

Government response to note prepared by Legal Services (National Assembly for Wales) on the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, dated 15 April 2020

1. Timing of laying before the Assembly

- 1.1. NAW Legal Services have noted the Regulations came into force on 26 March at 4:00p.m., but they were laid after this time (27 March).
- 1.2. Once a Statutory Instrument has been made it must be registered with the Statutory Instruments Registrar (in The National Archives) and an official version prepared for laying. In normal circumstances this is a process which can take up to 48 hours. Although the SI Registrar was able to expedite registration and preparation of the official version of these Regulations in light of the nature of emergency legislation, the instrument did not complete registration until after Table Office closed on 26 March.
- 1.3. To ensure the public had access to the instrument ahead of laying, the SI Registrar ensured publication on the legislation.gov.uk website, and the Welsh Government on the gov.wales website, on the evening of 26 March.

2. Human rights

- 2.1. NAW Legal Services have indicated that Members may wish to seek clarification from the Welsh Government about their assessment of the interference with various Articles of the European Convention on Human Rights.
- 2.2. The requirements and restrictions contained in the Regulations interfere with an individual's rights under the Human Rights Act 1998. However, to the extent that they do, the Government considers that such interference is justified for the purpose of preventing the spreading of infectious diseases and the interference is permitted on the basis that it is in pursuit of a legitimate aim, namely of protecting public health.
- 2.3. The Government considers that the provisions in the Regulations are proportionate and necessary, whilst the Regulations prevent a person from leaving the place where they live unless they have a reasonable excuse, they set out a non-exhaustive list of reasonable excuses which people may rely upon. The Regulations also prevent public gatherings, again subject to a number of critical exceptions, which ensures that the provisions are proportionate.
- 2.4. The Regulations have effect to require local authorities and other bodies to close certain footpaths and access land, which they consider are prone to people gathering, to reduce risk of transmission of COVID-19. The Regulations specifically permit people to leave their homes to take exercise, but this should be done close to home.

- 2.5. The Regulations have effect to close (essentially non-essential) listed businesses and places in which members of the public are likely to congregate, thus reducing the risk of transmission of COVID-19. But they enable all other businesses to remain open, subject to those responsible for those businesses or work undertaken to take all reasonable measures to put in place physical distancing measures. They also close non-essential shops, but permit them to continue trading on-line, or by post or phone. The Government considers this to be a proportionate approach to helping control the health crisis created by the COVID-19 epidemic.
- 2.6. The Regulations also place a specific duty on the Welsh Ministers to review the need for the requirements and restrictions every 21 days, as well as requiring them to terminate at any time, by directions, any restrictions or requirements which are no longer necessary.

3. Enabling powers

- 3.1. NAW Legal Services have queried why the Welsh Ministers did not rely on the enabling power contained in section 45C(4)(d) of the Public Health (Control of Diseases) Act 1984 to make the Regulations.
- 3.2. The power to make the Regulations is centred upon section 45C(1) of the 1984 Act. Subsection (3) of that section then provides examples of the way in which that power may be used. The substantive provisions of the Regulations all fall within subsection (3)(c), hence that provision is cited as part of the enabling power. Subsection (4) then goes on to provide examples of types of provision that may be made under the example given in subsection (3)(c).
- 3.3. The power in subsection (1) and the example in subsection (3)(c) are both intentionally broad. It is clear from the material associated with the passing of the Health and Social Care Act 2008 (which inserted Part 2A into the 1984 Act) that the intention is for these powers to be wide-ranging¹.
- 3.4. In the Government's 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.

¹ See for example the speech by Lord Darzi of Denham at Second Reading of the Health and Social Care Bill in the House of Lords, 25 March 2008, Hansard column 452 <https://hansard.parliament.uk/Lords/2008-03-25/debates/0803256000002/HealthAndSocialCareBill>

- 3.5. For example, there is no reason to cite subsection (4)(d) but not subsection (4)(b). And in any case, even citation of both does not directly reflect the content of the Regulations.
- 3.6. In addition, it is not clear that the example given in subsection (4)(d) requires the things referred to as “special restrictions” to be subject to the conditions attached to them in section 45G, 45H or 45I. Taking the example of the closure of premises under section 45I(2); this is contingent on, among other things, being satisfied that the premises are infected or contaminated. That is not the basis on which the Regulations impose restrictions on premises. The Regulations make proportionate provision in the circumstances of this pandemic to minimise the spread of the virus via person to person contact and to minimise the pressure on essential services by limiting activity in public, so as to focus services on dealing with those who are infected or are at particular risk in the event of becoming infected.
- 3.7. We therefore take the view that the Regulations have been made in exercise of the powers which accurately reflect the content of the Regulations.

4. Regulation 7(4) and 7(5)(b) – inconsistencies between Welsh and English

- 4.1. NAW Legal Services have identified a potential inconsistency in regulation 7(4) and 7(5)(b) of the Welsh language text of the Regulations.
- 4.2. The Government agrees with the points raised, and will take the opportunity to amend both regulations when a suitable legislative vehicle presents.

5. Comparison with the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020

- 5.1. NAW Legal Services have identified a number of differences between the Regulations for Wales and the equivalent provision for England. The Welsh Government is working with the UK Government and the other devolved administrations to ensure a coordinated response to the pandemic. However, the powers in Part 2A of the Public Health (Control of Disease) Act 1984 are conferred on the Welsh Ministers in relation to Wales so that provision may be made which is specifically suited to circumstances in Wales and based on decisions made by the Welsh Ministers.
- 5.2. For example, in order to emphasise the limited nature of the reasonable excuse to leave the place where a person lives for exercise, it was considered appropriate to specifically refer to a limitation of exercising no more than once a day.
- 5.3. Similarly, attendance at funerals is recognised as a very important part of people’s lives, but the public health imperative is to limit public gatherings and to ensure that, in the limited circumstances where people may gather, distancing is observed as far as possible. The provisions on attending funerals have subsequently been

amended by the Health Protection (Coronavirus Restrictions) (Wales) (Amendment) Regulations 2020 (SI 2020/399 (W. 88)).

- 5.4. One area where particular provision has been made in relation to Wales only is in relation to the closure and restrictions of entry to certain public paths and land which was first included in the Health Protection (Coronavirus: Closure of Leisure Businesses, Footpaths and Access Land) (Wales) Regulations 2020 (SI 2020/334 (W. 76)) in response to concerns about the numbers of people travelling to certain public land as part of their exercise during this period of emergency (in particular the record numbers who travelled to Pen y Fan). This is a response to particular concerns in Wales.
- 5.5. The Government has also taken a slightly different approach to certain aspects of the enforcement of the Regulations. For example, the Government considers it appropriate for a power of entry to be spelt out in the Regulations to provide certainty for those enforcing the Regulations (and those who may be subject to the exercise of such powers) as to the ability to enter premises to enforce any aspect of the Regulations.
- 5.6. Similarly, the Government considered it important in Wales to be clear that an offence committed under the Regulations may be committed by any type of organisation (such as partnerships or other unincorporated associations). This may be particularly relevant to the restrictions and requirements relating to business premises.
- 5.7. The sum payable under a Fixed Penalty Notice (FPN) in Wales doubles to £120 on the second occasion an FPN is issued and remains at £120 for each subsequent notice. It should be noted that in serious cases the option is available to proceed with a criminal conviction where the punishment is a fine (with no limit to the potential fine which may be imposed). Legal Services have also commented that the Regulations provide a discretion to reduce the amount payable if the sum is paid within 14 days. This gives the enforcing authority some element of discretion depending on the circumstances of the case in question.
- 5.8. The Regulations make provision that the Welsh Government considers to be necessary and proportionate to the circumstances in Wales during the pandemic. The same can no doubt be said of the equivalent regulations in England, Scotland and Northern Ireland, each of which are different. The Government was very surprised, therefore, to see reference to divergence in the law potentially amounting to an “inequality”. The law is routinely different across the UK as a result of powers vesting in the devolved legislatures and governments.