We note that due to the nature of the measures provided for by these Regulations, the following Articles of the European Convention on Human Rights appear to be engaged:

- Article 8 – right to respect for private and family life – in respect of regulations 8 and 11;
- Article 9 – freedom of thought, conscience and religion – in respect of regulations 7 and 8;
- Article 11 – freedom of assembly and association – in respect of regulations 4, 6, 7, 8, 9 and 10; and
- Article 1 of the First Protocol – protection of property – in respect of regulations 4, 5, 6, 7, 8 and 11.

Each of these are qualified rights, which permit the Welsh Ministers to interfere with the exercise of the rights. In the case of the first three, interference is permitted if necessary in a democratic society in the interests of public safety or for the protection of health. In the case of the protection of property, interference is permitted if interference is in the public interest and in accordance with the general principles of international law.

The necessity of the situation that has given rise to these Regulations is the likely basis relied upon to justify the interference with these rights as a proportionate means of achieving the legitimate aim of protecting the citizens of Wales.

Until the end of the transition period, the European Union Charter of Fundamental Rights will apply in the United Kingdom. There are corresponding protections to those above contained in the EU Charter of Fundamental Rights. Subject to the principle of proportionality, limitations which effect the rights under the Charter can be made if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The Explanatory Memorandum does not contain a justification for the interference with these human rights. Members may wish to seek clarification from the Welsh Government about their assessment of the interference with these human rights.

3. Enabling powers

These Regulations are made in exercise of the powers conferred on the Welsh Ministers by sections 45C(1) and (3)(c), 45F(2) and 45P of the 1984 Act. Unlike the Business Closure Regulations and the the



Leisure Businesses Regulations, the Welsh Ministers have not relied on the enabling power contained in section 45C(4)(d) of the 1984 Act. Section 45C(4)(d) of the 1984 Act enables the Welsh Ministers to include in regulations a "special restriction or requirement". For these purposes, a special restriction or requirement is "a restriction or requirement which can be imposed by a justice of the peace by virtue of section 45G(2), 45H(2) or 45I(2)" of the 1984 Act. Those restrictions and requirements include the closure of premises (section 45I(2)(a) of the 1984 Act).

Regulations 4, 5, 6 and 7 of these Regulations impose a requirement for the closure of premises identified in the Schedule to these Regulations. It appears that the Welsh Ministers should rely on the enabling powers under sections 45C(4)(d), as it did with the Business Closure regulations and Leisure Businesses Regulations, in order to make regulations 4, 5, 6 and 7 of these Regulations. It is also noted that the English Regulations, which contain similar provisions, rely on the enabling power in section 45C(4)(d) of the 1984 Act.

Members may wish to seek clarification from the Welsh Government about why it is not considered necessary to rely on section 45C(4)(d) of the 1984 Act in order to make these Regulations.

4. Regulation 7(4) and 7(5)(b) – inconsistencies between Welsh and English

Members may wish to seek clarification from the Welsh Government regarding the text used in regulation 7(4) and 7(5)(b), in relation to the Welsh language version of the Regulations.

Regulation 7(4) of the English text begins with the following text: "*If all reasonable measures are taken to ensure a distance of 2 metres...*".

The Welsh text for this regulation is as follows: "*Os cymrir pob cam rhesymol wedi ei gymryd i sicrhau y cynhelir pellter o 2 fetr...*".

We are of the view that the words "*wedi ei gymryd*" should be removed from this text, as it unnecessarily repeats the verb "to take". The same issue arises in regulation 7(5)(b).

5. Regulation 7 – providing an exception to maintaining a 2 metre gap in places of worship

We note that regulation 7 in respect of restrictions on places of worship, crematoriums and community centres have been amended by the Amendment Regulations. Regulation 4 of the Amendment Regulations address inconsistencies in the Regulations in respect of providing an exception for two members of the same household or a carer and the person assisted by the carer, with regards to maintaining a distance of 2 metres between them in a place of worship. Such exceptions are made in respect of places of business (regulation 6) under these Regulations, yet had not been made in respect of places of worship until amended by the Amendment Regulations.

6. Regulation 3 – the emergency period and review of the restrictions

Regulation 3(2) of these Regulations provide that the Welsh Ministers must review the need for restrictions and requirements imposed by the Regulations every 21 days. It is welcomed that this period is shorter than the 28 day period provided for in the revoked regulations. (Regulation 2(6) of the Business Closure Regulations, and regulation 2(3) of the Closure of Leisure of Businesses, Footpaths etc Regulations).

We note that regulation 3(3) of these Regulations provides that the Welsh Ministers must publish a direction terminating a requirement or restriction, as soon as the Welsh Ministers consider that the restrictions set out in these Regulations are no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in Wales with the coronavirus. Regulation 3(4) makes further provision as to what may be terminated under the direction.



Due to the nature of the emergency circumstances provided for by the 1984 Act, such a grant is envisaged under section 45D(5)(a) of the 1984 Act.

These Regulations and the relevant powers granted to the Welsh Ministers expire at the end of six months from the date these Regulations come into force. It is welcomed that the expiry period of six months is consistent with the expiry period of the revoked regulations, and is considerably shorter than the expiry period of two years which applies to the Health Protection (Coronavirus) (Wales) Regulations 2020.

7. Regulation 9(5) – publicity for closure of public paths and land

Regulation 9(5)(b) of these Regulations requires a relevant authority (a local authority, a National Park authority in Wales, Natural Resources Wales, or the National Trust) to erect and maintain notices in prominent places informing the public of the closure of a public path or access land. This is in addition to publishing a list of public paths or access land closed in its area on a website. It is welcomed that these Regulations include an additional requirement to advertise the closures in prominent places, which are more likely to come to the attention of those trying to use public paths or access land than a list on a website.

8. Regulation 11 – power of entry

A person exercising a power of entry under regulation 11 of these Regulations is required to provide evidence of their identity and outline the purpose for which they power is exercised. Although this may imply that the person must provide evidence of their authority to exercise the power of entry (particularly when they are a person designated by the Welsh Ministers, a local authority, a National Park authority in Wales or Natural Resources Wales), it is not clear that the evidence of identity expressly includes evidence of authority to exercise the power. A requirement to provide evidence of authority is common when exercising powers of this nature.

Further, although providing an outline of the purpose for which the power is exercised may also require a person to provide the reasonable grounds for suspecting that a requirement imposed by these Regulations is being, has been or is about to be contravened on the premises, it would be reasonable to expressly set out a requirement to provide that information.

Although the omission of express wording does not materially adversely affect these Regulations, inclusion of appropriate express wording would provide additional protections, and greater clarity, for those that are subjected to the power of entry.

9. Regulation 13 – fixed penalty notices

Members may wish to note the following issues in relation to fixed penalty notices under these Regulations:

- a notice must specify the local authority to whom a fixed penalty must be paid¹, but in relation to a contravention of regulation 9(4) of these Regulations in a National Park, it is not clear whether payment of a fixed penalty would be made to the National Park authority or the county or county borough council in which that National Park is located;

¹ It is noted that this requirement has been amended by the Amendment Regulations to additionally provide for the Welsh Ministers to designate a person for receiving payment.



- regulation 13(7) of these Regulations provides each authority with discretion to offer a discount for early payment under a fixed penalty notice – this could create inequality between areas in Wales in some authorities adopt the discount but others do not;
- it is unclear if it will be possible to identify whether a person has already received a fixed penalty notice under these Regulations for the purposes of imposing a higher fixed penalty under regulation 13(8) of these Regulations – as it is possible for at least 30 organisations to be administering fixed penalty notices, there is potential for inequality of treatment of offenders across Wales;
- the only method of payment of a fixed penalty notice expressly required under the Regulations is by way of payment by post addressed to the local authority in question, even though many local authorities in Wales have closed their contact centers and may have limited staff working at their offices – although authorities can, and most likely will, offer payment by telephone or online, those would be helpful options to be expressly referenced in these Regulations, particularly in light of the need to minimise the reasons why a person has to leave their home.

10. Comparison with the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020

Members may wish to note there are some material differences between these Regulations and the English Regulations. Those material differences are:

- in Wales, a person may only leave the place they live to take exercise once per day – there is no similar limit in England;
- the scope of “close family member” is clarified in relation to attendance at funerals in Wales so that reference includes a partner, child, step-child or foster child, or parent, although these are not likely to be an exclusive list of “close family members” – there is no similar clarified wording in relation to the English Regulations, although there is not likely to be a difference of approach or interpretation between each set of regulations;
- these Regulations expressly permit a carer to attend a funeral with a person that is otherwise permitted to attend that funeral – there is no such express permission under the English Regulations;
- the English Regulations do not contain requirements to close and not enter certain public paths and land during the emergency period;
- the English Regulations do not contain a power of entry – see also point 8 above;
- these Regulations include provisions concerning the treatment of offences committed by partnerships and unincorporated associations – equivalent provisions are not contained in the English Regulations;
- these Regulations provide discretion for the amount payable under a fixed penalty notice to be reduced if the sum is paid within 14 days – the English Regulations require the sum to be reduced if paid in that period – see also point 9 above; and
- the English Regulations provide for the sum payable under a fixed penalty notice to be doubled for third and subsequent fixed penalty notices, upto a maximum of £960.

The differences between the two regulations may create inequality for some citizens in Wales, particularly those on the border with England.



Members may wish to seek clarification from the Welsh Government about the reasons for the differences, or some of the differences, between the regulations.

Legal Services

National Assembly for Wales

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