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MEMORANDUM E (20) 57 (C)

FROM: ROBIN SWANN MLA
MINISTER FOR HEALTH

DATE: 17 April 2020

TO: EXECUTIVE COMMITTEE

**FINAL EXECUTIVE PAPER - AMENDMENTS TO THE HEALTH PROTECTION
(CORONAVIRUS, RESTRICTIONS) (NORTHERN IRELAND) REGULATIONS 2020**

Introduction

1. The above Regulations were made and came into operation on 28 March 2020. They are scheduled to be considered by the Assembly on 21 April 2020. Executive colleagues accepted the recommendation in paper E (20) 55 (C) on the required review of the Regulations on 15 April 2020.
2. The next review of the Regulations must be completed by 9 May 2020. In the meantime I propose to make amending Regulations in order to deal with a number of policy matters that have arisen; and to make a number of minor or technical amendments to clarify the effect of the provisions.
3. These proposals reflect consideration of proposals for amending Regulations in England and Wales (in so far as they have been made public); and new Regulations in Ireland. They also take into account the views of the PSNI on enforcement of the Regulations, representations from stakeholders LPP/LAP
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4. Subject to the agreement of Executive colleagues to the proposals outlined below, I will bring a draft of the amending Regulations to the Executive as soon as possible

Policy proposals

Access to churches for solitary prayer

5. The Regulations currently require places of worship to remain closed except for:
 - funerals;
 - to broadcast an act of worship; or

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- to provide essential voluntary or community services.
6. Archbishop Eamon Martin and Bishop Donal McKeown wrote to the First Minister and deputy First Minister on 3 April, asking that churches be permitted to open for acts of individual prayer, subject to adherence to social distancing precautions. They emphasised the particular significance of the tradition of individual prayer within the Roman Catholic Church. Whilst no other representations have been made, the leaders of some other denominations and faiths may hold similar views. Others may prefer a more precautionary approach, under which places of worship remain closed.
 7. I appreciate that, for many people, the opportunity to express their faith through personal prayer in a place of worship is particularly important at this time. This is especially so, given the ongoing need for restrictions on church services and funerals, which must add to the distress for families affected by the pandemic.
 8. In these circumstances, I recommend that the Regulations should be amended to permit places of worship to be open for individual acts of prayer only – there should be no relaxation on the restriction on gatherings. I should emphasise that this change would be permissive, and no place of worship would be obliged to open for individual prayer.

Access to burial grounds other than for funerals

9. At present, access to burial grounds for members of the public is restricted to funerals and burials. My Department has received a number of representations seeking a relaxation to permit, for example, family members to visit a grave.
10. There are a number of factors to be considered. On the one hand, granting access to any public place might lead to some degree of risk for visitors and anyone working at the burial ground. (This risk is viewed as relatively low, and manageable through engagement with churches and other stakeholders on observance of guidance on safe working practices, and communication with the public on the need for a common sense approach.)
11. On the other hand, there is a need to consider the mental health and well-being of bereaved persons (not just recently bereaved) through facilitating the social customs associated with the grieving and remembering process.
12. On balance, I am satisfied that the restriction can be lifted. As with the opening of churches, this would be permissive, providing flexibility for those responsible for burial grounds to open as and when they can manage access safely. The corresponding restriction in other jurisdictions is also likely to be removed.

Holiday accommodation – preparing for recovery

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13. The equivalent Regulations in Wales have been amended to permit businesses providing holiday accommodation to prepare for recovery, by taking future bookings by telephone, post or internet. This would be strictly at the proprietor's own risk, as the restrictions on the actual provision of such accommodation have not been removed (nor is there any firm timescale for doing so). Subject to that risk, the change may provide a modest benefit to the liquidity of such businesses through deposits or advance payments.
14. The tourism and hospitality sectors of the economy have been particularly badly affected by the pandemic. Recovery will be challenging for many businesses in these sectors, and there is a compelling argument to take all reasonable steps (however modest) to facilitate preparation for a return to business. In these circumstances, I recommend that a similar change should be made to the Northern Ireland Regulations. I am willing to consider extending this provision to other types of business if there is clear evidence of the need to do so.

Opening of livestock markets

15. The equivalent English and Welsh regulations are being amended, to clarify that livestock markets are excluded from the requirement to close '*auction houses*'. I understand that livestock markets in Northern Ireland closed voluntarily some weeks ago in order to develop a protocol to operate with appropriate social distancing precautions, but have now reopened.
16. Given the importance of protecting food supplies, and the need to ensure sustainability of the agri-food sector of the economy, I recommend that a similar change is made here, allowing markets to remain open for the sale of primestock, cull animals and store stock. In the meantime, officials will liaise with PSNI on the need to exercise discretion in relation to any enforcement action that was being considered prior to the change to the Regulations.

Garden centres

17. The Regulations require the closure (or requirement to reconfigure to '*delivery only*' mode) of most retail businesses. Exceptions currently include: homeware, building supplies, hardware stores, and agricultural supplies stores.
18. The delineation between some types of hardware stores and garden centres is not always precise, and this has resulted in calls for clarification or substantive amendment. The argument for permitting garden centres to open is threefold. Firstly, there is a need for demonstrable equity with large, mixed hardware stores. Secondly, social distancing may be able to be managed just as well (if not better) in many garden centres as it is in hardware stores, as much of the stock is often held outdoors. Thirdly, the availability of gardening supplies helps to support the '*stay at home*' message by allowing people to engage in healthy and productive outdoor activity.

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19. The counter-argument is based on safety, and the risk that a trip to a garden centre can be as much a recreational activity (resulting in gatherings) as a transactional one. A further distinction could be drawn on the basis that garden centres supply goods which are, by nature, largely non-essential, and many of which are amenable to a '*delivery only*' mode of business. By contrast, it may be argued that homeware or hardware stores supply some items that are essential, and for which an urgent need may arise, for example, to repair damage to property, or replace a cooking utensil. Such urgent needs may not be amenable to the delays involved in '*delivery only*' provision.
20. It is understood that, in England and Wales, consideration is being given to addressing this through guidance, which will set out more clearly the types of goods that can be sold in mixed stores.
21. A final factor to consider is that the engagement forum established by Minister Dodds has not included garden centres in its recommended list of essential sectors.
22. Taking all of the above into account, I recommend that garden centres remain subject to a requirement to close, or to operate on a '*delivery only*' basis for the time being.

Enforcement of 2 metre distancing

23. The equivalent Welsh Regulations have been amended to promote adherence to the observance of a 2 metre separation distance in the workplace. This involves, in some instances, a strict duty to maintain such separation, and in other instances a duty to '*have regard*' to guidance on social distancing.
24. My Department has carefully considered the merits of both approaches, with the benefit of legal advice.
25. Firstly, in relation to a strict requirement, the conclusion is that the practical difficulties of enforcement would mean that such a duty would be of very limited value. The preferred approach is to offer clear, practical guidance to businesses, such as that already provided by the Public Health Agency and the Health and Safety Executive; and the draft code of practice on safe working drawn up by the engagement forum established by Minister Dodds.
26. My Department also considered the need for a duty to '*have regard*' to such guidance. However, that also raises practical enforcement difficulties.

27. A decision would have to be made as to whether or not to make a criminal offence of non-compliance with such a duty.

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28. The potential consequence of that, is that one or more failed prosecutions would be likely to attract adverse publicity, and prejudice the operation of the Regulations. If, on the other hand, non-compliance with guidance is not to be made an offence, then it is not clear what would be achieved by inserting a duty to comply, other than potentially causing confusion amongst the public. This is particularly important in the current situation where there is significant debate on, and calls for clarity of, the scope of police enforcement powers.
29. A third factor is that there already exists a legislative structure that could be applied to this situation. The applicable legislation (the Health & Safety at Work (Northern Ireland) Order 1978 and the Management of Health & Safety in the Workplace Regulations (Northern Ireland) 2000) already impose enforceable duties on employers and the self-employed to assess risk in the workplace and to take steps to minimise those risks. Such steps include, but are not limited to, adapting the work undertaken, choosing appropriate work equipment and production methods, etc. The duties also extend to people who are not employees (e.g. customers in a shop).
30. Taking all of the above into account, my recommendation is that the Regulations should not be amended to include the Welsh model relating to a 2m separation in the workplace.

Recycling centres

31. My Department received a request from Belfast City Council to amend the Regulations to permit the re-opening of civic amenity sites (recycling centres), reflecting the apparent difficulty faced by that Council in maintaining domestic waste collections.
32. I am not in favour of re-opening the centres at present, for three reasons.
33. Firstly, the Council has not set out a clear rationale for the necessity of such a measure.
34. Secondly, there are practical concerns over how such centres could operate safely, both with regard to social distancing for customers and staff, and for the management of vehicle queuing, given the likely need to limit access strictly.
35. Thirdly, support for such a change appears to vary from Council to Council, with PSNI and SOLACE having expressed opposition.

¹ Reflecting the general principle that criminal offences should generally be set out clearly in the statute itself, rather than in guidance that requires interpretation.

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36. However, I recognise that we need to prepare for the re-opening of such centres when it is necessary - and safe – to do so. I propose to provide for this by broadening the range of '*critical public services*'; access to which constitutes a reasonable excuse for leaving one's home.

37. At present, '*critical public services*' includes:

- childcare or educational facilities;
- social care services;
- services provided by the Department for Communities; and
- services provided to victims (such as victims of crime).

38. I propose to broaden this to include any services provided by district councils or any Northern Ireland Department.

39. This would mean that Councils could re-open the centres when the time is right, following careful consideration of operational safety, and liaison with the PSNI on traffic management. There would also need to be careful messaging to the public on common sense behaviour, to ensure that the centres are not inundated (a particular risk if only some centres are open).

40. This change also will help to ensure that Departments and Councils can provide a flexible response to the Covid-19 outbreak. It would also provide further reassurance on their ability to deal with any other concurrent contingencies (a point raised previously by Minister Mallon).

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the PSNI has **not** concluded that all travel to exercise is prohibited.

47. Rather, the PSNI is actively applying a '*reasonableness test*' to determine whether such travel can be justified in any given instance. This is with a view to preventing travel for leisure purposes (e.g. to a beach or coastal town) being presented as travel for the purpose of exercise.

48. This is reflected in a reasonable and pragmatic approach to enforcement. I am assured that the PSNI would recognise, for example, the '*reasonable excuse*' of a household with young children or an elderly relative driving a short distance to a safe space in order to take exercise; or the particular needs of people with disabilities.

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50. I have carefully considered this suggestion, but I conclude that the approach currently reflected in our Regulations is preferable, for a number of reasons.

51. Firstly, a specified travel distance may have the apparent attraction of simplicity. However, it would be difficult to determine and justify any particular limit on an objective basis. Why, for example, would a limit of 2km be chosen as opposed to 3km? Could a single limit be applied for both urban and rural situations? I believe that most citizens are likely to support a pragmatic approach based on tests of reasonableness and necessity, rather than an arbitrary travel distance which may be difficult to justify on public health grounds.

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52. Secondly, the apparent simplicity of such a limit would be negated by the complexity that would be added to enforcement, stemming from the need to verify travel distances.

53. Thirdly, the introduction of a specified travel distance in respect of one activity is likely to raise questions about specified travel distances for other activities. This could give rise to policy challenges in relation to an 'acceptable' travel distance for everything from travelling to work, travelling to attend a funeral, or travelling to purchase essential items that are in short supply. Given that the success of these measures depends on public acceptability of their reasonableness, further specification of travel limits is not an approach that commends itself to me.

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55. In these circumstances, I am not minded to amend the Regulations to introduce a distance limit on driving in order to take exercise.

Recommendation / Decision sought

56. I recommend that the Executive agrees that my Department, in exercise of the power in Section 25Q of the Public Health Act (Northern Ireland) Act 1967, should make Regulations to amend the Health Protection (Coronavirus, Restrictions) (Northern Ireland) Regulations 2020, as described in this paper.

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