EXPLANATORY MEMORANDUM TO

THE CORONAVIRUS ACT 2020 (EXPIRY OF MENTAL HEALTH PROVISIONS) (ENGLAND AND WALES) REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care (the "Department") and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument expires provisions of the Coronavirus Act 2020 which would have made temporary changes to certain requirements under the Mental Health Act 1983 ("the MHA"). These provisions were aimed at ensuring the continued functioning of the mental health system in the event that the sector experienced a significant reduction in available workforce during the pandemic, potentially resulting in patients' safety being put at risk. As the powers have not been needed to date, and as other means of increasing capacity and resilience have now been introduced, the Government has decided to expire the emergency provisions in England and the provisions relating to the criminal justice system in Wales.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 This entire instrument applies to England and Wales only.

3.3 In the view of the Department, for the purposes of House of Commons Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of parts of this instrument would not be within the devolved legislative competence of any of the Northern Ireland Assembly as a transferred matter, the Scottish Parliament or the National Assembly for Wales if equivalent provision in relation to the relevant territory were included in an Act of the relevant devolved legislature.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 The Secretary of State for Health and Social Care has made the following statement regarding Human Rights:

"In my view the provisions of The Coronavirus Act 2020 (Expiry of Mental Health Provisions) (England and Wales) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument is being made to expire certain emergency provisions contained in Schedule 8 to the Coronavirus Act 2020, which would have introduced easements relating to the treatment of people with mental disorders under the MHA.

6.2 The intention to expire these provisions has been made to Parliament by the Secretary of State for Health and Social Care (*Official Report*, 30th September 2020, cols. 392-393).

7. Policy background

What is being done and why?

7.1 The emergency measures contained in Schedule 8 to the Coronavirus Act 2020 would have decreased the immediate safeguards around a number of processes under the MHA for people with mental health conditions.

7.2 These measures included allowing for the extension or removal of certain time limits relating to the detention and transfer of patients. Most notably the measures would have allowed for one rather than two doctors to recommend that a person be detained and treated or assessed under the MHA. Schedule 8 contained similar easements relating to the detention in hospital and compulsory mental health treatment of people accused or convicted of offences.

7.3 The intention has been that these measures, if commenced, would allow for the mental health service to continue in the event of severe constraints on staff numbers during the Covid-19 pandemic, and ensure that patients could receive the mental health treatment they require in a timely and effective manner.

7.4 The Joint Committee on Human Rights[1] argued that these provisions, if enacted, would water down the protections available for people subject to compulsory treatment under the MHA and "reduce the safeguards that exist to prevent arbitrary detention under Article 5 ECHR". Further, the Public Administration and Constitutional Affairs Committee noted the concerns of the mental health charity Mind and their call on Government to remove the MHA modifications from the Coronavirus Act 2020.[2]

7.5 We have taken the decision to remove the emergency provisions because they were not required during the first peak of the pandemic. Instead, the Department in partnership with the National Health Service in England has found alternative ways to manage mental health services during the pandemic, for example allowing for greater use of electronic technology to engage with and assess patients. The mental health workforce has also demonstrated resilience and ingenuity during the peak of the Covid-19 pandemic earlier this year, avoiding the need for Government to bring the

[1] Para 126, The Government's response to COVID-19: human rights implications. JCHR, 2020. https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/265/26502.htm

[2] Para 90, The Government's handling of COVID-19, Public Accounts and Constitutional Affairs Committee,2020, https://publications.parliament.uk/pa/cm5801/cmselect/cmpubadm/377/37707.htm#_idTextAnchor044

measures into force. We consider that the policy to now expire these powers is justified and proportionate.

7.6 The decision to expire Schedule 8 to the Coronavirus Act 2020 was announced by the Secretary of State for Health and Social Care on 30 September 2020 at the Coronavirus Act six-monthly debate in the House of Commons.

7.7 Devolved provisions under Schedule 8 will be retained for Wales. This is because the Welsh government is concerned that the mental health workforce in Wales may experience unprecedented pressures as a result of a second wave of the pandemic in the winter and may need to rely on the emergency provisions. However the provisions of Schedule 8 that modify Part 3 of the MHA are reserved, and will be expired for both England and Wales. The Welsh government has indicated its support of this.

8. European Union (Withdrawal) Act 2018/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 This instrument does not consolidate legislation and a consolidation is not planned.

10. Consultation outcome

10.1 No consultation was required under relevant provisions of the Coronavirus Act 2020. However, the Welsh government has been consulted in preparing this instrument. The Secretary of State for Health and Social Care's announcement as to the expiry of Schedule 8 has been well-received by the Department's stakeholders, including major mental health charities such as Mind, and Sir Simon Wessely, who led the Independent Review of the MHA in 2018.

11. Guidance

11.1 Guidance is not required as the effect of this statutory instrument is to remove the provisions which have not been commenced.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An impact assessment has not been prepared for this instrument because no significant impact on business, charities or the public sector is foreseen. These changes will not create any significant additional burdens.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Coronavirus Act 2020 is subject to six-monthly parliamentary reviews. The approach to monitoring of the MHA is that it falls within the responsibilities of the

Care Quality Commission, which is responsible for regulating and reporting on the use and operation of the MHA.

15. Contact

15.1 Amy McGregor at the Department of Health and Social Care email: amy.mcgregor@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Caroline Allnutt, Deputy Director for Mental Health Legislation, at the Department of Health and Social Care can confirm that this explanatory memorandum meets the required standard.

15.3 Nadine Dorries MP, Minister of State for Mental Health, Suicide Prevention and Patient Safety at the Department of Health and Social Care can confirm that this explanatory memorandum meets the required standard.