

EXPLANATORY MEMORANDUM TO
THE HEALTH PROTECTION (CORONAVIRUS, WEARING OF FACE COVERINGS) (ENGLAND) (AMENDMENT) REGULATIONS 2021

2021 No. 1400

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care (“DHSC”) and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument makes provision to take public health measures to ensure a proportionate and appropriate response to the public health risks posed by the spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in England which causes the disease COVID-19. The instrument makes this provision by expanding the legal requirement to wear face coverings when in shops, when using public transport and in transport hubs to more indoor settings, including, banks, places of worship, public areas in hotels and hostels, museums, in England, except in limited cases.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The instrument is made under the emergency procedure set out in section 45R of the Public Health (Control of Disease) Act 1984 (c. 22). The Regulations are made without a draft having been laid and approved by a resolution of each House of Parliament. It is the opinion of the Secretary of State that, by reason of urgency, it is necessary to make the Regulations without a draft being so laid and approved so that public health measures can be taken in response to the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) and the Omicron variant of concern (B.1.1.529).
- 3.2 The Regulations come into force just after midnight on 10 December 2021 and are published on www.legislation.gov.uk. The Regulations cease to have effect at the end of the period of 28 days beginning with the day on which the instrument is made unless, during that period, the instrument is approved by a resolution of each House of Parliament. The Regulations will expire at the end of 26 January 2022.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

- 5.1 Maggie Throup, The Parliamentary under Secretary of State for Vaccines and Public Health, has made the following statement regarding Human Rights:

“In my view the provisions of The Health Protection (Coronavirus, Wearing of Face Coverings) (England) (Amendment) Regulations 2021 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Part 2A of the Public Health (Control of Disease) Act 1984 (“the 1984 Act”), provides a legal basis for protecting the public from threats arising from infectious disease or contamination, and includes powers to impose restrictions or requirements on people, and in relation to things and premises.
- 6.2 Section 45C of the 1984 Act provides a power for the appropriate Minister to make regulations to prevent, protect against, control or provide a public health response to the incidence or spread of infection or contamination. The threat can come from outside the country.
- 6.3 This instrument is made under section 45C to support an effective response to reduce public health risks posed by the incidence and spread of SARS-CoV-2 and the Omicron variant of concern (B.1.1.529). It amends the Health Protection (Coronavirus, Wearing of Face Coverings) (England) Regulations 2021 SI 2021/1340 (the Principal Regulations).
- 6.4 The Health Protection (Coronavirus, Wearing of Face Coverings) (England) (Amendment) Regulations 2021 (the “Face Covering Regulations (Amended)”) require members of the public to wear a face covering when on a “public transport service”, and in a “relevant place”, which includes a “transport hub”. ‘Public transport service’ and ‘public transport vehicle’ are defined in regulation 2 of the Principal Regulations and the face covering requirements apply to any part of a public transport vehicle, which is indoors, with reference to regulation 4(3)(g) of the Principal Regulations; a relevant place means any of the premises or parts of premises listed in part 1 of schedule 1 which are indoors; and a transport hub, as defined in regulation 2(4).
- 6.5 A “relevant place” includes shops, shopping centres, banks, post offices, places of worship, crematoria and burial ground chapels, community centres, public areas in hotels and hostels, concert halls, exhibition halls, conference centres and other public halls, cinemas, museums, galleries, aquariums, zoos and visitor farms and other tourist, heritage or cultural sites, bingo halls, public libraries and reading rooms, casinos, theatres, polling stations, play and soft play areas, snooker and pool halls, amusement arcades and adult gaming centres, games and recreation venues, skating rinks, circuses, theme parks, fairgrounds, funfairs, adventure parks, indoor areas at sports stadiums, sexual entertainment venues, and cars or small vans during a driving lesson or test delivered by an ADI or DVSA examiner, or during any HGV test or lesson or driving theory test.
- 6.6 Members of the public are required to wear a face covering indoors when using a public transport service. This includes on buses, trains, private hire vehicles, taxis, the London Underground, trams, aircraft and water taxis. It does not include school transport that is being used solely for that purpose, or cruise ships.
- 6.7 Members of the public are required to wear a face covering when they are in a transport hub, which is any premises used as a place from or to which a public transport service operates, The requirement only applies to areas that are indoors and open to the public.

- 6.8 A number of premises are excluded from the requirement to wear a face covering and are therefore not included. This includes hospitality settings, gyms and exercise facilities and nightlife settings, such as nightclubs. Places where face coverings are not required are listed in Part 2 of Schedule 1.
- 6.9 Regulation 3(1) of the Principal Regulations sets out the requirement to wear a face covering in a relevant place, unless a relevant exemption applies for a gathering under Schedule 2. Regulation 4(1) of the Principal Regulations requires a person to wear a face covering on public transport. In both cases, the requirement is subject to any reasonable excuse that the person has for not wearing one. Regulations 3(2) and 4(3) of the Principal Regulations set out the categories of people to whom the requirement to wear a face covering does not apply, including children under the age of 11 and an operator of a public transport service acting in the course of their employment.
- 6.10 Exemptions apply for eating, drinking and exercising (including dancing) at a place where face coverings would otherwise be required.
- 6.11 Regulation 5 of the Principal Regulations provides a non-exhaustive list of what may constitute a “reasonable excuse” for the purposes of regulations 3(1) and 4(1). A reasonable excuse for singing is included. Examples of where removing a face covering to sing would be reasonable includes (but is not limited to) – singing as part of a choir, during a service, rehearsal or performance.
- 6.12 Regulation 6 requires a responsible person to display a notice in a relevant place or public transport vehicle stating that any person present in that setting is required to wear a face covering unless exempt. Alternatively, the responsible person may take other measures to ensure that people entering a relevant place or boarding a public transport vehicle are given this information (e.g. an announcement over the public address system). These Regulations (“Face Covering Regulations (Amended)” Regulations) make an amendment to make it clear that this is subject to a reasonable excuse defence.
- 6.13 “Face Covering Regulations (Amended)” Regulations amend Regulation 7 of the Principal Regulations and prohibits any person responsible for a relevant area from preventing someone from wearing a face covering in a place where a face covering is required or in any place listed in Part 2 of Schedule 1.
- 6.14 The Principal Regulations include provisions that a person who contravenes the requirement in regulations 3, 4, 6, 7(1), 9(2)(4)(7) to wear a face covering or fails to comply with a direction under regulation 9 commits an offence, punishable on summary conviction by a fine. This instrument does not amend those provisions.
- 6.15 The Principal Regulations provide that a fixed penalty notice (a notice which enables a person to discharge their liability to criminal conviction) may be issued by authorised persons; as defined by Regulation 11(9) as: a constable, police community support officer, a TfL officer, or a person designated by the Secretary of State for the purposes of this regulation. The fixed penalty notice may be issued to a person over 18 whom the authorised person reasonably believes to have committed an offence under the Regulations. The amount of the fixed penalty is £200, reduced to £100 if paid within 14 days of a notice being issued. If somebody is issued with their second fixed penalty notice, the amount due is £400, and doubles with each subsequent fixed penalty notice to a maximum sixth fixed penalty notice amount of £6,400. The amount payable for the second or any subsequent fixed penalty notice is not reduced if

paid within 14 days of the fixed penalty notice being issued. This instrument does not amend these provisions.

7. Policy background

What is being done and why?

- 7.1 The amendments to the 1984 Act made by the 2008 Act comprehensively modernised the legal framework for health protection. Part 2A of the 1984 Act, as inserted by the 2008 Act, takes an “all hazards” approach to health protection, where the criterion for action is based on the potential for an infection or contamination to present significant harm to humans, rather than on specific infectious diseases.
- 7.2 On 14 September, the Government published the ‘COVID-19 Response: Autumn and Winter Plan’. The Plan set out the Government’s approach to sustaining progress made in fighting the virus and returning to normal, while also ensuring the NHS would not come under unsustainable pressure. Plan B includes measures aimed at helping control transmission of the virus, while seeking to minimise economic and social impacts. These measures include asking people to work from home; communicating to the public that the level of risk has increased and that people should behave more cautiously; introducing mandatory vaccine-only certification in certain settings; and legally mandating face coverings in certain settings.
- 7.3 As an initial response to the Omicron variant, on 30 November 2021, The Health Protection (Coronavirus, Wearing of Face Coverings) (England) Regulations 2021 were made which mandated face coverings in shops as well as on public transport services and in public transport hubs. These Regulations were debated in the House of Commons on 30 November 2021 and the House of Lords on 1 December 2021. The latest evidence on the Omicron variant suggests community transmission of the variant and signals that further action is necessary to slow the spread of the new variant and to protect public health. Therefore, the Government has implemented these amending Regulations to expand the mandatory wearing of Face Coverings to a greater number of settings.
- 7.4 Given the ongoing spread of this new variant, the Government continues to strongly encourage people to get vaccinated, and for those people more vulnerable to the virus, to get their booster vaccine. The experience with current variants is that vaccinated people are less likely to be infected, and thus are less likely to spread the virus. Face coverings are a useful measure to help reduce transmission.
- 7.5 The Government is mandating the wearing of face coverings in a range of indoor settings – such as shops, cinemas, places of worship, public libraries, soft play areas and museums – as well as on public transport services and in public transport hubs. This is due to the potential risk posed by this emerging variant of coronavirus. Evidence demonstrates that face coverings are effective, when worn correctly, at reducing virus transmission. This, in turn, will reduce the number of people requiring hospital treatment for the virus.
- 7.6 SAGE has advised that face coverings are likely to reduce transmission of the virus by partially reducing peoples’ exposure to virus-carrying droplets. Mandating the use of face coverings in indoor public settings as listed in Schedule 1, Part 1, as well as in transport hubs, and on public transport, offers a reasonable protective measure to reduce the risk of infection on contamination by a virus that presents a significant

harm to public health. SAGE also advised that mandating the use of face coverings is likely to increase usage.

- 7.7 People will not be required to wear face coverings in hospitality settings. This will encompass settings such as pubs, bars, and restaurants. Reasonable excuses for people not to wear face coverings are included under these regulations, as they were in the previous regulations.
- 7.8 These settings are excluded because mandating face coverings in hospitality settings would be impractical, as most people will be eating and drinking, and would be likely to have a high negative economic and social impact. Similarly, face coverings are not required to be worn during exercise, including dancing, and are not required to be worn at gyms or exercise facilities. This is because they would be uncomfortable to wear while undertaking these activities, and may inhibit someone's ability to breathe properly.
- 7.9 A person is not required to wear a face covering if they have a "reasonable excuse" for not wearing a face covering. Transport workers are exempt from having to wear face coverings. A non-exhaustive list of circumstances in which a person has a reasonable excuse is set out in regulation 5, and includes an inability to wear a face covering because of medical reasons or disability, to avoid the risk of harm or injury, or for eating and drinking or taking medication. People may also remove their face covering when it is reasonably necessary to sing, including, for example, singing as part of a choir, or during a service, or rehearsal or for performance. Nobody who has a reasonable excuse and is therefore not wearing a face covering should be prevented from visiting any setting because of the requirements in these Regulations. Furthermore, people do not need to show proof of this reasonable excuse under the Regulations. Further information on this is available in the relevant guidance published on GOV.UK.
- 7.10 If a person who is required to, is not wearing a face covering and does not have a reasonable excuse, then a relevant person (which includes a constable, policy community support officer, TfL officer, or transport operator, as defined at regulation 9(12) can deny that person entry, direct that person to wear a face covering and may direct that person to leave. A police constable can also remove someone from the premises, using reasonable force if necessary. Under regulation 11 a fixed penalty notice may also be issued to a person aged 18 or over, if it is reasonably believed that an offence under these Regulations is committed.
- 7.11 The Regulations therefore support the overall aims of the 1984 Act to protect the public from threats arising from infectious disease.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 No consolidation is being undertaken.

10. Consultation outcome

- 10.1 There has been no public consultation in relation to this instrument.

11. Guidance

- 11.1 The Government has published guidance on wearing and making face coverings at <https://www.gov.uk/government/publications/face-coverings-when-to-wear-one-and-how-to-make-your-own/face-coverings-when-to-wear-one-and-how-to-make-your-own>. This guidance will continue to be updated to include the latest information on what constitutes a face covering, the settings where these regulations apply and those who will be exempt from these regulations.

12. Impact

- 12.1 Mandating face coverings in shops, on public transport and in other indoor settings may give members of the public confidence to visit these premises, despite the emergence of this new variant, which may increase visitors to these settings, bringing benefit to the business. Settings where face coverings will not be required, such as nightclubs, may benefit as people could be more likely to want to attend than if they were required to wear face coverings. However, there is also a risk that by not mandating face coverings in these settings, transmission rates may increase among those attending such settings.
- 12.2 The policy may also offer added protection to employees working in settings where face coverings are required for all, in addition to any other mitigations that have been put in place by businesses already. Employers in settings that are not in scope, including hospitality and nightlife settings, are prohibited from requiring staff to remove a face covering, if that member of staff wishes to wear one. Government guidance to businesses will communicate the legal requirement that they must not seek to prevent staff from wearing a face covering if they choose to.
- 12.3 The Department has considered the fact that some people may be deterred from visiting the settings where these Regulations apply due to them being required to wear a face covering either because they cannot source a suitable face covering or they have protected characteristics (e.g. a disability) which makes it difficult to wear a face covering. The definition of face covering used is broad and includes any covering that securely covers the mouth and nose. As such, the Department considers that it will not be prohibitively costly or difficult for people to obtain a suitable face covering. The Department has also included a range of exemptions to ensure that this policy does not unfairly discriminate against those with protected characteristics. Furthermore, the policy will be supported by a communications campaign that will make clear that some people are exempt from these regulations and people should not be challenged by members of the public for not wearing a face covering. This Regulation requires people to wear face coverings in many of the same places that they were required under previous regulations. Compliance with regulations was high, and most people are familiar with the requirement.
- 12.4 There is no significant impact on the public sector.
- 12.5 An Impact Assessment has not been prepared for this instrument because this measure will be in place for less than 12 months.

13. Regulating small business

- 13.1 No specific action is proposed to minimise regulatory burdens on small businesses.

14. Monitoring & review

- 14.1 No review clause is included in the instrument.
- 14.2 The instrument ceases to have effect at the end of 26 January 2022.

15. Contact

- 15.1 PPE Briefing team at the Department of Health and Social Care, facecoveringsregulations@dhsc.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Michael Dynan-Oakley, Deputy Director for PPE policy, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Maggie Throup, the Parliamentary under Secretary of State for Vaccines and Public Health, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.