

## Doc 12: Review of Lockdown and Coronavirus Restrictions

### Legal Advice

This advice sets out the legal issues to be borne in mind by Ministers when considering whether to lift restrictions and/or requirements currently imposed by the Health Protection (Coronavirus Restrictions) Wales Regulations 2020 (“the Regulations”) in order to exit lockdown, as well as risks attaching to the decision-making process.

#### Summary

- i. As a starting point, decisions to terminate or amend restrictions and requirements from a legal perspective need to be based on the test as set out in the 1984 Act and the Regulations – this is whether the restrictions or requirements are necessary to prevent, protect against or control the spread of coronavirus or provide a public health response to the pandemic and whether they are proportionate to that aim.
- ii. Any such decision to the extent that it has the potential to discriminate against a particular group of people will need to be objectively and reasonably justified in order not to contravene Article 14 of the European Convention on Human Rights. The justification for the restrictions and requirements to date has been that they are necessary for the protection of health.
- iii. At present there is very limited information on the equalities impact of proposals. Carrying out such impact assessments is a statutory duty and any failure to do so leaves Ministers vulnerable in an event of a challenge. To some extent lack of robust assessments is easier to justify when decisions are binary in nature, particularly in responding to an imminent and serious threat to public health, but as decisions are taken to ease restrictions and those decisions become more nuanced, the need for careful consideration of the equalities impact of proposals becomes even more significant.
- iv. Any other factor insofar as it informs that key decision-making process will be relevant in the context of informing whether or not measures are proportionate to the aim of controlling the coronavirus outbreak; they may inform decision-making to the extent that they are complementary to, and do not go against, scientific and technical advice on the pandemic. Other factors will also be key in informing the decision-making process of the longer term recovery of society and business.

#### The Statutory Basis for the Restrictions

1. The Regulations are made under section 45C of the Public Health (Control of Disease) Act 1984, subsection (1) of which gives the Welsh Ministers powers to make Regulations “for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in... Wales”. Subsection (3)(c) provides that the Regulations may make provision “imposing or enabling the imposition of restrictions or requirements

on or in relation to persons, things or premises in the event of, or in response to, a threat to public health.”

2. In turn, section 45D(1) provides that regulations may not impose a restriction or requirement, unless the Welsh Ministers consider that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.

Regulation 3(3) provides:-

*As soon as the Welsh Ministers consider that a requirement or restriction imposed by these Regulations is no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in Wales with the coronavirus, the Welsh Ministers must publish a direction terminating the requirement or restriction.*

3. Therefore in carrying out the both the 21 day Review, and more generally, the Welsh Ministers must consider the following issues:
  - i. Whether the restrictions or requirements are still needed for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection of the coronavirus in Wales; and
  - ii. Whether the restrictions or requirements remain a proportionate response to that purpose.
4. Consideration will specifically need to be given to the ongoing effect and therefore necessity and proportionality of the restrictions and requirements in preventing, protecting against, controlling and providing a public health response to the incidence and spread of the coronavirus, based on the medical evidence of their effect. The statutory duty is one which must be based on the prevailing medical and scientific evidence about the effect of the restrictions and requirements, whether or not they are necessary and whether they are a proportionate response. If they are no longer necessary, they must be terminated.
5. It is noted that the MA recommends maintaining the current restrictions and requirements. It sets out a number of recommended areas which could see future lifting of restrictions and requirements (whether mandated by the Regulations or effectively self-imposed by businesses or local authorities), and sets out considerations which could form part of the next review. This advice sets is provided both in the context of the current review and future decision-making.

## **Requirement and Restrictions**

6. The Regulations set out a number of requirements, which impose duties, for example on those responsible for businesses and work to take all reasonable measures to ensure physical distancing, they also require local authorities and other bodies to consider where risks arise due to people congregating in hotspots, to close footpaths and access land.
7. The restrictions on closure relate to a number of different businesses specified in Parts 1 to 3 of Schedule 1 to the Regulations, as well as more generally to businesses offering goods for sale or hire (other than those allowed to remain open by virtue of being listed in Part 4 of Schedule 1).
8. From an individual perspective, regulation 8 is perhaps the most significant, effecting the lockdown, requiring people not to leave or remain away from the place where they are living, or from gathering in groups of more than two people in any public place. Regulation 8(2) lists a number of circumstances / reasons which will constitute a reasonable excuse. Of particular note recently has been the partial relaxation of the limit on exercising once a day, where more frequent exercise is required as a result of a medical condition or disability. Further reasonable excuses can be listed, albeit that must be balanced against the risk that listing increasing specific reasons, may conversely limit the ability to rely on other reasonable excuses not listed as a defence to the offence in regulation 8(1).

### **Termination of Restrictions under the Regulations**

9. Under regulation 3(4) a direction terminating a restriction or requirement may be exercised in relation to:
  - a. a specified business or service or a specified description of business or service;
  - b. specified persons; or
  - c. specified areas.
10. This would enable the Welsh Ministers to reopen certain categories of business otherwise closed by virtue of regulation 4 or by being listed in Parts 1 to 3. For example, it could see the deletion of 'libraries' from Part 3 and relisting in Part 4.
11. However, in considering lifting restrictions, whether for example, by adding to or amending the list of reasonable excuses or by amending the lists in Schedule 1, careful analysis will be required from a legal perspective.

### Human Rights

12. The restrictions imposed by regulation 8 engage a number of articles under the European Convention on Human Rights: Articles 5 (rights to liberty); 6 (right to a fair trial); 8 (right to respect for home); 9 (freedom of religion); 11 (rights to assemble) and 14 (prohibition from discrimination). Accepting that these rights have been interfered with by the imposition of the restrictions and requirements, they have been justified on the basis that they are necessary for the protection of health and are proportionate.
13. In deciding whether to partially relax any restriction, which may discriminate against a certain group of people, particular attention will need to be paid to Article 14, this provides that the enjoyment of Convention rights must be secured without discrimination on any ground, whilst age is not specifically listed it will undoubtedly fall within the grounds covered. Article 14 is parasitic on other rights and is not a standalone right. Any relaxation of restrictions which favours one group of people over another will need to be objectively and reasonably justified<sup>1</sup> in order to be compliant with Convention rights, for example were the relaxation to allow a certain group to leave their homes for a specific purpose, but not another group, this would need to be justified given it will engage of Article 5 (right to liberty) and Article 11 (right to assemble).
14. The restrictions, requiring business closures and preventing people leaving their homes (for example preventing them taking advantage of a holiday they booked), engage Article 1 of the First Protocol (right to peaceful enjoyment of possessions), again the test be necessary to pursue a legitimate aim (protection of health) and be proportionate to that aim. In practice that reflects the test under the 1984 Act and the Regulations.

#### Equality Impact Assessment

15. The Welsh Ministers are bound by the public sector equality duty, set out in section 149 of the Equality Act 2010, which requires them in exercising functions to have due regard to the need (amongst other things) to eliminate discrimination, advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not. Given the reviews of the Regulations will be considering a number of factors, regard should be had to the effect of proposals on groups with protected characteristics by means of an equality impact assessment, of course accepting that the overriding consideration and key test will be on of whether or not a restriction can be relaxed without undermining public health through increased transmission of coronavirus.
16. This will be increasingly important as more discretion for decision-making becomes available in the event of a continuing fall in the transmission of the coronavirus and the need for certain measures potentially diminishes, or may be able to be relaxed, in the light of other safeguards becoming available.

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<sup>1</sup> See for example E.B. v France (Application no 43546/02)

When the initial restrictions and requirements were brought in by means of the principal Regulations, the choices were binary in nature given the very significant health risks being posed by the spread of the virus, however, decisions on the how to ease restrictions will inevitably be more nuanced requiring consideration of a range of factors, there is also the potential of choices favouring one sector of society or group of people more than others, which will need careful analysis from an equalities perspective.

17. It should be noted that many challenges arise on both ECHR and equalities grounds, and we are aware of a number of pre-action challenges being brought by disability groups in respect of a number of the restrictions currently imposed elsewhere in the UK. Therefore the need for clearly documented reasoning for decisions, and the justification for them will be necessary. At present we consider that the assessment of the equalities impact of recommendations is minimal, which renders any decision vulnerable in the event of a challenge. If the clear prevailing scientific and technical evidence, and the view of the CMO, is to maintain the status quo, that will mitigate this, but increasing the need for robust (and not simply general) assessment will become important. The courts have held that it “must be exercised in substance, with rigour, and with an open mind”<sup>2</sup>. Provided this is done, it is for the decision-maker to decide how much weight to be given to the factors informing the decision.

#### Lawfulness and rationality

18. A further challenge around exit related decisions could arise by means of judicial review, in particular that they are not (*Wednesbury*) reasonable, rational or lawful. This means that any decision to terminate a restriction or requirement must be based on clear scientific and technical advice, and also made in accordance with the law (i.e. applying the test referred to in paragraph 3 above). Other considerations which inform a key decision, as opposed to informing a range of potential choices which in health terms will be neutral, will render such a decision to a medium to high risk of successful challenge, were one to be brought. However, other consideration of other broader social, economic and environmental factors will form part of the wider consideration of the recovery programme, as well as the ongoing proportionality of measures as circumstances change.

#### Legitimate expectation

19. Counter to that is the risk of challenge based on legitimate expectation, in all likelihood from businesses in light of the principles for exit as outlined in the framework for recovery, in particular of the economic benefit of the measure (presumably in this context measure means step to lift a restriction), which could imply that economic considerations will be a central aspect of the decision-making process. On this we would argue that the representation

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<sup>2</sup> R (Brown) v. Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin)

relied on must be a lawful one. In the specific context of whether or not to lift a restriction, that must be based on the statutory test as laid out in the 1984 Act and the Regulations and any other considerations will not be lawful, save where they can be factored in alongside and complementary to that medical and scientific advice.

### **Lifting Wales out of the Coronavirus Pandemic – a framework for recovery**

20. The Welsh Government has published a document, Lifting Wales out of the Coronavirus Pandemic – a framework for recovery, which sets a framework for lifting Wales out of the Coronavirus Pandemic. The framework is based on 3 pillars:

- a. The measures and evidence by which the current infection level and transmission rates will be judged;
- b. The principles by which the measures to ease the restrictions will be examined;
- c. How the public health surveillance and response system will enable the virus to be tracked as restrictions are eased.

21. The First Pillar (Measures and evidence) sets out medical and scientific tests, which clearly feed into the consideration of whether restrictions and requirements remain necessary to control the transmission of coronavirus.

22. The Second Pillar (Principles to evaluate changes to the restrictions) contains a seven different 'principles' which it is stated will be used to evaluate options, in order to test risk and potential benefit:

- a. To what extent would easing a restriction have a negative effect on containing the virus?
- b. Is the measure at the low end of risk of further infection?
- c. How can it be monitored and enforced?
- d. Is it capable of being rapidly reversed if it has unintended consequences?
- e. It is a measure of relatively high positive economic benefit?
- f. Does it have a high impact on social and psychological well-being?
- g. Does the measure have a high positive equality impact?

23. A number of these issues go to the core legal tests of whether or not restrictions and requirements are necessary, however, others refer to statutory duties, particularly in the public sector equality duty, which for reasons outlined above are important considerations both around proportionality of measures, particularly in the context of falling levels of transmission and consideration of lifting measures within the wider context of recovery. They will also increasingly help to inform choices as more potential options become available to Ministers for consideration, with relatively neutral differences in health outcomes.

#### Well-being of Future Generations Act

24. In addition to human rights and Equality Act requirements as considered above, the Welsh Ministers are subject to a range of other duties attaching to their decision-making functions. Of particular note in this regard is the Well-being of Future Generations (Wales) Act 2015, section 3 of which imposes the sustainable development duty. This requires, amongst other matters, to take all reasonable steps to meet the well-being objectives (currently set within Prosperity for All). These objectives are designed to maximise the contribution to the well-being goals, which include a more prosperous Wales, a healthier Wales and a more equal Wales. As such they may inform the choice of various options which may arise, and they will be important in framing longer term policy, albeit they must be balanced against the fundamental statutory tests within the public health legislation, which has been used as the basis to respond to the pandemic, and which will be the principal legal determining factor for decisions to terminate or amend restrictions and requirements imposed by the Regulations.

25. Consideration of factors, other than then necessity for control coronavirus transmission and proportionality, in deciding whether or not to lift a requirement or restriction could leave the Welsh Ministers at risk in the event of challenge. In particular, if restrictions were lifted, for example, based on economic benefit considerations, and people were subsequently to contract the virus based on that decision, that could open the Welsh Ministers to claims that the lifting of the restrictions were unlawful (not based on the statutory test) with claimants seeking damages.

26. Economic considerations are important in the wider consideration of the future of Wales, and form part of the greater consideration of the overall programme of transition from the pandemic, for example socio-economic hardship arising from the effects of lockdown are acknowledged as giving rise to adverse health issues, which Ministers will wish to weigh in the decision-taking, but from a legal perspective they should be exercised at a more peripheral level to the core decision-making process.