

SL(5)540 – The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 2) Regulations 2020

Background and Purpose

These Regulations amend the Health Protection (Coronavirus Restrictions) (Wales) Regulations ("the principal regulations") and came into force at 12.01 a.m. on 25 April 2020.

The principal Regulations have previously been amended by the Health Protection (Coronavirus Restrictions) (Wales) (Amendment) Regulations 2020 which came into force at 12.01 a.m. on 7 April 2020.

Specifically, these Regulations amend regulation 3 (termination directions), regulations 4 – 6A (physical distancing requirement), regulation 8 (restrictions on being outside the place people live), regulation 10 (enforcement) and make further minor and consequential amendments to the principal Regulations.

These Regulations are made under sections 45C(1), (3)(c), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984 ("the 1984 Act").

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 (SARS-CoV-2) in Wales.

The purpose of the principal Regulations, which these Regulations amend, 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 principal Regulations also revoked 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").

Procedure

Made affirmative: the Regulations have already been made, but require Senedd approval for them to stay in force for more than 28 days.

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 or public policy likely to be of interest to the Senedd.

The Explanatory Memorandum that accompanies these Regulations sets out the Welsh Government's assessment of the interference with certain individual rights under the Human Rights Act 1998 and the European Charter of Fundamental Rights.

Whilst no specific articles are referred to in this Explanatory Memorandum, the Explanatory Memorandum to the Health Protection (Coronavirus Restrictions) (Wales) (Amendment) Regulations 2020, addressed that the following articles were engaged in respect of those Regulations: Article 8 – right to respect for private and family life; Article 11 – freedom of assembly and association; and Article 1 of the First Protocol – protection of property.

It appears that the articles noted above in relation to previous amending regulations, are engaged in respect of these Regulations. It also appears that article 9 of the European Convention on Human Rights – freedom of thought, conscience and religion, is engaged in respect of regulation 4 of these Regulations (which amends regulation 8 of the principal Regulations). This right is a qualified right, which permits the Welsh Ministers to interfere with the exercise of the rights in the same manner as with articles 8 and 11 of the European Convention. The Government considers that they are justified for the purpose of preventing the spreading of infectious diseases and/or the interference is permitted on the basis that it is in pursuit of a legitimate aim, namely of protecting public health and are proportionate.

A Government response is required to explain which specific articles the Welsh Government considers are engaged in respect of these Regulations, and to provide additional reasons to explain why the Welsh Government believes engaging these individual rights are justified for the purposes of these Regulations.

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

These Regulations, like the principal Regulations and previous amending 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 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).

The omission of section 45C(4)(d) of the 1984 Act from the list of enabling powers relied on by the Welsh Ministers was raised as a technical point that required further explanation. A Welsh Government response to the point was received after the Committee considered the previous amending regulations. At the same time, the Welsh Government issued a response to the point raised in relation to the principal Regulations, which were the subject to a report to Members considered by Plenary.

The Welsh Government response to the principal Regulations in relation to enabling powers stated that their view:



“referring to section 45C(4) of the 1984 Act in relation to these Regulations would be unhelpful and inaccurate. The examples given in that subsection are specific and do not reflect the wide-ranging nature of the substantive provisions of the Regulations; provisions which we consider to be necessary and proportionate in light of the nature of the current health emergency and in line with the kind of provision envisaged by the UK Parliament when it enacted Part 2A of the 1984 Act.”

The Welsh Government's response is very clear and helpful, noting that the way sections 45C(1) and (3)(c) of the 1984 Act are drafted as broad enabling powers and that there is no need to specify section 45C(4)(d) of the 1984 Act.

In light of that helpful response, the only issue that remains is that the approach taken in relying on enabling powers for these Regulations, and the principal Regulations and previous amending regulations, is different to that taken in respect of the Business Closure Regulations and the Leisure Businesses Closure Regulations. That does not affect the validity of these Regulations in any way, but it does give rise to inconsistency between the approach in these Regulations and the approach in the (now revoked) Business Closure Regulations and the Leisure Businesses Closure Regulations.

A Government response is required in respect of the inconsistency between enabling powers relied upon in Welsh Government regulations.

Implications arising from exiting the European Union

No implications are identified for reporting under Standing Order 21.3 in respect of this instrument.

Government Response

A Welsh Government response is required.

Committee Consideration

The Committee considered the instrument at its meeting on 11 May 2020 and reports to the Senedd in line with the reporting points above.

