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The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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## **Introduction**

1. The Coronavirus (Scotland) Act completed Stages 1, 2 and 3 and was passed on 1 April 2020. The Holyrood Act sits alongside Westminster legislation, the Coronavirus Act 2020, which also confers powers on Scottish Ministers. The Commission previously produced a [briefing on the implications of the UK framework legislation](#) to inform consideration of such provisions as were placed before the Scottish Parliament. The Coronavirus (Scotland) Act 2020 contains measures relating to additional devolved areas which have an impact on human rights. This briefing comments on range of these issues with a view to informing any further primary legislation, regulations, guidance and implementation.

## **Expiry, suspension and revival**

2. Emergency measures should only be in place for as long as they are required, and the assessment of whether they are required should be based on scientific evidence on the coronavirus outbreak. It is therefore positive that the Act allows for provisions

to be suspended and revived should they become necessary again (section 10).

3. Section 11 provides for expiry on 30 September 2020, unless the parliament passes regulations for it to continue until 31 March 2021. If those regulations are passed, it may only pass one further extension until 30 September 2021. Finally, section 12 gives Ministers power to allow certain parts of the Act to expire earlier if they are satisfied that measures are no longer appropriate nor proportionate.
4. In its previous briefing to MSPs, the Commission highlighted that emergency legislation must be subject to frequent review and should be time limited. The Commission largely supports the expiry, suspension and revival provisions in the Act; however, we believe that Parliament has a key role to play in determining whether provisions remain necessary. The Commission recommends that mechanisms are agreed to allow for meaningful and continued parliamentary scrutiny both as to whether measures should remain in force, and how measures are being implemented in practice.

## **Reporting**

5. Section 14 requires Ministers to keep the necessity of the provisions under review, and to report every two months on its assessment of that necessity, on the status of the provisions of the Act and on the use of the powers in the Act.
6. In its briefing to MSPs, the Commission stressed the importance of reporting and monitoring on the use of powers. The Commission welcomes the reporting duty; however, the success of these provisions will depend on whether adequate and accurate data is collected on the use of powers. The Commission reiterates the importance of external, independent oversight and scrutiny on the use and impact of emergency powers.

# Justice

## Extension of time limits

7. Part 4 of Schedule 4 extends time limits set out in the Criminal Procedure (Scotland) Act 1995. A number of different time limits are addressed, including the time an accused can be remanded in custody pending trial. For summary procedure, an extension of 3 months is applied. For solemn procedure the Act provides for an extension of 6 months.
  
8. The Commission is mindful that it is highly likely that time limits may not be met due to the coronavirus outbreak and that delays are inevitable. That said, we question whether a blanket extension is appropriate. We note that the Criminal Procedure (Scotland) Act 1995 already allows for extension of certain time limits on cause shown, and the Scottish Government has highlighted in its policy memorandum that an alternative approach would be to allow courts to consider extensions to time limits on an individual basis. The Commission suggests that the court system could be given the opportunity to respond to delays using provisions set out in current legislation, and the viability of this approach should be kept under parliamentary review.
  
9. The Commission believes the extensions provided for in the Act should be for shorter time frames than currently provided for, should be specifically linked to scientific evidence around the length of time the current outbreak is expected to continue and should be subject to parliamentary review. The Commission stresses the importance of ongoing monitoring to ensure time spent in custody pending trial remains as short as possible. Alongside this, alternatives to custody, where public protection and adequate community arrangements can be ensured, should be actively sought.

## Trials without a jury

10. The Commission notes that proposals to allow certain trials to continue without a jury were removed from the Coronavirus (Scotland) Bill, and that a standalone Bill on this issue will be introduced to Parliament on 21 April 2020. The Commission looks forward to engaging with the Scottish Government and stakeholders to scrutinise the human rights implications of any proposals brought forward.

## **Adults with incapacity**

11. In our previous briefing, we recognised that people may need to be moved from hospitals to alternative care settings, such as care homes, including in circumstances that are likely to amount to a deprivation of liberty (Article 5 ECHR), and called for a legal basis which upholds safeguards as far as possible.
12. Schedule 3, paragraph 11(1) allows for the use of s.13ZA of the Social Work (Scotland) Act 1968 to provide care, including a move to residential accommodation, even where there is a welfare guardianship, welfare power of attorney or intervention order in place or in progress. This provides a partial legal basis, however, s.13ZA is not currently understood to be capable of authorising a deprivation of liberty<sup>1</sup>. On a practical level, it does not allow for any package of restrictions that might be required to keep an incapable adult in the accommodation, such as restraint, nor provide anyone with lawful authority to make welfare decisions on behalf of the adult on an ongoing basis. It also remains deficient in procedural safeguards. It is thus only a partial solution and we consider that a more robust legal basis and proper review of the appropriateness of the placement for the adult will be required as soon as possible, once the emergency has passed. We

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<sup>1</sup> *CJR v in respect of the adult JMR* 2013 G.W.D. 13-293 <https://www.scotcourts.gov.uk/search-judgments/judgment?id=1df986a6-8980-69d2-b500-ff0000d74aa7>

understand that the Mental Welfare Commission has since been reassured by the Scottish Government that this emergency provision is intended to be used in exceptional circumstances only, and when an authority has exhausted all other measures<sup>2</sup>. We welcome this clarification.

13. Article 5(4) ECHR requires both “speedy review” of the lawfulness of detention and continuing review “at regular intervals”, particularly in circumstances where the grounds for detention are susceptible to change over time, as is the case with mental health. We therefore recommend the following:
14. We support the Centre for Mental Health and Capacity Law in calling for real and effective access to legal review of these arrangements immediately upon these emergency provisions ceasing to have effect<sup>3</sup>.
15. We support the Mental Welfare Commission’s ask for the system to include a formal notification to a scrutiny body each time these powers are used<sup>4</sup> and we welcome the clarification provided during the debate that whenever this provision is used, the Mental Welfare Commission will be involved in the reporting process.
16. Paragraph 11(1) also dispenses with the need, when using s.13ZA, to take into account the past and present wishes and feelings of the adult lacking capacity. This is a fundamental

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<sup>2</sup> <https://www.mwcscot.org.uk/news/coronavirus-emergency-legislation-mental-welfare-commission-role>

<sup>3</sup> <http://blogs.napier.ac.uk/cmhcl-mhts/2020/04/01/centre-for-mental-health-and-capacity-law-comment-on-the-coronavirus-scotland-bill-2020/>

<sup>4</sup> <https://www.mwcscot.org.uk/news/mental-welfare-commission-response-coronavirus-emergency-legislation>

principle applied across the Adults with Incapacity (Scotland) Act 2000 (the AWI Act) to ensure compliance with Article 8 ECHR, and is strongly backed up by the requirements of Article 12 CRPD. We believe it is vital to continue to uphold the principles of the AWI Act even in these emergency circumstances and we do not consider that a pressing need has been established to justify dispensing with the duty to take the adult's wishes and feelings into account. This principle is only one of a number to be considered and continuing to apply it would not necessarily prohibit a move and, when balanced with other principles, may ensure the robustness of decision-making in this context. However, such decisions must bring in consideration of whether the placement is appropriate for the adult to the greatest extent possible, and therefore to uphold the principle of proportionality. We understand that the provisions of Schedule 3, paragraph 11 are to be brought into force by regulations at a later date and we recommend that the provision dispensing with the adult's wishes and feelings is not commenced.

## **Coronavirus Act 2020 (UK)**

17. The above commentary relates to the Scottish legislation passed on 1 April 2020. The measures brought in by the UK Act sit alongside this and the issues raised in our previous briefing remain of importance in relation to their implementation and monitoring. We appreciate clarification that has been offered on the use of those powers so far, including that the mental health provisions will not be brought into force until an appropriate time based on the safe running of the mental health system.

