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Scottish Parliament
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By email only

9 May 2022

Dear Siobhian

SCOTTISH GOVERNMENT RESPONSE TO SCRUTINY COMMITTEE REPORTS ON THE CORONAVIRUS (RECOVERY AND REFORM) (SCOTLAND) BILL AT STAGE 1

I write in response to the lead COVID-19 Recovery Committee's Stage 1 Report on the Coronavirus (Recovery and Reform) (Scotland) Bill, following on from other Committees' recent Stage 1 responses. I have copied this letter to those Committees' Convenors for their Committees' interests.

I and my Ministerial colleagues would like to thank the Committees for their effective coordination and careful consideration of the public health, public services reform, education, tenancies and justice system provisions the Bill. This demonstrates the Parliament's adeptness at scrutinising longer, more complex and cross-portfolio Bills – we remain of the view that it was best to group the range of proposals consulted on into a single Bill intended for commencement from September 2022.

I am pleased that your Committee has endorsed the general principles of the Bill and recognised that it is appropriate to equip the statute book with powers to counter future public health threats. I am persuaded in light of the reports that the Bill should be appropriately amended to build on the safeguards already in the Bill. Therefore the Government's detailed responses in the Annexes to this letter include:

- a commitment to bring forward Stage 2 amendments to ensure that Ministers provide appropriate explanations of urgency when making use of the made-affirmative procedure, which in certain parts of the Bill is provided as an alternative to the draft affirmative procedure; and

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- a commitment to considering the options suggested by the Committee on the power to modify primary legislation in Part 1 of the Bill (sometimes known as a “Henry VIII” power) and what other approaches might be possible to further strengthen parliamentary oversight.

I also particularly note the Committee’s interest in the remote delivery of public services and agree that digital public services reforms should not disadvantage service users who cannot or prefer not to use digital means. The response sets out how the Government is working with partners to support connectivity across Scotland, and minimise risks of digital exclusion, whilst remaining open to any appropriate amendments to the relevant Bill provisions.

The Government’s responses to Committee reports are set out in the following Annexes:

- Annex A: COVID-19 Recovery Committee Report (22 April 2022)
- Annex B: Local Government, Housing and Planning Committee Report (20 April 2022)
- Annex C: Criminal Justice Committee Report (4 April 2022)
- Annex D: Education, Children and Young People Committee Report (1 April 2022)
- Annex E: Delegated Powers and Law Reform Committee Report (29 March 2022)

Each Annex responds to each of the main recommendations in the respective report, using the paragraph numbers in that report. In a number of instances the Government accepts recommendations for amendments to the Bill whilst for other recommendations the Government is not persuaded that there is a case for amending the Bill, for the reasons set out in the response. As mentioned, in some cases the Government has indicated an openness to further consideration of particular matters.

On justice proposals specifically, you will be aware that the Crown Office and Procurator Fiscal Service has separately written to the Criminal Justice Committee in relation to paragraphs 114 to 117 of its report⁽¹⁾, and my understanding is that that Police Scotland will also be writing in relation to issues its report raises around arrangements for solicitors and social workers to access their clients in police custody.

I hope that the Government’s responses in the Annexes are helpful in Members’ further consideration of the Bill. The Government looks forward to exploring points within the reports during the Stage 1 debate on 12 May 2022 and to continue working with the Committee on this important Bill at Stage 2, should the Parliament endorse the general principles at Stage 1.

Yours sincerely,

JOHN SWINNEY

⁽¹⁾ [Crown Office and Procurator Fiscal Service Response to the Criminal Justice Committee | Scottish Parliament Website](#)

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ANNEX A: GOVERNMENT RESPONSE TO SCRUTINY COMMITTEE REPORTS ON THE CORONAVIRUS (RECOVERY AND REFORM) (SCOTLAND) BILL AT STAGE 1 COVID-19 RECOVERY COMMITTEE REPORT (22 APRIL 2022)

Purpose of the Bill

8. ...Part 3 contains new provisions that relate to... the Register of Inhibitions (Section 25).

The Government wishes to highlight that the Bill's provisions on the Register of Inhibitions are not new. They place the existing temporary provisions for that register on a permanent statutory footing in the same manner as the provisions relating to Registers of Scotland's property registers.

Limits on the use of [public health protection] power: regulations directly and indirectly imposing restrictions or requirements

42. The Committee notes that the inclusion of a higher threshold for special restrictions and requirements will bring Scotland into line with English and Welsh legislation. The Committee considers nonetheless that the Bill could be strengthened by providing a non-exhaustive list of factors for Scottish Ministers to consider when determining whether a threat is "serious and imminent". Relevant factors may include the severity of disease; transmissibility of infection; the size of the exposed population; the susceptibility of exposed population; availability of diagnostic tests, treatments, and vaccinations; and the potential impact on critical services. The Committee therefore invites the Scottish Government to bring forward an amendment at Stage 2 that sets out relevant factors which Scottish Ministers may take account of when determining whether a threat is serious and imminent.

The Government acknowledges that there are, at times, advantages to providing definitions for certain concepts in legislation. However we do not consider that attempting to define the levels of public health harm would be of benefit in this particular legislative context. The Government is mindful that, as mentioned in the course of Stage 1 scrutiny, one public health threat may not be like another. The Government is therefore also mindful that even a non-exhaustive list may inadvertently limit the range of factors that are considered to the detriment of reacting with appropriate speed or effectiveness. The Government will consider what alternatives to a list on the face of the Bill might provide some clarity to members as to the factors which may be considered while also maintaining necessary scope to respond to specific circumstances.

Parliamentary oversight

Made affirmative procedure

50. The Committee agrees with the recommendations of the Delegated Powers and Law Reform Committee on the provisions that are subject to the made affirmative procedure in the Bill. The Committee recommends that the Scottish Government bring forward amendments at Stage 2 to provide that where a provision is subject to the made affirmative procedure:

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- *Scottish Ministers must provide a written statement prior to the instrument coming into force providing an explanation and evidence as to why Scottish Ministers consider the regulations need to be made urgently when using the made affirmative procedure;*
- *Scottish Ministers must include an assessment of the impact of the instrument on those affected by it; and*
- *Statutory instruments to be made under the powers are subject to a sunset provision.*

The Government's responses to these points are contained in the response to the Delegated Powers and Law Reform Committee report.

51. The Committee notes that Scottish Ministers currently have the power to determine whether a situation is urgent. The Committee recommends the Scottish Government considers whether more detail could be set out on the face of the Bill to note the types of scenarios when Scottish Ministers may consider that legislation is required to be made urgently.

The Government is giving consideration to this matter including what alternatives might be available, which might provide further clarity to members as to the types of scenarios when legislation may be required urgently. The Government is conscious that there may be disadvantages in being overly prescriptive on the face of the Bill which might leave Scotland ill-equipped to respond to new public health threats.

Henry VIII Power

57. The Committee considers that Parliament's role in a public health emergency is paramount. The Committee notes there are alternative approaches to the inclusion of the Henry VIII powers in the Bill. This includes removing this provision entirely, or delaying its commencement until a public health emergency arises and giving Parliament a role in scrutinising the decision to commence the powers in those circumstances. The Committee did not come to a consensus on this matter, but invites the Scottish Government to give further consideration to this issue.

The Government has listened to concerns and wishes to reiterate that these powers have been included because the measures needed to respond to a public health threat may not always be foreseeable and may come in many forms. Regulations may therefore conflict with existing primary or secondary legislation or result in unforeseen consequences that would make the operation of the measures impractical. The Bill provides a mechanism to amend existing legislation where appropriate as an important tool to ensure clarity around applicable law and an effective delivery of any required public health response.

The Government has accepted that the Henry VIII power is a significant power and notes that the Committee has not been able to come to a consensus on this matter. In these circumstances the Government is considering the options suggested by the Committee and what other approaches might be possible.

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Review of Regulations

64. The Committee welcomes the requirement for public health protection regulations to be reviewed, as set out in new Section 86G. The Committee considers the Bill could be strengthened by incorporating best practice reporting processes that were contained in the Scottish Coronavirus Acts. The Committee therefore invites the Scottish Government to bring forward an amendment at Stage 2 to provide a reporting process to accompany the use of public health protection regulations on the face of the Bill.

65. The Committee also invites the Scottish Government to bring forward an amendment at Stage 2 to require Scottish Ministers to notify Parliament of the outcome of the reviews conducted under new Section 86G, either through the publication of a report, or by a requirement to write to the Presiding Officer and lead policy committee on the outcome of the review. This should include the options considered and the evidence that underpins the decision taken.

As was noted in the Deputy First Minister's letter of 8 April⁽²⁾, the Government considers that review requirements would best be set out in the relevant regulations. This again relates to the variety of measures that may be used to respond to a public health response. Different measures will have different impacts, requiring consideration of different factors and may require different review processes. It is important that Ministers are able to tailor these appropriately. All regulations made under these powers would be subject to scrutiny, and so the Government believes that stipulating review requirements in regulations themselves would also ensure a more active parliamentary role in determining their suitability than would be the case if a single review requirement, which cannot be tailored to specific circumstances, is included on the face of the Bill.

Other (public health) provisions

69. The Committee notes the Scottish Government's explanation as to why Scottish Ministers or other persons are not required to obtain a Sheriff's order when seeking to apply the special restrictions and requirements contained in Section 86E. The Committee nonetheless invites the Scottish Government to give this further consideration, including whether to bring forward an amendment at Stage 2 to clarify the process that will be applied when these measures are implemented.

The Government recognises the need to ensure that the process for a decision to be taken under regulations to impose any of the special restrictions and requirements is clear. As with the review requirements above, the Government believes that regulations are the best place to set those processes out. The process will necessarily differ depending on the nature of the restriction or requirement, and the circumstances under which it may be imposed. To set out a single process on the face of the Bill would risk creating one which does not work in response to particular circumstances. The Government therefore does not consider it is appropriate to do so.

Other (public health) provisions

⁽²⁾ [Deputy First Minister follow to the session on 31 March 2022 | Scottish Parliament Website](#)

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70. The Committee also notes that other parts of the Public Health etc. (Scotland) Act 2008 contain an appeals process on the face of the primary legislation. The Committee therefore invites the Scottish Government to consider bringing forward an amendment at Stage 2 to set out a requirement that an appeals process is provided for in secondary legislation when the provisions in the new Part 5A are implemented.

As the Committee notes, the Public Health etc (Scotland) Act 2008 contains specific appeal provisions (in sections 60 to 65). However those appeal provisions are specific to the orders which may be made under corresponding provisions in that Act. Section 86F(4) (inserted by section 1 of the Bill) requires that the regulations must provide for a right of appeal to the sheriff against a decision taken under those regulations which leads to the imposition of a special restriction or requirement. Those regulations would, therefore, need to contain provision for appeals as well as setting out the details of the decisions which might be made, including any conditions around those decisions. The Government therefore considers that we have already met this recommendation in the Bill as drafted.

Arrangements for vaccination and immunisation

74. The Committee agrees with the Bill's policy intent to permanently remove the requirement for vaccinations and immunisations to be delivered only under the direction and control of a medical practitioner.

75. The Committee considers that the implementation of this provision should continue to be accompanied by accessible public health messaging aimed at supporting public confidence in the future delivery of programmes. This should highlight the safety measures that have been built into vaccination and immunisation programmes, including the development of vaccines and the training and regulation of persons administering doses.

The Government is pleased that the Committee supports the Bill provisions and intends to continue accompanying the implementation of this provision with accessible public health messaging aimed at supporting public confidence in the future delivery of programmes. Public health messages about safety measures that have been built into vaccination and immunisation programmes, including the development of vaccines and the training and regulation of persons administering doses, will vary for each vaccination and immunisation programme depending upon who is being vaccinated, what they are being vaccinated with and why they are being vaccinated.

Remote delivery of public services

Experience of remote service provision

92. The Committee notes the support for the remote delivery of public services and the flexibilities and efficiencies the provisions in the Bill will bring. The Committee welcomes these provisions, which will build on good practice in service provision experienced during the pandemic.

93. However, the Committee is aware that not everyone will be able to access services remotely and believes that it is essential that the Bill ensures that local authorities provide a choice of remote or in person service where required. The Committee welcomes the Deputy First Minister's willingness to look at this and recommends that Scottish

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Government brings forward an amendment at Stage 2 to ensure the Bill requires local authorities to offer the choice of remote or in person service where required.

Remote services development support

The Government considers it logical to address paragraphs 113-115 alongside paragraphs 92 and 93 and ahead of paragraph 94.

113. Given the evidence heard in relation to digital exclusion, the Committee recommends the Scottish Government brings forward amendments at Stage 2 making it a requirement for local authorities to retain the option of in-person services, including the provision of hard copy documents and in-person meetings, where this is required.

114. The Committee is concerned that some people for various reasons, such as digital exclusion, may not be able to access services remotely and is of the view this must be addressed as a priority. The Committee welcomes the acknowledgement from the Deputy First Minister that more work needs to be done to address digital exclusion and requests that the Scottish Government provides further information on the specific funding streams that are available to support this work.

115. In addition, the Committee believes there should be a recognition that greater support will be needed at community level to help support users moving to online public service provision. The Committee requests the Scottish Government sets out how it plans to work with local authorities and the third sector to ensure sufficient and appropriate support is available to users of online services, particularly those who are digitally excluded, to ensure everyone has continued access to the public services they require.

The Government recognises that there are some people who cannot or do not want to use technology to access services. We remain committed to offering alternative options and using digital technology behind the scenes to improve the quality of the user experience.

The Government will work to ensure that moving government and other services online reduces inequalities and does not exclude the least advantaged in society from the services they may need the most. We will make design decisions through the lenses of inclusion and offer clearly signposted alternative ways of accessing services for those who cannot, or do not want to, use digital routes. This will include the development of tools, processes and approaches that will allow identity to be established in a secure and sympathetic way for the digitally excluded.

The Government will ensure that face-to-face services continue to be provided when they are necessary and enhanced, where possible, by technologies that support staff with local decision making and service delivery.

In this context, the Government is considering what appropriate amendments might be brought forward to the different provisions affected by these recommendations, in the context that nothing in the Bill as introduced precludes in-person or paper-based services and each topic exists in a distinct legislative context that requires careful individual consideration. In many cases the Bill's provisions let individuals decide on a traditional paper-based or in-

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person option. For example, a requester of information will be able to choose whether to deal with the Scottish Information Commissioner by postal correspondence or electronically.

In relation to paragraphs 114 (funding streams), 'Connecting Scotland', a collaboration between the Government, Local Government and the Third Sector, developed in response to the pandemic, provides an internet connection, training and support, and a laptop or tablet, so that the most vulnerable and digitally excluded people in Scotland can access services and support and connect with friends and family.

Connecting Scotland is one of the most comprehensive national programmes aimed tackling digital exclusion in the world, unmatched elsewhere in the UK. Connecting Scotland reached its initial target of bringing 60,000 households online by the end of 2021, by providing devices, connections and training and support – backed by £48 million of investment. Work is now underway to develop an extension to the programme with the objective of bringing 300,000 people online by the end of this Parliament.

In relation to paragraph 115, Scotland's £1.5m Digital Participation Charter has secured commitment from over 600 public, private and third sector organisations to build the digital skills of their workforce, customers and service users and to support each other to increase digital inclusion.

Grants of up to £10,000 for voluntary and community organisations are helping people develop the skills, confidence, and motivation and to get online making a massive difference in their lives. There have been seven rounds since 2014 which have supported 189 local projects and has helped over 22,000 people to gain or improve their essential digital skills. In this regard, the Government announced a further over £700k investment in the Digital Participation Charter Fund in 2021.

The Scottish Council for Voluntary Organisations (SCVO) has been working with the Government, BT, Cellnex and Edinburgh and Lothian Health Foundation to launch the eighth round of the Digital Participation Charter Fund, the Connecting Communities Fund and the Device Refurbishment Support Fund, as part of its ongoing work to support individuals and organisations to get online and promote digital inclusion.

Further, the £28.75 m Scottish 4G infill programme (S4GI) is addressing mobile 'notspots' (areas where no mobile coverage is available) in remote communities across Scotland. 28 masts are currently live and providing 4G services, including masts on Orkney, Shetland and the Western Isles, with more sites to go live in the coming months.

S4GI is improving everyday life for the communities our masts serve, directly supporting wider plans for local tourism and enabling residents to access services and stay in touch with families and friends more easily during periods of Covid restrictions. The Government has a pipeline of build activity and site activations through to 2023.

Our Reaching 100% (R100) commitment – to ensure that everyone could access superfast broadband by the end of 2021 - has been achieved thanks to the £600 million R100 contracts, our R100 Scottish Broadband Voucher Scheme and continued commercial coverage.

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R100 contract build is far exceeding our commitment with a substantial number of connections being gigabit-capable, fibre to the premises – more than 30 times faster than our original superfast aim.

Bankruptcy: service of documents

94. In relation to the bankruptcy provisions, the Committee agrees that there should be distinction drawn between electronic communications with creditors and communications with debtors. The Committee recommends that the Scottish Government brings forward amendments at Stage 2 to allow for different consent processes to apply for electronic communications with creditors and electronic communications with debtors.

The Government has considered this matter and considers that consent requirements provided for within existing provisions are clear and do not disadvantage debtors.

In order for a document to be served electronically under the Bankruptcy (Scotland) Act 2016, the recipient has to have indicated to the sender a willingness to receive the document in that way. This applies to creditors, debtors and those involved in the administration of insolvency alike and it is difficult to envisage how separate consent processes can bring about improvement or enhanced protection for any party involved. The protections for debtors are underpinned by clear requirement for consent and there is scope to revert to conventional document delivery in the event that electronic delivery is no longer possible.

Therefore the Government does not propose making further amendment to these particular provisions.

Discretion on the format of [licensing] meetings

101. The Committee notes the concerns regarding the discretion afforded to local authorities in deciding the format of licence hearings and meetings. The Committee welcomes the Deputy First Minister's willingness to look again at these provisions.

102. The Committee recommends that the Scottish Government brings forward amendments at Stage 2 to make it explicit that those entitled to participate in licence meetings and hearings are also involved in the process of decision-making on the format of meetings.

The Government notes the Committee's recommendation that the Government should bring forward a Stage 2 amendment in relation to the decision making process around the format of licensing hearings and meetings. Further engagement is being undertaken with key licensing stakeholders to assist policy thinking, which will help inform the Government's consideration of this matter.

Bankruptcy threshold

127. The Committee considers the threshold limit of £5,000 as set out in the Bill is reasonable. However the Committee notes that the cost of living crisis has escalated considerably since the Bill was introduced. For this reason, the Committee recommends that the Government set out in further detail the assessment they have made as to why this remains the right balance.

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The Government acknowledges and welcomes the Committee's agreement that the £5,000 threshold included in the Bill is reasonable. There is a need to consider a level which strikes the right balance between the interests of creditors and those in debt, including the particular consequences for creditors who may be impacted by the cost of living crisis.

Although the Government acknowledges the need to keep this threshold under review particularly in light of the current economic situation, it does consider it to be an appropriate level for inclusion within the Bill. Statistics show that an increase to £7,000 would double the percentage of creditors that would be precluded from petitioning the court for bankruptcy of a debtor (from 15% to 30%).

The Government agrees with Donna McKenzie-Skene that this would be a step too far for permanent provision at this stage. There is scope to revise this threshold through secondary legislation and the Government will keep the impact of this change under review.

Moratorium on diligence

135. The Committee welcomes the Scottish Government's intention to bring forward amendments at Stage 2 on the moratorium on diligence and notes the evidence which suggests this period should be no less than 12 weeks. The Committee recommends that, in bringing forward any Stage 2 amendments, the Scottish Government should take into account the views of the working group currently looking at this issue.

The Government agrees that the moratorium on diligence should be no less than 12 weeks.

The Government has been continuing to engage with stakeholders to determine the right length of period and is now finalising proposals. The Government can confirm that a Stage 2 amendment will be brought forward which will take account of the working group and the Committee's views.

Mental health

146. The Committee recommends that the Scottish Government bring forward an amendment at Stage 2 to require that nominated named persons are provided with guidance on their role, rights and responsibilities in writing before they accept their nomination.

The Government notes the Committee's views however does not consider that an amendment is necessary. The statutory Code of Practice which accompanies the Mental Health (Care and Treatment) (Scotland) Act 2003 is clear that, "*It would be best practice for the Mental Health Officer (MHO), or any other practitioner discussing this with the nominee, to ensure that they are provided with information about the role in a form which is helpful to them*". In addition, the 2003 Act already places specific duties on MHOs when it comes to the role of named persons which directs them to seek out and talk to a named person before certain orders and applications are made therefore the potential for a person not to understand the role is extremely minimal.

The legislation as it stands only places a statutory duty for a prescribed person to act as a witness to the nominee's signature. This process of checking understanding is separate to

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the requirement for the nominated person's signature to be witnessed and can be undertaken by a range of professionals not just MHOs.

The Government notes that the Scottish Mental Health Law Review, which is considering what changes are required to our mental health and incapacity legislation, is currently carrying out a discrete piece of work looking at the role of the named person. The Government has therefore made the Review aware of the content of the Stage 1 report as this will help develop the recommendations for change and looks forward to receiving the Review's final report in September 2022.

147. The Committee also recommends that the Scottish Government bring forward an amendment at Stage 2 to require a nominated named person to declare that they understand their role, rights and responsibilities when they accept their nomination in writing.

The Government proposes to take this recommendation forward via guidance. There is no required statutory form to complete although there is a suggested template and the Government is aware that some local authorities have their own versions. Guidance is already available regarding "named persons" within mental health and the statutory Code of Practice explains that Mental Health Officers in particular and medical practitioners in general have a role in providing information to nominees about the role of named person. That role will not change.

The Government already plans to issue revised guidance covering named persons therefore we will include text which makes clear that the nominee understands the role. This would confirm what the Government understands should be happening in practice anyway.

148. The Committee is also concerned that relatively few people are exercising their right to appoint a named person under the 2003 Act as amended. It therefore encourages the Scottish Government to work with the Mental Welfare Commission to consider what more can be done to promote this important safeguard and increase its uptake.

Scottish mental health legislation is clear that the patient has the right to choose whether to have a named person or not. That being said the Bill's provisions remove a layer of bureaucracy without removing any layer of safeguarding. The change has the potential to make it easier for a named person to take up the role. The Government will continue to encourage and remind those who discharge their functions under the 2003 Act to ensure the role of named person is actively promoted.

ANNEX B: GOVERNMENT RESPONSE TO SCRUTINY COMMITTEE REPORTS ON THE CORONAVIRUS (RECOVERY AND REFORM) (SCOTLAND) BILL AT STAGE 1 LOCAL GOVERNMENT, HOUSING AND PLANNING COMMITTEE REPORT (20 APRIL 2022)

The Bill and housing policy

13. The provisions in this Bill are part of wider ongoing work on the Scottish Government's long term housing strategy. The Committee accepts that allowing current temporary provisions in relation to tenancies to lapse only to potentially reintroduce them in a future bill would risk causing uncertainty and confusion to both tenants and landlords. The Committee will undertake further scrutiny of measures to support the rental sector once the Scottish Government completes its consultation on its rental sector strategy and introduces a bill to take forward relevant measures.

The Government welcomes the Committee's support for our approach of not allowing the temporary Tribunal discretion measures to lapse only to seek to re-introduce them at a later date.

The Government looks forward to working with the Committee as we take forward legislation to deliver a New Deal for tenants.

Making all eviction grounds discretionary

26. A range of organisations and individuals are likely to be affected by these changes. The Committee has been contacted by the Church of Scotland with concerns about the impact of changes on Church property. The Committee has not had an opportunity to consider this matter but we are aware that there are likely to be a number of organisations with similar concerns. This needs to be taken into account as the Bill progresses.

The Government acknowledges the concerns raised by the Church of Scotland and the Government will fully consider these concerns as the Bill progresses.

31. The Committee views the move to allowing the Tribunal to consider all the relevant factors before granting an eviction order to be a positive development for tenants in the private rental sector. This change does not prevent landlords from applying for or obtaining an eviction order but does allow wider consideration of the circumstances of both landlord and tenant before a decision is made on whether to grant an eviction order.

The Government welcomes the Committee's comments that the provisions in Part 4 of the Bill which enable all relevant factors to be considered by a Tribunal before granting an eviction order are a positive development for tenants in the private rented sector.

32. The Committee acknowledges the concerns raised by some witnesses about the potential to increase risks to landlords in the private rental sector. It is vital that the Scottish Government works constructively with landlords to address these concerns.

The Government is aware of the concerns raised by some stakeholders in relation to increased risk for private landlords and we welcome constructive engagement on these concerns.

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It is important to make clear that the Tribunal discretion provisions do not prevent a landlord from seeking eviction if that is necessary – they simply enable a Tribunal to take into account all of the circumstances relating to a case before making a decision.

While it is possible that this could lead to a limited increase in costs for landlords in certain situations, for example if eviction proceedings relating to grounds which were previously mandatory take longer due to the Tribunal considering whether eviction is reasonable in the circumstances, it is unlikely to create a substantial increase in overall costs to landlords.

Social sector eviction cases are already considered on a discretionary basis by a sheriff, a provision that has been in place since 2001. Therefore this is an important move to align the rights of all tenants, no matter what sector they rent within.

33. The Scottish Government should monitor the impact of making all grounds for eviction discretionary, including the effect on the number of evictions and on supply of property in the private rented sector. The Committee will reflect on the impact of these changes when we consider the future housing bill.

The Government will continue to liaise with the Tribunal and monitor eviction cases in order to understand how these provisions are working in practice but our initial analysis demonstrates minimal financial impact – as set out in the accompanying documents for the Bill.

Going forward, a wide range of data will help inform policy development as the Government aims to deliver a New Deal for Tenants over the course of this Parliament.

Pre-action protocols

38. The Committee views the pre-action protocol as a useful tool for helping landlords and tenants resolve issues with rent arrears. To ensure that the protocol is as effective as possible the Scottish Government should review both the requirements and any signposting or guidance material for both landlords and tenants to see if it can be improved.

The Government welcomes the Committee's view that the pre-action protocol is a useful tool for helping landlords and tenants resolve issues with rent arrears.

The Government's New Deal for Tenants consultation sought views on what further additions could be made to the Private Landlord Pre-action Protocol in order to further protect and support tenants and we will consider the wide range of responses as we develop policy and legislation to deliver a New Deal for Tenants, including the appropriateness of the actions under the protocol and where guidance can be expanded or improved.

The Private Rented Sector

43. The Bill contains two specific measures to grant tenants in the private rental sector additional protections. While the Committee welcomes these measures we also acknowledge that tackling homelessness is a complex task that requires coordination and cooperation across organisations and sectors. We note the issues that were raised by witnesses as part of the Committee's scrutiny of the Bill, particularly the points made about

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the relationship between the private rental sector and local authorities when it comes to preventing homelessness.

The Government has renewed activity around homelessness and the private rented sector. We have set up a private rented sector homelessness forum for practitioners and have a commitment to focus on preventing homelessness from the private rented sector, using it as a housing option and as a discharge of a local authority's homelessness duties.

The Government is also committed to introducing new legal duties on the prevention of homelessness. This will include new duties on public bodies, including those in health and justice, and on landlords to 'ask and act' to prevent homelessness and proposals for changes to existing homelessness legislation to ensure action can be taken by local authorities at least six months before potential homelessness.

The Government's approach is guided by the principles of shared public responsibility to prevent homelessness, earlier intervention and increasing choice and control over their housing options for people at risk of homelessness. We have an opportunity to prevent homelessness at an earlier stage, so that the disruption and trauma of homelessness is avoided, by ensuring a whole systems approach to earlier intervention. This can lead to better outcomes for individuals and families and, ultimately, to more effective and better joined up use of services and public resources.

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ANNEX C: GOVERNMENT RESPONSE TO SCRUTINY COMMITTEE REPORTS ON THE CORONAVIRUS (RECOVERY AND REFORM) (SCOTLAND) BILL AT STAGE 1

CRIMINAL JUSTICE COMMITTEE REPORT (4 APRIL 2022)

Permanent justice measures

Legal aid – interim payments

18. In the limited time available for the Committee to scrutinise the Bill, the Committee did not receive many comments on this proposal. We have not, therefore, been able to scrutinise this measure in detail. From the evidence we did receive, this appears to be a relatively minor administrative provision, which nonetheless has been welcomed by the Law Society of Scotland and others.

The Government notes that the Committee heard supportive views on these provisions in written evidence from stakeholders. The provisions establish a permanent system to enable interim payments to be made to solicitors and counsel providing legal aid. The current temporary system has operated effectively since its introduction, and has been welcomed by stakeholders as an improvement to the legal aid system. Putting the system on a permanent footing will ensure continued cash flow support to businesses that provide vital legal aid services.

Requirements of writing

22. In the limited time available for the Committee to scrutinise the Bill, this proposal did not attract significant comment in evidence.

The Government notes that this provision did not attract significant comment in evidence to the Committee. The Bill preserves the right of a service user to access certain legal services in person, while increasing the choice available to service users through the flexibility of remote access.

Custody at police stations

28. In the time we had to scrutinise the Bill, there was limited comment on the expanded role of Prisoner Custody Officers.

The Government notes that this provision did not attract significant comment in evidence to the Committee. It supports the effective operation of virtual custody hearings, by extending prisoner custody officers' functions into the police station so that they can perform their role when prisoners are taking part in virtual court appearances from a police station.

The Government response to paragraph 29 is carried after the response to paragraph 125 below.

35. On the basis of the limited evidence received by the Committee, this appears to be a sensible change which will help the efficient running of the Parole Board for Scotland.

The Government welcomes the Committee's views on the parole delegation powers. These provisions provide resilience within the Parole Board and allow it to continue to operate as efficiently and effectively as possible.

Temporary justice measures

Before addressing specific observations and recommendations made by the Committee, the Government wishes to emphasise the temporary nature of measures in the schedule of the Bill. The Government's existing commitment to expire or suspend temporary provisions that are no longer necessary or appropriate will continue to apply if the Bill is passed.

As the Committee is aware, the Bill will enable these temporary provisions to be extended initially until 30 November 2023. Thereafter, they will be able to be extended by regulations to 30 November 2024 and then finally to 30 November 2025. At the point of laying any annual extension SSIs before the Scottish Parliament, the Bill requires the Scottish Ministers to lay a statement of reasons explaining why it is proposed that measures are extended. Each extension SSI would attract full parliamentary scrutiny under the draft affirmative procedure.

Courts and Tribunals – electronic business

89. There is evidence, at least in the criminal courts, that only a limited number of fully virtual hearings have gone ahead and so a greater evidence base is needed about (a) how they work in practice; (b) what advantages they deliver and any disadvantages; (c) the outcomes of virtual criminal trials; and (d) any unintended consequences. This evidence base is needed before a view can be taken as to whether the temporary provisions in this Bill should be made permanent in future legislation. It will also be important to monitor and respond to developing evidence during the continued temporary use of such powers for a period that could run as long as November 2025.

91. There are clearly some in the justice sector who see the advantages of either fully virtual hearings or having some elements of them virtual. However, the Committee heard other far more sceptical views, including fundamental concerns about how they impact on the solemnity of justice and other practical concerns such as digital exclusion. More needs to be done by the Scottish Government and the SCTS to acknowledge these legitimate concerns and to attempt to bring all the participants in the justice sector on board.

92. The Committee is of the view that more virtual trials need to take place in the criminal courts before a properly informed view can be taken as to whether there is merit in these arrangements being made permanent. In particular, the Committee is concerned that only a limited number of virtual summary trials have gone ahead. In effect, there needs to be an expansion of the pilot so more evidence can be gathered as to the effectiveness of virtual summary trials. The Committee also considers that more evidence should be gathered and research carried out into the impact of virtual trials in civil cases, which have become the norm during the pandemic.

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95. The Committee recommends that the Scottish Government provides evidence, including robust data, of the impact of electronic business in courts and tribunals before taking a view as to whether the temporary measures in the Bill should be continued beyond 2025.

96. If the Scottish Government was to seek to extend the temporary provisions beyond 2023, the Committee would expect it to bring forward a robust evidence base to justify such request. This should include a clear quantification of the benefits of such an extension, as well as details of how the Scottish Government has worked to address the concerns expressed by some in the justice sector.

97. Any future legislation beyond the 2025 expiry date of the temporary provisions in this Bill would be a chance to look more fundamentally at how the legislation is constructed and whether there may be any merits in a different approach to the way the law is framed. For example, could the legislation governing virtual attendance at court specify different rules for different types of trial? In particular, whether there should be a presumption that summary domestic abuse cases should be virtual, with only limited reasons specified by which an opt out could be obtained? The Committee believes such proposals are worthy of consideration.

The Government response to paragraph 93 is carried after the response to paragraph 125 below.

In relation to the above mentioned recommendations, the Committee's evidence sessions and report focused particularly on virtual hearings and trials. Its report emphasised that a greater evidence base should be developed before any future permanent legislation was introduced, or before the legislation is extended beyond 2023. In responding to these particular proposals, the Government has considered the associated recommendations made by the lead COVID-19 Recovery Committee on the Bill's other provisions for virtual public services.

The Government recognises that there are a range of views on making virtual hearings and trials a permanent feature of our justice system. That is why these provisions are included in the Bill as longer extensions rather than permanent measures, allowing the opportunity for further evidence-gathering and assessment to support decision-making on the way forward.

Several strands of evidence-gathering are already underway or planned. These include:

- This Spring, the Government will launch a consultation on a range of possible measures to improve victims' experiences in the justice system, which will include seeking views on the use of virtual trials in summary criminal cases. This follows on from the recommendations made in report of the Virtual Trials National Project Board (led by Sheriff Principal Pyle) on its piloting of virtual summary trials for domestic abuse cases. The Project Board's report recommended that virtual trials should be considered as a default position for all domestic abuse cases in the Scottish summary courts. That would be a development beyond the position in the Bill (which provides that, for proceedings where evidence is being heard, the default is that participants physically attend). As part of the consultation, the Government will engage with parties to hear their experiences of, and concerns about, the use of virtual proceedings, and explore how those concerns could be addressed.

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- Further consultation as part of our planned review of how offending is dealt with by the summary justice process, including the potential long-term role for virtual proceedings.
- The Civil Justice System's Pandemic Response Research Project, due to conclude in Spring 2023, which is gathering evidence on the impact of measures introduced in response to the pandemic with a particular focus on virtual hearings in civil courts and tribunals.
- The Scottish Children's Reporter Administration and Children's Hearings Scotland has carried out initial research on the impact of virtual hearings during the pandemic. This includes findings from care experienced children and young people and volunteer panel members. Further work is being carried out in this area as the hybrid model develops.

In addition, the Virtual Trials National Project Board, on which the Government is represented, has agreed to continue its pilot of the use of virtual summary trials for domestic abuse cases in Aberdeen. At the same time, the Project Board will consider how the model could be developed to incorporate procedural and technological innovations, to further improve the process and the experiences of people taking part in these cases.

The Government welcomes the extension of the pilot, which will allow more evidence to be gathered on the operation and outcomes of virtual trials, and will enable further engagement with all parties, including with defence solicitors at both local and national level (the Law Society of Scotland is a member of the Project Board). The Scottish Courts and Tribunals Service (SCTS) will consider how evidence from the extended pilot can be best captured, and the Government will be able to draw on this to help inform decisions on the future role of virtual proceedings.

The Government will consider carefully the evidence that emerges from the strands of work outlined above, and from wider engagement with partners across the sector. Any proposals we bring forward for future legislation on criminal business will be focused on delivering a person-centred approach for victims, witnesses and accused people, while upholding the interests of justice.

In terms of civil business, the Committee will be aware that the Scottish Civil Justice Council (SCJC) is the body tasked with modernising the civil justice system in Scotland, and it is ultimately for the SCJC to advise how civil court business should proceed. The SCJC has consulted on proposed new court rules concerning the mode of attendance in civil proceedings, and is developing plans to implement changes. This falls within the SCJC's powers and functions under the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013.

Fiscal fines

115. COPFS should make public the numbers and types of offence which are dealt with by fiscal fine and, in particular, the types of offence brought in to the new temporary £300-£500 range of fine.

116. We ask the COPFS to provide the reassurances sought by Scottish Women's Aid that fiscal fines have not been used in domestic abuse cases, and will not be in the future.

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117. We ask the COPFS how communication with victims of crime can be improved so they are better informed when an alternative to prosecution is taken forward by a prosecutor. In addition, if the accused rejects a fiscal fine, the victim involved should be told of the outcome of the case including a decision by the Crown Office to take no further action.

The Committee requested certain information from COPFS in relation to the use of fiscal fines. As mentioned in the cover letter to these responses, COPFS has responded directly to the Committee on the matters raised by members and the response has been published.

In addition to the response received from COPFS, it is worth noting that information on the use of fiscal fines has been provided to the Scottish Parliament on a quarterly basis since the higher level of fiscal fines was introduced in April 2020.

In respect of the legislative proposal, the Government notes that a majority of the Committee is in support of the continuation of allowing fiscal fines up to £500.

As outlined in the policy memorandum for the Bill, fiscal fines have been an integral part of the Scottish criminal justice system for more than 20 years and they are not mandatory penalties. Anyone who receives an offer of a fiscal fine can reject it.

The higher maximum level of fiscal fine and the further temporary adjustments to the fiscal fine scale will help address the significant backlog of cases that has built up in the summary courts system as a result of the Covid pandemic. It will do this by freeing up the courts and prosecutors to deal with more serious cases and ease the burden on the courts system during a time of significant resource pressure as a result of the ongoing impact of Covid, which is expected to last for a number of years.

Retention of this measure for a further time-limited period is intended to support the justice system recovery from the impact of Covid while still ensuring justice is done in individual cases.

As the Committee will be aware, operational decisions about how to use fiscal fines within the powers provided in legislation are a matter for COPFS.

Failure to appear before court following police liberation

125. In the limited time available for the Committee to scrutinise the Bill, the Committee is not aware of any significant concerns raised in the evidence taken about this proposal. However, we ask the Scottish Government to respond to the point raised by Scottish Women's Aid about checking the COVID-19 status of the accused when this provision is being used.

The Bill provision provides the court with a power to prevent the expiry of an undertaking and any protective conditions attached to it when certain conditions are met.

Those conditions are:

- the person has failed to appear at court as required by the terms of the undertaking,
- the court considers that the failure to appear is attributable to a reason related to Covid, and
- the court does not consider it appropriate to grant a warrant for the person's arrest on account of the failure to appear.

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The Committee invited the Government to respond to the suggestion made by Scottish Women's Aid that, when this provision is being used, the court should seek to confirm whether the accused person has Covid.

It is worth noting that the provision is not restricted solely to an accused person having a confirmed Covid infection. The provision requires the court to be satisfied the accused person's failure to appear in accordance with their undertaking is attributable to a "reason related to coronavirus" more broadly. This may include, for example, an accused person being identified as a close contact and asked to self-isolate until a test is taken.

Whilst the Government notes the feedback offered, it is a matter for the independent court to assess whether the conditions set out above are met, including how best to ensure it is satisfied that the accused's failure to appear is attributable to a reason related to Covid. Such consideration would be based on the individual facts and circumstances of each case. This could include evidence of a positive Covid test, but the Government considers it preferable to leave this to the discretion of the court in reaching its determination.

National jurisdiction for callings from custody

As mentioned at the appropriate earlier points in this response, the Government considers it most appropriate to respond to paragraphs 29 and 93 together with paragraph 130.

<i>29: The Committee asks the Scottish Government to respond to the comments from both the legal profession and the Scottish Association of Social Work about access arrangements where an accused's first appearance in court is from police custody.</i>
<i>93. We have heard specific concerns about the operation of virtual custody hearings which we have highlighted in this report. The Committee asks the Scottish Government how it proposes to address the legitimate concerns raised by the legal profession about the access arrangements to their clients.</i>
<i>130. We heard views from legal representatives that this practice should be discontinued when it was no longer needed in the interests of public health. We ask if this is the intention of the Scottish Government.</i>

The Committee asked whether the Government proposes making these provisions permanent.

These measures help ensure the continued, safe operation of custody courts in the interests of public health while Covid remains within communities. Importantly, they also form part of the wider approach to enabling the justice system to recover from the impacts of Covid by helping SCTS efficiently manage scarce court resources in response to the substantial backlog, which is expected to last for a number of years.

Accordingly, these provisions remain a valuable tool to support the recovery of the court system. However, there is no proposal to make them permanent in the present Bill. If there are to be steps in the future to consider making these changes permanent, relevant issues will be explored through developing the policy of a future permanent proposal.

The Committee highlighted concerns expressed by the Scottish Association of Social Work and the Scottish Solicitors Bar Association that the use of virtual appearances from custody

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could limit the face-to-face access that social workers and solicitors have to people in police custody. The Government has raised these concerns with Police Scotland, and we understand that they intend to write directly to the Committee on access arrangements for those in police custody.

Criminal procedure time limits

162. The Committee would not want these extended time limits to become the new normal. The Committee seeks reassurance that the use of extended time limits would be monitored and used proportionally.

The Government notes and agrees with the Committee's view that the extended time limits contained in the Bill should not become the 'new normal'. This Bill would not make them the new normal, as the provisions are time-limited and not permanent.

The Government is committed to reverting to the pre-pandemic criminal procedure time limits as soon as the backlog of cases brought about by the pandemic is sufficiently reduced.

In assessing whether the Government considers the continuation of the extended time limits will be needed, evidence of the position in respect of the backlog of cases at the time will be considered carefully in reaching a decision whether to seek to extend the operation of the time-limits beyond November 2023.

Proceeds of crime

168. The Committee notes that, in the limited time available for us to take evidence on the Bill, this provision did not attract much comment.

The Government notes that the Committee received limited comments on these provisions. They continue existing arrangements to ensure Crown and defence agents have sufficient time to investigate and prepare for confiscation proceedings at a time when the court system continues to face backlogs caused by the pandemic.

Prisons and young offenders institutions

189. Any regulations brought forward under the Bill on early release of prisoners would be subject to close parliamentary scrutiny by this Committee, with sufficient time to take evidence. There is a balance which must be struck between the risks associated with early release of prisoners (despite the safeguards in the Bill) and the risks associated with a COVID outbreak in prison. The Committee notes that on the occasion the Scottish Government used this power, 40% of the prisoners reoffended within six months. The Committee requests that the Scottish Government monitors reoffending rates if these powers are used again.

The Cabinet Secretary for Justice and Veterans' letter to the Committee of 29 March underscored that, while no level of reoffending is acceptable, the proportion of individuals that the Scottish Prison Service (SPS) recorded as returning to custody within the subsequent six months is not out of proportion to the reoffending rates that are typically seen amongst similar cohorts of short sentence prisoners.

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Should there be a need to implement a future early release, the SPS would be able to record data on the incidence of return to custody for that cohort in the same way as was done for the May 2020 process.

190. We ask the Scottish Government whether, if it has no immediate plans to use these powers, it is necessary to keep this legislation on the statute book. Is an alternative approach to legislate if and when it is necessary to release prisoners early via emergency legislation?

The Government considers that it is important to recognise that Covid continues to place a significant additional pressure on the operations of the prison system. While the SPS are continuing to implement public health restrictions in a manner that reflects the particular conditions within the prison estate, and vaccination programmes have been applied across the prison population, Covid continues to have an impact, and the risk remains that in the future a new variant or other change in circumstances could create a new crisis.

The regulations that were set out for the May 2020 release process intentionally delivered a comparatively small reduction in the prison population, but it was a timely intervention which provided the necessary impact. As Ms Medhurst, the Chief Executive of SPS, explained to the Committee, the change helped enable the SPS to provide the single cell capacity that was urgently required at that time to enable prisoners to be shielded, or to be quarantined.

There is currently no other legal power for Scottish Ministers to instruct an early release process of this type, which makes it necessary for this provision to be extended. The Government and SPS have demonstrated that the provision would be used sparingly and proportionately, and in line with the clear intentions and limitations set out in the 2020 Act.

However, should the circumstances change for the worse, and it again became judged necessary to instruct the early release of a limited number of prisoners in order to keep the prison population down to a size where prisons could be operated safely, it would be appropriate for the Government to act quickly. In such circumstances, the specific regulations of any potential early release would be set out to Parliament in an SSI, establishing how many individuals were required to be released, and of what type, and how the process would be delivered. By contrast, repeating the process of presenting new emergency legislation to parliament, simply to reinstate provisions that have already been established under the 2020 Act, would cause an unnecessary delay, and could increase the risk to public health.

Earlier this year, the Government consulted on the operation of bail, remand and release from custody. The consultation included a proposal for creating a new permanent power that would enable the early release of groups of prisoners in response to an emergency (whether a public health emergency like Covid, or an operational emergency like fire or flooding). Responses to that consultation have been carefully considered to inform legislation which will the Government will be introducing to Parliament shortly.

The Government takes the view that a future emergency Bill is a suboptimal legislative approach and notes the evidence of Professor Fiona de Londras of Birmingham University's Covid Review Observatory before the COVID-19 Recovery Committee that the scrutiny of the Bill through an ordinary Bill process, following full public consultation, is welcome.

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191. The provisions in the Bill on the early release of prisoners do not include measures prioritising the release of particular types of vulnerable individuals. Again we ask the Scottish Government why this approach to the early release of prisoners was not adopted.

The legislative test for the use of the early release provision permits the Government to take only necessary and proportionate action to maintain the safe operation of the prison system, and protect the health of prison staff and prisoners, from the effects of Covid. As noted above, the May 2020 release process was implemented in order to release only a small volume of prisoners in a timely manner, in order to ensure that sufficient single-cell capacity was available to maintain safe operation of prisons.

The criteria that were set for the May 2020 process (i.e. restricting eligibility to prisoners serving less than 18 months, and with less than 90 days left to serve – and excluding specific groups whose previous offending presented a notable risk to the public) delivered that impact in a manner that was quick, effective, fair, and easily understood by staff, prisoners and others. It delivered the positive effect that was required from the emergency process, through the minimum of changes to the sentences prisoners were serving.

It should be noted that these eligibility rules did enable the early release of prisoners with particular vulnerabilities, so long as they fulfilled the main criteria. However, had the overall eligibility process been based on other criteria instead (such as age, health or other vulnerability), it would have created circumstances where some prisoners could have been eligible for early release from long sentences, and/or having served very little of their sentences. The treatment of individuals on similar sentences/offences could have varied substantially, depending on their wider circumstances.

On a practical level, conducting a selection process requiring a detailed assessment of all prisoners against complex criteria, would have created a substantial extra workload for SPS, social work and other staff – at a point in time where emergency action was being taken to ease the strain on the operation of the prison service.

191. We ask the Scottish Government to include such measures to ensure the appropriate testing of any prisoners who may be released.

The legislation instructs that individuals who are permitted early release under this provision are to be treated the same as they would have been had they been released at their scheduled liberation date. As such, it would not be legal to exclude a prisoner from being eligible for early release, purely on the basis of Covid testing. (In May 2020 the regulations allowed for a prisoner's early release to be delayed until they were cleared by a medical professional. In practice, this situation never occurred). As SPS noted to the Committee, at the time of the May 2020 early release process, there was not the same non-symptomatic testing regime available as was established later.

As SPS noted to the Committee, as Covid testing is not compulsory in the community, it cannot be made compulsory whilst in prison, or prior to release (whether under an early release process, or at their scheduled release date). They detailed the substantial programme of voluntary testing now available to prisoners, and noted that SPS do encourage those approaching release or transfer to another establishment to take a test. There are also testing processes available for prison staff and visitors.

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192. We recommend that communication with and support for victims is improved if this power is to be used again including specific measures to notify victims who would be affected by any decision to release prisoners early.

The potential impacts on victims and the wider community were carefully considered in the development of the regulations and operation of the early release process in May 2020. Representatives of victims' groups were consulted, and action taken to address their views in the development of the process (such as the exclusion of prisoners serving sentences for domestic abuse, or on charges with domestic abuse aggravations). The Government continued to liaise with victims groups before, during and after the May 2020 process, and later to review the process.

The regulations for the May 2020 early release process did include specific measures to include it under the remit of the Victim Notification Scheme (VNS), and so ensure that individuals who were registered with the VNS would be informed if the prisoner they had registered to be notified about was to be released early.

The Government notes the comments regarding members of the public who were seeking information about whether or not a prisoner was eligible to be released. The VNS is the agreed method by which individuals can register to be kept informed about specific prisoners, and that process was implemented where appropriate.

Should there be any need to implement a further early release, the Government would propose to confer with victims groups and incorporate their views into any planning, and to utilise the VNS to inform victims.

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ANNEX D: GOVERNMENT RESPONSE TO SCRUTINY COMMITTEE REPORTS ON THE CORONAVIRUS (RECOVERY AND REFORM) (SCOTLAND) BILL AT STAGE 1 EDUCATION, CHILDREN AND YOUNG PEOPLE COMMITTEE REPORT (1 APRIL 2022)

Educational establishments and student accommodation

Relationship with local authority powers

35. The Committee notes the Cabinet Secretary's willingness to engage with the EIS to discuss its concerns that local authorities do not have the power to close a school on public health grounds. It is of the view that clarity is required on this matter and that local authorities and other stakeholders should have a clear and unambiguous understanding of where responsibility lies to close schools quickly in any future public health emergencies.

Local authorities have principal responsibility for the management of their schools and wide powers, including when schools open or close. They have recently used those powers, including when all schools were closed on 20 March 2020. Local authorities also work closely with local health protection teams, and it is clearly essential that they get appropriate and timely expert advice on health matters, including on whether or not a school should close for public health reasons.

Under the Schools General (Scotland) Regulations 1975 a local authority is required to close a school where advised to do so by the health board. As shown during the pandemic so far these local arrangements, backed up by appropriate ministerial powers, have worked well.

The powers the Government is proposing through the Bill allow Ministers to take a strategic view and support efforts by local authorities and schools to maintain the continuity of education as we tackle a major public health emergency.

Alternative proposals

40. The Committee notes that the Scottish Government does not support the alternative approach to the Bill put forward by the CYPCS that a draft bill should be prepared ready to implement in the event of a future emergency situation. It also acknowledges that such an approach was considered and rejected by the Scottish Government when developing the Bill proposals. However, the Committee calls on the Scottish Government to provide further detailed comment on its rationale for dismissing this approach in favour of the provisions set out in the Bill as introduced.

Now that all scrutiny Committees have concluded their Stage 1 scrutiny and reported, the Government considers there to be a possible similarity with the lead COVID-19 Recovery's suggestion in paragraph 57 of their report that the effectiveness of enacted Bill provisions be suspended until a public health emergency arises, and giving Parliament a role in scrutinising the decision to activate public health protection powers in those circumstances.

In these circumstances the Government is considering the options suggested by the Committees and what other approaches might be possible, noting that the lead Committee (at paragraph 26) considered but did not ultimately recommend the approach of a Bill being kept in reserve for emergency enactment in future.

46. The Committee notes the opposition of both Universities Scotland and Colleges Scotland to the regulation-making powers as currently set out in the Bill. It also

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notes the Scottish Government's disagreement with the alternative framework proposal put forward by Universities Scotland.

47. The Committee welcomes the undertaking made by the Cabinet Secretary to continue with discussions with Universities Scotland and Colleges Scotland to bridge the current gap in their respective positions. It would encourage the respective parties to seek to resolve their differences in this regard and make every effort to find common ground. The Committee further calls on the Scottish Government to commit to providing both it and the lead committee with an update on the outcomes from these further discussions in advance of Stage 2 consideration.

As the Cabinet Secretary for Education and Skills indicated to the Committee on 9 March, the Government has continued to engage with Universities Scotland and Colleges Scotland on the provisions in the Bill relating to further and higher education institutions. The Government will continue discussions to ensure we have appropriate measures in place for further and higher education institutions during future public health emergencies, whilst seeking to address stakeholder concerns.

As part of our stakeholder engagement, the Government is considering the scope of the regulation making powers available to Ministers in Part 2 of the Bill and this includes consideration of possible appropriate amendments. We will also consider further how we might provide reassurance to the college and university sectors on the use of the student accommodation powers in section 10, particularly on the guidance and support that would be available to student accommodation providers should those powers be used.

Exemptions

50. The Committee is of the view that it is essential that clarity is provided on how exceptions to closure will be managed. It therefore calls on the Scottish Government to provide further detail on—

- how it intends to consult with institutions to identify those facilities whose closure may not be possible or may have to be limited for practical, safety or welfare reasons; and*
- how such issues would be addressed in the development and application of regulations under this Part of the Bill.*

As was shown during the Covid pandemic it is our expectation that the Government will engage with relevant stakeholders during a public health crisis and take appropriate steps to mitigate any dangers to public health with regard to the requirements made in regulations, including in relation to any specific facilities. While the UK Coronavirus Act 2020 powers were not used in relation to the Higher and Further Education sectors, the approach taken by the Government to develop directions that applied to the schools and early years sectors is indicative of how we expect the powers to be used in the future. That is, engagement with relevant bodies and institutions will take place so that any measures put in place are “necessary and proportionate” as required by provisions in the Bill. Ministers are also required to consider the appropriateness of particular measures in their respective contexts.

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Compatibility with ECHR

55. The Committee notes the divergence of views between the Scottish Government and the CYPSC on the compatibility of the regulation-making powers in Part 2 of the Bill with the ECHR. It is essential that the Bill meets the relevant ECHR requirements. The Committee therefore calls on the Scottish Government to provide a more detailed response to the concerns raised by the CYPSC in both written and oral evidence on ECHR compatibility prior to Stage 2 consideration.

Article 15 (derogation in time of emergency) of the European Convention on Human Rights (ECHR) provides a mechanism by which a High Contracting Party may derogate from its obligations under the Convention “in time of war or other public emergency threatening the life of the nation”, to the extent strictly required in the circumstances. The UK has not made use of that mechanism during the Covid pandemic.

The argument advanced on behalf of the Children and Young People’s Commissioner for Scotland (CYPSC) in relation to article 15 ECHR was not developed in any detail in written evidence or before the Committee. The underlying assumption appears to be either that (1) there has been a derogation from the UK’s obligations under the ECHR, or (2) article 15 imposes some substantive, generally applicable, restrictions on the ability of states to take legislative measures to manage public health crises. The Government’s view is that both assumptions would be inaccurate. Accordingly, the Government does not agree with the CYPSC’s position.

The Human Rights Act 1998 and the Convention rights-based restrictions on the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers under the Scotland Act 1998 applied throughout the pandemic unaltered, and continue to apply.

Accordingly, a provision in an Act of the Scottish Parliament is “not law” if “it is incompatible with any of the Convention rights” (this means ECHR rights).

Equally, the Scottish Ministers remain subject to the restrictions on executive competence in section 57(2) of the 1998 Act, which provides: “A member of the Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights”.

This means that, as has been the case throughout the pandemic to date, the Convention rights remain protected in the usual ways, and any regulations made under the Bill (once enacted and commenced) would have to be compatible with ECHR rights. The Government will have to consider the potential impact of any measures to be included in any regulations on the range of Convention rights, and any interference with an ECHR right would have to be justified in accordance with the Scottish Ministers’ human rights obligations.

The Government is also committed to compliance with the UN Convention on the Rights of the Child and to that end we published a Child Rights and Wellbeing Impact Assessment alongside the draft Bill in January 2022.

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School boarding and student accommodation

71. The Committee notes that proposals relating to the closure of or restriction of access to school boarding and student accommodation have been developed in response to lessons learned from previous handling of such matters during the pandemic. It is encouraged that the provisions have been designed to take account of the different scenarios involved and that they will also allow for support for students or pupils to comply with any restriction or requirement relating to the protection of public health, such as to self-isolate.

The Government welcomes the comments of the Committee regarding the school boarding and student accommodation regulation making powers.

Subordinate legislation procedures for regulations under Chapter 1 of Part 2

79. The Committee notes that the Bill proposes that for regulations made under sections 8, 9 or 10, either the affirmative procedure or the 'made affirmative' procedure can be used. It acknowledges that Ministers may have to use the made-affirmative procedure in certain circumstances to ensure regulations are brought in swiftly in emergency situations.

80. However, the Committee supports the principle proposed by the DPLRC that where primary legislation provides for the made affirmative procedure to be used, this should also require a statement to be provided detailing the reasons and justification on each occasion the procedure is used. The Committee considers this would provide an appropriate balance between the need for Ministers to act with agility in appropriate circumstances and parliamentary oversight. It therefore calls on the Scottish Government to bring forward an appropriate amendment at Stage 2 to insert such a requirement in to the Bill.

The Government's responses to these points are contained in the response to the Delegated Powers and Law Reform Committee report.

School consultations

86. Whilst the Committee recognises that school consultation processes may have to be altered in a public health emergency, it is of the view that the opportunity to maximise engagement should be taken wherever possible. For that reason, the Committee considers that the provisions in Chapter 2 of Part 2 should be used only as a last resort.

87. The Committee agrees with COSLA that local authorities should be able to use their "best endeavours" to facilitate involvement in school consultations by as many parents/carers and other members of the community as is possible. It also considers that there should be provision for hybrid meetings to be held in addition to the fully remote meetings proposed in the Bill, which could also help address some of the concerns raised about digital exclusion.

88. The Committee calls on the Scottish Government to bring forward amendments to the Bill to provide the maximum flexibility for local authorities to conduct effective engagement in school consultations in public health emergencies.

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The provisions are needed during the remainder of the Covid pandemic, and in the event of a future public health emergency, where holding an in-person public meeting risks the transmission of infection and danger to public health or where paper copies cannot be provided because places in which they can be provided to the public are closed. Ministers may only issue a direction exempting an education authority from holding an in-person public meeting on the application of the authority, and where it is a “necessary and proportionate action for or in connection with the protection of public health”. A direction therefore will only be issued where needed and the current statutory requirement on education providers to hold public meetings in-person and to make available paper copies remains in place, except where a direction outlined above has been given.

In addition to the requirements to hold a public meeting, the Schools (Consultation) (Scotland) Act 2010 places a series of requirements on education authorities to ensure that relevant consultees have an opportunity to consider and provide views any proposals subject to the 2010 Act. This includes preparing and publishing a proposal, publicising the consultation locally and to relevant consultees and holding the consultation for a minimum of 30 school days. Therefore, during a period where it is not possible to hold in-person public meetings, it remains open to members of the public to participate in the consultation process.

With regard to hybrid meetings, it is already possible under the 2010 Act for education authorities to hold public meetings in-person along with video or audio conference facilities. The provisions the Government is proposing are to enable education authorities to hold virtual only public meetings where it would be otherwise unsafe to hold such a meeting in-person due to a public health threat.

The Government also plans to amend the statutory guidance for the 2010 Act so that education authorities have clear advice on the changes set out in the new provisions and this will emphasise the importance of maximising participation in such consultations.

It is also the case that local authorities are subject to the Equality Act 2010 and so have obligations to ensure their engagement takes into account the needs of groups with protected characteristics in how they deliver public services, including school consultations under the 2010 Act.

Therefore, the Government does not regard that it is necessary at this stage to put forward any amendments to the Bill as currently drafted.

ANNEX E: GOVERNMENT RESPONSE TO SCRUTINY COMMITTEE REPORTS ON THE CORONAVIRUS (RECOVERY AND REFORM) (SCOTLAND) BILL AT STAGE 1 DELEGATED POWERS AND LAW REFORM COMMITTEE REPORT (29 MARCH 2022)

The Government is pleased that the Committee had no comment on most delegated powers in the Bill, and was able to approve others specifically discussed in the report, as drafted. In that context, this response addresses only those Committee conclusions where a specific response is needed.

Future made affirmative process

23. The Committee recommends that the Scottish Government brings forward amendments on each power which can be exercised subject to the made affirmative provision so that they include the following statutory requirements:

- that Scottish Ministers provide a written statement prior to the instrument coming into force providing an explanation and evidence as to why the Scottish Minister consider the regulations need to be made urgently when using the made affirmative procedure;*
- that Scottish Ministers include an assessment of the impact of the instrument on those affected by it, and*
- that statutory instrument made under the powers are subject to a sunset provision.*

In response to the recommendations for amendments to the made affirmative powers in the Bill:

Explanation of urgency

The Government is sympathetic to this recommendation and agrees that it is appropriate to provide an explanation of urgency if regulations are made using the made affirmative procedure provided for by the Bill. The Government is therefore willing to bring forward an amendment to this effect to require an explanation of urgency to be provided if regulations are made using the made affirmative procedure.

Assessment of impact

The Government considers that current scrutiny frameworks (per Standing Orders, existing statutory requirement or via Government procedures and internal guidance) are fit for purpose and that there is no need for such an amendment.

Sunset provision

The Government is sympathetic to the principle underlying the Committee's recommendation and is considering bringing forward a relevant amendment. Such an amendment could require the Government to include a sunset provision in the regulations made using the made-affirmative procedure where this is appropriate given the nature of the power. For example, a sunset provision may not be required if the made-affirmative regulations are already time-limited in some way.

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Expedited affirmative procedure

27. The Committee will continue to explore how such a protocol will work with the Government so that it might be in place before this Bill, subject to Parliamentary approval, is enacted. This will ensure that it is ready for use to deal with emergency legislation stemming from this Bill and any other relevant Act.

Government and Parliament officials are working together on the terms of a protocol for agreeing an expedited timetable for instruments to be progressed under the draft affirmative procedure, and how this might be piloted. The Government would, however, emphasise the need for any approach to remain flexible and proportionate to ensure it remains a practicable alternative to the made-affirmative procedure designed for urgent SSIs.

Permanent powers in the Bill which can be exercised subject to the made affirmative procedure

Section 9(1) – Regulations on school boarding accommodation

66. While some Members are content with the parliamentary procedure in the bill, the majority of the Committee do not consider that the option for the power to be exercised subject to the made affirmative procedure is appropriate in this case and instead should only be subject to the affirmative procedure.

Section 10(1) - Regulations on student accommodation

73. Again, while some Members are content with the parliamentary procedure in the Bill, the majority of the Committee do not consider that the option for the powers to be exercised subject to the made affirmative procedure is appropriate in this case and instead should only be subject to the affirmative procedure.

The Government would resist the removal of the option for instruments to be subject to made-affirmative procedure in the cases recommended by the Committee.

The specific policy areas covered in the Bill, and the powers proposed be available to Ministers in those areas have been identified as measures that may require Ministers to take immediate action.

- Using the affirmative procedure could delay implementation of measures to address an urgent public health emergency and to provide support for self-isolating children and young people and leave them and their families uncertain of the support their accommodation provider or boarding school should be offering.
- We may find ourselves in a situation where these young people get sub-standard or otherwise unacceptable provision of food, counselling, etc. or where the measures taken to protect health are inadequate to manage the health emergency.

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A time limited power in the Bill which can be exercised subject to the made affirmative procedure

Paragraph 24(1) of the schedule – Power to release early from prison or young offenders institution

83. Some Members highlighted the unusual nature of this provision and that it undermines the Scottish Government's reasoning for the permanency of the other powers in the Bill which can be exercised subject to the made affirmative procedure. Again, the majority of the Committee was content with the temporary nature of the power and the delegation of the power in principle.

The Government have no plans to utilise the early release protocol under current circumstances but, given the risk of future Covid outbreaks, and given that there are no alternative powers for Ministers to order early release of groups of prisoners it remains necessary to extend the Covid-specific power from the existing temporary legislation until such time as any new legislation can be brought into force. Given that this measure is intended to be deployed only in an emergency situation (where early release of a specified number of prisoners is required to maintain the safe operation of prisons and protect the health of prison staff and prisoners) there is a necessity to retain the option to utilise a made affirmative approach to enable swift action to be taken.

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