

GOVERNMENT RESPONSE: THE HEALTH PROTECTION (CORONAVIRUS RESTRICTIONS) (NO. 2) (WALES) (AMENDMENT) (NO. 4) REGULATIONS 2020

1. This is a Government response to the report of the Legislation, Justice and Constitution Committee laid before the Senedd on 24 August 2020. Since laying their report, the Committee has also written to the First Minister on points relating to the custodial sentence (see below).

Technical scrutiny points:

Custodial sentence

2. The Committee's report has sought confirmation of any practical effect of including provision about custodial sentences in the Regulations.
3. The Government is not aware that during the period 10 August to the end of 16 August 2020, when the potential for an erroneous custodial sentence to be given was removed from the Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020, that there had been any practical effect of its original inclusion.
4. As noted in the Explanatory Memorandum to the subsequent Regulations which removed the error, HMCTS Wales, the Ministry of Justice and the Judicial Office were notified on 10 August 2020 of the error by email (from the lead official with responsibility for such liaison). HMCTS Wales acknowledged the email, but there has not been any subsequent engagement from HMCTS, the Judicial Office or indeed the Lord Chief Justice's office who were also subsequently informed, on this matter.
5. Additionally, we have not been made aware of any instances when a custodial sentence had been sought, but in any case the courts had no correct powers to impose such a sentence in practice. Further, early indications from ongoing engagement with enforcement officers is that after the first week of operation (i.e. the relevant period) there were no reports of premises being closed, and that enforcement officers are – as would be expected – taking a proportionate approach to these Regulations and working with each other nationally to ensure a consistent approach.

Information and records

6. The Committee is seeking explanation of:
 - a. the reason regulation 18(7A)(a) is expressly limited, whilst regulation 18(7A)(b) is not similarly limited;
 - b. whether information or answers provided under regulation 18(7A)(a) can be used in proceedings not brought under an enactment; and
 - c. why regulation 18(9B) refers only to regulation 18(7A)(a).

7. The difference between the wording of paragraphs (a) and (b) of regulation 18(7A) reflects the nature of the requests that would be made under each paragraph. When officers ask a specific question or require a person to give specific information under paragraph (a), they should know whether it is relevant to their inquiries, whereas when they are asking to see a document or record under paragraph (b) they may not be certain until they see it. However, in both cases the opening words of regulation 18(7A) make clear that the purpose of requiring information or documents must always be to facilitate the exercise of the enforcement powers in Schedule 5. An officer seeking documents or records under paragraph (b) will therefore need to think that documents or records are likely to contain information relevant to the exercise of those powers.
8. It was not the intention that the protection provided by regulation 18(9B) should be limited to proceedings brought under enactments, but the Government accepts that the wording of regulation 18(9B) did not accurately reflect its intended effect. The Welsh Ministers have therefore taken the opportunity in the Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 6) Regulations 2020 to amend regulation 18(9B) to make clear that information and answers given under regulation 18(7A) is not admissible in any proceedings other than proceedings under the Regulations.
9. The protection given by regulation 18(9B) applies only to information and answers provided under regulation 18(7A)(a), and not to other documents and records that a person is required to produce. This is because there are particularly strong arguments for preventing answers and information given under compulsion in the course of a criminal investigation from being used against a person in other proceedings. The Government considers that a clear rule against admitting this material evidence is therefore justified in the interests of fairness. The arguments for excluding information and records that already existed independently of any investigation are generally less strong. A court would still need to consider whether it was fair to admit material obtained under regulation 18(7A)(b) in each case, but the Government does not consider that an outright prohibition on doing so is required.

Merits scrutiny points:

Enforcement of coronavirus restrictions

10. The Committee has asked the Government to:
 - a. broadly set out how it works with the various enforcement agencies in Wales,
 - b. confirm whether the pace of change of the restrictions has any impact on the approach to enforcement (for example, does it lend itself to a regime that focuses only on the more serious breaches, and how much additional burden does it put on the various enforcement agencies).
11. The Government is also asked to confirm what discussions it has had regarding the new enforcement powers, in particular regarding the resources required to carry out the enforcement powers.

12. The Government has worked closely with the four police forces in Wales on enforcement of the requirements of the legislation. Constables (police officers) may take action against those breaching the principal Regulations, including but not limited to issuing Fixed Penalty Notices (FPNs). Under the principal Regulations, the same enforcement powers are available to Police Community Support Officers, who have taken an active role in enforcement.
13. Forces have taken a 4 Es approach to the principal Regulations: engage, explain, encourage and using enforcement as a very last resort. Despite that a number of FPNs have been issued across the forces for a variety of reasons, and where appropriate additional FPNs have been issued for repeat offenders. On 10 July the National Police Chief's Council published a statistical analysis of FPNs – the full data pack can be found at: <https://cdn.prgloo.com/media/ce7016aa5ba24a188ebd06363fbc4d60.pdf>. The figures are for 27 March to 6 July, and therefore a number of FPNs were issued under the original principal Regulations¹. However the report includes information on the reasons the fines were issued:

Contravene requirement as to restriction of movement during the emergency period	2,166
Contravene a direction or fail to comply with instruction	350
Contravene requirement to not participate in a gathering of more than two people	262
Contravene requirement from a relevant person	54
Obstruct person carrying out a function under the Regulations	9
Total	2,166

14. The analysis also sets out the number of FPNs issued for repeat offences during the reporting period:

Number of FPNs	
2	78
3	4
4	2
5	2
6	0
7	1
8	0

15. As can be seen the significant majority of FPNs were issued for breaches of travel restrictions. Dyfed Powys and North Wales police force areas issued the most fines, a significant majority of which were issued to people travelling into the area.

¹ The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020

16. It is recognised that the pace of change has been problematic in terms of enforcement, but throughout the process the Government has worked with Welsh Police and Crime Commissioners, police forces and the British Transport Police to ensure there has been as early sight as possible of the changes. Both Ministers and officials have briefed Police and Crime commissioners and Chief Constables ahead of changes being made.
17. As the principal Regulations have changed, the role played by policing in proactive enforcement has reduced as restrictions have been eased. The position now is one where policing is supporting other enforcement bodies – notably local authorities – rather than taking the lead. Usual policing demand has now returned to pre-pandemic levels. In fact, forces have identified in the last couple of weeks, calls for service demands over weekends that are in excess of that for New Year’s Eve. This inevitably has a knock on effect in terms of policing’s capacity to engage in other enforcement activity. That being said, where policing is required to intervene (such as in the case of unlawful gatherings) they continue to do so, but utilising more traditional policing powers. The Committee will also be aware that new provision to tackle unlicensed musical events has been introduced since the time of the draft report on the “No. 4” amending Regulations was prepared.
18. There have been extensive discussions between Government officials and local authorities during the preparation of the principal Regulations (and subsequent amendments), including with Directors of Health Protection, local authority chief executives and council leaders. These focused on how existing resources could be prioritised so as to create and implement legislation that would provide practical solutions to dealing the problems of non-compliance quickly but in a graduated, consistent and clear way.
19. Local authorities play a key role in enforcing environmental health, trading standards and latterly legislation aimed at reducing the spread of coronavirus. Enforcement powers provide authorities with the ability to prohibit practices, products or equipment where there is an immediate risk; to require improvements or changes to be made where appropriate; or to prosecute. None of these powers is used lightly and local authority inspectors are encouraged to work with business to improve, only resorting to enforcement action where there is an immediate threat, or where a business simply refuses to comply in relation to a significant issue.
20. Annex 1 to the Government’s *‘Guidance to enforcement officers on regulation 12: the requirement to take all reasonable measures to minimise risk of exposure to coronavirus in workplaces and premises open to the public’* sets out the principles underpinning how local authorities and officers should enforce the principal Regulations, including proportionality in application; targeting of enforcement action; consistency in approach; transparency about how enforcement officers operate and what can be expected, and accountability for actions taken. A practical framework as to how the Regulations should be implemented is at Annex 2.