

SL(5)611 – The Health Protection (Coronavirus, Restrictions) (Functions of Local Authorities) (Wales) Regulations 2020

Background and Purpose

These Regulations provide local authorities across Wales with additional powers 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) in Wales. These Regulations include powers for local authorities, by issuing directions to relevant people, to:

- close individual premises, or impose restrictions or requirements in respect of the use of, access to, or number of people on, the premises;
- prohibit certain events (or types of event) from taking place or impose restrictions or requirements in respect of the holding of, access to, or number of people attending, the event; and
- restrict access to, or close, public outdoor places (or types of outdoor public places).

These Regulations also continue a duty already imposed on local authorities, a National Park authority, Natural Resources Wales and the National Trust to close public footpaths and land accessible by the public in Wales where congregation of people may lead to a high risk of exposure to coronavirus.

Procedure

Made affirmative.

These 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: (i) dissolved, or (ii) 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

One of the enabling powers cited in the preamble to these Regulations is section 45C of the Public Health (Control of Disease) Act 1984 (the 1984 Act). Subject to section 45R of the



1984 Act, an instrument containing regulations under section 45C of the 1984 Act may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Senedd.

These Regulations confirm that they were made under section 45R of the 1984 Act. By virtue of section 45R(2) of the 1984 Act, an instrument may be made without a draft having been laid and approved as required by section 45C(4) of the 1984 Act if the instrument contains a declaration that the person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved. Although the Explanatory Memorandum to the Regulations includes such a declaration, the declaration has not been included in the Regulations as required by section 45R(2) of the 1984 Act.

The instrument purports to be made in partial reliance on a provision (section 45R(2) of the 1984 Act) which requires the declaration to be contained in the instrument and therefore there has not been compliance with the statutory requirements of including a declaration in the instrument.

2. Standing Order 21.2(vi) - that its drafting appears to be defective or it fails to fulfil statutory requirements

In regulation 2(g), there is a reference to regulation 7(1), which should contain the definition of "public place". This is incorrect and should instead refer to regulation 7(2). The correct reference is included in the Welsh version of these Regulations.

3. Standing Order 21.2(vi) - that its drafting appears to be defective or it fails to fulfil statutory requirements

In regulation 16(9), there is a reference to paragraph (9), which refers to an enforcement officer having reasonable grounds to suspect that a person is contravening, or is about to contravene, regulation 14(4). This is incorrect and should instead refer to paragraph (8). The correct reference is included in the Welsh version.

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument.

4. 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

Regulation 9 requires a local authority to have regard to any guidance issued by the Welsh Ministers about directions under Part 2. There are a number of provisions which would appear to benefit from further explanation that would be set out in such guidance, for example indication of what constitutes "critical infrastructure" for the purposes of regulation 5(3), "essential goods and public services" for the purposes of regulation 5(5) or a "reasonable excuse" for acting in contravention of a direction.



At the time of writing, the “Enforcement and fines” section of the Coronavirus regulations: frequently asked questions page of the Welsh Government’s website refer to the enforcement and fines regime under the Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020, but not these Regulations. The page states that it was last updated on 14 September 2020.

The guidance in relation to these Regulations does not appear to be published on the Welsh Government website, or at least it is not easily identifiable.

We think that making the guidance available, or more easily accessible, would be a helpful aid for local authorities and members of the public wishing to understand the impact of these Regulations.

5. 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

These Regulations require a local authority to take reasonable steps to give prior notice of a premises direction, event direction or public place direction. That prior notice must be given:

- in relation to a premises direction, to a person carrying on a business from the premises and, if different, any person who owns or occupies the premises;
- in relation to an event direction, to a person involved in the organisation of the event and, if different, any person who owns or occupies the premises at which the event will take place; and
- in relation to a public place direction, to persons carrying on a business from premises within the public place and ensure it is brought to the attention of any person who owns, occupies or is responsible for any premises in the public place.

Regulation 11 requires a local authority to give a direction to:

- in the case of a premises direction, a person carrying on a business from the premises and, if different, a person who owns, occupies or is otherwise responsible for the premises;
- in the case of an event direction, a person involved in organising the event and, if different, a person who owns, occupies or is otherwise responsible for the premises at which the event takes, or is proposed to take, place; and
- in the case of a public place direction, a person carrying on a business from premises within the public place and each person who owns, occupies or is otherwise responsible for any premises in the public place.

Regulation 12 provides for an interested person to make an appeal to the Magistrates’ Court against a direction or make representations about the direction to the Welsh Ministers. The definition of “interested person” is:



- in the case of a premises direction, a person carrying on a business from the premises and, if different, a person who owns or occupies the premises;
- in the case of an event direction, a person involved in organising the event and, if different, a person who owns or occupies the premises at which the event takes, or is proposed to take, place; and
- in the case of a public place direction, a person carrying on a business from premises within the public place and a person who owns, occupies or is responsible for any premises in the public place.

The phrase “is otherwise responsible for the premises” is used in some, but not all, regulations concerning the making of directions. Using that phrase in some, but not all, regulations appears to suggest that there is a distinction made between persons that own and occupy premises, and those that are responsible for premises. If that is the case, a person responsible for premises, but who is not the owner or occupier of those premises may:

- receive prior notice only in relation to a public place direction;
- be given a premises direction, an event direction or a public place direction; and
- only appeal or make representations in relation to a public place direction.

This appears to suggest a difference in treatment between the types of notice in relation to each of these matters, but it is not clear why this distinction is necessary.

6. 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

In the third paragraph of Part 4 of the Explanatory Memorandum, there is a reference to “policy officer”, which appears to be a typographical error that should instead read “police officer”. The same error appears in the Welsh version, which “swyddog polisi” is used.

Implications arising from exiting the European Union

None.

Welsh Government response

Given the current circumstances regarding coronavirus, a Welsh Government response is required as soon as is reasonably practicable.

Legal Advisers

Legislation, Justice and Constitution Committee

17 September 2020

