

## POLICY NOTE

### THE CORONAVIRUS (SCOTLAND) ACT 2020 (SUSPENSION: ADULTS WITH INCAPACITY) REGULATIONS 2020

SSI 2020/267

The above instrument was made in exercise of the powers conferred by section 11 of the Coronavirus (Scotland) Act 2020. The instrument is subject to the negative procedure.

**The purpose of the instrument is to suspend paragraphs 11(2) and 11(3) of schedule 3 of the Coronavirus (Scotland) Act 2020 (the care of adults with incapacity). Part 1 of the Coronavirus (Scotland) Act 2020 expires on 30 September 2020. The Scottish Ministers intend to lay a draft of the Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020 seeking to amend these expiry dates to 31 March 2021. This would have the effect that Part 1 of each of those Acts, other than the provisions that have already been expired, would then expire on 31 March 2021. This instrument suspends paragraphs 11(2) and 11(3) of schedule 3 during this time, unless they are revived by regulations in the meantime.**

#### Legislative Background

1. The Coronavirus (Scotland) Act 2020 (the ‘first Scottish Act’) came into force on 7 April 2020. The Act has provided powers and measures which have helped to protect the public, maintain essential public services and support the economy in the face of the unprecedented public health and economic challenges created by the pandemic.

#### Policy Objectives

2. During the passage of both Bills, Ministers committed to expiring and suspending provisions of both Scottish Acts as soon as appropriate.
3. It has been judged that the provisions set out in these Regulations will no longer be needed at the present time. However, there remains concern about the possibility of a resurgence of the virus and therefore this provision is to be suspended, in order that it could be revived by regulations, if required at a future point.
4. Guardianship provisions were brought in because there was a concern about whether the system would be able to process renewals of guardianship in sufficient time. Renewal applications have to be lodged with the court before the original expires, otherwise a whole new application has to be made, rendering the work put into the renewal reports otiose and meaning that additional, unnecessary work is required for the new guardianship. In order to prevent this, the ‘clock was stopped’ on expiry of guardianship orders, meaning that they would not expire for the period the provision was in force.
5. Time has moved on and circumstances have changed. The courts are now processing guardianship orders as ‘business as usual’ and the Office of the Public Guardian has sufficient staff to be able to process the applications and orders sent from the court. There is also more availability than there has been since the provisions have been in

force, of doctors and mental health officers to produce the reports required for an application.

6. Therefore there is no requirement for the expiry of guardianships to be extended for any longer and so this provision should be suspended at this time, due to the above noted change in circumstances. However, there remains serious concern about the possibility of a resurgence of the virus and therefore this provision is to be suspended rather than expired, in order that it could be revived by regulations, if required at a future point.
7. There is a similar argument for section 47 certificates to authorise medical treatment for adults lacking capacity. This requires a doctor to sign a certificate and therefore the process is much less onerous than a guardianship order. There is more availability of doctors and this extension of the expiry of medical certificates is no longer required. However, as per guardianships, there remains concern about the possibility of a resurgence of the virus and therefore this provision should be suspended, rather than expired.

### **Consultation**

8. A formal public consultation exercise has not been undertaken in relation to this instrument due to the timescales in which decisions on extension of the Scottish Acts and expiry of provisions not to be covered by an extension have had to be made. However the Scottish Government has informally consulted with public bodies and other stakeholders on development of certain provisions within these Regulations.
9. Informal consultation was undertaken with the Law Society of Scotland, Social Work Scotland, the Scottish Courts and Tribunals Service, the Office of the Public Guardian, the Convention of Scottish Local Authorities, the Mental Welfare Commission, Health and Social Care Scotland and the Centre for Mental Health and Capacity law at Edinburgh Napier University.
10. Extending the provisions was considered and that was the wish of some of the stakeholders. The benefits were seen to be a more gradual and co-ordinated return to normal business and to take the pressure off mental health officers and doctors. Other stakeholders were of the opinion that the provisions were no longer required as systems were now able to cope with guardianships and s.47 certificates. However because of the concern around a resurgence of the virus, they preferred that the provisions were suspended rather than expired.

### **Impact Assessments**

11. No impact assessments have been completed for this instrument, however in development of the instrument the impacts assessments undertaken at the time of the introduction of the first Scottish Act has been reviewed in order to determine whether any new or additional impacts would result from expiry of the provisions covered by the Regulations.
12. Equal opportunities and human rights were carefully considered in decisions on this matter. Those people who had a guardianship that would have expired without

renewal have already had a guardianship applied to them for longer than would have been possible under existing legislation. It should be noted that there is a route for people to challenge their guardianships under the Adults with Incapacity (Scotland) Act 2000.

13. Whilst these measures being available for use in the initial term of Part 1 of the first Scottish Act was deemed to be necessary, as outlined above, circumstances have changed. Extending for a further six months and maintaining the status of the provision that it is 'commenced and still in force', could result in the provision being operational for a year and would raise serious human rights concerns. In recognition of this, the provisions are being extended but with a parallel provision made in separate regulations to suspend them. The provisions can only be revived at a future point (in the life of Part 1 of the first Scottish Act) through regulations which would be subject to scrutiny by Parliament. A similar point applies to section 47 certificates.

### **Financial Effects**

14. The Cabinet Secretary for Constitution, Europe and External Affairs confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government  
Directorate for Constitution and Cabinet

26 August 2020