

GOVERNMENT RESPONSE: THE HEALTH PROTECTION (CORONAVIRUS RESTRICTIONS) (NO. 2) (WALES) REGULATIONS 2020

1. This is a Government response to the draft report of the Legislation, Justice and Constitution Committee dated 27 July 2020.

Technical scrutiny points:

Points 1 and 2: Apparent retrospective effect and apparent drafting irregularity

2. The draft Report indicates that regulation 1(3) did not come into force until 13 July 2020, but purported to bring other provisions of the Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020 (“the No. 2 Regulations”) into force on 11 July 2020, meaning that when regulation 1(3) came into force it applied retrospectively.
3. The Government agrees that an error was made in the sequencing of bringing provisions into force under regulation 1. In regulation 1(3), the list of provisions that came into force on 11 July 2020 should have included regulation 1 itself. The drafting implies that the provision bringing parts of the instrument into force on 11 July 2020 did not come into force until 13 July 2020.
4. Nevertheless, the Government considers that the intended effect of regulation 1 was obvious and that it should be read in a way that avoids the error. In other words, regulation 1(3) should be read as having come into force on 11 July 2020 as was clearly intended. The Committee’s comments about the legal issues to which retrospective provisions would give rise provide further reasons to read the No. 2 Regulations in this way.
5. Even if it were not possible to read the No. 2 Regulations in this way, the Government does not agree with the suggestion that the apparent retrospectivity of regulation 1(3) might give rise to a breach of Article 7 of the European Convention on Human Rights.
6. The provisions of the No. 2 Regulations that came into force on 11 July 2020 were regulation 8 and provisions that were required to make regulation 8 work. Their effect was to remove an existing prohibition on opening hotels and holiday accommodation in certain cases. Regulation 4(4) of the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, which came into force on 26 March 2020, had required those premises to be closed (and regulation 12 had made contravening that requirement without a reasonable excuse an offence). Regulation 8 of the new (No. 2) Regulations re-imposed the requirement but with exceptions allowing self-contained accommodation to be provided. Its practical effect was therefore not to criminalise acts or omissions, but to authorise activities that had previously constituted a criminal offence.
7. The dates specified in regulation 1(3) and (4) have now passed, and regulation 8 and the provisions that referred to it were later revoked by regulation 2 of the Health Protection (Coronavirus Restrictions) (Wales) (No. 2) (Amendment) (No. 2) Regulations 2020 on 25

July 2020. In these circumstances, the Government does not intend to take any further action, but will take care to avoid repeating the issue identified by the Committee.

Point 3: Inconsistencies between English and Welsh texts

8. The draft Report notes potential typographical errors in the Explanatory Note of the Welsh language text of the No. 2 Regulations. We will seek to remedy this through discussions with The National Archives.
9. The draft Report identifies that the date of laying is incomplete in the Welsh language text of the No. 2 Regulations. The Government agrees and will seek to add the date via the correction slip process.
10. On the typographical errors identified in the Welsh language text of regulation 8, no further action will be taken as this provision has subsequently been revoked. We will seek a correction slip in respect of regulation 12(3)(d).
11. The draft Report also identifies a number of apparent cross reference errors in the Welsh language text. The Queen's Printer version of the Statutory Instrument does not include these and therefore no further action is required.
12. The draft Report sets out a number of areas where the Committee considers that the meanings of the Welsh language text and the English language text differ.
 - a. In respect of regulation 11(2)(a), the Government notes the views of the Committee but considers that the wording in the Welsh language text is satisfactory and will not be taking any further action.
 - b. The Government agrees with the draft Report on regulation 12(2)(a)(ii). The English language text better reflects the intended meaning, so the Government has amended the Welsh language text to add the word "rhyngddynt" (corresponding to "between them" in English)¹.
 - c. On the point regarding the Welsh language text of regulation 20(6) the Government will seek to correct this via a correction slip.
 - d. In regulation 20(11), the Government considers that the reference to "partnership assets" in the English language text better reflects the intended meaning, and has amended² the Welsh language text to refer to "asedau'r bartneriaeth".

¹ See regulation 2(5)(a) of the Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 3) Regulations 2020

² See regulation 2(12) of the Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 3) Regulations 2020

- e. On the meaning of “fixed penalty notice” in regulation 21(2), the Government considers that the wording in the Welsh language text is satisfactory and will not be taking any further action.

Merits scrutiny points:

Human rights

13. This draft Report seeks:

- a. specific analysis as to how Articles 5, 8, 9 and 11 and Article 1 to the First Protocol are engaged;
- b. details of any justification for interference with the protection of property under Article 1 to the First Protocol;
- c. further information as to what rights under the ECFR are engaged and in what way and how interference with such rights is justified;
- d. confirmation as to whether Article 7 is engaged and how this could be rectified.

14. To the extent that the No. 2 Regulations revoke and remake provisions set out in the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 (as amended), the Welsh Government was already satisfied that those provisions were compliant with the Convention Rights. The purpose of revoking and remaking the Regulations was to ensure clarity of and accessibility to the law as the original Regulations had been amended seven times. The No. 2 Regulations made new provision which permitted gatherings of up to 30 people outdoors where organised by a “responsible person”, the reopening of a number of businesses, including barber and hairdressing salons, and places of worship. They also imposed new duties on those responsible for premises to take reasonable measures to minimise the risk of exposure to coronavirus (in addition to the ongoing duty to take all reasonable measures to ensure 2 metres distance is kept between persons on premises).

15. All of the regulations made imposing restrictions in response to the coronavirus engage, or have the potential to engage, a number of Articles of the European Convention on Human Rights. These were identified as Articles 5, 8, 9 and 11 and Article 1 of the First Protocol. The No. 2 Regulations continue to impose restrictions on the gathering of more than two households outdoors and gatherings indoors without a reasonable excuse. However, the provisions made are considered necessary and proportionate to what is sought to be achieved by imposing them as a public health response to the coronavirus pandemic. The Committee will be aware that the coronavirus remains a severe threat to the health and lives of people in Wales and should transmission rates increase, as has been seen elsewhere, could see the National Health Service overwhelmed with cases and unable to respond. Indeed, the Government is also mindful of Article 2 (right to life) in taking action to ensure the health and safety of people. The Government has sought to balance the rights of individuals and businesses

with the need to ensure an appropriate response to the pandemic. A number of restrictions have been relaxed, though others have been retained in the No. 2 Regulations.

16. In so far as the restrictions on gatherings are concerned, the Government is satisfied that the ongoing restrictions are proportionate in light of the prevailing scientific evidence, that they have been made in accordance with the law and that they are necessary for the protection of health. This consideration is applicable insofar as rights under Articles 8, 9 and 11 are engaged. The No.2 Regulations saw provision allowing outdoor, organised gatherings of up to 30 people. The Government considered this to be a proportionate response when set against requirements for a person to be responsible for the gathering, and for that person to carry out a risk assessment and take reasonable measures to minimise risk of exposure. The Regulations continued to allow for travel beyond the locality of a place where a person was living which means that Article 5 is less likely to be engaged; but to the extent that anyone may claim that their liberty continues to be infringed by ongoing restrictions, the Government considers that any interference is justified for preventing the spread of infectious diseases.
17. With respect to the ongoing closure of businesses as set out in Schedule 2, these are all considered to be of a higher risk category where the possibility of transmission of the virus is greater. This is because they are types of premises where activities take place which are more likely to cause exertion, because of the length of time people will spend together, because of the close physical face to face proximity in which people find themselves or because of the nature and environment of the premises. Accordingly their continuing closure can be justified under Article 1 of the First Protocol on the basis that the provisions serve a legitimate aim in the public interest (public health) and are proportionate. As indicated, the Government has considered businesses by sector, for example, opening outdoor hospitality but continuing the closure of indoor hospitality businesses under regulation 6. However, set against this is a further relaxation of the types of businesses which have been allowed to open, albeit with new duties to take measures to minimise the risk of exposure to coronavirus. This balances the rights to enjoyment of possessions with the need to act in a safe manner and is a proportionate response to the public health crisis.
18. In addition to the provisions within the enabling powers in the 1984 Act, regulation 4 requires the Welsh Ministers to review the need for, and the proportionality of, the restrictions and requirements set out in the Regulations every 21 days, the first review having fallen due on 30 July.

Cross border issues

19. The draft Report refers to the Explanatory Memorandum to the No. 2 Regulations, in the context of extended households, and seeks a practical explanation of the effect of “as respects Wales” in the context of the Regulations.

20. The Committee is referred to the Government's response to the draft report on the Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 7) Regulations 2020.

Owners of self-contained holiday accommodation

21. The draft Report seeks clarification on how the requirement to let to members of the same household (extended or not) is to be applied in practice by owners of self-contained accommodation.

22. This question relates to regulation 8 of the No. 2 Regulations, which has now been revoked. As stated in the draft report, contravention of regulation 8 would have been an offence in the absence of a reasonable excuse for the contravention. The responsible person would therefore have to show that the action they took to avoid contravention was objectively reasonable in the particular circumstances.

Inconsistency between the Regulations and Explanatory Memorandum

23. The draft Report notes the No. 2 Regulations expire at the end of the day on 8 January 2021, but that the Explanatory Memorandum refers to the Regulations expiring on 9 January 2021. Technically both are correct in that the end of the day of 8 January amounts to the same thing as "on 9 January" because that would be taken to mean at the very beginning of that day. Nevertheless we appreciate that the inconsistency in approach is unhelpful and care will be taken on future reports to avoid this.

Power of entry and Fixed Penalty Notice

24. The draft Report raises two aspects of the No. 2 Regulations which it previously noted, but did not require response on, in relation to the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020. The Committee are now seeking comment on these matters.

25. The draft Report sets out the case for specifying in more detail that a person exercising the power of entry must, if requested, show evidence of authority to exercise the power and explain the grounds for exercising the power. However the Government considers that this is necessarily implied by regulation 19(3)(a). The requirement to show evidence of the officer's identity is clearly a reference to the officer acting in that capacity. Equally the Government does not consider that an officer acting reasonably and proportionately could explain the purpose for which the power of entry is being exercised without explaining the grounds the officer has for suspecting that a requirement has been, or is about to be, contravened.

26. On fixed penalty notices, addressing the points in the draft Report in turn—

- a. A fixed penalty issued in relation to a contravention of regulation 11(4) in a National Park area is to be paid to the county or council borough council in whose area the contravention take place (i.e. the council area in which the part

of the National Park where the contravention took place is situated) in accordance with regulation 21(2)(a) and (5) – but the Welsh Ministers may, as an alternative, designate a National Park authority to receive payments under regulation 21(2)(b). To date such a designation has not been made.

- b. Enforcing authorities are subject to public law principles of reasonableness and proportionality – as a result, any divergence in the exercise of the power in regulation 21(9) would need to be objectively justified in the circumstances.
- c. The Government has worked with the police forces and other organisations in Wales with powers to issue fixed penalty notices, to enable them to understand the requirements of the Regulations. North Wales, Gwent and South Wales Police are “NICHE” forces so all alleged offenders would have been linked to an individual occurrence via Niche RMS. This means that they are in a position to identify repeat offenders and indeed those who have had previous contact with police and been provided with suitable advice. This enabled local policing teams to identify hot spots and persistent offenders, and to encourage engagement and information sharing with the relevant local authority coordination cells. In addition ACRO also maintained records to assist all police forces in identifying repeat offenders so that they could administer the correct FPN in line with the escalating fine tariff linked to repeat offences.
- d. Under regulation 21(7)(e) the enforcing authority has discretion to specify methods of payment and must set them out on the face of the fixed penalty notice. Regulation 21(12) merely ensures that a person required to pay is not restricted to paying by particular methods that the person may not have access to, hence the requirement to allow payment by sending cash or some other form of payment by post. Given that the notice itself must set out the payment methods there would be nothing to be gained by listing them expressly in the Regulations and further limiting an enforcement authority’s discretion.