

Agenda Supplement – Legislation, Justice and Constitution Committee

Meeting Venue:

Committee Room 5 – Tŷ Hywel

Meeting date: 19 October 2020

Meeting time: 10.00

For further information contact:

Gareth Williams

Committee Clerk

0300 200 6565

SeneddLJC@senedd.wales

– Supplementary pack: Welsh Government responses

Please note the documents below are in addition to those published in the main Agenda and Reports pack for this Meeting

2.5 SL(5)634 – The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 18) (Bangor) Regulations 2020

(Pages 1 – 2)

CLA(5)–30–20 – Paper 16 – Report

CLA(5)–30–20 – Paper 17 – Regulations

CLA(5)–30–20 – Paper 18 – Explanatory Memorandum

CLA(5)–30–20 – Paper 19 – Letter from the First Minister, 9 October 2020

CLA(5)–30–20 – Paper 20 – Written statement, 9 October 2020

Attached Documents:

CLA(5)–30–20 – Paper 16

CLA(5)–30–20 – Paper 16a

CLA(5)–30–20 – Paper 17

CLA(5)–30–20 – Paper 18

CLA(5)–30–20 – Paper 19

CLA(5)–30–20 – Paper 20

3.3 SL(5)623 – The Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Wales) Regulations 2020

(Pages 3 – 8)

CLA(5)–30–20 – Paper 51 – Report

CLA(5)–30–20 – Paper 52 – Welsh Government response



Attached Documents:

CLA(5)-30-20 - Paper 51

CLA(5)-30-20 - Paper 52

Agenda Item 2.5

Government Response: The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 18) (Bangor) Regulations 2020

1. This is a Government response to the draft report of the Legislation, Justice and Constitution Committee dated 13 October 2020.

Technical scrutiny points:

Point 1: omission of "(Bangor)" in paragraph 1(q)(viii) of Schedule 4A

2. The draft Report notes the omission of "(Bangor)" in paragraph 1(q)(viii) of Schedule 4A to the Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020, as amended by the No. 18 Regulations. This has been rectified in the Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 19) Regulations 2020 made on 16 October 2020.

Merits scrutiny points:

Point 1: error in EM description of Article 11 of the ECHR

3. The draft Report notes an error in the description of Article 11 of the European Convention on Human Rights in the Explanatory Memorandum. The error will be corrected.

Point 3: no EIA report published

4. The Regulations have been made to respond to a public health emergency, so it has not been possible to produce and publish an Equality Impact Assessment alongside them. An Integrated Impact Assessment of social gathering restrictions will be published in due course.

Point 4: request for EM to set out the evidence on which the Welsh Government relies

5. When the Bangor area local health protection area (LHPA) was established, there was a rising trend in rolling 7-day incidence rates of COVID-19 in Gwynedd and this information was provided in the Explanatory Memorandum.
6. Gwynedd was continuing to exceed 50 cases per 100,000 population placing it in the category where further action to control the infection is considered. However, PHW figures indicated that the incidence rate in Bangor was much higher at 318 cases per 100,000 population, compared with around 35 cases per 100,000 population for the rest of the county. There were 176 cases in Gwynedd from 4/9/2020 to 7/10/2020, of which 79 were in the Bangor area.
7. The Incident Management Team's biggest concern was student communities in Bangor. They reported there were currently 108 positive cases linked with the University (an

incidence rate of around 390 cases per 100,000). The clear recommendation from the IMT was to establish a local health protection zone for Bangor only.

Point 5: request for evidence of the need for the Regulations to come into force before being laid

8. The Government considers that the increase in cases described above demonstrates and justifies the need for the Regulations to come into force as quickly as possible.

SL(5)623 – The Coronavirus Act 2020 (Residential Tenancies Protection from Eviction) (Wales) Regulations 2020

Background and Purpose

The Coronavirus Act 2020 (the "2020 Act") section 81 and Schedule 29 provide protection from eviction by increasing the notice period a landlord is required to give a tenant when seeking possession.

These Regulations extend until 31 March 2021 the period during which increased notice must be given to tenants granted tenancies under the Rent Act 1977 and the Housing Acts 1985, 1988 and 1996. Previously, the end date was 30 September 2020.

Additionally, these Regulations increase from 3 months to 6 months the period of notice required for most notices served in respect of protected and statutory tenancies, secure tenancies, introductory and demoted tenancies. This brings those tenancies into line with the period of six months notice already required for assured and assured shorthold tenancies.

However, in respect of all tenancies, where the ground or reason for giving notice relates to antisocial behaviour, or domestic violence, the Regulations suspend the longer notice periods required under Schedule 29 of the 2020 Act.

Section 88(1) of the 2020 Act provides a power for a relevant national authority (in this case the Welsh Ministers) to suspend the operation of any provision of that Act by regulations. Regulations may also be made to revive a suspended provision (section 88(3)), and the provisions in 88(1) and (3) may be used more than once (see section 88(4)).

Procedure

Negative.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3 (ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd



We note the breach of the 21-day rule in respect of these Regulations (i.e. the rule that 21 days should pass between the date a “made negative” instrument is laid before the Senedd and the date the instrument comes into force). This Minister for Finance and Trefnydd, Rebecca Evans provides an explanation for the breach in a letter to the Llywydd dated 28 September 2020:

There remains an urgent need to ensure that the number of tenants under threat of eviction from their homes is kept as low as possible, so as to continue with the containment of Coronavirus, ease the burden on frontline staff, and ensure tenants are provided with appropriate support. The Regulations make an important contribution to meeting that urgent need. In order to ensure that the provisions of Schedule 29 continue to apply after 30 September, the Regulations come into force on 29 September 2020.

Likewise, paragraph 2.1 of the Welsh Government’s Explanatory Memorandum (“EM”) states as follows:

There is an urgent need to ensure that the relevant period is extended beyond the 30 September. The number of people under immediate threat of eviction from their homes must be kept low, in order to continue to contribute to the range of measures in place that respond to the virus. Consequently, the Regulations come into force on 29 September 2020 and do not follow the convention that not less than 21 days should elapse between the laying of the Regulations and their coming into force.

Whilst we recognise that a number of measures have had to be put in place urgently during the Coronavirus pandemic, we are not clear why it was necessary for these Regulations to come into force so urgently as to breach the 21-day rule. Since earlier, similar, provision was made, in July by the Coronavirus Act 2020 (Assured Tenancies and Assured Shorthold Tenancies, Extension of Notice Periods) (Amendment) (Wales) Regulations 2020 (the “previous Regulations”), there has been a period of two months for the Welsh Ministers to consider and put into place provision beyond 30 September. Despite this, these Regulations were made on 25 September, laid on 28 September and came into force on 29 September. We noted in our report on the previous Regulations, that the Welsh Ministers have had the power to make such regulations since 25 March 2020 (when the 2020 Act was passed).

2. Standing Order 21.3 (ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

These Regulations engage a landlord’s rights under Article 1 Protocol 1 of the European Convention on Human Rights (“A1P1”). A1P1 states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance



with the general interest or to secure the payment of taxes or other contributions or penalties.

The Regulations extend, in certain cases, the notice period that a landlord must give a tenant from three months to six months, after 29 September 2020. The Regulations have the effect of restricting a landlord's use and enjoyment of their property for this additional period of time. A1P1 is a qualified right and so controlling the landlord's use of their property is permitted if it is deemed necessary in the general interest.

In considering whether an interference is justified, the State must show that the Regulations have a legitimate aim sufficient to justify the limitation of landlords' rights, that the Regulations are rationally connected to that aim, that a less intrusive measure couldn't be used, and that there is a reasonable relationship of proportionality between the means employed to achieve that aim, and the aim pursued.

In our report on the previous Regulations, we noted that there was no analysis in the Welsh Government's EM of landlords' A1P1 rights and how interference with these rights is justified. The Government response to the Committee's report on those previous Regulations did not provide any detail about the rationale for the Government's decision.

The EM accompanying these Regulations also does not contain an analysis of the impact on human rights. As such, it is not possible for a reader of the Regulations to understand how the Government has weighed up the competing rights of landlords, tenants and the wider public.

The Welsh Government is asked to set out how it considers that these Regulations are compliant with A1P1 of the ECHR.

3. Standing Order 21.3 (ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

Paragraph 2.3 of the Welsh Government's Explanatory Memorandum discusses the issue of retrospectivity:

Even though the Regulations apply prospectively (i.e. on or after the date the amendments come into force) there is an element of retrospectivity to the Regulations in that notice periods in existing tenancies are temporarily altered. However, the extended notice period will apply to notices given on or after the date the Regulations come into force.

Whilst we appreciate that the Regulations will apply prospectively, in that only notices given after the date the Regulations come into force will be affected by the provisions, the Regulations will apply to existing tenancies, made between landlords and tenants.



4. Standing Order 21.3 (ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

Paragraph 6.1 of the EM explains that the Welsh Government has not been able to carry out a quantified regulatory impact assessment, but that the EM provides a qualitative assessment of the likely impacts of the Regulations. However, these Regulations were laid on 28 September 2020 and came into force on 29 September 2020 giving landlords and other stakeholders only a matter of hours notice of this (extension to a) substantive change to the law and their rights.

In regard to the potential economic effects of the Regulations on landlords, paragraph 6.11 of the EM states as follows:

...whilst landlords would still be able to recover possession if a tenant fails to pay rent, or otherwise breach the terms of their tenancy, and lenders may still be able to recover possession in the event of the landlord defaulting on the mortgage, there is a potential additional cost to them arising from increased notice periods. However, the financial impact of this may be balanced out by the additional time landlords, tenants and support agencies have to work together to identify and agree arrangements to support tenants to better manage their finances and repay any rent arrears. Any negative economic impact caused should therefore be slight...

The Committee are concerned that the lack of consultation and the absence of a quantified regulatory impact assessment makes it harder to ascertain if the Regulations represent a proportionate response by the Welsh Government. There has also been a period of two months since the previous Regulations were made, which could have provided an opportunity for further assessment to be made by the Welsh Government into the impacts of the provisions.

Implications arising from exiting the European Union

None.

Welsh Government response

A Welsh Government response is required.

Committee Consideration

The Committee considered the instrument at its meeting on 12 October 2020 and reports to the Senedd in line with the reporting points above.



Government Response: *The Coronavirus Act 2020 (Residential Tenancies Protection from Eviction) (Wales) Regulations 2020*

Merit Scrutiny point 1: As the Committee has already noted from the letter sent by the Minister for Finance and Trefnydd to the Llywydd, there was an absolute requirement to bring the Regulations into force before 30 September so that the provisions of Schedule 29 to the Coronavirus Act 2020 continued to apply after that date. The Welsh Government is always keen to ensure as much advanced warning as is possible and appropriate is given before it introduces new legislation. For that reason, the intention to extend the relevant period to March 2021 was announced by the Minister for Housing and Local Government in her statement on Housing, Poverty and Communities given in Plenary on 15 September 2020.

However, two factors combined to mean that it was not possible to lay the Regulations 21 days before they were required to come into force. Firstly the demands placed on the Welsh Government by the need to respond to pandemic has had a significant impact on our capacity for making legislation, and the Government has had to take difficult decisions about the legislative programme in order to prioritise resources. Secondly, the Regulations were responding to a rapidly changing set of circumstances, including the evolving nature of the pandemic, the lifting of the stay on possession proceedings in the courts, and the UK Government's amendments to Schedule 29 to the Coronavirus Act. These matters all needed to be taken into account before the Regulations could be laid.

Whilst the Welsh Government accepts that it has had the power to make these Regulations for many months, that does not mean that it could or should have acted sooner to make them.

Merit Scrutiny point 2: We consider that the Regulations are compatible with the European Convention on Human Rights.

Merit Scrutiny point 3: The Welsh Government notes the Committee's comment and has nothing further to add in relation to this point.

Merit Scrutiny point 4: This point raises concerns about the amount of notice given to landlords and others, the lack of consultation and the absence of a quantified regulatory impact assessment.

As noted in response to point 1 above, the intention to extend until March 2021, the relevant period during which increased notice periods apply, was announced in Plenary by the Minister for Housing and Local Government on 15 September. The announcement was publicised on the same day through: an update sent to all registered landlords in Wales via Rent Smart Wales, the issuing of a press notice, and relevant posts issued through the Welsh Government's social media accounts.

This was done in order to provide landlords and others with as much notice as possible of the intended changes.

Whilst it was not possible to conduct a formal consultation in the time available prior making this emergency legislation, the Welsh Government has strong relationships with stakeholders from across the housing sector, and received various representations and evidence from them in relation to notice periods. That evidence helped to inform the development of the Regulations, including, for example, the decision to revert to the pre-Covid arrangements for notices relating to anti-social behaviour and domestic violence.

The Explanatory Memorandum explains at paragraph 6.1 that *The COVID-19 emergency and the urgency to make these Regulations means it has not been possible to prepare a quantified Regulatory Impact Assessment*. Even though there was a period of two months between the making of these Regulations and the previous regulations made in July, the decision to extend the relevant period was still taken at relatively short notice in response to a situation that was rapidly evolving, so there was no significant additional time available in which to conduct a full regulatory impact assessment. Furthermore, with the stay on possession proceedings in the courts only coming to an end on 20 September, longer notice periods have thus far had little impact that is capable of being assessed. Importantly though, the Explanatory Memorandum points out at paragraph 6.4 that if there are additional costs to landlords arising from the extra delay to making a claim to the court and the arrears that may build up during that time, this is now mitigated by the introduction of the Tenancy Saver Loan scheme. As paragraph 6.4 states, *“funds from these loans will be paid directly to landlords, and should help considerably with easing any financial burden on them resulting from rent arrears”*. The Committee may also wish to note that an integrated impact assessment has been completed, a summary of which will be published in the near future.