

Legal Services Department

Considerations relevant to review and possible exit strategy

The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 (as amended)

Legislative Background

1. The Welsh Ministers are required by regulation 3(2) of the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 ("the Regulations") to *"review the need for restrictions and requirements imposed by these Regulations every 21 days, with the first review being carried out by 16 April 2020"*.
2. 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.***"
3. 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.
4. 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".

Considerations relevant to ongoing review and exit strategy

In carrying out the Review required by the Regulations and indeed formulating an exit strategy, 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.
5. 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. If it is considered that the restrictions and requirements, whether taken as a whole or considered separately, continue to be necessary and proportionate, they should remain in place. **If any or all of the requirements are not considered necessary, then they should be terminated by means of direction.** If any are no longer considered proportionate, they should either be terminated or amended to ensure that they are. It follows that the advice of the CMO and SAGE which lead Ministers to making the Regulation is relevant to the three week reviews, ongoing review (*see paragraph 8 below*) of the necessity for the restrictions and the formulation of any exit strategy (whether that be by a single direction or desired phased approach).

6. In the first Review, and on the basis that the Regulations continue in place, future reviews, on a three weekly cycle, will need to consider the same issues, which may lead to partial relaxation of specific restrictions or requirements. This will all need to be on the basis of CMO etc. advice as mentioned above.
7. Under regulation 3(4) a direction terminating a restriction or requirement may be exercised in relation to a specified business or service or a specified description of business or service, which could, subject to appropriate health advice, be exercised in relation to specified sectors.
8. It is also important to note the requirement of regulation 3(3) referred to above, which requires the Welsh Ministers to issue a direction terminating a restriction or requirement as soon as they consider that a particular restriction or requirement is no longer necessary. **This is not connected with the three weekly review process, but is rather is a wider, ongoing duty to keep the provisions of the Regulations under review,** requiring immediate action to relax restrictions or requirements if they are no longer considered to be necessary.

Other considerations

9. **Ministers' reasons for ending the Regulations in whole or in part will need to be firmly rooted in public health considerations** as required by the legislation as explained above. Whilst Ministers will doubtless have other considerations to take into account the primary consideration, for the purposes of the Regulations and exit needs to be "public health" linked to containing the spread and incidence of Coronavirus (as explored above) which of course was what drove the making and shaping of the Regulations. The other considerations that Ministers are likely to want to have regard to such as the economy and economic recovery, hardship etc. should not be the primary focus and Ministers need to take care to not stray from the public health considerations in coming to their final view or in making comments publicly on an appropriate exit strategy and stray into possible irrationality territory by giving those others factors greater consideration than the public health matters.

- 10. Each time an exit strategy or relevant part of a strategy is considered it will be relevant to weigh into the decision making process the views of the CMO etc. and have regard to that advice.** An exit strategy that departs from following such advice in whole or in part is likely to be more difficult to defend in any legal challenge in terms of reasonableness/irrationality. We are already aware of one challenge to legislation akin to the Regulations made in England currently making its way through the courts (though an application for an urgent hearing has been denied).
- 11.** Where Ministers consider an exit strategy that may be partial in the sense that it relates to sections of the community, say younger people or other categories of people, being allowed to move more freely than at present that will need to not only need to be clearly rational in terms of decision taking but will also need to be seen to be so. It will also need to be based on criteria or public health considerations that are defensible i.e. they will need to be based on empirical evidence which suggests that for public health reasons (as above) there is clear reasoning for taking such a step or steps that suggest a departure from the Regulations is required going forward. Also relevant to this will be issues about equality of treatment and the logic for treating different sectors of the population differently. It is not possible to comment on how those issues will need to be taken into account until the exact details of a proposed exit strategy are known. The Public Health Act is however clear that Ministers can legislate in relation to “*persons, things or premises*” therefore it is possible to consider categories of people or places for example forming part of a phased exit strategy if the public health evidence supports that.
- 12.** One other thing that Ministers may wish to take into account is not a legal issue per se but is about **possible unintended actions that could flow from different decision taking around exit strategy by the other nations.** For example if England decided to take action to lift the ban on people leaving the place where they live and that was not done at the same time in Wales it is possible to conceive that could lead to lots of people attempting to travel from England to Wales to holiday destinations.
- 13.** There is merit in Ministers therefore seeking to ensure that in so far as is possible the approach to exit is similar (even if not identical) to that in England in particular to avoid unintended consequences for public health in Wales that could be impacted by a different approach to relaxation. Given that the evidence from the CMO and SAGE is the same for all UK nations it is however likely that a difference of approach would be difficult to achieve unless of course the CMOs begin to diverge in their views across the four nations.
- 14.** Ministers may wish to note also that the European Commission has this week (8th April) adopted amongst other things a Recommendation to support Exit Strategies through mobile data and apps (see the [ec.europa.eu](https://ec.europa.eu/web-pages) web pages.) which may be relevant.

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