

Explanatory Memorandum to the Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 4) 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) (No. 2) (Wales) (Amendment) (No. 4) Regulations 2020.

Vaughan Gething
Minister for Health and Social Services

7 August 2020

1. Description

These Regulations amend the Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020 (“the principal Regulations”).

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. In particular, the restrictions contained in the principal Regulations should be relaxed as soon as they are no longer considered necessary or proportionate to retain them in their existing form.

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.

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 continued easing of the restrictions made under the principal Regulations by these Regulations, is a proportionate response. These provisions balance 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 avoid an increase to the rate of transmission of the coronavirus, taking into account the scientific evidence.

The new provisions allowing enforcement officers to issue premises improvement notices and premises closure notices, whilst engaging Article 1 of the First Protocol, insofar as they constitute interference with property, are justified as being in pursuit of protecting public health, balancing the right to carry out businesses with the threat to public health if those business do not take any or adequate reasonable measures to minimise the risk of exposure to coronavirus. If those responsible for premises do open the premises, but do not comply with the duties to take reasonable measures, the need to be able to serve improvement notices is an important step in ensuring

the safety of those who enter the premises. Where measures identified in the notice are not taken, or where the duties under regulation 12 have not been complied with, the ability to issue a closure notice is necessary to ensure public health is safeguarded. Additionally, to order closure, the officer must consider that closure is necessary and proportionate for the purpose of minimising the risk of exposure to the virus. Any improvement notice must allow at least 48 hours for measures to be taken, and a closure notice cannot have effect for more than 336 hours (or 14 days) from the time of issuing. Both improvement and closure notices are subject to appeal to the magistrates enabling determination of a person's civil rights and obligations in compliance with Article 6 ECHR. Further if a court determines that the notice should cease to have effect or be modified, it may order compensation to be paid for any loss suffered as a result of the notice having been given.

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, in respect of Wales, means the Welsh Ministers.

4. Purpose and intended effect of the legislation

The 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 to the principal Regulations will come into force at the beginning of 10 August, and will –

- a) permit swimming pools, fitness studios, spas (to the extent they are not already open), leisure centres and indoor play areas to reopen.

Work has been undertaken with the sector on preparations to allow full re-opening of indoor facilities aimed at providing exercise and fitness. Some parts of the sector, particularly spas, partially re-opened on 27 July when businesses providing close contact services (beauty treatments, etc.) were permitted to re-start. However where such businesses were open they were not permitted to reopen exercise (including swimming) facilities.

Gathering indoors (in a group of 30 people or less) for the purpose of exercise is now permitted under the Regulations. This recognises the significant physical and mental benefits to be accrued from exercise. Facilities providing these services must take all reasonable measures to limit the transmission of coronavirus.

Indoor play areas and centres are indoor playgrounds specifically designed for children to play in. As well as specific centres created for the purpose of indoor play, facilities such as these are often found in a range of buildings and services used by parents including pubs, shopping centres and some of the larger tourist attractions. Those settings have previously re-opened, but until now any indoor play area element had to remain closed.

Play and exercise for children provides well-being, resilience and development benefits for children, and indoor play centres are now permitted to reopen to provide children with increased access to these benefits.

- b) permit community centres to open, this will enable them to may provide public services (other than at the request of local authorities or the Welsh Ministers) and other activities on their premises insofar as permitted under the Regulations. This could include, for example, exercise and fitness classes.

The Regulations will also confer new powers on local authority enforcement officers. Although a number of existing enforcement regimes exist that authorities could utilise to close premises that present a health risk, they do not provide a bespoke enforcement regime capable of supporting compliance with obligations stemming from the Regulations, notably regulation 12. That is, the obligation to take all reasonable measures to maintain a distance of 2m between persons on the premises and persons waiting to enter and to take other reasonable measures to minimise the risk of exposure to coronavirus.

Local authority enforcement officers may issue a “premises improvement notice” requiring the person responsible for the premises or business to take specified remedial measures within a specified timeframe (being not less than 48 hours). If the improvement measures are not taken an officer may issue a “premises closure notice”. This can do more than simply close premises, it can be used to prohibit activities, insofar as undertaken in any part of the premises which is specifically closed. A notice would have immediate effect and could only be used if considered proportionate and necessary to prevent, control or provide a public health response to an incidence of coronavirus. If the enforcement officer considers that the requirements under regulation 12 have not been complied with, a premises closure notice can be issued without being preceded by a premises improvement notice. In order to issue a closure notice an enforcement officer must consider that it is

necessary and proportionate to the purpose of minimising risk of exposure to coronavirus.

It is an offence to fail to comply with a premises improvement notice or premises closure notice. Responsible persons have a right of appeal to a magistrates' court.

The Regulations will also specify signs which will require to be affixed alongside an improvement notice or closure notice, to be displayed at a prominent place near to any entrance to the premises. This will enable people to understand whether or not businesses have taken reasonable measures to minimise risk of exposure to coronavirus. This will enable members of the public to take an informed choice about those premises they wish to enter and enable them to determine the level of risks they are willing to accept.

It is critical to take all reasonable steps to limit the 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 easing and adapting the restrictions by means of the amendments made to the principal Regulations are proportionate to what the principal Regulations seek to achieve, which is to respond to a serious and imminent threat to public health.

5. Consultation

Given the serious and imminent threat arising from coronavirus and the need for an urgent public health response, including the need to lift any restrictions which are no longer considered proportionate to that response, there has been no public consultation in relation to these Regulations. Individuals and businesses have been informed about the restrictions 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.

The First Minister, together with other Ministers and the Welsh Government, has continued to update individuals and businesses throughout subsequent changes to the Regulations. The First Minister signalled in his press conference of 31 July the intention to bring about the changes achieved in the Regulations made today, if circumstances allowed for it. These proposed changes were subsequently widely reported. The First Minister confirmed these changes would be made in his press conference of 7 August.

6. Regulatory and other impact assessments

A regulatory impact assessment has not been prepared 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.

A summary equalities impact assessment has been prepared and will be published¹. In summary, these Regulations should have a positive impact on equality given the closure of many of the sectors under assessment has disproportionately affected disadvantaged groups. Mitigations put in place have also considered the additional risks associated with some groups, such as BAME or vulnerable people, and risk assessments should take these factors into account. Reopening plans should also account for specific needs of different client groups, such as accessibility and availability of facilities.

¹ To be available at: <https://gov.wales/equality-impact-assessments-coronavirus>