

SL(5)792 – The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 5) Regulations 2021

Background and Purpose

These Regulations amend the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 (“the principal Regulations”).

The amendments—

- (a) extend the expiry date of the principal Regulations to 28 May 2021;
- (b) revoke restrictions on pupils and students attending schools and further education colleges;
- (c) provide that premises closed to the public (such as theatres) may be used to rehearse;
- (d) provide that a sporting event, at which the only people present are elite athletes and persons working or providing voluntary services at the event, is not prohibited under the restrictions that apply at Alert Level 3;
- (e) make minor technical changes to the provisions relating to the process for people agreeing to form extended households, to reflect the fact that not all households include a person aged 18 or over;
- (f) replicate changes previously made to the Alert Level 4 restrictions, that enabled under 18s who live alone to form an extended household, for Alert Levels 1, 2 and 3;
- (g) make temporary modifications to the restrictions and requirements applying to an Alert Level 4 area under Schedule 4 to the principal Regulations, which—
 - (i) extend the duration of the temporary modifications (previously made) to the end of the day on 26 March 2021;
 - (ii) from 13 March 2021, change the prohibition in paragraph 1 of Schedule 4 on leaving the place where a person is living (without a reasonable excuse) so that it becomes a prohibition on leaving (without a reasonable excuse) the area local to the place where the person is living;
 - (iii) from 13 March 2021, provide that a person has a reasonable excuse to leave the area local to the place where they are living, and to gather, when visiting a friend or relative in a care home, as long as they have the permission of the person responsible for the care home;
 - (iv) from 13 March 2021, provide that up to 4 people (not including children under 11 or carers) from no more than 2 households may gather outdoors, including in private gardens;



(v) from 13 March 2021, provide that a sporting event at which the only people present are elite athletes and persons working or providing voluntary services at the event is not prohibited;

(vi) from 15 March 2021, allow hair salons and barbers to open for the purposes of cutting, styling or colouring hair (by appointment);

(vii) from 13 March 2021, allow outdoor sports and exercise facilities to open;

(viii) from 22 March 2021, provide that supermarkets and other shops that sell multiple types of goods, which are already open to the public and which mainly sell the goods allowed to be sold in accordance with the Alert Level 4 restrictions, may sell other goods on their premises; and

(ix) from 22 March 2021, allow garden centres and plant nurseries to open.

Provision has also been made to prohibit gathering for the purposes of political campaigning such as canvassing. Most other activities relating to an election, for instance, voting or distributing campaign material, are allowed.

The Regulations also amend the Health Protection (Coronavirus Restrictions) (Functions of Local Authorities etc.) (Wales) Regulations 2020 to change their expiry date to 28 May 2021 and to make a temporary modification which is consequential on the other amendments made by these Regulations.

Procedure

Made Affirmative.

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd must approve the Regulations within 28 days (excluding any days when the Senedd is dissolved or in recess for more than four days) of the date they were made for them to continue to have effect.

Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

Regulation 2(6)(c) revokes paragraph 5 of Schedule 3 to the principal Regulations. However, a cross-reference to paragraph 5 remains in paragraph 4(2) of Schedule 3.

2. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

Regulation 2(8)(d) adds a new paragraph (ba) to Schedule 5 to the principal Regulations. New paragraph (ba) requires Schedule 4 to the principal Regulations to be read as if, among other



things, a new sub-paragraph (6) were added to paragraph 1 of Schedule 4. However, there is already an existing sub-paragraph 6 to paragraph 1 of Schedule 4.

3. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

Regulation 2(8)(e) adds a new sub-paragraph (cb) to Schedule 5 to the principal Regulations. That provision requires that paragraph 5 of Schedule 4 to the principal Regulations is treated as if it were omitted. However, a cross-reference to paragraph 5 remains at paragraph 4(2) of Schedule 4 and is not treated as though it were omitted.

Merits Scrutiny

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

4. 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

We note the Welsh Government's justification for any potential interference with human rights. In particular, we note the following paragraphs in the Explanatory Memorandum:

"Whilst the principal Regulations, as amended by these Regulations, engage individual rights under the Human Rights Act 1998 and the European Convention on Human Rights, 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.

Article 5 (right to liberty), Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 11 (freedom of assembly and association) and Article 1 of the First Protocol (protection of property) are engaged by the principal Regulations.

Each of these is a qualified right, which permits the Welsh Ministers to interfere with the exercise of the rights if necessary in a democratic society in the interests of public safety or for the protection of health. All such restrictions and requirements must be justified on the basis that they are in pursuit of a legitimate aim, namely of protecting public health and are proportionate. Any interference with these rights also needs to be balanced with the State's positive obligations under Article 2 (right to life). The adjustment of the restrictions and requirements under the principal Regulations by these Regulations is a proportionate response to the spread of the coronavirus. It balances the need to maintain an appropriate response to the threat posed by the coronavirus against the rights of individuals and businesses, in a manner which remains proportionate to the need to reduce the rate of transmission of the coronavirus, taking into account the scientific evidence.



These amending Regulations reduce the extent in which the restrictions and requirements under the principal Regulations interfere with those individual rights. "

5. 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

We note that there has been no formal consultation on these Regulations. In particular, we note the following paragraph in the Explanatory Memorandum:

"Given the serious and imminent threat arising from coronavirus and the need for an urgent public health response, there has been no public consultation in relation to these Regulations."

6. 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 provides that a regulatory impact assessment has not been carried out in relation to these Regulations due to the need to put them in place urgently to deal with a serious and imminent threat to public health.

7. 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

We note that the changes brought into force by the Regulations are given effect, in large part, by requiring the reader of the Regulations to read various provisions in a particular way. Notably, readers are invited to read Schedule 4 to the principal Regulations as if the wording of that Schedule is different from the actual wording which appears in it. This method has been used instead of simply amending the principal Regulations.

We recognise that the reason for this may be because the changes are time-limited. We also recognise the pressures currently faced by the Government. However, these provisions are of paramount importance to all those who live in Wales. The use of this complex mechanism means that only skilled and experienced readers of legislation will be able to find the true effect of these Regulations. As a result, the law in this important area lacks transparency.

We further note that a similar mechanism was used in the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 4) Regulations 2021. We did not report on the use of the mechanism on that occasion as the changes were far less extensive. In this instance, the changes are far-reaching. This makes it all the more notable that such a complex mechanism was used.

8. 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

Following on from the previous point, Regulation 3 provides that Regulation 6(2)(d) of the Health Protection (Coronavirus Restrictions) (Functions of Local Authorities etc.) (Wales) Regulations 2020 is to be read as though it directs the reader to paragraph 2A of Schedule 4



to the principal Regulations (rather than to paragraph 2 of that Schedule). However, there is no paragraph 2A to Schedule 4.

Instead, Regulation 8(d) of these Regulations adds new sub-paragraph (ba) to paragraph 2 of Schedule 5 to the principal Regulations. That new sub-paragraph requires Schedule 4 to the principal Regulations to be read as though a new paragraph 2 and 2A are added to Schedule 4.

Again, this lacks transparency as the reader will not find paragraph 2A in Schedule 4 to the principal Regulations.

Welsh Government response

Technical Scrutiny points 1 - 3: that drafting appears to be defective or fails to fulfil statutory requirements

The Government is grateful for the notice of the issues raised.

In relation to points 1 and 3, the Government agrees that the cross-references to paragraph 5 of Schedule 3 and paragraph 5 of Schedule 4 should have been omitted or treated as having been omitted respectively.

In relation to point 2, the Government agrees that the new sub-paragraph that is to be read as being included in paragraph 1 of Schedule 4 should be numbered (7), not (6).

The Government will make the necessary corrections at the earliest opportunity.

Merits Scrutiny point 7: drafting approach of making non-textual modifications to Schedule 4 requirements and restrictions

As the Committee's draft report identifies, some of the Regulations' changes are made by temporary (non-textual) modification of the Alert Level 4 restrictions and requirements set out in Schedule 4. The modifications are set out in Schedule 5.

The Government confirms that part of the rationale for making the changes in this way is that they are time-limited because of the desire to retain the Alert Levels as they were originally proposed (subject to minor, permanent, amendment). So at the expiry of the relevant period, the modifications will cease to apply and the Alert Level 4 restrictions and requirements will revert to those which are provided for in Schedule 4. On balance, the Government considers that this is the most appropriate way of making the required changes whilst also maintaining the principal requirements and core structure of Schedule 4 intact. Although the Government hopes that this will not be necessary the system provided for in the Regulations would enable a return to stricter restrictions quickly, either for the whole of Wales or a part of Wales.



The Government also agrees that these provisions are of great importance to the general public, and is committed to making the law as accessible as possible. To that end, we have published an illustrative document showing the Alert Level 4 restrictions and requirements as they have been temporarily modified by Schedule 5. The document is published alongside the main illustrative document showing the principal restrictions Regulations as amended, on the 'coronavirus and the law' pages of GOV.wales. The Government will also consider ways of drawing the public's attention to this document should this drafting approach continue to be used in future amendment regulations (e.g. by means of footnotes to the relevant regulations, or in the Explanatory Memorandum). This supplements numerous other explanatory documents already provided by the Government.

Merits Scrutiny point 8: cross-reference to paragraph 2A of Schedule 4 to the principal Regulations in the modification of regulation 6 of the Functions of Local Authorities etc. Regulations

The Committee's draft report queries the accessibility of the change made by regulation 3(2) of the (Amendment) (No. 5) Regulations. That regulation provides that until the end of the day on 26 March 2021, regulation 6(2)(d) of the Functions of Local Authorities etc. Regulations is to be read as if for "paragraph 2" (of Schedule 4 to the principal restrictions Regulations) there were substituted "paragraph 2A". Schedule 4 of the principal restrictions Regulations is required to be read as if including paragraph 2A by virtue of regulation 2(8)(d) of the (Amendment) (No. 5) Regulations.

The drafting of the (Amendment) (No. 5) Regulations is such that regulation 3(2) follows closely after regulation 2(8)(d) (the provision which requires Schedule 4 to be read as including paragraph 2A). The Government therefore considers that it is sufficiently clear from the context of regulation 3(2) that the cross-reference is to the paragraph 2A that is required to be read into Schedule 4 of the principal restrictions Regulations.

However, the Government will consider additional ways of ensuring the accessibility of such provisions, should it be necessary to make similar consequential modifications in any future amendments of the principal restrictions Regulations.

Legal Advisers
Legislation, Justice and Constitution Committee
16 March 2021

