

Proper decision making based on scientific and medical evidence and legal advice

- The Welsh Ministers have extraordinarily wide-ranging powers under the Public Health (Control of Disease) Act 1984.
- The recent use of powers of this kind is unprecedented in peacetime – decisions to impose and to lift restrictions using the powers are probably the most important decisions Ministers will ever make.
- These decisions will be closely scrutinised (now and in the future) most basically because of their impact on the number of people dying in Wales.
- There is also more likelihood of legal challenge as time goes on.
- Proper use of the powers depends upon—
 - there being a clear public health purpose for restrictions imposed,
 - the imposition of restrictions being proportionate to that they seek to achieve, and
 - (from a general public law perspective) the restrictions imposed being rational.
- We have been concerned for some time—
 - that the decision making process does not properly and formally reflect these legal requirements, and
 - that the information provided to Ministers does not sufficiently clearly articulate the scientific and other information to enable them to properly assess the public health purpose and the proportionality of the restrictions (i.e. that they cannot fulfil the legal requirement because of the opacity and complexity of the information provided).
- Assessing the public health purpose, proportionality and rationality requires an understanding of a number of inter-related factors including—
 - the rate of reproduction (R) of coronavirus;
 - statistical analysis of the number of cases of coronavirus and the number of deaths from coronavirus;
 - scientific advice on how coronavirus spreads;
 - an assessment of the capacity of the NHS;
 - the impact of restrictions on wider public health problems and on society and the economy more generally;
 - the equality impact.

- In consequence we produced advice on the legal requirements which included a process for ensuring that the legal requirements would be properly assessed based on all relevant and available scientific and medical evidence and advice.
- This involves following a four step process (set out in full in the Annex) which reflects the legal framework, the First Minister's "7 tests" and the "4 public health harms":

STEP 1 ASSESS IMPACT ON CONTAINING CORONAVIRUS

**STEP 2 ASSESS POSSIBLE MITIGATION OF NEGATIVE IMPACT ON
CONTAINING CORONAVIRUS**

STEP 3 ASSESS IMPACT ON GENERAL PUBLIC HEALTH

STEP 4 ASSESS OTHER SOCIAL, ECONOMIC AND ENVIRONMENTAL IMPACTS

- Since developing this we have discovered that a very similar decision making process has been adopted in Northern Ireland.
- For reasons that are not totally clear (because we don't understand them), those responsible for collating advice to Ministers on easing restrictions are unwilling to adopt this process. We believe this is based on the following:
 - a distinction is being drawn between the "regulatory review" and the "21 day review" which is apparently a review of lockdown "in the round"
 - it is said that because the 21 day review looks at lockdown "in the round" the "legal" decision making process we proposed is inadequate;
 - it is believed that the legal decision making process can only consider restrictions in isolation and can only consider those changes that "do not require balancing against competing easements";
 - it is said that "...decisions on coming out of lockdown are not simply a technical legal exercise" and "it is not possible to isolate the purely legal restrictions and assess them on their own".
 - It is argued that the legal decision making process can't take into account a variety of "non-legislative actions" that can have a material impact on the degree of threat to public health (e.g. public messaging, policy choices) and also affect the proportionality of the regulatory restrictions in turn."
- We disagree with this on the basis that everything said is either incorrect or an inaccurate reflection of the decision making process we proposed:
 - the "21 day review" derives from the Regulations, it is an assessment of whether the restrictions imposed continue to have a public health purpose and are proportionate;
 - even if the 21 day review does purport to consider the lockdown "in the round" (whatever that means) this is not a reason for not following the decision making process we advise;
 - this is partly because it has to be done and partly because the decision making process (in assessing the public health purpose and proportionality of

the restrictions) must obviously take into account other factors (e.g. whether schools reopen);

- “lockdown” *is* a legal exercise, so decisions on coming out of lockdown *is* a “technical legal exercise”;
- it *is* possible to isolate the “purely legal restrictions”, in fact it is legally required;
- in addition the legal decision making process *does* envisage considering the cumulative effect of the restrictions (and indeed must if it is to be a meaningful process) and it does envisage balancing the effect of lifting the restrictions against other easements;
- non-legislative actions are again, obviously, to be taken into account in the decision making process we advise e.g. to assess the proportionality of a restriction you must assess alternatives (e.g. public massaging, policy choices).