



Law Society
of Scotland

Consultation Response

Coronavirus Acts: third report to Scottish Parliament

October 2020



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.

Our Criminal Law committee and Mental Health and Disability sub-committee welcome the opportunity to consider and respond to the Scottish Parliament COVID-19 Committee's consultation: *Coronavirus Acts: third report to Scottish Parliament*.¹ We have the following comments to put forward for consideration.

General Comments

We note that this consultation covers a broad range of sectors. This response is restricted to those areas within the remit of our Criminal Law committee and Mental Health and Disability sub-committee.

¹ <https://yourviews.parliament.scot/covid19/coronavirus-acts-third-report/>

Consultation Questions

Children, vulnerable adults and mental health

Children

We have no comments to make.

Vulnerable adults

Do you think the Scottish Government needs these emergency powers?

The emergency powers applicable to vulnerable adults are set out in Section 4 and Schedule 3, paragraph 11 of the Coronavirus (Scotland) Act 2020.

Paragraph 11(1) 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, and accordingly was not used during the reporting period. It has since been expired by The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020.

We previously expressed significant concerns regarding paragraph 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 We therefore agree that these provisions are no longer necessary and that it is appropriate that they have now expired.

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

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>; 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>; and Law Society of Scotland, Consultation Response: COVID-19 Related Legislation, 7 September 2020 at page 3 <https://www.lawscot.org.uk/media/369381/20-09-07-ppc-mhd-covid-19-committee-covid-19-related-legislation.pdf>

will not expire and that the powers they contain will continue to have effect whilst the provisions are in force. These provisions were commenced on 7 April 2020. They were extended by virtue of the Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020, but have also been suspended by The Coronavirus (Scotland) Act 2020 (Suspension: Adults with Incapacity) Regulations 2020 from 30 September 2020.

We have previously highlighted our concerns regarding the ‘stop the clock’ provisions, particularly in relation to orders granted subject to short time limits in order to comply with Article 5 EHCR.³ Whilst we acknowledge that these provisions were enacted against the challenging background of the emerging pandemic, and may have been necessary at that time, we would now suggest that continued restrictions on the rights of Adults subject to interventions under the 2000 Act are no-longer required and it is appropriate that these provisions have been suspended. A compelling set of circumstances would be required to justify these provisions being reinstated at a future date.

Where the powers have been used, was this clearly communicated?

Whilst the provisions of paragraph 11(1) were not used, we do have some concerns that this was not clearly communicated to decision-makers in local authorities and others potentially impacted by these provisions including adults lacking capacity and their families. This may have led to confusion as to whether these provisions were in force. We welcome the recent clarification provided by the Mental Welfare Commission in relation to section 13ZA,⁴ and would suggest that Scottish Government, local authorities and other agencies should reflect on whether lessons can be learned in communicating prospective changes to legislation to stakeholders.

The impact of the ‘stop the clock’ provisions appears to have been communicated clearly to relevant stakeholders by Scottish Government, the OPG and other relevant agencies.

Where the powers have been used, what impact did these changes to the law have on you, or your sector?

The practical consequence of the ‘stop the clock’ provisions was that applications for renewal of guardianship orders which would have been made during the period in which the emergency legislation was in force were not made. For solicitors, there has been a substantial impact in communicating and explaining the position in relation to guardianships to clients and others.

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> and Law Society of Scotland, Consultation Response: COVID-19 Related Legislation, 7 September 2020 at page 4 <https://www.lawscot.org.uk/media/369381/20-09-07-ppc-mhd-covid-19-committee-covid-19-related-legislation.pdf>

⁴ Mental Welfare Commission, Position Statement on Section 13ZA, Social Work (Scotland) Act 1968 in relation to Coronavirus, 9 October 2020: https://www.mwscot.org.uk/sites/default/files/2020-10/PositionStatement_Section13ZA-Covid_October2020.pdf

A particular issue which we have already highlighted is that the “stop the clock” provisions in relation to guardianships have the effect of preventing review of appointments where the court has explicitly applied a short time limit to ensure human rights compliance. An example is the case of *Borders Council v AB*⁵ where to ensure human rights compliance the sheriff time-limited the order to six months, because exercise of the powers under the order amounted to a deprivation of liberty contrary to Article 5 of ECHR (Article 5 not having been derogated for the purposes of the pandemic by the UK Government).

Could other measures have been used to better support you or your sector to respond to the challenges posed by the pandemic?

Better support for the operation of Adults with Incapacity legislation could have been provided, not by modifications to statute, but by better monitoring and supervision to ensure that neither local authorities nor the courts discriminated against older persons and persons with relevant disabilities by providing less effective, and less human rights-compliant, services to them than to others. This would have assisted the legal sector, but also individuals, families and other professionals involved in proceedings under the 2000 Act. It is notable that some courts ceased processing guardianship applications altogether, whereas the Court of Protection in England & Wales was able to keep its equivalent work up to date and the Mental Health Tribunal was able to continue to operate via teleconferencing. It would also have been better if social and healthcare practitioners and administrators had been advised that the deprivation of liberty provisions of Article 5 of ECHR had remained in force throughout: there is increasing evidence of widespread deprivations of liberty in relation to the movement of persons from one setting to another, and imposition of controls upon them, which are likely to result in a significant impact in future when the redress guaranteed by Article 5 is sought by those affected.⁶

Any other comments you wish to make?

We have no further comments.

5 [2019] SC JED 85

6 See our letter to the COVID-19 Committee dated 15 September: https://www.parliament.scot/The_Law_Society_of_Scotland2.pdf

Temporary modification of mental health legislation

Do you think the Scottish Government needs these emergency powers?

Section 10 and schedule 9 of the Coronavirus Act 2020 make temporary changes to mental health legislation, specifically the Mental Health (Care and Treatment) (Scotland) Act 2003, the Criminal Procedure (Scotland) Act 1995, and associated subordinate legislation. Section 10 is not in force in relation to Scotland, and the provisions in schedule 9 are prospective at present.

Scotland's existing mental health legislation contains a number of safeguards to protect the fundamental rights of those subject to the legislation, and in particular the rights of individuals' arising from Articles 3, 5, 6 and 8 ECHR. The provisions of schedule 9 have the potential to remove or reduce these safeguards, leading to potential significant human rights violations.

We acknowledge that the provisions of schedule 9 were introduced at a time when there were acute fears that health services could be overwhelmed. We recognise that there may be circumstances where infringement of individual rights may be justified, including in response to a public health emergency such as the pandemic. However, the provisions contained in schedule 9 have not yet been required, and as such have not been brought into force. Mental Health Tribunal hearings have continued throughout the pandemic. Those involved in the system, including medical practitioners, have been able to make adjustments to their practice within the confines of the current legislation. Those subject to mental health legislation have continued to receive care and treatment, and have continued to benefit from the safeguards set out in the current legislation. We are not aware of significant difficulties in meeting demand for doctors' opinions or MHO reports. We are not aware of significant operational difficulties within the tribunal system.

We note that stakeholders including the Royal College of Psychiatrists have highlighted potential workforce pressures which may come to bear later in the year,⁷ and the need to retain these provisions on the statute books as a 'safety net' during uncertain times.⁸ We acknowledge that the future course of the pandemic and the impact on mental health services remains uncertain, and it may yet be necessary to enact temporary modifications to allow flexibility to ensure a continuing service to those with the most severe mental health needs. However, any decision to commence these temporary measures will require to be supported by robust data and evidence to address the potential adverse impact on the rights of individuals, as well as stringent monitoring and review.

Section 2 and schedule 1, part 6 of the Coronavirus (Scotland) (No.2) Act 2020 make temporary modifications to the provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 which relate

⁷ Scottish Government, Coronavirus Acts: third report to Scottish Parliament, at para 7.3.1.12 <https://www.gov.scot/publications/coronavirus-acts-third-report-scottish-parliament/>

⁸ *Ibid*, at para 7.3.1.13

to named persons, and are currently in force. This temporary modification is important, necessary, and proportionate, and continues to be needed

Where the powers have been used, was this clearly communicated?

We have heard from those practising within in the Tribunal system that professionals involved in the creation or use of named person nominations appear to be aware of the temporary modifications set out in Section 2 and Schedule 1, part 6 of the Coronavirus (Scotland) (No.2) Act 2020.

Where the powers have been used, what impact did these changes to the law have on you, or your sector?

We have heard from those involved in the Tribunal system of several cases where the temporary provisions in relation to named persons have been utilised and accepted by Mental Health Tribunals, although we are not aware of any publicly available data to support this. Without this provision the patient would have been deprived of having a named person at the Tribunal hearing.

Could other measures have been used to better support you or your sector to respond to the challenges posed by the pandemic?

The temporary modifications in relation to named person provisions have been a small but very important safeguard for patients to continue to be allowed to effectively nominate a named person who can act and support them at hearings. Given restrictions on hospital visiting and pressures on mental health professionals, we do not believe that other measures could have been better used in this context.

Mental Health Tribunals have been able to continue throughout the pandemic by adapting to teleconferencing. Whilst this is not the most optimal way of holding a hearing, it remains necessary until such time as venues are available which can cope with social distancing, such distancing is no-longer required, or alternative accessible technology can be made available.

Independent advocacy remains an important way of ensuring that vulnerable adults, including those subject to mental health legislation and interventions under adults with incapacity legislation, receive appropriate support for decision-making in accordance with the United Nations Convention on the Rights of Persons with Disabilities. Whilst the temporary modifications in relation to named person nominations are helpful, they should not detract from the importance of independent advocacy and other forms of supported decision-making.

Any other comments you wish to make?

We have no further comments to make.

Duty of Local Authority to assess needs: Scotland

We have no comments to make.

Criminal justice and procedure

Criminal Justice: Fixed Penalty Notices under the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020

We have no comments to make.

Release of prisoners

We have no comments to make

Extension of time limits

Do you think the Scottish Government needs these emergency powers?

We have previously highlighted our concerns regarding the current substantial backlog of cases in the court system and the number of prisoners being held on remand.⁹ As the emergency legislation continues to be in place and its use has been extended, we would take this opportunity to emphasize these concerns. There are 1711 untried prisoners as at 16 October.¹⁰ Though this number has fallen slightly over the last week, this is a sizeable prison population which must be a continuing concern.

⁹ <https://www.lawscot.org.uk/media/369381/20-09-07-ppc-mhd-covid-19-committee-covid-19-related-legislation.pdf> and https://www.parliament.scot/S5_JusticeCommittee/General%20Documents/20200902_LSStoAT_re_courts.pdf

¹⁰ <https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>

There are a number of factors as to how that figure of prisoners on remand is made up but given that there has been a backlog of cases from the courts due to COVID-19, it will take some time until that backlog can reduce and the numbers facing trial will begin to fall. The Scottish Courts and Tribunal Service have outlined plans¹¹ to resolve the backlog. It includes the use of additional cinema estate allowing the High Court trials to run in both Glasgow and Edinburgh,¹² a planned resumption of Sheriff and Jury business and a return of summary trials to the levels heard pre-pandemic.

We recognise that there may well be legal challenges to come from those prisoners who have been held for lengthy periods on remand, as they have experienced lockdowns and restrictions on their family visits.

There are also a number of risks which COVID-19 brings to prison. We note that there have been some deaths from prisoners within the prisons from COVID-19.¹³

Where the powers have been used, was this clearly communicated?

We have no further comments to make.

Where the powers have been used, what impact did these changes to the law have on you, or your sector?

We have no further comments to make.

Could other measures have been used to better support you or your sector to respond to the challenges posed by the pandemic?

We have no further comments to make.

Any other comments you wish to make?

We have no further comments to make.

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

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

13 <https://www.edinburghnews.scotsman.com/news/crime/first-inmate-scottish-prison-dies-covid-19-2535551>

BUSINESS

For further information, please contact:

Jennifer Paton

Policy Team

Law Society of Scotland

DD: 0131 476 8136

JenniferPaton@lawscot.org.uk