

Explanatory Memorandum to the Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 3) Regulations 2020

This Explanatory Memorandum has been prepared by the Welsh Government and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 3) Regulations 2020.

Vaughan Gething
Minister for Health and Social Services

11 May 2020

1. Description

These Regulations amend the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 (“the principal Regulations”) which—

- 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, 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.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

These Regulations are made under the emergency procedure set out in section 45R of the Public Health (Control of Disease) Act 1984 (c. 22) (“the 1984 Act”). The Regulations are made without a draft having been laid and approved by the Senedd. It is the opinion of the Welsh Ministers that, by reason of urgency, it is necessary to make the Regulations without a draft being so laid and approved so that public health measures can be taken in order to quickly respond to the threat to human health from coronavirus.

The Regulations cease to have effect at the end of the period of 28 days (excluding recess) beginning with the day on which the instrument is made unless, during that period, the Regulations are approved by the Senedd.

European Convention on Human Rights

Whilst the Regulations engage individual rights under the Human Rights Act 1998 and the European Charter of Fundamental 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. A number of provisions see a widening of the list of specified reasonable excuses, which people may rely upon to leave, or remain away from, the place where they are living, as further referred to in section 4 below. This includes the lifting of the once a day restriction on exercise, enabling people to exercise at any time, locally to where they live, as well as enabling them to leave to access waste disposal and recycling services and to visit a library.

These articles are engaged by the 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.

Each of these are qualified rights, which permit 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. The easing of restrictions within these Regulations, is a proportionate response balancing the need to maintain an appropriate response to the threat posed by the coronavirus against the rights of individuals and businesses, allowing people more reasons to leave their homes, in a manner which remains proportionate to the need to avoid an increase to the rate of transmission of the coronavirus. In addition to the widening of the reasonable excuses enabling people to leave their homes, the Regulations also relax a number of restrictions imposed by the principal Regulations requiring categories of business to close, in particular allowing garden centres and plant nurseries to open, provided those responsible for them take all reasonable measures to ensure 2 metre distance is maintained by people on, or waiting to enter, the premises.

3. Legislative background

The Regulations are made under sections 45C(1) and (3)(c), 45F(2) and 45P of the 1984 Act.

The 1984 Act and Regulations made under it provide a legislative framework for health protection in England and Wales. Part 2A of the 1984 Act was inserted by the Health and Social Care Act 2008, and provides a legal basis to protect the public from threats arising from infectious disease.

Section 45C of the 1984 Act provides a power for the appropriate Minister to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination. It includes powers to impose restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health. Section 45F enables the making of supplementary provision including provision for the enforcement of restrictions and requirements imposed under the Regulations and the creation of offences.

The functions under these sections are conferred on “the appropriate Minister”. Under section 45T(6) of the 1984 Act the appropriate Minister, as respects Wales, means the Welsh Ministers.

4. Purpose and intended effect of the legislation

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) which causes the disease known as COVID-19 or “coronavirus”.

The amendments achieved through these Regulations include:

1. Removing the Welsh Ministers' power to terminate requirements or restrictions by direction, which has the effect of requiring any future changes to the principal Regulations to be made by amendment or revocation.

In addition, the duty on the Welsh Ministers to review the principal Regulations is amended to require the Welsh Ministers to consider the proportionality of the requirements and restrictions.

The requirement to terminate requirements and restrictions by ministerial direction was included in the principal Regulations to ensure that they were not imposed for longer than is necessary, particularly at a time when the Senedd was not sitting and it was unclear when there would be an opportunity for the legislature to scrutinise the regulations. The Welsh Government now considers it unnecessary to retain provisions about termination by direction and is committed to making any alterations to, or revocations of, the principal Regulations by making amending Regulations. This will ensure democratic oversight of any changes by the Senedd.

In addition it avoids the potentially confusing position whereby a requirement or restriction is terminated by direction but remains on the statute book (a termination direction would not amend the text of the principal Regulations themselves).

The amendment to the Welsh Ministers' duty to review the principal Regulations every three weeks ensures that the proportionality of the requirements and restrictions as well as their necessity must be considered. This more accurately reflects the nature of the review and the Welsh Ministers ongoing duty to keep under the review the proportionality of the requirements and restrictions from a Human Rights perspective. If the Welsh Ministers do consider a requirement or restriction to no longer be necessary or proportionate that overarching duty requires the Welsh Ministers to remove or amend the requirement or restriction. As a result of these amendments, any such removal or amendment must be made by Regulations and brought before the Senedd.

2. Permitting the operators of libraries to open them should they choose to. If a library is open, the operator (most commonly a local authority) must take all reasonable measures to ensure the distancing requirements within the Regulations are followed. In conjunction with that change, visiting a library is expressly added to the list in regulation 8(2) of reasonable excuses for the purposes of regulation 8(1) of the principal Regulations.
3. The non-exhaustive list in regulation 8(2) of reasonable excuses for the purposes of regulation 8(1) has also been changed so that a person may now make use of a recycling or waste disposal facility (if it is open) or collect goods ordered from a shop on an "click and collect" basis if they need to.

4. The reasonable excuse of the need to exercise in regulation 8(2)(b) of the principal Regulations is amended to remove the limit on exercising no more than once a day. In addition, provision is made to require that exercise must be taken “*within an area local to the place where a person is living*”. The Welsh Government’s guidance on taking exercise has been revised to account for this change (in particular to provide guidance on the matters to consider in determining what may constitute local exercise).
5. Garden centres and plant nurseries are added to the list of businesses that may open, but this is subject to the physical distancing requirements of ensuring that people waiting to enter or on the premises, maintain a distance of 2 metres from one another.

In addition, regulation 4 makes it clear that any action which was in contravention of the principal Regulations before these amendments were made can still be enforced as such.

The principal Regulations (and these amendments) expire at the end of the period of six months beginning with the day on which they come into force – they came into force on 26 March 2020 and will therefore expire on 26 September 2020.

It is critical to take all reasonable steps to limit onward transmission of coronavirus. Coronavirus was declared a Public Health Emergency of International Concern on 30 January 2020 by the World Health Organisation, and steps are being taken worldwide to limit its transmission. The Chief Medical Officer for Wales together with the other Chief Medical Officers across the UK continue to assess the risks to public health stemming from coronavirus to be high.

The Welsh Ministers consider that restrictions and requirements imposed by the Regulations are proportionate to what they seek to achieve, which is to respond to a serious and imminent threat to public health.

The restrictions form part of the UK response to coronavirus. Restrictions have also been put in place by regulations made by the Secretary of State in relation to businesses, public spaces and the movement of individuals in England.

5. Consultation

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 amending Regulations. Individuals and businesses have been informed about the restrictions in the principal Regulations through wide scale and ongoing public information broadcasts across the UK, including by the Chief Medical Officer for Wales, the First Minister of Wales and the Prime Minister.

6. Regulatory Impact Assessment (RIA)

There has been no regulatory impact assessment 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.