



Llywodraeth Cymru  
Welsh Government

**From:**

James Gerard  
Justice Policy Division

Name Redacted

**Cleared by:**

James Gerard

**Date:**

27 January 2021

## MINISTERIAL ADVICE

**For decision by:** First Minister

**Copied to:** Counsel General, Deputy Minister and Chief Whip

<b>Subject</b>	Single Justice Procedure and coronavirus related offences
<b>100 word summary</b>	The Attorney General's Office has advised that they will be making an SI on Friday 29 January to allow the use of the Single Justice Procedure for fines issued under Coronavirus Regulations. We have been asked if we would also want this to apply to fines under the Welsh Regulations.
<b>Timing</b>	A decision is required on 27 January.
<b>Recommendation</b>	The First Minister is asked to: <ol style="list-style-type: none"> <li>1. Decline the offer of including the Welsh Regulations in this SI, unless and until there is a compelling case made that such a designation is needed in Wales.</li> <li>2. Note the risk that, should such data be provided in the near future, we would be unable to act on it without the agreement of the UK Government to make a further SI.</li> </ol>
<b>Decision report</b>	This decision does not require a Decision Report.

## ADVICE

### Background

1. The UK Government has advised that at Covid (O) this week it was agreed that the Attorney General would, as was done last summer, make proceedings for offences set out in the English lockdown regulations “specified proceedings” in order that the police can prosecute them under the Single Justice Procedure. The purpose of this is to avoid extensive backlogs of non-payment of fines hearings.
2. The Attorney General has the power to make orders specifying proceedings for the purposes of section 3 of the Prosecution of Offences Act 1985 (“the 1985 Act”). If offences are specified in such an Order the CPS is not under a duty to take over proceedings when they are instigated by the police. Nevertheless the CPS can still take over the proceedings if they consider it appropriate to do so. There is a long list of offences that are already specified for the purposes of Section 3, they are generally either minor road traffic offences or minor public order offences such as littering or drunk and disorderly behaviour.
3. The UK Government proposes to specify offences under the English lockdown regulations. The CPS and the NPCC have agreed that once this has been done, proceedings for offences under the regulations will be handled by the police where the accused pleads guilty by post or does not respond (known as the Single Justice Procedure, or SJP). If the accused pleads not guilty or chooses to appear for whatever reason, the CPS will take over the proceedings.
4. In order for police forces in England to bring proceedings for these offences, England’s Chief Constables will be designated under the provision in the English Coronavirus Restrictions Regulations which states “proceedings for an offence under these Regulations may be brought by the Crown Prosecution Service and any person designated by the Secretary of State.”
5. When this approach was taken by the UK Government previously last May, the NPCC and CPS confirmed they would want to apply the same approach for Welsh forces, and you agreed to do so.
6. Police forces in Wales are able to bring proceedings for offences under the Welsh lockdown regulations. The designation you made on 26 May last year continued to have effect for each subsequent iteration of the Welsh Regulations (including the current ones). However, the authority to bring proceedings under the SJP was time limited, and so it lapsed last year. If a police force in Wales currently brings proceedings, those proceedings have to be taken over by the CPS. In order for the authority to use the SJP to be restored to Wales’s Chief Constables, offences under Welsh lockdown restrictions would need to be included in the Order being made by the Attorney General. This Order is expected to be made on Friday, so a decision has been requested on Wednesday if possible.

## Argument

7. We understand that police forces would welcome the ability to bring cases under the SJP once again. Our expectation is that this would also be supported by HM Courts and Tribunals Service (HMCTS) and by the Crown Prosecution Service (CPS) as it reduces operational pressures on all three of the above.
8. However, there are good reasons why the SJP is only available for limited types of cases. In principle, the SJP does not deny individuals accused of crimes the ability to contest their cases in open court, as when it has previously been adopted the practice has been that where individuals opt to contest the charges against them, the police hand the case over to the CPS.
9. In practice, though, we know that decisions on whether to issue Fixed Penalty Notices for Covid related offences very often hinge on police officers' views as to whether the accused had a reasonable excuse. Covid regulations are also complex and change frequently, especially when compared with the rules on traffic offences and littering where the SJP has traditionally been used. Legal Aid will not be available to those accused of Covid-related offences as they are non-custodial offences, and so it is likely that a significant proportion of those charged under Covid offences will not access legal advice before deciding on their plea or feel able to access legal representation. This will generate significant pressure for people to plead guilty even if they consider they had a reasonable excuse for their actions.
10. We are aware at least anecdotally from media reporting of offences being brought under the SJP (and convictions secured) where:
  - the conduct in question was not an offence at the time
  - police mistook guidance for law
  - the regulations cited were Welsh even though the offence was committed in England
  - fines were awarded which exceeded the maximum possible
  - incorrect paperwork had been submitted; or
  - police had failed to provide signed statements
11. While the involvement of the CPS in the case does not guarantee that any of the above will not happen, it is an important safeguard. Our recommendation is therefore that the SJP is not adopted unless and until it is demonstrated clearly that the consequences in Wales of failing to do so outweigh the risks of allowing the SJP to be used.
12. At present, we do not believe the data exists to make this judgement. We do not have recent figures on the numbers of outstanding unpaid FPNs in Wales, although in the past the proportion of FPNs in Wales that were unpaid were considerably lower than in England (36% compared to 53% in September). We do know that backlogs in Wales are currently very close to the level they were before the pandemic, which again is considerably lower than they were when the SJP was previously adopted – and is a contrast to England where the backlog remains around 25% higher than at the start of the pandemic.

13. The fundamental challenge here arises from the fact that we are not being asked to act on the basis of an evidenced request from the operational bodies of the justice system, nor (because of the current devolution settlement) do we have our own access to the necessary evidence to make judgements for ourselves. We were also not given notice that this issue was under consideration, so were unable to request evidenced views from justice system agencies until this week (we have now done so, but they have not yet been able to provide us with meaningful data).
14. We hope to receive some of this outstanding information imminently, which will allow a more informed decision to be made about whether there is a need in Wales to authorise the use of the SJP as in England. We have asked whether there is a prospect of a slight delay in making the SI to accommodate the possible receipt of that data, but at present we do not have any indication that this would be possible.

## Risks

15. As stated above, the preference of the police is to allow the use of the SJP, and we expect this to be the preference of HMCTS and the CPS as well. It is likely therefore that if we did not agree to the use of the SJP, the Welsh Government will come under some pressure to reconsider its decision not to allow the use of the SJP in Wales, especially having done so earlier in the pandemic.
16. If we were then presented with a compelling case at a later date, but the offences had not been specified through this Order, it is not within devolved competence for Welsh ministers to specify them at a later date, so we would require the UK Government to agree to make a further SI. There is no obvious reason why they should not agree to do so, but of course this cannot be guaranteed.
17. On balance, though, we recommend accepting these risks, on the basis that under the current settlement it should be for the operational agencies to make the case and provide the evidence. We have expressed to them a willingness to consider any such evidenced case.
18. Demonstrating that we did not simply follow the same approach as the UK Government, and were alive to concerns about the operation of the Single Justice Procedure, does also potentially have benefits in terms of showing that the Welsh Government would take a different approach if justice were devolved. It would show that we were more responsive than the UK Government to the many issues raised by the likes of the House of Lords Constitution Committee about the way in which emergency legislation is being policed. It would therefore potentially be something to include in a publication about how the Welsh Government has exercised its justice functions.
19. Even if you do agree (either now or later) to the use of the SJP, it is also worth registering that it is an undesirable state of affairs for this to be needed, and reflects a chronic underfunding of the justice system over time, which allowed the large backlogs to develop in the courts in the first place.

**Annex 1: ASSURANCE AND COPY RECIPIENTS****CLEARANCE TRACKING**

Aspect	Tracking	Yes	No	N/A	Clearance no.
<b>Finance</b>	Financial implications over £50,000?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
	Cleared by Group Finance?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
	Cleared by Strategic Budgeting?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
	Cleared by Local Government Finance?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<b>Legal</b>	Legal issues?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
	Cleared by relevant lawyers?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<b>Governance</b>	Novel and contentious issues?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
	Cleared by Corporate Governance Centre of Excellence?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	

**DEPUTY DIRECTOR, STATEMENT OF ASSURANCE**

In clearing this MA, I confirm that I, James Gerard have quality assured this advice, ensuring it is provided on the basis of evidence, accurately presents the options and facts and I am accountable for the recommendations made

I am satisfied that the recommended decision or action, if agreed, would be lawful, affordable and comply with all relevant statutory obligations. Welsh Government policy priorities and cross portfolio implications have been fully considered in line with delivery of the government objectives.

I have fully considered the statement of assurance contained in the MA guidance to ensure all relevant considerations have been taken into account and that the actions and decisions take account of regularity, propriety and value for money.

**COPY LIST**

All mandatory copy recipients (as indicated in the guidance). Additional copy recipients specifically interested in this advice:

- Reg Kilpatrick

Name Redacted

- Terry Kowal
- Dylan Hughes

- Tom Smithson

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- Neil Buffin

- Liz Lalley

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- Helen Lentle

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