

## POLICY NOTE

### THE CORONAVIRUS (SCOTLAND) ACTS (EARLY EXPIRY AND SUSPENSION OF PROVISIONS) REGULATIONS 2021

SSI 2021/93

1. The above instrument is made in exercise of the powers conferred by section 13 of the Coronavirus (Scotland) Act 2020 and sections 8(1)(a) and 10 of the Coronavirus (Scotland) (No. 2) Act 2020, and all other powers enabling them to do so. The instrument is subject to the negative procedure.

**The purpose of the instrument is to expire early certain provisions in the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No.2) Act 2020 on 30 March 2021. Part 1 of each of those Acts expires on 31 March 2021. The Scottish Ministers intend to lay a draft of the Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2021 seeking to amend these expiry dates to 30 September 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 30 September 2021. This instrument also suspends the operation of paragraph 24 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020 in relation to marriage and civil partnership.**

#### Legislative background

2. The Coronavirus (Scotland) Act 2020 (the “first Scottish Act”) came into force on 7 April 2020 (except for one provision) and the Coronavirus (Scotland) (No.2) Act 2020 (the “second Scottish Act”) came into force on 27 May 2020. The Acts provide powers and measures which have helped to protect the public, maintain essential public services and support the economy in the face of the unprecedented and ongoing public health and economic challenges created by the pandemic. This includes protections for individuals in areas such as housing, measures to support the ongoing operation of the justice system, and support for public bodies in their response to coronavirus (COVID-19) such as adjustments to deadlines for reports and accounts.
3. As set out under section 12 of the first Scottish Act, and section 9 of the second Scottish Act, Part 1 of both Acts were due to expire on 30 September 2020. On 29 September 2020, the Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020<sup>1</sup> came into force extending the expiry date of Part 1 of both Acts to 31 March 2021. On 11 February 2021, the Cabinet Secretary for Constitution, Europe and External Affairs advised the Scottish Parliament that the Scottish Ministers were conducting the analysis necessary to determine whether the Acts should be extended beyond 31 March 2021<sup>2</sup>. That analysis has now been concluded and the Scottish Government will lay draft regulations<sup>3</sup> for Parliament to consider, which seek to extend the expiry date of Part 1 of both Acts from 31 March 2021 to 30 September 2021.

<sup>1</sup> <https://www.legislation.gov.uk/ssi/2020/299/contents/made>

<sup>2</sup> <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=13117&i=118750>

<sup>3</sup> The Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2021

## Policy objectives

4. Parts 1 of the Acts can only be extended in their entirety and not on a provision by provision basis. This is done through regulations with the agreement of the Parliament, and anything that should not be extended is therefore required to be expired through separate regulations.
5. During the passage of both Bills, Ministers committed to expiring provisions of both Scottish Acts as soon as it is appropriate to do so. In the decision on whether Part 1 of the two Acts should be extended, Scottish Ministers have given careful consideration to the need to balance the needs of many stakeholders and partners who wish to see the provisions remain available, against the commitment given when the Acts were introduced that the provisions would not remain in place unless they were needed.
6. As part of the Scottish Government's regular reviews of the Acts' provisions and as part of the preparations for the potential extension of the Acts, consideration has been given to whether each individual provision continues to be needed beyond 31 March 2021.
7. It has been judged that the provisions set out in regulations 2 and 3 of these Regulations will no longer be needed beyond 31 March 2021 and can be expired. The provisions of both Acts which are expired early on 30 March 2021 will accordingly not benefit from the extension of Part 1 of both Scottish Acts, should this be agreed to by the Scottish Parliament. It has also been judged that the provisions set out in regulation 4 of these Regulations are not currently required but that it would not be appropriate to expire them at this time.

### *Expiry of certain provision on 30 March 2021*

8. Paragraph 2(2) of schedule 3 of the first Scottish Act modifies section 35(5) of the Children's Hearings (Scotland) Act 2011, which sets the maximum period for which a child assessment order has effect. Under section 35 of that Act, a local authority may apply to the sheriff for an order to authorise the assessment of a child's health or development, or the way in which a child has been or is being treated or neglected. Paragraph 2(2) of schedule 3 of the first Scottish Act modified the maximum period during which such an order has effect from 3 to 5 days. The provision has been used on a minimal number of occasions, only two child assessment orders have been recorded over the period that the legislation has been in force, and it is the Scottish Government's view that the original legislative arrangement and timetabling for these types of order can be managed within the operating conditions expected to be in place at the end of March 2021. It is therefore the view of the Government that it is appropriate to expire this provision as it is no longer required.
9. Paragraphs 15 to 19 of schedule 7 of the first Scottish Act amend the Land Registration etc. (Scotland) Act 2012 to extend the protected period offered by affected advance notices until ten days after the Keeper declares the application record in the Land Register and Register of Sasines fully re-open. This enabled property transactions underway at the date of Registers of Scotland office closures to continue to settle with confidence during the period when the property registers were closed, allowing the

property market to continue to function and preventing transacting parties from experiencing personal or financial hardship. Following a commitment made during the progress of the Bill through parliament, the Keeper has consulted with the Law Society of Scotland and agreed to fully reopen the application record and Register of Sasines on the 1 March 2021. The practical effect of the reopening will be that the additional protection afforded to advance notices will fully lapse over time. Consequently, paragraphs 15 to 18 can be expired on 30 March 2021 as they are no longer necessary. Paragraph 19, however, requires to remain in force beyond 31 March 2021 for a further short period in order to ensure that the full protected 35 day period is applied to the relevant advance notices. Paragraph 19 should therefore not be expired early on 30 March 2021 and should benefit from extension, should that be approved by Parliament. Provision will be made to expire paragraph 19 as soon as practicable after 5 April 2021 when it becomes spent and is no longer required.

10. Paragraphs 20 to 22 of schedule 7 of the first Scottish Act modify the Anatomy Act 1984 to extend the periods for which a body or parts of a body can be retained for the purpose of anatomical examination and enable such bodies or parts of bodies to be retained after examinations are concluded. As cremations have generally been able to proceed without issue, albeit with further advanced planning, it is the view of the Scottish Government that this provision is no longer required and can be expired.
11. Paragraphs 32 and 33 of schedule 7 of the first Scottish Act modify section 23 of the Hill Farming Act 1946, with the effect of suspending the muirburn season during the period in which paragraph 33 has effect. The operation of paragraphs 32 and 33 was suspended by the Coronavirus (Scotland) Act 2020 (Suspension: Muirburn) Regulations 2020<sup>4</sup>. The Scottish Government has received no requests to reinstate the ban on muirburn since that suspension and no other forms of outdoor work or land management have been banned outright through the Coronavirus Acts. In the absence of both evidence that muirburn continues to pose a threat to the work of the emergency services and requests to revive the provisions, the Scottish Government does not believe that there is sufficient evidence to continue to differentiate muirburn from other forms of outdoor work by retaining a provision to proscribe it. It is therefore the Scottish Government's view that this is no longer necessary and should be expired.
12. Paragraph 7 of schedule 2 of the second Scottish Act amended regulation 9 of the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020<sup>5</sup> to raise (from 16 to 18 years) the age at which a person could have a fixed penalty notice under those regulations issued in respect of them. Those regulations were subsequently revoked on 14 September 2020 by the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020<sup>6</sup>. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020<sup>7</sup> are now in place and continue the policy that a Fixed Penalty Notice can only be issued to a person where it is reasonably believed that the person is aged 18 or over. Paragraph 7 of schedule 2 therefore has no remaining legal effect. As that is the case, and as the provision in the second Scottish Act is no longer necessary in order to deliver the policy as it has been achieved by the Health Protection (Coronavirus) (Restrictions and

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<sup>4</sup> <https://www.legislation.gov.uk/ssi/2020/260/contents/made>

<sup>5</sup> <https://www.legislation.gov.uk/ssi/2020/103/contents>

<sup>6</sup> <https://www.legislation.gov.uk/ssi/2020/279/contents>

<sup>7</sup> <https://www.legislation.gov.uk/ssi/2020/344/contents>

Requirements) (Local Levels) (Scotland) Regulations 2020, it is the Scottish Government's view that it should be expired.

13. Paragraph 13 of schedule 4 of the second Act requires a report to be laid before the Scottish Parliament, by 4 December 2020, on the progress being made towards the introduction of low emission zones under Part 2 of the Transport (Scotland) Act 2019. As that report was laid on 1 December 2020<sup>8</sup>, paragraph 13 of schedule 4 has no remaining legal effect, and it is, therefore, the view of the Scottish Government that it should be expired.
14. Paragraph 15 of schedule 4 of the second Scottish Act modifies section 15 of the Road Traffic Regulation Act 1984 to permit temporary traffic regulation orders made under section 14 of that Act in relation to footpaths, bridleways, cycle tracks or byways to remain in force for up to 18 months and to be extended beyond that period by the Scottish Ministers. The effect of this provision was to allow local authorities to make temporary traffic regulation orders regulating the use of routes that are mainly used by pedestrians, cyclists and persons on horse, for a period of up to 12 months longer than previously permitted. There have been no known uses of this provision, and there is no expectation that it will be used in the future. It is therefore the view of the Scottish Government that this provision is unnecessary and should be expired.

#### *Suspension of provision*

15. Paragraph 24 of schedule 1 of the second Scottish Act requires the Scottish Ministers, in conjunction with the Registrar General of Births, Deaths and Marriages for Scotland, to take such steps as they consider necessary to ensure that the solemnisation of marriages and registration of civil partnerships continue to be available in Scotland whilst paragraph 24 is in force. It specifies that the steps taken must ensure that a person's right to marry, which is protected by Article 12 of the European Convention on Human Rights ("ECHR"), is not disproportionately interfered with for reasons relating to coronavirus. It also requires the Scottish Ministers to report on the steps taken and on the number of marriages and civil partnerships that have taken place.
16. It is already the Scottish Government's policy to ensure the continued availability of marriage and civil partnership and the provision in the second Scottish Act has not to date been instrumental in achieving that. Early expiry of the provision was therefore considered. However, restrictions on marriage and civil partnership could be subject to further adjustment as a consequence of the pandemic, and given this, and given the views of stakeholders and others, suspension of the provision is deemed more suitable at present.
17. At the time of the second Scottish Act, marriage and civil partnership was only available to those in an emergency situation, for example, if a party to the marriage or civil partnership was seriously ill. This was principally due to the closure of local registration offices where notices of intention to marry or register a civil partnership are processed, where marriage and civil partnership schedules are prepared, and where some ceremonies take place.

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<sup>8</sup> The report is expected to be published on the Transport Scotland website shortly

18. Since the reopening of local registration offices, couples wishing to marry or register a civil partnership have generally been able to do so. Regulations placing restrictions on leaving home, on gatherings and on travel have also provided for exceptions to ensure that it has remained possible for ceremonies and registrations to take place both indoors and outdoors with limited numbers and with suitable health protection measures in place.
19. Guidance published on the Scottish Government website, and updated from time to time, has assisted couples planning to marry or register a civil partnership and celebrants to understand and take account of relevant restrictions. As part of their existing work on publishing statistics on vital events, National Records of Scotland (NRS) already provide quarterly figures on their website<sup>9</sup> on the number of marriages and civil partnerships taking place.
20. While the provision is not currently required, the provision is being suspended rather than expired in order to take account of the possibility that further restrictions could be imposed by the Scottish Ministers on public health grounds. In doing so, the provision could be revived during the extension period to reinstate the direct duty on the Scottish Ministers and the Registrar General and the requirement to report to the Scottish Parliament.

#### *Saving provision*

21. Whilst paragraphs 15 to 18 of schedule 7 of the first Scottish Act in relation to Land Registration are to be expired by these regulations, paragraph 19 is to remain in force for a short period. The regulations therefore save the effect of paragraph 15 for the purposes of defining “the 2012 Act” (Land Registration etc. (Scotland) Act 2012) in order that paragraph 19 continues to operate effectively.

#### **Consultation**

22. 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 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 the approach to extension or expiry of measures contained in the Acts, and further detail of this is provided both below and in the Statement of Reasons for making these Regulations.
23. In considering the expiry of child protection order provision, consultation took place with Social Work Scotland since the provision impacts on the Chief Social Work Officers of local authorities. That consultation confirmed that this provision is no longer needed.
24. HM Inspector of Anatomy and all heads of anatomy schools were consulted on the continued necessity of the Anatomy Act 1984 provision. No anatomy school currently possesses bodies beyond the 3 year statutory limit and for bodies approaching the 3 year limit within the next few months, cremations are scheduled as normal. All anatomy

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<sup>9</sup> [Births, Deaths and Other Vital Events - Quarterly Figures | National Records of Scotland \(nrscotland.gov.uk\)](https://www.nrscotland.gov.uk/publications/births-deaths-and-other-vital-events-quarterly-figures)

schools unanimously stated that an extension to the provision is not required and should be expired.

25. In considering the expiry of the traffic regulations provision, the Scottish Government informally consulted with local authorities and the MSP whose amendment to the second Bill introduced these measures. Local authorities are unaware of any circumstances where this provision has yet been used or indeed is intended to be used.
26. In relation to land registration advance notice provision, the full reopening of the registers and the protected period for advance notices reverting to the position prior to commencement of these provisions has been well communicated by the Keeper and via key representative bodies including the Law Society of Scotland. Details of the change have been published on the Keeper's website since 3 December 2020.
27. In considering the suspension of the marriage and civil partnership provision in the second Scottish Act, the Scottish Government informally consulted with NRS and the MSP whose amendment to the second Bill introduced these measures, who were supportive of the suspension of this provision.

### **Impact Assessments**

28. No impact assessments have been completed for this instrument. However, as part of the two-monthly reporting<sup>10</sup> to Parliament on the provisions in the Coronavirus Acts, impacts on rights and equality are regularly considered.
29. Equality Impact Assessments and Child Rights and Wellbeing Impact Assessments were undertaken for both of the Acts as part of the development of the Bills which were introduced to Parliament on 31 March and 11 May, respectively. The human rights impacts were summarised in the Policy Memorandums for each of the Acts.
30. Rights and equality implications were considered in relation to child assessment orders and it was determined there will be no impact as expiry of these provisions will result in reverting to standard practice which is already compliant with rights and equality obligations.
31. Rights and equality implications were considered in relation to the land registration provisions and it was determined that no additional rights and equality implications have been identified in relation to expiring the provision. Expiry of these provisions will result in reverting to the position that existed prior to the pandemic which is already compliant with rights and equality obligations.
32. No rights or equality implications have been identified in relation to the provisions concerning duties under the Public Finance and Accountability (Scotland) Act 2000, the Anatomy Act 1984, muirburn or fixed penalty notices.

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<sup>10</sup> Section 15 of the first Scottish Act, and section 12 of the second Scottish Act require Scottish Ministers to review the operation of the provisions of Part 1 of those Acts in each reporting period, and every two months, report on the status of the provisions and make a statement that they are satisfied that the status of those provisions is appropriate.

33. In considering the suspension of the marriage and civil partnership provision in the second Scottish Act, the Scottish Government considered that the right of men and women of marriageable age to marry is already protected by Article 12 of the ECHR. While the right of same sex couples to marry or enter into civil partnerships is not similarly protected, any restriction that applied only to, or disproportionately to, such relationships would likely constitute a violation of Article 14 of the ECHR (protection from discrimination) in conjunction with Article 8 (respect for private and family life). In any event, there is no likelihood of restrictions being imposed in a way that treats those relationships less favourably.

### **Financial Effect**

34. 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**

February 2021