



Law Society
of Scotland

Consultation Response

Reporting on Coronavirus Acts: Adults with
Incapacity provisions

July 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 Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Scottish Government's request for comments in advance of the second report to the Scottish Parliament on the Coronavirus Acts. The sub-committee has the following comments to put forward for consideration in relation to the provisions relating to Adults with Incapacity legislation.

General Comments

We note that Section 15 of the Coronavirus (Scotland) Act 2020 requires the Scottish Ministers to, in respect of each reporting period, undertake a review of the operation of the provisions of Part 1 of the Act with a view to considering whether those provisions remain necessary, and to prepare a report on that review. We further note that the second reporting period ends on 31 July 2020. We understand that the second report will cover:¹

- Those powers contained in the Coronavirus Act 2020 for which the Scottish Parliament gave legislative consent.
- The powers contained in the Coronavirus (Scotland) Act 2020
- The powers contained in the Coronavirus (Scotland) (No. 2) Act 2020
- Reporting on all Scottish Statutory Instruments (SSIs) made by Scottish Ministers where the primary purpose relates to coronavirus.

¹ Scottish Government, Coronavirus Acts: first report to Scottish Parliament, 9 June 2020 <https://www.gov.scot/publications/coronavirus-acts-two-monthly-report-scottish-parliament/pages/1/>

The above legislation is wide-ranging. We have been asked to comment specifically in relation to the provisions which relate to Adults with Incapacity legislation, which are set out in Section 4 and Schedule 3 Part 2 of the Coronavirus (Scotland) Act 2020 (“the Act”). Our response is restricted on this basis.

We have previously commented on modifications to Adults with Incapacity legislation in the context of the coronavirus pandemic. We refer to our briefing issued in advance of the Stage 1 Emergency Debate on the Coronavirus (Scotland) Bill.² We also refer to our proposals for temporary modifications to the Adults with Incapacity (Scotland) Act 2000, set out in a letter from the President of the Law Society of Scotland to the Cabinet Secretary for Health and Sport dated 15 April and accompanying technical note.³ Finally, we refer to our submission to the Scottish Parliament’s Equalities and Human Rights Committee’s Inquiry on the impact of COVID-19.⁴

Section 4 and Schedule 3, Part 2, Paragraph 11(1): Modifications to Section 13ZA of the Social Work (Scotland) Act 1968

We note that these provisions are not yet in force. We further note that the Scottish Government have indicated that these provisions will be brought in to force only when evidenced as absolutely necessary.⁵ We have previously called for the Scottish Government to confirm that these provisions will not be brought in to force, on the basis that to do so would open the way to serious and unnecessary violations of fundamental human rights.⁶ We would take this opportunity to reiterate this position.

Section 4 and Schedule 3, Part 2, Paragraph 11(2) and (3): Modifications to duration of guardianship orders and certificates authorising medical treatment

We note that these provisions ‘stop the clock’ in respect of guardianship orders and certificates authorising medical treatment for the period that the emergency legislation is in force. These provisions are currently in force.

2 <https://www.lawscot.org.uk/media/368600/200331-coronavirus-scotland-bill-briefing.pdf>

3 <https://www.lawscot.org.uk/news-and-events/legal-news/ministers-urged-to-reform-awi-law-for-covid-19-cases/>

4 <https://www.lawscot.org.uk/media/369002/2020-05-25-equalities-and-human-rights-committee-submission-regarding-covid-19.pdf>

5 Scottish Government, Coronavirus (COVID-19): adults with incapacity guidance, 8 April 2020 <https://www.gov.scot/publications/coronavirus-covid-19-adults-with-incapacity-guidance/>

6 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>

Whilst we acknowledge that these provisions were enacted against the challenging background of the emerging pandemic, and are intended to protect the interests of adults requiring interventions under the 2000 Act, we believe that blanket ‘stop the clock’ provisions applying to all certificates and guardianship orders are no-longer justified.

We note the potential for individuals subject to interventions under the 2000 Act to remain subject to these interventions for longer than would otherwise be the case, as a consequence of the ‘stop the clock’ provisions. We note that this is not consistent with the principle that the intervention should be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.⁷ This is acknowledged in the Scottish Government’s first report to the Scottish Parliament on the Coronavirus Acts.⁸

We have previously noted our concerns in cases where a court has explicitly set a specified time limit for the order required for compliance with ECHR Article 5.⁹ ECHR Article 15 provides a procedure for derogation from (*inter alia*) Article 5 in time of emergency. It would appear that the UK Government has not derogated from Article 5, which accordingly remains applicable in full. It has been reported to us that at least one adult deprived of her liberty for a fixed period which has been extended by the “stop the clock” provisions is among those who now “feel extremely aggrieved and frustrated that they are being kept subject to an order somewhat unlawfully, as they see it”. We find it difficult to assert that they are wrong in this view. We would draw attention to English caselaw on ECHR Articles 5 and 15, such as *BP v Surrey County Council, RP*.¹⁰ That case also founds upon CRPD Article 11 under which the United Kingdom has accepted an obligation to take “all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including humanitarian emergencies”.

Considerable progress has been made in re-opening courts and resuming civil business.¹¹ More staff at the Office of the Public Guardian are returning to office-based working.¹² Solicitors, medical practitioners and social work professionals are becoming adept at using remote methods. Court business is increasingly being carried via digital and remote solutions.¹³ We understand that the English Court of Protection is using remote methods to deal with procedures to have a deputy appointed, which is the equivalent procedure to appointment of a guardian. If such procedures can be put in place in England, we believe that they should also be possible in Scotland. We have also noted that in Scotland even cases as sensitive as those

7 Section 1(3) of the 2000 Act

8 Scottish Government, Coronavirus Acts: first report to Scottish Parliament, 9 June 2020 at 7.1.3.12

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

10 [2020] EWCOP 17, 2020 WL 01663365

11 Scottish Courts and Tribunals Service, Sheriff Courts Business Update, 1 June 2020, <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/06/01/sheriff-courts-business-update>

12 Office of the Public Guardian (Scotland), Update – Getting back to work, 18 June 2020 <https://www.publicguardian-scotland.gov.uk/general/news/2020/06/18/update-getting-back-to-work>

13 Scottish Courts and Tribunals Service, Sheriff Courts Business Update, 1 June 2020, <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/06/01/sheriff-courts-business-update>

involving children with additional support needs are now being held by “virtual” video-conferencing platform in accordance with the Health and Education Chamber “Guidance to Tribunal Members No 02/2020”. If all available technical means are not engaged to ensure that the needs for protection of adults in Scotland who come within the regime of the 2000 Act are addressed, questions are likely to arise as to whether that violates anti-discrimination and other protections under human rights instruments and domestic law.

For the above reasons, we would suggest that the ‘stop the clock’ provisions should now be suspended. Whilst we recognise that such measures may have been necessary at the height of the coronavirus crisis, we would now suggest that appropriate systems and solutions are in place to allow normal renewal procedures to recommence, such that continued restrictions on the rights of Adults subject to interventions under the 2000 Act are no-longer justified.

If the Scottish Ministers are not minded to suspend the ‘stop the clock’ provisions at present, we would strongly suggest that guidance is updated to make it clear that the ‘stop the clock’ provisions do not affect any other ground on which the certificate or order may otherwise cease to have effect. In the case of guardianship orders, guidance should clearly state that in cases including those where a specific time limit has been set for compliance with ECHR Article 5 or where there is otherwise a concern that continued intervention is no-longer consistent with the principles of the 2000 Act, it remains open to the adult or any other person claiming an interest in the adult’s property, financial affairs or personal welfare to make an application to the sheriff under other provisions of the 2000 Act.

We recognise that at present there remain concerns regarding a ‘second spike’ of coronavirus or further increases in cases in specific geographical areas. We therefore recognise that it may be prudent for the Scottish Ministers to suspend the ‘stop the clock’ provisions at this time, rather than repealing them altogether.

The provisions of Part 1 of the Act expire on 30 September 2020.¹⁴ We note that Section 12 of the Act provides that the Scottish Ministers may extend this expiry date. At present, such extension in respect of provisions relating to Adults with Incapacity would not appear to be justified. However, we do recognise that there remains considerable uncertainty as to the future of the coronavirus outbreak.

For further information, please contact:

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¹⁴ Coronavirus (Scotland) Act 2020, section 12(1)