

SL(5)573 – The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 7) Regulations 2020

Background and Purpose

These Regulations are the latest amendments made by the Welsh Ministers to the coronavirus restrictions that apply in Wales.

The amendments:

- enable members of a household to agree with one other household to form an extended household,
- revoke the requirement not to leave the area local to the place where a person is living without a reasonable excuse,
- clarify that indoor visitor attractions are required to be closed,
- clarify that it is a reasonable excuse to gather with others to participate in activities organised at outdoor visitor attractions, but only in accordance with the physical distancing requirements.

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: (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

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

Human rights

Despite the continued easing of coronavirus restrictions, there are still restrictions in place that impact upon the daily lives of people in Wales. Where those restrictions interfere with human rights, the interference still needs to be justified.

Regarding justification, we note the approach taken by the courts regarding judicial review of coronavirus regulations in England. Although the England coronavirus regulations are different from the Wales coronavirus regulations, the underlying principles are largely the same.



In *Dolan v Secretary of State [2020] EWHC 1786 (Admin)*, the High Court decided that restrictions in England did **not breach** the following articles of the European Convention on Human Rights (the Convention): Article 5 (right to liberty and security), Article 8 (right to respect for private and family life), Article 11 (freedom of assembly and association), Article 1 of Protocol 1 (protection of property).

In reaching its decision, the court:

- referred to the coronavirus pandemic as presenting “truly exceptional circumstances”,
- said that the restrictions had a clear legitimate aim, “namely the reduction of the incidence and spread of coronavirus”,
- emphasised the importance that the restrictions: (i) were time-limited to 6 months, (ii) must be reviewed regularly, and (iii) must end as soon as they are no longer necessary to meet the public health threat,
- decided that any interference with human rights was proportionate.

As noted above, these underlying principles are also broadly applicable to the Wales restrictions. Nevertheless, we raise the following questions:

- (1) Regarding Article 5, it appears to us that the court did not consider that there was any deprivation of liberty and therefore there was no need to consider the exceptions to Article 5.

The Explanatory Memorandum to the Regulations says that Article 5 is engaged. Can the Welsh Government set out which restrictions engage Article 5?

- (2) The court dealt individually with each human right that was in play, using separate headings for discussion about each human right and, where relevant, setting out the various competing considerations that arose. See, for example, paragraphs 76 to 78 of the judgment, which discuss Article 8.

Does the Welsh Government believe there would be advantage in adopting a similar approach in Explanatory Memorandums, particularly for legislation that has a significant impact on human rights, such as the coronavirus restrictions?

- (3) The court did not come to a conclusion as to whether the England restrictions breached Article 9 of the Convention (freedom of thought, conscience and religion). The court adjourned its consideration of Article 9, but nevertheless noted the potential for the England restrictions to engage Article 9.

The Explanatory Memorandum to the Regulations lists various human rights that are engaged by the Wales restrictions, but it does not include Article 9. Given that restrictions still apply to, for example, prayer that forms part of communal worship in Wales, does the Welsh Government believe that Article 9 is engaged?



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

Equality

In a [webinar](#) organised by Swansea University School of Law on 18 June 2020, Jeremy Miles MS, Counsel General, said that: "Covid is exacerbating pre-existing inequalities in our society"¹ and, with regard to the measures the Welsh Government could potentially take in response to the pandemic, the Welsh Government will always "evaluate the potential steps against an equality lens".²

The Wales restrictions have now been made / amended seven times, but we can find no reference to equality in any of the seven Explanatory Memorandums laid before the Senedd.

Public bodies, including the Welsh Ministers, have a duty under regulation 8 of the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 to assess and monitor the impact of its policies on equality. In particular, the Welsh Ministers must make such arrangements as they consider appropriate to publish reports of the equality impact assessments they have carried out.

With regard to the making and amending of the Wales restrictions, can the Welsh Government outline what steps it has taken to comply with the duties in regulation 8 of the 2011 Regulations, in particular the duty to publish reports under regulation 8(1)(d)?

We raise this point at a time when equality matters more than ever – from global Black Lives Matter issues to local issues raised by the Older People's Commissioner for Wales in her report "[A snapshot of life in care homes in Wales during Covid-19](#)".

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

Cross-border issues

The Welsh Government "[Guidance on extended households: coronavirus](#)" states:

"Extended households can be cross-border – for example, a household in Wales can join with a household in England – but the arrangements will need to comply with the rules in both countries."

As set out in the Public Health (Control of Disease) Act 1984, the Wales restrictions apply "as respects Wales", and the England restrictions apply "as respects England".

The Wales restrictions do not make express reference to cross-border issues. Can the Welsh Government clarify how the Wales restrictions relating to extended households can capture households in England? In effect, this is a call for clarity on the meaning of "as respects Wales".

¹ At 1:20:45

² At 1:21:25



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

Welsh Government Guidance

On 8 June 2020, Vaughan Gething MS, Minister for Health and Social Care, gave evidence to us on the Wales restrictions. He said: "We actually want to have something that helps the public to understand how they can follow the rules, and that's why the guidance is really important as well".

However, we note that (at the time of writing, 9 July 2020) the Welsh Government guidance "**Coronavirus: what does the law in Wales say?**" refers to law that is no longer in force. For example, the guidance says that people are still required to stay at home. But this has not been a legal requirement since 1 June 2020.

Implications arising from exiting the European Union

None.

Government Response

A Welsh Government response is required to the four merits points raised in this report.

Committee Consideration

The Committee considered the instrument at its meeting on 13 July 2020 and reports to the Senedd in line with the reporting points above. In addition, the Committee noted that the instrument has been revoked by The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020.

