

Explanatory Memorandum to the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) Regulations 2021

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. 5) (Wales) (Amendment) Regulations 2021.

Mark Drakeford
First Minister

19 January 2021

1. Description

The Regulations amend the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 (“the principal Regulations”), and the Health Protection (Coronavirus Restrictions) (Functions of Local Authorities etc.) (Wales) Regulations 2020 (“the Functions of Local Authorities 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. The Welsh Ministers are of the opinion that the restrictions and requirements as set out in these Regulations are necessary and proportionate as a public health response to the current threat posed by coronavirus.

European Convention on Human Rights

Whilst the principal Regulations, as amended by these 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.

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. These Regulations also engage Article 2 of the First Protocol (right to education). Despite the closure of the premises of schools to some learners, maintained schools remain under their usual duties, but the duty to deliver the curriculum has been modified to a duty to use reasonable endeavours to deliver the curriculum (using a notice under Schedule 17 to the Coronavirus Act 2020).

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. Any interference with these rights also needs to be balanced with the State’s positive obligations under Article 2 (right to life). The implementation of the restrictions and requirements under the principal Regulations is a proportionate response to the increasing spread of the coronavirus. It balances 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 reduce the rate of transmission of the coronavirus, taking into account the scientific evidence.

These amending Regulations do not change the nature or extent of the engagement of individual rights.

3. Legislative background

The Public Health (Control of Disease) Act 1984 (“the 1984 Act”), and regulations made under it, provide a legislative framework for health protection in England and Wales. These Regulations are made under sections 45C(1) and (3)(c), 45F(2) and 45P(2) of the 1984 Act. Further information on these powers is set out in the Explanatory Memorandum to the principal Regulations.

4. Purpose and intended effect of the legislation

These 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 principal Regulations made on 18 December set out restrictions and requirements which will apply to four different Alert Levels with the determination of applicable Alert Levels as set out in the updated [Coronavirus Control Plan](#). Wales has been in Alert Level Four since the beginning of the day on 20 December 2020.

These Regulations amend the principal Regulations to:

- a. require the person responsible for business premises that are open to the public, public service vehicles and workplaces to undertake a specific coronavirus risk assessment;
- b. specify additional reasonable measures applicable to retail premises and premises licensed to sell or supply alcohol for consumption on the premises.;
- c. require the proprietor of a school or a Further Education Institution (FEI) to not permit pupils to attend the school premises, or students to attend FEI premises (subject to specified exceptions);
- d. make minor consequential and technical amendments to the principal Regulations and the Functions of Local Authorities Regulations.

Coronavirus risk assessment

Under the Management of Health and Safety at Work Regulations 1999, an employer must identify hazards, decide risk and take action to eliminate the hazard or control the risk. Alongside these requirements, Part 4 of the principal Regulations makes provision for the purpose of minimising risk of exposure to coronavirus in premises open to the public and in workplaces.

The principal Regulations are now amended to require a specific coronavirus risk assessment to be carried out, in consultation with any person working on the premises

or workplace (or their representatives). This risk assessment will form the basis for the pre-existing obligation to take “all reasonable measures” to minimise the risk of exposure to coronavirus on premises open to the public and workplaces. Guidance is being updated to provide that the risk assessment should consider issues such as:

- whether ventilation is adequate to minimise risks and to consider mitigations.
- whether 2m distancing is practicable;
- the extent to which the use of screens, PPE and face coverings can mitigate risks;
- the extent to which people can work from home.

The assessment will be required to be reviewed and updated regularly, in particular should the coronavirus alert levels increase in Wales.

Retail premises

Regulation 16 of the principal Regulations applies to “regulated premises” which includes retail premises. Such premises are required to take (1) all reasonable measures to ensure that a distance of 2 metres is maintained between persons on the premises; (2) all other reasonable measures, for example to limit close face to face interaction and maintain hygiene; and (3) provide information to those entering or working at premises about how to minimise risk of exposure to coronavirus.

There is evidence of good adherence in all sizes and types of businesses, however there are also emerging concerns being raised by local authorities, and by worker representative bodies, about a lack of physical distancing and crowding in retail stores. In light of the spread of coronavirus, and the current levels of transmission, the Regulations will now also specifically require the owners and operators of open retail premises to:

- put in place measures to control entry to their premises and limit the number of customers who are on the premises at any one time;
- provide hand sanitisation products or hand washing facilities for customers when they enter and exit the premises;
- put in place measures to sanitise baskets or trolleys; and
- remind customers of the need to maintain 2m distance via signage and announcements.

These requirements apply to all retailers permitted to be open within any Alert Level.

School and FEI premises

On 4 January 2021, the four UK Chief Medical Officers agreed that the UK is now at the highest level of risk, Joint Biosecurity Centre Level 5. In the light of that decision the Welsh Government, in consultation with the WLGA and Colegau Cymru, agreed that all schools, colleges and independent schools should move to online learning.

On 8 January I announced that this approach would continue, but would be brought in line with the three week review cycle of the principal Regulations. Unless there is

a significant reduction in cases of coronavirus before the review that must take place by 29 January, schools and colleges in Wales should continue to provide online provision until the end of February half term.

The amendments made by these Regulations:

- prevent proprietors from allowing pupils to attend school premises, including independent schools;
- prevent proprietors from allowing students from attending FEI premises.

The Regulations do not prevent the proprietor from permitting the attendance at the premises of:

- learners at school or FEI undertaking exams or assessment;
- vulnerable learners at school or FEI (as determined by the proprietor); and
- learners at school who are a child of a critical worker (as determined by the local authority).

The Regulations also permit the proprietor to allow learners to attend the premises of special schools, pupil referral units and SEN units in schools. Further, they do not prevent a boarder from residing in accommodation at the school premises. The Regulations also provide for the enforcement of any failure to comply by the Welsh Ministers or the local authority in whose area the alleged failure occurred.

Consequential and technical amendments

In light of the amendments made above, a number of minor consequential amendments are also required to the principal Regulations. Additionally, the opportunity is being taken to correct some minor drafting points in the principal Regulations, but which do not affect the operation or effect of those provisions.

The expiry date of the Functions of Local Authorities Regulations has been extended to 31 March 2021, to bring it into line with the expiry of the principal Regulations. The opportunity has also been taken to make a minor amendment to regulation 6 of the Functions of Local Authorities Regulations. The amendment is consequential on the making of the principal Regulations, and replaces references to the Health Protection (Coronavirus Restrictions) (No. 4) (Wales) Regulations 2020 with references to the principal Regulations.

Finally, these Regulations also revoke provisions and instruments relating to the coronavirus restriction legislation which are now spent.

5. Consultation

Given the serious and imminent threat arising from coronavirus and the need for an urgent public health response, there has been no public consultation in relation to these Regulations.

The Welsh Government have engaged with stakeholders within the Health and Safety Forum to seek their views on this proposal for a specific Covid Assessment.

This has included the following trade unions; Wales TUC, USDAW, UNITE, the GBM and Unite. The following business organisations: CBI, the Federation of Small Businesses and Chambers Wales. It has also included seeking the views of the Welsh Local Government Association and the Health and Safety Executive.

The Minister for Environment, Energy and Rural Affairs has met with representatives of retailers, including supermarkets and other 'mixed' retailers, to discuss their role during the pandemic. They broadly welcomed the current good practice by a number of premises and adherence to the guidance being 'formalised' by being included within the principal Regulations.

In determining the need for, and details of the restrictions and requirements, relating to the closure of school and FEI premises, Welsh Government officials undertook a series of urgent discussions with key sectors and stakeholders, including local government and schools. The Minister for Education provided a written statement on this matter on 4 January 2021.

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.

In relation to the closure of school and FEI premises to learners a Children's Rights Impact Assessment and Equality Impact Assessments have been completed and considered. While it is inevitable there will be impacts on children's rights and, in particular, on groups with protected characteristics, there will be some scope to mitigate the most significant impacts especially for the most vulnerable learners by allowing them access to school or college premises, but it will not be possible to address all of the disproportionate and negative impacts. These negative impacts continue to be tolerated on the basis of the risk to public health. Copies of these assessments will be published on the GOV.wales website:

<https://gov.wales/impact-assessments-coronavirus>.