

Government Response: *The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 2) Regulations 2020*

Merits Scrutiny

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 Assembly.

- 1.1. Senedd legal advisers have asked the Welsh Government to explain which specific articles the Welsh Government considers are engaged in respect of these Regulations, and to provide additional reasons to explain why the Welsh Government believes engaging these individual rights are justified for the purposes of these Regulations.
- 1.2. The Government considers that the Regulations engage or, depending on circumstances may engage, the following convention rights as set out in Schedule 1 to the Human Rights Act: Article 5 (right to liberty); Article 8 (right to respect for private and family life); Article 9 (Freedom of religion); Article 11 (Freedom of Assembly); Article 14 (Prohibition against discrimination) and Article 1 of the First Protocol (Protection of Property).
- 1.3. The provisions requiring persons responsible for businesses which open for any purpose as requested by the Welsh Ministers or local authorities, cafés and other businesses listed in paragraph 2 of Part 1 to Schedule 1 and ‘click and collect’ businesses to take all reasonable measures to ensure 2m distance is maintained between persons on premises, whilst being an imposition on those persons and an interference with their right to quiet enjoyment of their possessions under A1P1, the Government considers that they are necessary to help control the spread of coronavirus and are therefore in pursuit of a legitimate aim being the protection of health. These requirements, which already apply to other businesses which are open, strike a balance between the ability of businesses to remain operational (a proportionate response under A1P1) during the pandemic with the need to protect people from being in close contact with one another, risking their health and life, by transmission of the coronavirus, as well as protecting the ability of the NHS to provide health services.
- 1.4. The amendment to regulation 8(1) to add the words “remain away from” is in the Government’s view a neutral matter, clarifying the existing legal position, namely the prohibition on leaving, or having left, home without a reasonable excuse. However, regulation 8(1) remains an interference with people’s rights under articles 5, 8, 9, 11 and 14. Its justification remains the protection of public health as previously reported by the Government. The restriction imposed by regulation 8(1) remains under review, and provisions in the regulations, particularly the amendment to the reasonable excuse of exercise and the new excuse of being able to visit graveyards, cemeteries and

gardens of remembrance to pay respects demonstrate a proportionate response balancing people's rights with the need to protect the health of the population. In particular, the latter excuse, inserted by regulation 8(3)(c) will enable people to exercise further rights as provided by articles 5, 8 and potentially 9.

1.5. The removal of the once a day restriction in relation to exercise where more frequent exercise is needed because of a health condition or disability sees a proportionate response to the needs of people with disabilities, in particular, enabling the exercise of rights under articles 5, 8, and 14. This is a proportionate response balancing the needs of people with disabilities and other health conditions against the need to control the opportunity for the transmission of coronavirus, which is necessary in the interests of health protection.

1.6. Other provisions within the Regulations are largely clarification or restructuring of existing provisions in the principal Regulations and are, as such, neutral in ECHR terms. The justification for the principal Regulations is as previously stated that they are necessary and proportionate, balancing the rights of individuals with the legitimate aim of controlling the spread of coronavirus for the protection of health, both reducing the incidence of death amongst the population and enabling the NHS to continue to provide a health response both to those infected with the coronavirus, as well as on an ongoing basis to the rest of the population. They balance the interference with individuals' rights as referred to above, with the Government's positive obligations to prevent loss of life (Article 2) and protect health (Article 8).

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 Assembly.

2.1. Senedd legal advisers noted the reasons given by the Welsh Government for not citing section 45C(4)(d) of the Public Health (Control of Disease) Act 1984 as one of the enabling powers in relation to—

- the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 (the “principal Regulations”),
- the Health Protection (Coronavirus Restrictions) (Wales) (Amendment) Regulations 2020, and
- the current Amendment (No. 2) Regulations.

2.2. They have therefore queried why that section was cited as an enabling power in relation to the Health Protection (Coronavirus, Business Closure) (Wales) Regulations 2020 and the Health Protection (Coronavirus: Closure of Leisure Businesses, Footpaths and Access Land) (Wales) Regulations 2020 (both revoked on 26 March 2020 by the principal Regulations).

2.3. The revoked Regulations were made in extreme haste and it was considered at the time to be prudent to follow the citation of powers in the Health

Protection (Coronavirus, Business Closure) (England) Regulations 2020 which were being produced in a similarly hasty manner to the same timetable as the equivalent Welsh regulations. In the subsequent days the Welsh Government was able to consider the enabling powers in the 1984 Act in more detail. We agree that the citation of section 45C(4)(c) did not affect the validity of the Regulations in question however we considered that in the subsequent Regulations it was preferable to cite only the relevant powers.