

SL(6)118 - The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 23) Regulations 2021

Background and Purpose

Part 2A of the Public Health (Control of Disease) Act 1984 (“the 1984 Act”) enables the Welsh Ministers, by regulations, to make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Wales.

[The Health Protection \(Coronavirus Restrictions\) \(No. 5\) \(Wales\) \(Amendment\) \(No. 23\) Regulations 2021](#) (“the Regulations”) are made in exercise of the powers conferred by sections 45C(1) and (3)(c) and 45F(2) of the 1984 Act in response to the threat to public health which is posed by the incidence and spread of COVID-19.

The Regulations amend the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 (the “principal Regulations”), with effect from 20 December 2021, to:

- list specifically allowing or requiring employees to work from home as a reasonable measure which employees may be required to take in accordance with the duty under Step 3 of regulation 16;
- place a new duty, under regulation 18B, on individuals to work, or provide voluntary or charitable services, from home where it is reasonably practicable for them to do so;
- create an offence under regulation 42A where a person, without reasonable excuse, contravenes the requirement in regulation 18B.

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

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.



Merits Scrutiny

The following four 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 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 Convention on Human Rights, the Government considers that they are justified for the purpose of preventing the spread 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.

Each of these is a qualified right, which permits 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 adjustment of the restrictions and requirements under the principal Regulations by these Regulations is a proportionate response to the spread of coronavirus. It balances the need to maintain an appropriate response to the threat posed by 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."

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 paragraph in the Explanatory Memorandum:

"Given the ongoing threat arising from coronavirus and the need for a prompt public health response, there has been no public consultation in relation to these Regulations. However, engagement has taken place with various stakeholders including the Equalities Division of the Welsh Government."



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 there is no equality impact assessment for the Regulations and ask the Welsh Government to explain what arrangements it has made, in respect of the Regulations, to publish reports of equality impact assessments in accordance with regulation 8(1)(d) of the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011.

While it is noted that the Explanatory Memorandum states, “... *summary impact assessments are in preparation which will include impacts relating to working from home*”, it is unclear whether these will include an equality impact assessment and, in any event, they are not currently available to the citizen for the purpose of assessing the equalities impact of the new provisions being introduced by the Regulations.

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

Beyond the following statement, the Explanatory Memorandum does not set out or link to any specific evidence on which the Welsh Government relies when making provision under the Regulations:

“The Welsh Ministers are of the opinion that the restrictions and requirements set out in the principal Regulations, as amended by these Regulations, are necessary and proportionate as a public health response to the current threat posed by coronavirus, particularly the rapid rise in Omicron cases.”

We note, however, the following from the First Minister, Mark Drakeford MS’, written statement of 17 December 2021:

“At the last review of the coronavirus regulations on 9 December, I set out that we would move from a three-week to a one-week review to ensure we have the right measures in place to keep Wales safe in response to the emerging omicron variant.

This fast-moving, more transmissible variant is here in Wales and is spreading quickly.

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The number of confirmed cases of omicron infections is rising every day in Wales – and across the UK. By the end of the month omicron will likely become the dominant form of the virus. We are still learning about this new form of coronavirus. But all the information we have tells us we are facing a very serious situation.”

Bearing in mind the additional statutory duty the Regulations impose under new regulation 18B, particularly the creation of an offence in new regulation 42A, we would be grateful if the Welsh Government could set out the relevant evidence that supports the significant tightening of restriction around home working at this time.



Welsh Government response

A Welsh Government response is required in relation to points 3 and 4 above only.

Legal Advisers

Legislation, Justice and Constitution Committee

23 December 2021



Senedd Cymru

Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Welsh Parliament

Legislation, Justice and Constitution Committee