



The Scottish Parliament
Pàrlamaid na h-Alba

Jeane Freeman
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The Scottish Government
St. Andrew's House
Edinburgh
EH1 3DG

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cc. Michael Russell MSP

Dear Jeane & Michael

The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020

I note that the above Regulations that came into force on 26 March 2020 and passed by Parliament on 1 April 2020 are to be extended following yesterday's review. I do not for a minute doubt that that is the correct course of action at this time.

The Regulations of course represent the legal basis for the restrictions that are imposed and sit separate (though in support of) the more general Government Stay at Home guidance. The Regulations also provide the sole basis for law enforcement in relation particularly to personal movement and the closure of businesses.

You will be aware that the Regulations have never been subject to any Parliamentary scrutiny and yet they impose unprecedented restrictions on our liberty and that any breach risks a criminal record.

I have been discussing the details of the regulations with constituents and colleagues and it is clear to me that there is a case for reviewing the Regulations to ensure that the measures are proportionate and provide no more restrictions than are absolutely necessary to deal with the Covid-19 public health emergency.

For example, Regulation 8(5) provides a non-exhaustive list of reasonable excuses that can provide a defence to what would otherwise be an offence of leaving one's home under Regulation 5. It is left to the Police to interpret what a reasonable excuse might be but those listed under Regulation 8(5) are statutory defences and includes 8(5)(b) "to take exercise, either alone or with other members of their household".

As you will be well aware, it is important that people take good care of both their physical and mental health and I appreciate the efforts being undertaken by the Scottish Government to raise awareness in particularly of mental health. But in this

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context, Regulation 8(5)(b) only applies to physical exercise as defined by any dictionary. I have heard reports of people being asked to move on by the Police who were birdwatching by an urban river, who were taking a rest from physical exercise or who were simply lying on the ground watching the clouds float by. This has happened because the Police (quite correctly) have judged that such activities do not represent exercise.

But for many people faced with the stay at home rules, getting out for some fresh air, to listen to the birds and to stimulate and relax their minds is equally, if not more important, than taking physical exercise, important though that is as well. I mention this because it is an example of where amendments to the Regulations could be quite straightforwardly made to ensure that such activities as I have outlined are not regarded as criminal offences in the eyes of the law.

There is also a broader drafting question over the term “reasonable excuse”. An excuse is defined as a justification for doing something one should not otherwise be doing and as such has negative connotations. Is there not a case for amending this to a “legitimate reason” which frames it more positively?

Beyond the particular instance cited above there is also a broader question relating to businesses. The Regulations specify that certain types of business must by law close and that others by law may remain open. But for all other businesses, there is no legal duty to close notwithstanding the fact that Government Guidance says they should.

I am aware of a number of businesses that are making plans to re-open in the coming weeks. Willie Rennie MSP cited a couple in FMQs yesterday. The Regulations place a statutory duty under Regulation 4 on businesses that can remain open under Part 3 of Schedule 1 to observe social distancing. However, no equivalent duty is placed on any business that may choose to re-open but which is not prohibited from doing so. One would hope and expect that they would follow Government Guidance on the matter but there is a case for amending the Regulations to make it obligatory for them to do so.

The next review of the regulations is due by 7 May 2020.

Can I invite you to consider whether there should be any amendments made consistent with the over-riding public health imperative? The above instances are merely examples of what might be desirable.

Can I also ask if Ministers intend to undertake some limited consultation on the question given that no Parliamentary scrutiny has taken place nor has any



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opportunity been afforded to the public expected to comply with the Regulations to question their scope.

Neither of the above suggestions would preclude Scottish Ministers from renewing the Regulations in three weeks time if they felt it appropriate to do so but would enable such renewal to better reflect in law a set of rules that are as liberal as possible whilst being consistent with public health imperatives.

Best wishes

Yours sincerely,

Andy Wightman MSP