

Welsh Government decision making process for easing coronavirus restrictions

Legal context

Restrictions have been imposed in Wales for the purpose of containing coronavirus by regulations made under Part 2A of the **Public Health (Control of Disease) Act 1984**. Decisions to lift the restrictions must also be made within that statutory framework.

Regulations under Part 2A of the 1984 Act may only make provision “for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination”. In addition, the Regulations can only impose restrictions “in the event of, or in response to, a threat to public health”. Finally, any restriction imposed by the Regulations must be “proportionate to what is sought to be achieved by imposing it” at the time when the Regulations are made¹.

These conditions also apply to any amendments to the Regulations.

In addition, Regulation 3(2) of the **Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020** provides:

“The Welsh Ministers must review the need for restrictions and requirements imposed by these Regulations, and whether those restrictions and requirements are proportionate to what the Welsh Ministers seek to achieve by them, every 21 days, with the first review being carried out by 16 April 2020.”

So the imposition of a restriction has to satisfy the following conditions—

- 1. The restriction must be imposed for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination.**
- 2. There must be a threat to public health.**
- 3. The restriction has to be a proportionate thing to do considering what the restriction is intended to achieve.**

Any amendment of a restriction must also meet those conditions (e.g. the restriction as amended must also be proportionate to what is sought to be achieved by the amended restriction).

A restriction **must** be lifted when no longer **proportionate** to prevent etc. the spread of coronavirus. The decision making process **must**, therefore, be **based on the assessment set out in the steps below and cannot be based on considerations unrelated to that assessment**.

The steps describe what must be considered before a decision is taken by Ministers. They set out an assessment process that needs to be completed to consider the impact of

¹ Note also that if the Regulations impose restrictions defined in the Act as “special restrictions”, the threat to public health must be considered to be “serious and imminent”. In Wales we do not consider the Regulations to have imposed special restrictions as defined in the Act but UK Government lawyers have taken a different view. Nevertheless the threat to public health is considered to be serious and imminent and the Welsh Ministers declared it as such for the purposes of using certain powers under the Coronavirus Act 2020, following advice from the Chief Medical Officer for Wales.

restrictions both generally and individually (and in whole or in part), as well as any differential impact of restrictions on particular sectors, demographics or geographical areas². Decisions on easing any individual restriction, therefore, cannot be taken in isolation.

Decision making process

Step 1 involves an assessment of the extent to which restrictions imposed to contain coronavirus remain proportionate. It is an assessment, therefore, of—

- whether there is an ongoing **threat to public health** from coronavirus, and
- whether the restrictions continue to have a **public health purpose** (i.e. preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination.)

Due to the nature of the legal power, and the gravity of the public health emergency, **Step 1** is the most fundamental assessment that needs to be made, and the subsequent assessments at steps 2, 3, and 4 are set against that context and should be done by reference to step 1.

Steps 2 and 3 involve an assessment of whether restrictions are **proportionate on public health grounds**. The extent to which they are proportionate involves an assessment of—

- the extent to which the negative effect on containing coronavirus of lifting a restriction can be **mitigated** by alternative actions;
- the extent to which the positive effect on containing coronavirus may be **outweighed** by other, negative, effects on public health more generally.

Steps 1, 2 and 3 form the basis for the Ministerial decision that needs to be taken.

However, Ministers also need to take account of **Step 4** which is an assessment of (1) the extent to which a restriction may be disproportionate due to its wider impact on social, economic and environmental wellbeing and (2) the public sector equality duty.

If the answer to the assessment undertaken under these steps that is restrictions (or a restriction) no longer have a public health purpose or have a disproportionate impact, they **must be lifted**.

If however, they remain a proportionate response to a threat to public health, they should **continue in place**.

² Regulation 4 provides as follows:

“The Welsh Ministers may, if they consider it appropriate to do so having regard to the need to prevent, protect against, control or provide a public health response to the incidence or spread of infection in Wales with the coronavirus, publish a direction terminating a requirement or restriction in relation to—

(a) a specified business or service or a specified description of business or service;
(b) a specified description of persons;
(c) a specified part of Wales.”

STEP 1 ASSESS IMPACT ON CONTAINING CORONAVIRUS

Step 1 involves assessing the impact of maintaining or easing a restriction (1) on containing coronavirus.

- Can the impact of easing a restriction on containing coronavirus be adequately quantified?
- If so, what is the estimated reproduction rate (R) of the virus before the decision is made to ease a restriction and what impact does epidemiological modelling suggest easing the restriction would have on R?
- What is the estimated impact of any increase in R caused by easing a restriction?
- Can the impact of easing a restriction be adequately monitored?
- Is the risk of significant negative impact on containing the virus low?
- Could easing a restriction have a negative effect on other restrictions that remain in place?
- Could it affect enforcement of other restrictions?
- Could it weaken those restrictions by giving a perception of normality?
- Could a decision to ease a restriction be quickly reversed if it has unintended consequences? What negative affect could reversing a decision have?
- What cumulative effect would easing restrictions have, including impact of other related event e.g. if schools re-opened?

List of advice and evidence that may be relevant to answering these questions:

Reproduction rate (R)

Statistical analysis of number of cases and deaths

SAGE scientific advice on transmission of coronavirus

Use of “circuit-breaker” system which applies trigger points if cases and deaths rise to a certain number or proportion

STEP 2 ASSESS MITIGATION OF NEGATIVE IMPACT ON CONTAINING CORONAVIRUS

Step 2 involves assessing the extent to which a possible negative impact on containing coronavirus of easing a restriction could be mitigated by other actions or by healthcare.

(1) EFFECTIVENESS AND CAPACITY OF TESTING AND TRACING SYSTEMS

- What is our capacity for testing and tracing coronavirus?
- To what extent could that capacity be expanded?
- To what extent could testing and tracing at existing or expanded capacity help contain coronavirus?
- To what extent would it mitigate the negative effect of easing a restriction?

(2) ALTERNATIVE RESTRICTIONS OR ALTERNATIVES TO RESTRICTIONS

- Could use be made of alternative powers under Schedule 22 to the Coronavirus Act 2020 to impose specific restrictions by Direction on particular establishments or areas to deal with ‘hotspots’?

- Should use be made of powers under Schedule 21 to the Coronavirus Act 2020 or under section 45I of the 1984 Act which could be used to impose legal obligations on persons to self-isolate?
- Alternatively could the behaviours needed to contain the virus, such as social distancing and self-isolating when exhibiting symptoms and/or having been tested positive, be achieved through public messaging and consensus – not legal requirements?

(3) AVAILABILITY OF PERSONAL PROTECTIVE EQUIPMENT

- What is our PPE capacity for the NHS and care services?
- What is our PPE capacity for use in other circumstances e.g. in other work places or by the public generally?
- To what extent could that capacity be expanded?
- To what extent could PPE at existing or expanded capacity help contain coronavirus?
- To what extent would it mitigate the negative effect of easing a restriction?

(4) CAPACITY OF WELSH NHS

- What is the capacity of the Welsh NHS to deal with any negative impact on containing coronavirus?
- To what extent is health care effective in treating covid-19?

List of advice and evidence that may be relevant to answering these questions:

Availability and effectiveness of testing and tracing system
Availability and effectiveness of PPE
Behavioural science analysis
Legal analysis of powers
Assessment of capacity of NHS if number of cases were to increase

STEP 3 ASSESS IMPACT ON GENERAL PUBLIC HEALTH

Although there may be good reasons (based on the assessments undertaken under Steps 1 and 2) to maintain restrictions in order to contain the coronavirus, the positive effect may not be proportionate if there is a negative effect on public health more generally. Step 3, therefore, involves an assessment of the detrimental effect restrictions may have on health generally.

- What positive effect could easing a restriction have on public health more generally (e.g. better mental health, enhanced treatment and monitoring of non-coronavirus related illness, more exercise)?
- Could easing a restriction have a positive effect on public health generally due to it increasing social, economic or environmental wellbeing?
- Can this positive effect be adequately quantified?
- If so, does the positive impact of easing a restriction on general public health outweigh any negative effect on containing coronavirus?
- What is the capacity of the NHS to resume routine health services?

- Could expansion of health services or care services increase the spread of coronavirus?

List of advice and evidence that may be relevant to answering these questions:

Analysis of effect of restrictions on other forms of illness

Analysis of effect of lack of capacity of NHS to treat other forms of illness

Analysis of effect on mental health and well-being

STEP 4 ASSESS OTHER SOCIAL, ECONOMIC AND ENVIRONMENTAL IMPACTS

Similarly, although the decision making process must be predominantly based on public health grounds, the question of whether a restriction is proportionate can be also be influenced by more a general detrimental effect on wellbeing or equality. Step 4, therefore, involves an assessment of whether the restrictions have such a disproportionately detrimental effect on social, economic and environmental wellbeing (essentially our Wellbeing of Future Generation (Wales) Act 2015 duties) that the overall effect on society is negative. The Welsh Ministers are under a statutory duty to have regard to the need to:

- eliminate discrimination, harassment, victimisation prohibited by the Equalities Act;
- advance equality of opportunity between persons sharing a ‘protected characteristic³’ and persons who do not share it;
- foster good relations between persons with a protected characteristic and persons without it.

(1) WELLBEING

- What positive effect could easing a restriction have on social well-being?
 - Could it have a detrimental effect on vulnerable or marginalised groups?
 - Could it provide an opportunities for widening participation and a more inclusive society?
 - More generally could it be socially divisive or cohesive?
- What positive effect could easing a restriction have on the economy?
 - Could the economic benefit be consistent with our commitments to a more prosperous, equal and greener Wales?
 - Could the economic benefit be sectoral or narrow in its scope?
 - Could the economic benefit assist longer term economic recovery?
- What positive effect could easing a restriction have on the environment?
 - Could the environmental benefit be consistent with our commitments to a more prosperous, equal and greener Wales?

³ Age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

- Could the environmental benefit contribute to our longer term environmental goals and targets?
- Can these positive effects be adequately quantified?

(2) EQUALITIES

- Could the impact of a restriction have a negative or positive impact on one group who share protected characteristics and those who do not?
- Does the exercise of powers under the 1984 Act help to:
 - eliminate unlawful discrimination, harassment or victimisation,
 - advance equality of opportunity, or
 - foster good relations,between those who share a protected characteristic and those who do not?
- If the policy is likely to have an adverse impact on any of the protected groups, what is the reason and what steps could be taken to remove or mitigate impact? If no steps can be taken, how is that justified?

List of advice and evidence that may be relevant to answering these questions:

*Advice of Chief Economist
Equality impact assessment
Cross-government policy analysis*

MINISTERIAL DECISION

Advising on the extent to which restrictions respond to a public health threat is a matter for the **Chief Medical Officer for Wales**⁴ (Dr. Frank Atherton). In so far as the public health impact is dependent on broader scientific considerations, advice will be provided by the **Chief Scientific Adviser for Health** (Dr Rob Orford).

Together with the **Minister for Health and Social Services** they will provide advice on Steps 1 and 2 informed by information and advice received from the Scientific Advisory Group for Emergencies (SAGE) and the other UK Chief Medical Officers. Steps 1 and 2 essentially determine the extent to which restrictions are needed to contain coronavirus and the extent to which they could be mitigated by alternative actions.

It will also be their role to advise on Step 3, the impact restrictions have on public health more generally. They will also provide their opinion as to the extent to which restrictions remain proportionate in light of the assessment on wellbeing undertaken by other Ministers and officials at Step 4.

But ultimately the decision as to whether restrictions should continue or be lifted is a matter (informed by these assessments and by the legal advice of the **Counsel General**) for the **First Minister**.

List of key officials for the purposes of completing Steps 1 to 4:

*Chief Medical Officer for Wales
Chief Scientific Officer for Health
Chief Executive of Welsh NHS and DG HSC
All other DGs
Chief Statistician
Reg Kilpatrick [role]
Director of Legal Services
First Legislative Counsel
Chief Economist
Tim Render [role]
Neil Surman [role]
James Gerard [role]*

⁴ Consultation with the CMO is a formal requirement under the Coronavirus Act 2020, but not under the 1984 Act. In practice however the advice of the CMO forms the basis for assessing the public health purpose of the restrictions imposed.