

Agenda Supplement – Legislation, Justice and Constitution Committee

Meeting Venue:

Video conference via Zoom

Meeting date: 25 January 2021

Meeting time: 10.00

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– Supplementary pack

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

3.7 SL(5)726 – The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) Regulations 2021

(Pages 1 – 4)

CLA(5)–03–21 – Paper 28 – Report

CLA(5)–03–21 – Paper 29 – Regulations

CLA(5)–03–21 – Paper 30 – Explanatory Memorandum

CLA(5)–03–21 – Paper 31 – Letter from the First Minister, 19 January 2021

CLA(5)–03–21 – Paper 32 – Written statement, 19 January 2021

Attached Documents:

CLA(5)–03–21 – Paper 28



SL(5)726 – The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) Regulations 2021

Background and Purpose

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

- require all persons who are subject to the obligation in regulation 16 to take measures to minimise the risk of exposure to coronavirus on their premises to undertake a specific assessment of the risk of exposure to coronavirus on those premises and to consult on that;
- make specific provision about the measures that must be taken to minimise the risk of exposure to coronavirus on retail premises;
- make provision imposing duties on the proprietors of schools and further education institutions preventing pupils or students from attending to their premises, subject to some limited exceptions;
- make consequential and other minor changes to ensure consistency with the new provisions.

These Regulations also amend the Health Protection (Coronavirus, Functions of Local Authorities etc.) (Wales) Regulations 2020 to require a local authority, when deciding whether to give an event direction under the those Regulations, to have regard to whether the event may result in people gathering in contravention of the relevant Schedule to the Restrictions Regulations.

These Regulations also revoke spent enactments relating to the Health Protection (Coronavirus Restrictions) (No. 4) (Wales) Regulations 2020.

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 point is 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(b) inserts a new paragraph (4) into regulation 16 of the Restrictions Regulations. The new paragraph 4(a) provides:

*"regulation 3 of the 1999 Regulations is to be read as if the words 'by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997', **in both places it occurs...**" [emphasis added]*

However, regulation 3 of the Management of Health and Safety at Work Regulations 1999 ("the 1999 Regulations") only contains the specified wording in *one* place (at paragraph (1)). The other occurrence of "*by or under the relevant statutory provisions*" (at paragraph (2)) does not include the reference to Part II of the Fire Precautions (Workplace) Regulations 1997.

As currently drafted, the new paragraph (4)(a) does not achieve (what we assume to be) its intended effect, because only the wording in regulation 3(1) of the 1999 Regulations (i.e. the "first" occurrence) is read as if it referred to the relevant provisions in the Restrictions Regulations.

Regulation 3(2) of the 1999 Regulations (i.e. what is erroneously considered the "second" occurrence) is not caught by the provision in paragraph (4)(a) as it does not contain the specified wording in its entirety. As such, it is not read as if it referred to the relevant provisions in the Restrictions Regulations.

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 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 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.

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. These Regulations also engage Article 2 of the First Protocol (right to education). Despite the closure of the premises of schools to some learners,



maintained schools remain under their usual duties, but the duty to deliver the curriculum has been modified to a duty to use reasonable endeavours to deliver the curriculum (using a notice under Schedule 17 to the Coronavirus Act 2020).

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. Any interference with these rights also needs to be balanced with the State's positive obligations under Article 2 (right to life). The implementation of the restrictions and requirements under the principal Regulations is a proportionate response to the increasing 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."

Section 5(4) of the European Union (Withdrawal) Act 2018 states that the European Charter of Fundamental Rights ("the Charter") is not part of domestic law on or after IP completion day (23:00 on 31 December 2020). Can the Welsh Government provide an explanation as to why reference to the Charter is made in the Explanatory Memorandum?

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

We note that there has been no formal consultation on these Regulations. In particular, we note the following paragraphs 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.

The Welsh Government have engaged with stakeholders within the Health and Safety Forum to seek their views on this proposal for a specific Covid Assessment. This has included the following trade unions; Wales TUC, USDAW, UNITE, the GBM and Unite. The following business organisations: CBI, the Federation of Small Businesses and Chambers Wales. It has also included seeking the views of the Welsh Local Government Association and the Health and Safety Executive.

The Minister for Environment, Energy and Rural Affairs has met with representatives of retailers, including supermarkets and other 'mixed' retailers, to discuss their role during the pandemic. They broadly welcomed the current good practice by a number of premises and adherence to the guidance being 'formalised' by being included within the principal Regulations.

In determining the need for, and details of the restrictions and requirements, relating to the closure of school and FEI premises, Welsh Government officials undertook a series of



urgent discussions with key sectors and stakeholders, including local government and schools. The Minister for Education provided a written statement on this matter on 4 January 2021."

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

We note that, although a regulatory impact assessment has not been carried out in relation to these Regulations, a Children's Rights Impact Assessment and Equality Impact Assessments have been completed. The Explanatory Memorandum provides:

"While it is inevitable there will be impacts on children's rights and, in particular, on groups with protected characteristics, there will be some scope to mitigate the most significant impacts especially for the most vulnerable learners by allowing them access to school or college premises, but it will not be possible to address all of the disproportionate and negative impacts. These negative impacts continue to be tolerated on the basis of the risk to public health. Copies of these assessments will be published on the GOV.wales website:

[https://gov.wales/impact-assessments-coronavirus.](https://gov.wales/impact-assessments-coronavirus)"

Welsh Government response

A Welsh Government response is required in relation to the technical reporting point and the first merits reporting point.

Legal Advisers

Legislation, Justice and Constitution Committee

21 January 2021

