

COVID-19 COMMITTEE

SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the Scottish Parliament COVID-19 Committee consultation: COVID-19 Related Legislation, with particular reference to SSI2020/249: The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020 and the draft Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020. We have the following comments to put forward for consideration.

General Comments

These Regulations appear to reflect a sensible and proportionate legislative approach to the continuing challenges of the coronavirus emergency. It is appropriate that certain provisions should expire early. It is also appropriate that certain provisions should be extended, where these remain necessary.

We note that further extension of the two Acts remains possible, to September 2021. We also note that the reporting requirements under the legislation will remain in place until Part

1 of the Acts expire, and that if provisions are deemed to be no-longer necessary, they could be subject to early expiry.¹

Consultation Questions

1. To what extent is this legislation necessary and what are the reasons for your views?

The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020

These regulations provide that certain provisions of the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No. 2) Act 2020 will expire on 29 September 2020. They are made under powers conferred by section 13 of the Coronavirus (Scotland) Act 2020 and section 10 of the Coronavirus (Scotland) (No. 2) Act 2020 and are subject to the negative procedure.

The following provisions are expired by these Regulations:

Coronavirus (Scotland) Act 2020

Schedule 3, paragraph 6 (children in secure accommodation)

We have no comments to make.

Schedule 3, paragraph 11(1) (care of adults with incapacity)

This provision relates to adults deemed to be incapable of making decisions about provision of community care services. It modifies s13ZA of the Social Work (Scotland) Act 1968 to remove the requirement on the local authority to consult the adult and interested parties, including those authorised under a guardianships or power of attorney, when making such decisions. This provision has not been commenced.

¹ Scottish Government, Proposed Extension of The Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland)(No.2) Act 2020 Statement of Reasons, August 2020 at para 1.9 <https://www.gov.scot/publications/proposed-extension-coronavirus-scotland-act-2020-coronavirus-scotland-no-2-act-2020-statement-reasons/>

We previously expressed significant concerns regarding para 11(1) of schedule 3 of the Coronavirus (Scotland) Act 2020. We called on the Scottish Government to confirm that these provisions would not be brought into force, on the basis that to do so would open the way to serious and unnecessary violations of fundamental human rights.² In particular, we were concerned that the modifications contained in para 11(1) could, if commenced, exacerbate the existing risk of s13ZA being used in such ways as would result in individuals being subject to deprivations of liberty in terms of Article 5 of the European Convention on Human Rights. As far as we are aware, the UK has not derogated from Article 5 in relation to the current emergency. We accordingly welcome the policy intention set out in paras 17-20 of the Policy Note accompanying the Regulations, and specifically the statement that “the Scottish Government has examined very carefully the considerations in relation to human rights” in determining that this provision should expire early. Accordingly, we agree that these provisions of the Regulations are necessary, that it is appropriate that para 11(1) should expire on 29 September 2020, and that it should not be brought in to force in the meantime.

We note that the Policy Note accompanying the Regulations also gives some indication of the policy intent in relation to the remaining provisions of paragraph 11. Paragraphs 11(2) and 11(3) contain the so-called ‘stop the clock’ provisions for guardianship orders and section 47 certificates under the Adults with Incapacity (Scotland) Act 2000. These provisions have the effect of ‘stopping the clock running’ on guardianship orders and section 47 certificates, meaning that they will not expire and that the powers they contain will continue to have effect whilst the provisions are in force. We have previously suggested that these provisions are no-longer justified and should be suspended.³ We note that it is

² See Law Society of Scotland, Equalities and Human Rights Committee: Response to Inquiry on the Impact of COVID-19, 26 May 2020 at page 15 <https://www.lawscot.org.uk/media/369002/2020-05-25-equalities-and-human-rights-committee-submission-regarding-covid-19.pdf>; and Law Society of Scotland, Consultation Response Reporting on Coronavirus Acts: Adults with Incapacity Provisions, July 2020 at page 3 <https://www.lawscot.org.uk/media/369174/2020-07-20-mhd-coronavirus-awi-provisions.pdf>

³ [Law Society of Scotland, Consultation Response Reporting on Coronavirus Acts: Adults with Incapacity Provisions, July 2020 https://www.lawscot.org.uk/media/369174/2020-07-20-mhd-coronavirus-awi-provisions.pdf](https://www.lawscot.org.uk/media/369174/2020-07-20-mhd-coronavirus-awi-provisions.pdf)

proposed that these provisions are to be extended and suspended.⁴ Whilst we are not in a position to comment on the justification for extending these provisions, we welcome the indication that they are to be suspended. We have previously highlighted our concerns particularly in relation to orders granted subject to short time limits in order to comply with Article 5.⁵ Where such orders have been suspended by virtue of the ‘stop the clock’ provisions, we would suggest that further regulations should include a procedure to allow individual cases to be brought back before the courts without further delay, and without further prolongation of potentially actionable human rights violations. It has been reported to us that there are individuals in this situation who “feel extremely aggrieved and frustrated that they are being kept subject to an order somewhat unlawfully, as they see it.”

We note that The Coronavirus (Scotland) Act 2020 (Suspension: Adults with Incapacity) Regulations 2020 SSI 2020/267 have now been laid. These Regulations suspend the operation of paragraphs 11(2) and 11(3) of schedule 3 of the Coronavirus (Scotland) Act 2020 and come in to force on 30 September. We would welcome the opportunity to comment on these Regulations in early course.

Schedule 7, sub-paragraph (a) of paragraph 1 (social security)

We have no comments to make.

Schedule 7, paragraphs 2, 3 and 4 (social security)

We have no comments to make.

Coronavirus (Scotland) (No.2) Act 2020

Schedule 3, paragraph 1 (reports, etc. under the Climate Change (Scotland) Act 2009)

We have no comments to make.

⁴ Policy Note: The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020, SSI 2020/249 at para 21

⁵ See for example *Scottish Borders Council v AB 2020* SLT (Sh Ct) 41

Schedule 3, paragraph 2 (accounts of registered social landlords)

We have no comments to make.

Schedule 3, paragraph 3 (accounts under the Public Finance and Accountability (Scotland) Act 2000)

We have no comments to make.

Schedule 3, paragraph 4 (Housing (Scotland) Act 1987: statement under section 33B)

We have no comments to make.

Schedule 4, paragraph 1 (UEFA European Championship)

We have no comments to make.

Schedule 4, paragraph 6 (Land and buildings transaction tax: additional amount)

Schedule 4, Paragraph 6 of the 2020 Act substantively amended schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013, although the amendments relate only to transactions with an effective date between 24 September 2018 and 24 March 2020 or within any extended period specified through the use of the relevant Order-making power in the 2013 Act. As the amendment has been made to the 2013 Act, the relevant provision in the Coronavirus (Scotland) (No. 2) Act 2020 is no longer required and we therefore consider it appropriate that these provisions are expired. This will help to ensure clarity in the statute book.

Schedule 4, paragraph 7 (Non-domestic rates relief: special power in respect of financial year

2020-21) and;

Schedule 4, paragraph 8 (Non-domestic rates relief: relief to be provided by the newspaper publishing industry).

Schedule 4, Paragraph 7 of the Act amended section 153 of the Local Government etc. (Scotland) Act 1994 in order to enable Ministers to make regulations in respect of financial

year 2020-21 to reduce or remit non-domestic rates liabilities. Schedule 4, Paragraph 8 amended schedule 1 of the Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2020 (S.S.I. 2020/101) to provide for those in the news publishing industry to be given relief under those regulations. As the 1994 Act and S.S.I. 2020/101 have been amended, these paragraphs of the 2020 Act are now spent. We consider it appropriate that these provisions are expired.

Draft Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020

These Regulations provide that the expiry date of Part 1 of the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland)(No.2) Act 2020 will be amended from 30 September 2020 to 31 March 2021. They are made under powers conferred by section 12(3) of the Coronavirus (Scotland) Act 2020 and section 9(3) of the Coronavirus (Scotland)(No.2) Act 2020 and are subject to the affirmative procedure.

The following provisions will be extended by these Regulations:

Coronavirus (Scotland) Act 2020

Section 1 (Meaning of “coronavirus”)

We have no comments to make.

Section 2 (Eviction from dwelling-houses)

We have no comments to make.

Section 3 (Temporary extension of moratoriums on diligence)

We have no comments to make.

Section 4 (Children and Vulnerable Adults)

Section 4 refers to the temporary modifications to the law in relation to children and vulnerable adults set out in schedule 3.

We refer to our comments above regarding the proposed extension and suspension of paras 11(2) and (3) of schedule 3 to the Coronavirus (Scotland) Act 2020. We note that The Coronavirus (Scotland) Act 2020 (Suspension: Adults with Incapacity) Regulations 2020 SSI 2020/267 have now been laid and we would welcome the opportunity to comment on these Regulations in early course.

Section 5 (Justice)

Section 5 refers to Schedule 4 of the Coronavirus (Scotland) Act 2020.

These provisions were far-ranging covering many aspects of the justice system to allow for changes to criminal procedure to ensure business could continue. In addressing whether these provisions should continue in force, it is helpful to set out the current position.

The backlog in the criminal court system as a result of the pandemic has been highlighted by the Scottish Courts and Tribunal Service (SCTS) most recently in the latest Quarterly Criminal Court statistics⁶ which has showed that:

- No solemn trials proceeded during Q1 2020/21, in the High Court or Sheriff Courts
- 149 High Court cases called for preliminary hearing, continued preliminary hearing or Section 76 hearings during Q1. This equates to 39% of the average callings per quarter during 2019/20. 30 indictments were concluded in the quarter.
- 1,313 Sheriff Court solemn cases called for first diet, continued first diet or Section 76 hearings during Q1. This equates to 58% of the average callings per quarter during 2019/20. 433 indictments were concluded in the quarter
- Outstanding Sheriff Court summary trials have increased by 28% to 17,818.
- Outstanding Justice of the Peace summary trials have increased by 7% to 3,732.

⁶ <https://www.scotcourts.gov.uk/official-statistics>

How to deal with the backlog has been addressed by SCTS in the publication of their Plan

“COVID-19 Respond, Recover and Renew – Supporting Justice through the pandemic and beyond.”⁷ It is recognised that there has been an increase in court business being able to be managed:

- with the High Courts now operating in Glasgow and Edinburgh and the acquisition of additional court estate with the proposed use of cinema venues to allow for remote juries and the need to satisfy social distancing in court⁸
- Some remote summary trials taking place

However pertinent to the extension of these provisions is the lack of clarity on how in particular the sheriff & jury cases will be able to proceed and when and how to maintain a throughput of summary trials.

The President of the Law Society of Scotland has written to the Justice Committee on 2 September 2020⁹ which followed the evidence session given by the Cabinet Secretary for Justice and Eric McQueen Chief Executive of SCTS on 18 August 2020 which provided the profession’s perspective on the backlog and the work needed to address the current situation. We stressed our commitment to work constructively and flexibility in going forward to meet these ongoing challenges.

The extension of time for the Schedule 4 provisions¹⁰ is inevitable and required because business in our courts has not been able to resume to the pre-pandemic situation. There is

⁷ <https://scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/08/16/covid-19-scts-moving-forward>.

⁸ <https://www.bbc.co.uk/news/uk-scotland-53768276>

⁹

https://www.parliament.scot/S5_JusticeCommittee/General%20Documents/20200902_LSSToAT_re_courts.pdf

¹⁰ Timelimits affected are section 65 of the Criminal Procedure (Scotland) Act 1995 which sets various time limits in respect of trials under solemn procedure; section 136, which requires that proceedings in summary cases must commence within six months of the alleged offence; section 147, which makes provision for summary procedure in cases where the accused has been held on remand; and section 52T, which applies the custody

an ongoing need to respect the public safety requirements of social distancing in the courts and public safety requirements for all, whether as a witness or accused, juror and public or court official. Though creative solutions involving the greater use of technology are being used, with the almost total cessation of court business in March, restarting is and has taken time.

However, we have concerns with regard to the implications in respect of:

- Article 5¹¹ of the European Convention on Human Rights (ECHR) specifically with regard to the paragraph 3 that “Everyone arrested or detained ... shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial” and
- Article 6 of ECHR concerning a right to a fair trial.

Part 4 of Schedule 4 of the Coronavirus (Scotland) Act 2020 contained extensions with regard to the time-limits which has meant that offenders will have remained on remand for considerable periods pending their trials taking place in both summary and solemn cases. There is no certainty as to when these trials will take place. There may as the backlog continues to be possible challenges as to the right to a trial within a reasonable period going forward. These increases may not have been incompatible originally to address the inevitable disruption to the justice system caused by coronavirus but may be less justifiable as time continues.

There will be an increase on numbers being held on remand which also has an ongoing effect on their family life, mental health and wellbeing. For those accused remanded for an extended period for a less serious crime, this may well be disproportionate to the sentence the court will eventually impose.

time limits in sections 65 and 147, where the accused is detained in hospital because of an assessment order or a treatment order.

¹¹ Everyone has the right to liberty and security of person

The case of HMA v Iain Lindsay¹² considered and ruled out the implication of sentencing to custody with regard to coronavirus at paragraph 25:

“To take account of the current emergency as a reason for discounting a custodial sentence would discriminate unfairly against prisoners who may have been given a short term sentence shortly before the lockdown, in favour of those upon whom such sentences are imposed now. Furthermore, short term prison sentences are subject to both automatic early release and discretionary early release. The latter in particular provides an administrative method by which the most serious consequences of imprisonment in the short term may be mitigated.”

Part 6 of the Coronavirus (Scotland) Act 2020 refers to community orders. There are implications with the extension given that there was an indication that “unpaid community work hours cut as Social Work Scotland said it would “not be possible” for the 700,000 hours of unpaid work that is outstanding to be completed within the next 12 months.”¹³

Part 8 of the Coronavirus (Scotland) Act 2020 affects the early release of prisoners. The release of prisoners under the regulations was a necessary and proportionate response to the effects that coronavirus was having, and in continuing these provisions, there may be greater use made of these provisions again. We echo that any decisions on future release of additional prisoners would need to be made in partnership with the Scottish Prison Service.¹⁴

Regarding CPOs, there is a suggestion that Scots offenders could have unpaid community work hours cut as Social Work Scotland said it would “not be possible” for the 700,000 hours of unpaid work that is outstanding to be completed within the next 12 months.

¹² <https://scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2020hcjac26.pdf?sfvrsn=0> 2020 HCJAC 26

¹³ <https://www.scotsman.com/news/crime/scots-offenders-could-have-unpaid-community-work-hours-cut-2920313>

¹⁴ <https://www.gov.scot/publications/coronavirus-acts-second-report-scottish-parliament/pages/9/>

Concerns have been expressed about the court processes in general being held remotely using virtual courts as these processes cannot and do not work successfully for all. Any accused must be able to hear understand and participate effectively in proceedings, including being able to instruct their solicitor and to give evidence. Those who are vulnerable may be worst affected. There may be implications for fairness in ensuring that effective hearings are arranged which are compounded by the ongoing court delays.

Section 6 (Alcohol licensing)

We have no comments to make.

Section 7 (Public bodies)

We have no comments to make.

Section 8 (Other measures in response to coronavirus)

We have no comments to make.

Coronavirus (Scotland)(No.2) Act 2020

Section 1 (Meaning of “coronavirus”)

We have no comments to make.

Section 2 (Protection of the individual)

Section 2 refers to the modifications to the law in response to coronavirus in relation to various matters concerning the protection of the individual set out in Schedule 1.

Part 6 of schedule 1 relates to named person nominations under mental health legislation. These provisions modify the provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 which relate to the nomination of a named person, and are currently in force. They provide that the nominated person’s signature does not require to be witnessed by a prescribed person. We agree that extending these provisions is appropriate and necessary. We are aware of individual circumstances in which the availability of these

temporary provisions has been beneficially utilised. It is likely that future unpredictable and localised restrictions on travel may continue to make it difficult for nominated persons to arrange to have their signature witnessed by a prescribed person. The temporary changes made by these provisions are pragmatic and enabling, in that they protect the right of the patient to have a named person.

We have no further comments to make.

Section 3 (Operation of the justice system)

Section 3 refers to Schedule 2 of the Coronavirus (Scotland) (No. 2) Act 2020.

We refer to our comments under section 5 (Justice) regarding the Coronavirus (Scotland) Act 2020.

Section 4 (Reports, accounts and other documents)

We have no comments to make.

Section 5 (Other measures in response to coronavirus)

Section 5 paves the way for the provisions at Schedule 4 Part 7 of the Coronavirus (Scotland) (No2) Act 2020.

We have conducted a survey in June 2020 with the profession and can report the highlights are that 66% have used video facilities for execution of documents, our guidance was popular with 37% of those executing documents of whom 83% were satisfied or very satisfied with the guidance and the vast majority of those using the process had no problems.

We continue to believe that this is a provision which is of benefit to people in Scotland who require the services of a notary. We also consider that were this provision to expire that could have an adverse impact on those who need notarial services in terms of risk of exposure to Covid -19, anxiety, cost and delay.

2. Will this legislation achieve the proposed outcomes?

We have no comments to make.

3. Are there any further improvements you would suggest and if so, why?

The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020

We note that the Policy Note to accompany the Regulations refers to engagement between Scottish Government and Health and Social Care Partnerships on improving discharge pathways for adults lacking capacity and ensuring that the adult and interested parties are fully involved and consulted.¹⁵ Whilst we welcome the indication that this has led to positive results, we would suggest that Scottish Government should also look to engage with disabled people's organisations and others with an interest in the human rights of disabled people.

We remain concerned that since the start of the pandemic, adults with incapacity may have been discharged or moved without due legal process in *prima facie* breach of Articles 5 and 6 of the European Convention. We note that delayed discharge figures have reduced substantially since the Coronavirus (Scotland) Act was passed.¹⁶ We remain concerned that some of those discharges may have resulted in deprivations of liberty which have not been authorised by an appropriate legal process. In this context, deprivation of liberty can arise in a wide variety of care situations, including potentially situations of physical restraint, isolation and where individuals' ability to leave the care setting or have contact with family is restricted. We understand that there is no independent monitoring or review of these discharges, and we would suggest that a mechanism for such monitoring or review should be established. We would point out that any violations of Article 5 that may have occurred could result in entitlement to redress, and obligations on local authorities to ensure that guardianship or intervention orders are sought to enable such claims to be pursued.

¹⁵ Policy Note: The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020, SSI 2020/249 at para 22

¹⁶ Scottish Government, Coronavirus Acts: second report to Scottish Parliament, August 2020 at para 7.1.3.5 <https://www.gov.scot/publications/coronavirus-acts-second-report-scottish-parliament/>

Draft Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020

In due course, it may be necessary to consider whether some of the provisions which have been brought into effect and extended may remain appropriate beyond the emergency period. As referred to above, this may be the case with certain provisions relating to justice, including legal aid, where it is likely that courts and tribunals will continue to deal with a backlog of cases for some time following the emergency period. This would require further legislation, and we would welcome the opportunity to engage with Scottish Government in this regard.

It may also be necessary to plan for the expiry of emergency provisions at the end of the emergency period. In relation to extended time limits for eviction, for example, it is important that there is adequate support to help tenants (and landlords) through the emergency period, and forward planning for any steps needed once this protection reaches its end.

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