

SL(6)108 - The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 22) Regulations 2021

Background and Purpose

These [Regulations](#) are made in response to the threat to public health which is posed by the incidence and spread of COVID-19.

These Regulations amend the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 (the “principal Regulations”), with effect from the beginning of 11 December 2021, to:

- Clarify that the auditorium of a theatre, cinema or concert hall and the viewing areas of an indoor arena or stadium is not to be treated as premises where food or drink is sold, or otherwise provided, for consumption on the premises. This change is designed to remove a potential ambiguity in the principal Regulations;
- Make face coverings a legal requirement during professional driving lessons and practical tests in Wales unless an individual is exempt.

The principal Regulations are further amended by these Regulations, from the beginning of 15 December 2021, to exclude prior recovery (or natural immunity) as a way of demonstrating COVID-19 status for the purposes of the COVID Pass.

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



Senedd Cymru
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—
Welsh Parliament
Legislation, Justice and Constitution Committee

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 these Regulations and ask the Welsh Government to explain what arrangements it has made, in respect of these 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 that *"summary impact assessments have been published previously which include impacts relating to face coverings"*, reference is not made to equality impacts relating to regulation changes that exclude prior recovery (i.e. natural immunity) as a way of demonstrating COVID-19 status for the purposes of the COVID Pass.

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

In relation to the exclusion of prior recovery (i.e. natural immunity) as a way of demonstrating COVID-19 status for the purposes of the COVID Pass, it is noted that the Explanatory Memorandum refers to the change being *"justified on public health grounds"*, as well as representing *"a strengthening of the requirements as previously proposed by the Technical Advisory Group"* that is *"supported by the Chief Medical Officer."*

However, the Explanatory Memorandum does not contain any specific reference to the evidence on which Welsh Government relies when making provision under these Regulations.

We would be grateful if the Welsh Government could set out the evidence which shows that excluding prior recovery (i.e. natural immunity) as a way of demonstrating COVID-19 status for the purposes of the COVID Pass is *"justified on public health grounds"*.

Welsh Government response

Merit Scrutiny point 3: Welsh Government Response

The summary impact assessment that was issued for the COVID pass has been updated in light of the changes to the provision of natural immunity. The updated version will be published shortly.

Merit Scrutiny point 4: Welsh Government Response

Welsh Government and the UK Government agree that the unpredictable nature of natural immunity makes it unsuitable as a certification measure compared with vaccination and testing. The strength of the protective immune response to COVID-19 varies greatly from person to person, and although it is highly likely an individual will be protected from severe disease or death for a period post recovery from first infection, the duration of this protection will vary and the ability for these individuals to still transmit the virus has not yet been quantified.

Sage 99 noted that:

- There remain many uncertainties about the biological parameters of Omicron including the combination of transmissibility and immune escape which give it a growth advantage over Delta in the UK. Evidence continues to suggest a significant degree of immune escape, and much higher levels of reinfections are being seen with Omicron (8% to 9%) than Delta (around 1%).



A link to the paper is attached <https://www.gov.uk/government/publications/sage-99-minutes-coronavirus-covid-19-response-16-december-2021/sage-99-minutes-coronavirus-covid-19-response-16-december-2021>.

The COVID pass provisions relating to natural immunity and evidence of vaccination (including the formal definition of fully vaccinated) will continue to be kept under review as case rates change and as the vaccination programme continues to be implemented.

Committee Consideration

The Committee considered the instrument and Government response at its meeting on 10 January 2022 and reports to the Senedd in line with the reporting points above.

