

# Coronavirus (Extension and Expiry) (Scotland) Bill

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## Policy Memorandum

### Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Coronavirus (Extension and Expiry) (Scotland) Bill introduced in the Scottish Parliament on 18 June 2021.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 1–EN);
  - a Financial Memorandum (SP Bill 1–FM);
  - a Delegated Powers Memorandum (SP Bill 1–DPM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 1–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

### Policy Objectives of the Bill

4. The purpose of the Coronavirus (Extension and Expiry) (Scotland) Bill ("the Bill") is to update a range of existing legislative measures which support various aspects of the ongoing response to the public health emergency caused by the coronavirus (COVID-19) pandemic. The Bill amends the Coronavirus (Scotland) Act 2020, passed by the Scottish Parliament on 1 April 2020, and the Coronavirus (Scotland) (No.2) Act

2020, passed by the Scottish Parliament on 20 May 2020 (“the Scottish Acts”).

5. Coronavirus continues to pose a significant threat to public health in Scotland. The Scottish Government is committed to taking all steps necessary to address that threat. The Scottish Acts contain provisions which make temporary adjustments to respond to the pandemic, and protect the health of people living in Scotland. Those provisions were subject to an expiry date, which was extended by regulations,<sup>1</sup> but which cannot be extended beyond 30 September 2021. This Bill amends the expiry dates in Parts 1 of the Scottish Acts. At the same time the Bill also expires a number of provisions which are no longer considered necessary. The effect of this is to extend only those provisions which the Scottish Government considers remain essential in order for public services to be able to continue to discharge their functions in the way they were intended to, or which are required for a longer period to respond to the pandemic. Many of the provisions contained in the two Scottish Acts have already been expired in line with the Government’s commitment to remove provisions that are no longer required to respond to the public health emergency.

## Public Health Context

6. COVID-19 is first and foremost a public health crisis, and the measures to combat it have been necessary to save lives. The restrictions put in place using powers under the Coronavirus Act 2020 that have been in place since March 2020<sup>2</sup> have been extensive but necessary in order to limit transmission of the virus as far as possible. Public health measures needed to control and limit the spread of the virus continue to require a significant adjustment to the lives of those living in Scotland, to business in Scotland, and to the way public services are delivered and regulated.

7. After taking firm action to stop the spread of the virus by implementing a nationwide lockdown, the Scottish Government published Coronavirus (COVID-19): Framework for Decision Making<sup>3</sup> in April 2020, setting out the principles and approach for responding to the epidemic based around managing four key harms: direct health impacts of COVID-

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<sup>1</sup> [The Coronavirus \(Scotland\) Acts \(Amendment of Expiry Dates\) Regulations 2020](#) and [The Coronavirus \(Scotland\) Acts \(Amendment of Expiry Dates\) Regulations 2021](#)

<sup>2</sup> [Coronavirus Act 2020 - Schedule 19 - Health Protection Regulations: Scotland](#)

<sup>3</sup> [Coronavirus \(COVID-19\): framework for decision making - gov.scot \(www.gov.scot\)](#)

19; non-COVID-19 health harms; societal impacts; and economic impacts. These harms are deeply inter-related: health harms impact on society and the economy, just as the societal and economic effects impact on physical and mental health and wellbeing.

8. The Scottish Government published COVID-19: Scotland’s Strategic Framework in October 2020.<sup>4</sup> A strategic approach to outbreak management based on graduated levels of protection was introduced in Scotland on 2 November 2020, with five packages of measures to apply different degrees of downward pressure on the Reproduction Rate (R) of the virus, according to different epidemiological conditions in the areas in which they are applied. The levels were designed to be applied locally, regionally or nationally, depending on the course of the pandemic.

9. An update to COVID-19: Scotland’s Strategic Framework was published in February 2021,<sup>5</sup> in which the Scottish Government re-confirmed its strategic intent to “suppress the virus to the lowest possible level and keep it there, while we strive to return to a more normal life for as many people as possible.” It described six key tools for achieving this:

- The quickest practical roll-out of vaccinations, in line with advice from the Joint Committee on Vaccination and Immunisation (JCVI);
- The most effective use of testing and contact tracing;
- Applying proportionate protective measures (rules and guidance) to suppress transmission of the virus;
- Effective measures to manage the risk of importation of the virus;
- Supporting individuals, businesses and organisations to adhere to protective measures; and
- Providing care and support to mitigate the harms of the crisis.

10. The emergence of the Variants of Concern B.1.1.7 and B.1.617.2 have increased the transmissibility of the virus, making it more challenging to effectively suppress. This is one reason why public health measures continue to be required.

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<sup>4</sup> [Coronavirus \(COVID-19\): Scotland’s Strategic Framework - gov.scot \(webarchive.org.uk\)](https://www.gov.scot/webarchive.org.uk)

<sup>5</sup> [Coronavirus \(COVID-19\): Strategic Framework update - February 2021 - gov.scot \(www.gov.scot\)](https://www.gov.scot)

11. Current public health guidance<sup>6</sup> continues to mean that businesses and public authorities operate very differently to the way they have done previously. In addition, revised Protection Levels were published in April 2021<sup>7</sup> which set out updated packages of measures in the levels-based approach, taking into account the higher transmissibility of the B.1617.2 variant and the impact of the progress made in the vaccination roll-out. The Health Protection (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 21) Regulations 2021<sup>8</sup> implement the approach. All restrictions will be kept under review in the event of new developments, such as the emergence of a new variant of concern, to ensure that they remain proportionate and necessary to support the ongoing public health response.

12. The Scottish Acts contained measures which were required to respond to an emergency situation. The Acts contained a number of safeguards. These included: the relevant provisions in the Acts automatically expired less than six months after they came into force, although this could be extended by the Scottish Parliament for two further periods of six months; where a provision was no longer considered necessary, the Scottish Ministers may bring it to an end earlier; the Scottish Ministers are required to report on the continued need for the measures, and on the use of powers in the Scottish Acts, every two months.

13. These safeguards will continue to be in place for the duration of the extension period, with the expiry date of the Scottish Acts by this Bill being for a six month period to 31 March 2022, with the Scottish Parliament given the power to extend the Acts for a further period of six months to 30 September 2022. Any such regulations would be made only if deemed necessary at that time. The Bill contains no provision to extend the Acts beyond 30 September 2022.

14. A number of provisions are expired in this Bill which, following engagement with stakeholders, are no longer deemed necessary to have in place beyond 30 September 2021.

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<sup>6</sup> [Coronavirus \(COVID-19\): guidance - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/coronavirus-guidance/pages/1-1-introduction.aspx)

<sup>7</sup> [Coronavirus \(COVID-19\) protection levels: what you can do - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/coronavirus-protection-levels/pages/1-1-introduction.aspx)

<sup>8</sup> [The Health Protection \(Coronavirus\) \(Restrictions and Requirements\) \(Local Levels\) \(Scotland\) Amendment \(No. 21\) Regulations 2021](https://www.gov.scot/publications/health-protection-restrictions-requirements-local-levels-amendment-no-21-regulations-2021/pages/1-1-introduction.aspx)

15. The Scottish Government remains committed to keeping the provisions of the Scottish Acts, as extended by this Bill, under review at all times, under the now established review scheme.

## Alternative Approaches

16. Given the need to continue to respond to the public health emergency, there is no alternative to a Bill which the Government proposes to progress under the emergency procedure. Where appropriate, consideration has been given to alternative approaches to primary legislation. This is set out below, for each of the measures to be extended by the Bill. The Scottish Government will shortly be consulting on proposals to make permanent some of the temporary measures put in place in the Coronavirus (Scotland) Act 2020; Coronavirus (Scotland) (No.2) Act 2020 and the Coronavirus Act 2020. In the main, this consultation will seek views on making permanent administrative changes which have resulted in improvements and efficiencies for the public in terms of service delivery, and changes which have enabled the public sector to operate in a more flexible way to respond to future challenges. Subject to the response to the consultation, the Scottish Government intend to take forward further legislation in this Parliamentary session.

## Consultation

17. Given the continuing need to respond to the epidemic, in light of the ongoing public health measures which remain in place, it is important that some of the provisions in the Scottish Acts remain in force after 30 September 2021. Due to the pre-election period and the need to have this legislation in force by 30 September 2021, it has not been possible to undertake formal consultation on the Bill itself. The Scottish Government has, however, informally consulted with public bodies affected by the measures to be extended or expired by the Bill. Information on this informal consultation is provided below, for each of the relevant measures.

## Content of the Bill

### Expiry

18. The Bill makes provision to expire the following provisions in Scottish Acts as they are deemed no longer necessary to support the ongoing public health response:

- Temporary extension of moratoriums on diligence (multiple applications) (Section 3 and schedule 2: paragraphs 2 and 3 of the Coronavirus (Scotland) Act 2020);
- Children and vulnerable adults: children’s hearings (Section 4 and schedule 3: paragraphs 1 to 5 and 7 to 10 of the Coronavirus (Scotland) Act 2020);
- Vulnerable adults: cases of adults with incapacity (Section 4 and schedule 3 paragraphs 11 of the Coronavirus (Scotland) Act 2020);
- Community orders (Section 5 and schedule 4 paragraphs 12; 14; 15(1) reference to “and drug treatment and testing orders.”; 15(6) reference to “or drug treatment and testing order” to expire; 16 definition of “drug treatment and testing order”; definition of “relevant local authority” 16(b) and definition of “specified period” of the Coronavirus (Scotland) Act 2020);
- Freedom of information (Section 7 and schedule 6 paragraph 6 of the Coronavirus (Scotland) Act 2020 and Section 5 and schedule 4 paragraphs 10 and 11 of the Coronavirus (Scotland) (No.2) Act 2020);
- Duties under the Public Finance and Accountability (Scotland) Act 2000 (Section 7 and schedule 6, paragraph 15 of the Coronavirus (Scotland) Act 2020);
- Social Security (Section 8 and schedule 7 paragraph 1(b) and 5 of the Coronavirus (Scotland) Act 2020);
- Irritancy clauses in commercial leases: non-payment of rent or other sums due (Section 8 and schedule 7 paragraph 6 and 7 of the Coronavirus (Scotland) Act 2020);
- Student residential tenancy: termination by tenant (Schedule 1: paragraph 3(2)(b)(i), the opening words of paragraph 3(2)(b)(ii) and paragraph 3(3) and (4) of the Coronavirus (Scotland) (No.2) Act 2020);
- Coronavirus Carer’s Allowance Supplement (Section 2 and schedule 1 paragraph 6 of the Coronavirus (Scotland) (No.2) Act 2020);
- Care Homes - Further provisions (Section 2 and schedule 1 paragraphs 22 and 23 of the Coronavirus (Scotland) (No.2) Act 2020);
- Marriage and Civil Partnership (Section 2 and schedule 1 paragraph 24 of the Coronavirus (Scotland) (No.2) Act 2020).

19. Details of each of these provisions, including information on why they are not deemed necessary beyond 30 September 2021, are included below.

## **Temporary Extension of Moratoriums on Diligence (Multiple Applications) (Section 3 and Schedule 2, Paragraphs 2 and 3 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Expiring this Provision**

20. Section 3 and schedule 2, paragraphs 2 and 3 of the Coronavirus (Scotland) Act 2020 remove the prohibition against benefitting from more than one moratorium on diligence in any 12 month period. The intention behind this amendment was to ensure that those who had recently had a moratorium prior to the on-set of the pandemic were not excluded from the effect of the changes. This provision has been in place since 7 April 2020 and the policy rationale to protect those who had utilised a pre-pandemic six week moratorium no longer exists. These provisions will therefore be expired.

### **Consultation**

21. Scottish Ministers have engaged with stakeholders throughout the period these measures have been in force through a working group on Statutory Debt Solutions. This comprises of a broad range of stakeholders including representatives from the debt advice sector, insolvency profession and key creditor groups (both large and small). Views were sought on the expiry of this provision from the 39 members of the working group on Statutory Debt Solutions and while there were some reservations about expiring the provision, a significant majority recognised the justification behind the expiry of this provision.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

22. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

23. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on human rights, in particular on Article 1 Protocol 1 which protects property rights.

24. As per paragraph 172 below, this Bill will extend the duration of paragraphs 1 and 4 of schedule 2 of the Coronavirus (Scotland) Act 2020. Paragraphs 1 and 4 amend the Bankruptcy (Scotland) Act 2016 in order to extend the period of any moratorium of diligence from six weeks to six months, thereby extending the length of time when creditors are prevented from taking debt recovery action over debtors. Creditors' property rights to recover their debts can be possessions protected by Article 1 Protocol 1 but, as set out below, the ECHR recognises that privileging the property rights of one individual over another can be a legitimate means for promoting the public interest. Expiring the provision that removes the prohibition against benefitting from more than one moratorium on diligence in any 12 month period helps ensure that the extended period of moratorium protection is proportionate and strikes a fair balance between the general interest and the rights of creditors. As above, the original policy rationale for these provisions was to protect those who had utilised a pre-pandemic six week moratorium and that rationale no longer exists. The expiry of these provisions will serve to protect the Article 1 Protocol 1 rights of creditors and prevent them from being unduly prejudiced by repeat moratorium applications that could result in sequential six month periods of protection from debt recovery action.

## **Island communities**

25. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

26. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

27. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Children and Vulnerable Adults: Children's Hearings (Section 4 and Schedule 3, Paragraphs 1 to 5 and 7 to 10 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Expiring this Provision**

28. These measures in the Coronavirus (Scotland) Act 2020 are limited to those considered necessary to support and protect children's rights and promote their welfare and well-being in accordance with the Scottish Government's, and other public authorities', obligations under the United Nations Convention on the Rights of the Child (UNCRC). The guidance produced in April 2020 in support of the Coronavirus (Scotland) Act 2020 included a set of clear principles for their use, agreed among agencies. It was agreed that powers contained in that Act should be used only when circumstances arise in practice which makes their exercise necessary. The exercise of emergency powers should:

- be underpinned by a focus on children and young people's, and families', human rights when making decisions to implement powers affecting their legal rights;

- be proportionate - limited to the extent necessary, in response to clearly identified circumstances;
- last for only as long as required;
- be subject to regular monitoring and reviewed at the earliest opportunity;
- facilitate effective participation, including legal representation and advocacy for children, young people and family members, wherever possible and appropriate; and
- be discharged in consultation with partner agencies. The application of those tests has led the Scottish Government to consider that they can now safely be expired.

29. The child protection provisions remove the requirement for a second working day hearing to be held following the issuing of a Child Protection Order, and amend timescales in relation to the issuing of Child Assessment Orders.

30. The children's hearings provisions relax existing requirements for the composition of children's hearings, and the administration and conduct of children's hearings, and there are extensions to the timescales for when certain legal orders must be reviewed and appeals against legal orders lodged.

31. The looked after children provisions extend the timescales for review of children's cases when they are placed in kinship care and enable local authorities to use foster carers more flexibly to look after additional children when necessary.

32. These provisions have been essential in responding to the pandemic by providing necessary flexibility which has ensured that children and their rights have been protected throughout this period. Children's hearings have been able to continue, local authorities have been able to use foster carers more flexibly to look after additional children when necessary, and legal orders have been able to be reviewed and appealed within timescales which did not put unnecessary pressure on relevant authorities, thus allowing them to prioritise work accordingly.

33. However, use of these provisions is becoming less frequent and from 30 September 2021 it will be possible to return to the pre-Covid legislative

arrangements. Given this, the Scottish Government is of the view that it would not be appropriate or proportionate to seek to extend these beyond 30 September 2021 and they will therefore be expired by the Bill on 30 September 2021.

## Consultation

34. The major stakeholders – the Scottish Courts and Tribunals Service (SCTS) and the weekly Children’s Hearings Covid Recovery Group (CHCRG) which includes membership from the Scottish Children’s Reporter Administration (SCRA), Children’s Hearings Scotland (CHS), Social Work Scotland, the Convention of Scottish Local Authorities (COSLA), Scottish Government, care-experienced people and CELCIS - have considered whether further extensions are required and believe that they can operate in the period beyond 30 September 2021 without these Coronavirus (Scotland) Act 2020 provisions.

35. A need for transitional provisions has been highlighted around child protection orders, appeals, and compulsory supervision orders due to the possibility of confusing children and families, and the possibility of some orders expiring in an unplanned way as the system reverts back to pre-Coronavirus (Scotland) Act 2020 timescales. To promote transparency for families and to prevent any risk of unplanned expiry of compulsory supervision orders, and to provide for a smooth transition between the emergency regime and the normal regime, some transitional arrangements are required to support orderly expiry. The transitional provisions ensure that: child protection orders granted before expiry of the 2020 Act continue to operate according to the modifications in the Act; the provisions of the 2020 Act continue to apply to compulsory supervision orders which at the date of expiry of the Act remain in place beyond their normal expiry date only because of those provisions (thus ensuring those orders do not terminate on the date of expiry of the Act); interim compulsory supervision orders and interim variations of compulsory supervision orders granted before the expiry of the Act continue in effect for the longer timescale provided for in the 2020 Act; extended timescales to lodge and dispose of appeals continue to apply in respect of any decisions or determinations made before expiry of the Act; and children who are in foster placements benefitting from the flexibility provided for by the 2020 Act are not required to automatically move placement, but local authorities are required, in respect of those children, to comply with the provisions of regulation 27A and 27B of the Looked After Children (Scotland) Regulations 2009.

36. The Scottish Government is in regular contact with those representing children, young people and their families, foster carers, kinship carers and local authorities. Officials have engaged with these stakeholders proactively to respond to the needs of looked after children during the coronavirus pandemic. This informal engagement on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of these measures.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

37. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

38. The Scottish Government has assessed the potential impact of expiring all of the children's hearings related provisions which offer extended timeframes and conclude there may be some areas affecting families' rights, for instance removing an extended period for appealing a decision. It has been concluded it is necessary to apply short-life transitional arrangements, as set out above.

39. The Scottish Government has assessed the potential impact of expiring all of the looked after children related provisions and conclude there is one area which may affect rights; removing the exemption for foster placement limits where children have settled and moving them would be detrimental to their welfare and wellbeing. To protect welfare and wellbeing it will be necessary to apply short-life transitional provisions.

40. The area of greatest potential risk to the welfare of children is in relation to the expiry of schedule 3, paragraph 3 of the Coronavirus

(Scotland) Act 2020. This provides that a compulsory supervision order which would otherwise lapse because it has not been reviewed before its original expiry date, will continue to have effect for up to a further six months. However, alongside this, there is a duty on the Principal Reporter to arrange a hearing before the original expiry date, and if not, to arrange the hearing as soon as practicable thereafter. This provision has only been used to the extent necessary driven by the practicalities of holding children's hearings in the current context, and the extent of use will vary as the safety and operational contexts develop. Due to the severe restriction in the number of children's hearings which could be held as a result of the current pandemic, this provision has had the effect of extending a number of compulsory supervision orders. The prevalence of its use, as reported by SCRA, is now reducing. However, without transitional provisions to ensure that those orders which, but for the provisions of the Coronavirus (Scotland) Act 2020 would already have expired, continue in force until the end of the six month period, there is a risk that some orders would expire in an unplanned way, putting children's welfare at risk. Therefore, there is a short-life transitional provision which ensures that those orders already relying on the six month extension at the date of expiry of these provisions, can continue to do so for as much of the six month extension remains.

## **Island communities**

41. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

42. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

43. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Vulnerable Adults: Cases of Adults with Incapacity (Section 4 and Schedule 3, Paragraph 11 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Expiring this Provision**

44. These provisions effectively ‘stop the clock’ on the duration of guardianship orders and certificates authorising medical treatment for the period these provisions in the Coronavirus (Scotland) Act 2020 are in force. They have, however, been suspended since 30 September 2020 as the conditions that existed when the provisions were brought in do not exist.

45. The courts are currently dealing with guardianships as business as usual and the Office of the Public Guardian (OPG) has a full complement of staff. Similarly, conditions have eased enough that doctors can re-start certification to ensure adults with incapacity have proper authority for medical treatment. While there is the potential that this may not continue to be the case as the pandemic continues, following consultation with key stakeholders the Scottish Government has determined that it would not be necessary or appropriate to seek extension of these provisions beyond 30 September 2021 and the Bill will therefore expire them on that date.

### **Consultation**

46. A stakeholder group consisting of representatives from Mental Welfare Commission, Royal College of Psychiatrists, Scottish Courts and Tribunals Service, Social Work Scotland, The Law Society of Scotland, The Office of the Public Guardian and The Centre for Mental Health and Capacity Law at Edinburgh Napier University has been meeting every three to four weeks since suspension of these provisions to monitor the practical situation in relation to the guardianship system and availability of doctors. In addition the group has been considering the human rights factors should the provisions be reinstated.

47. At a meeting of this group on 26 April 2021, there was a unanimous conclusion that the provisions should expire on 30 September 2021.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

48. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

49. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on human rights and considers that ECHR issues do not arise.

### **Island communities**

50. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

### **Local government**

51. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

### **Sustainable development**

52. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Community Orders (Section 5 and Schedule 4 Paragraphs 12; 14; 15(1) reference to “and drug treatment and testing orders.”; 15(6) reference to “or drug treatment and testing order” to expire; 16 definition of “drug treatment and testing order”; definition of “relevant local authority” 16(b) and definition of “specified period” of the Coronavirus (Scotland) Act 2020)**

### Policy Objectives of Expiring this Provision

53. The provisions in paragraph 12(1), (2), (7) relate to a one-off extension of the time to complete unpaid work or other activity requirements by 12 months, for Community Payback Orders imposed on or before the date the Coronavirus (Scotland) Act 2020 came into force. The provisions can therefore be expired on 30 September 2021.

54. The provisions in paragraph 12(3), (4), (5), (6), (7) enable the Scottish Ministers to make regulations which extend the period allowed to complete the unpaid work or other activity requirements of a Community Payback Order. Ministers may do so only if it is required due to a likely failure to comply with the requirements due to the coronavirus, or in response to the effects of the coronavirus on local authorities or the courts. The court is already empowered to extend the period allowed to complete the requirement on a case by case basis, and while there may be some rationale for retaining this power to allow Ministers to reduce the administrative burden on courts should a lot of orders require to be extended, on balance the Scottish Government does not envisage a situation where such an extension could be justified. Information from local areas on orders which may be about to expire but are not complete indicates that the volume of such orders is not sufficient to require an extension of the power. The Scottish Government is satisfied that cases can be dealt with by local authorities taking cases to court as necessary. The Scottish Government does not consider it proportionate or necessary to extend this provision, therefore it should expire on 30 September 2021. The provisions in paragraph 14 allow for the postponement of Community Payback Orders. To date these provisions have not been used and, taking into account the likely progress of the pandemic and recovery work, the Scottish Government does not envisage any circumstance where they

would be required in future. The provisions can therefore be expired on 30 September 2021.

55. The provisions in paragraph 15 allow for regulations to be made to vary or revoke requirements imposed in Community Payback Orders or Drug Treatment and Testing Orders. To date the provisions in relation to Drug Treatment and Testing Orders have not been used and, taking into account the likely progress of the pandemic and recovery work, the Scottish Government does not envisage any circumstance where they would be required in future. It is the Scottish Government's intention that the provisions in paragraph 15, as far as they relate to Drug Treatment and Testing Orders, should expire on 30 September 2021.

56. The provisions in paragraph 16 are interpretive and are applicable to some of the powers proposed for extension. However, as it is the Government's intention that paragraphs 12, 14, and 15, as it applies to Drug Treatment and Testing Orders, should not be extended beyond 30 September 2021, paragraph 16 will be amended accordingly.

## Consultation

57. The Scottish Government has informally consulted with a number of stakeholders (including Social Work Scotland, the Scottish Courts and Tribunals Service, the Convention of Scottish Local Authorities, and Community Justice Scotland) on these provisions throughout the period of the coronavirus pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of the measures. Recent informal discussions have informed the approach being taken on expiry of provisions, and extension of some provisions.

**Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.**

### **Equal opportunities**

58. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on equal opportunities and has determined it does not unlawfully discriminate

in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

## **Human rights**

59. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on human rights and considers that ECHR issues do not arise.

## **Island communities**

60. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

61. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

62. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Freedom of Information (Section 7 and Schedule 6, Paragraph 6 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Expiring this Provision**

63. Where a Scottish public authority fails to comply with the timescales for responding to requests and requirements for review under the Freedom of Information (Scotland) Act 2002 (FOISA), this provision enables the Scottish Information Commissioner (the Commissioner) to decide that,

notwithstanding the delay, the authority has complied with Part 1 of FOISA if certain conditions are met.

64. The Commissioner has advised that there have been fewer than ten instances where a Scottish public authority has invited the Commissioner to consider exercising this power in the first year of its operation. The Commissioner has not agreed to exercise the power in any of the applications which he has so far determined. The Scottish Government therefore considers that there has been very limited use of the power to date, and that the conditions which require to be met before it could be exercised mean that it is now less likely that authorities could satisfy the Commissioner that the power should be exercised. Accordingly, the Scottish Government considers that it is now appropriate that this provision be expired.

65. As this provision is being expired, the Scottish Government also considers it appropriate to expire two related provisions in the Coronavirus (Scotland) (No.2) Act 2020. Paragraph 10 of schedule 4 amended paragraph 6 of schedule 6 to the Coronavirus (Scotland) Act 2020 and is spent. Paragraph 11 of schedule 4 repealed paragraphs 3 to 5 of schedule 6 and is also spent.

## Consultation

66. The Scottish Government has consulted the Scottish Information Commissioner on the expiry of the provision. The Commissioner drew the lack of demand for the use of the provision to the attention of the Scottish Government, and observed that in his view it was for the Parliament to determine when it would be appropriate for the provision to be expired. The Commissioner did however consider that appropriate transitional arrangements should be made in respect of events occurring before the expiry of the provision. The Scottish Government therefore considers that, to promote transparency and clarity for requesters and Scottish public authorities in fulfilling their duties under FOISA, saving provisions are required to support an orderly expiry. The saving provisions provided for in the Bill mean that a Scottish public authority can still ask the Commissioner to take the effects of the coronavirus pandemic into account when an application reaches him for a decision under section 47(1) of FOISA in respect of a request for information made before the end of 30 September 2021.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

67. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

68. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on human rights and considers that ECHR issues do not arise.

### **Island communities**

69. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

### **Local government**

70. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

### **Sustainable development**

71. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Duties Under the Public Finance and Accountability (Scotland) Act 2000 (Section 7 and Schedule 6, Paragraph 15 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Expiring this Provision**

72. The provisions allowed for amendment of the statutory deadlines for annual accounts as set by the Public Finance and Accountability (Scotland) Act 2000. The deadlines for such accounts were the 31 December 2020 and 31 December 2021 respectively. The first statutory deadline was met in December 2020 and there have been no requests to utilise this provision during the current reporting cycle for December 2021. Accordingly, the Scottish Government considers that it is now appropriate that this provision be expired.

### **Consultation**

73. The Scottish Government has consulted Audit Scotland on the expiry of the provision. The Scottish Government drew attention to the lack of demand for the use of the provision during the previous financial reporting cycle and agreed that accounts had been successfully laid by all bodies for the December 2020 deadline. Audit Scotland confirmed that no bodies within the scope of the provision are currently reporting any concerns with meeting the statutory deadline of the 31 December 2021 and reiterated its policy of being flexible and pragmatic with regards to laying deadlines for annual accounts. The Scottish Government therefore considers that on balance there is no need to retain this provision and it should be expired.

### **Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.**

#### **Equal opportunities**

74. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual

orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

## **Human rights**

75. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on human rights and considers that ECHR issues do not arise.

## **Island communities**

76. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

77. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

78. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Social Security (Section 8 and Schedule 7, Paragraph 1(b) and 5 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Expiring This Provision**

79. Paragraphs 1(a), 2, 3 and 4 of schedule 7 relaxed timescales which apply to clients seeking a redetermination, and clients bringing an appeal before the First-tier Tribunal for Scotland, where normal timescales cannot be met for reasons related to coronavirus. They also modified timescales for making applications where these have not been able to be met directly as a result of coronavirus. These provisions were expired on 29 September

2020 by [The Coronavirus \(Scotland\) Acts \(Early Expiry of Provisions\) Regulations 2020](#).

80. The provisions which remain in force are paragraphs 1(b) and 5 of schedule 7, which relax the timescales which apply for Social Security Scotland making re-determinations.

81. The key factor in considering the necessity of these provisions was the disruption created by coronavirus. Where it was considered likely to have an impact on people's ability to request a redetermination or appeal, including to gather and receive supporting information, there was considered to be a need for these provisions. Similarly, where the continued disruption created by coronavirus impacts on Social Security Scotland's ability to process redeterminations, or on a clients' ability to gather information requested in support of their redetermination, there was benefit from the extended timelines for redetermination remaining in place.

82. Social Security Scotland's review of the operation of the provisions to date indicates that these extensions provided some benefit to clients, in helping them access their rights despite the impact of coronavirus. They have also helped to avoid appeals by allowing more time to make the re-determination.

83. The Scottish Government concluded that there remained value to the agency and to clients in having these extensions in place until 30 September 2021 as a contingency against further disruption to services and clients' circumstances - for example, where public health measures continue to be required to support the ongoing public health response. However, given strategic approach to outbreak management in place and low numbers of occasions the provisions were engaged, the conclusion has been reached that there is insufficient justification for extending these provisions beyond September 2021. The Interpretation and Legislative Reform (Scotland) Act 2010 provides a basis for the provisions to continue to have effect for re-determinations commenced ahead of the provisions being expired.

## Consultation

84. The Scottish Government has consulted with Social Security Scotland throughout the period that these provisions have been in place to monitor their use and the benefits to clients and Social Security Scotland's

operations, alongside any impacts on clients' right to challenge benefit decisions.

85. The Scottish Government did not consider it necessary to consult more widely given the low numbers of occasions the provisions were engaged and in view of the fact that Social Security Scotland otherwise successfully ensured that redeterminations were generally still undertaken within the usual timescales.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

86. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

87. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on human rights and concluded that there will be no significant impact.

88. The key factor in considering the impact of expiring these provisions on human rights was the effect this would have on clients' ability to challenge decisions made by Social Security Scotland, in the context of disruption created by coronavirus. Where this was considered likely to have an impact on people's ability to request a redetermination or appeal, including to gather and receive supporting information, there was a benefit to clients seeking to challenge a decision.

89. Social Security Scotland's review of the operation of the provisions to date therefore indicates that these extensions have provided some benefit to clients, in helping them access their rights despite the impact of coronavirus. They have also helped to avoid clients' cases being

automatically passed to the appeal, which they may not favour, by allowing more time to make the re-determination.

90. The Scottish Government concluded that there remained value to the agency and to clients in having these extensions in place until 30 September 2021 as a contingency against further disruption to services and clients' circumstances - for example, where restrictions are still required. However, given the strategic approach to outbreak management which is in place and is providing for an easing of restrictions, the conclusion has been reached that there is insufficient justification for extending these provisions beyond September 2021.

91. However, the extended timeframes allowed by the provisions allow Social Security Scotland longer to undertake a redetermination across the board and therefore could undermine clients' right to challenge a decision and receive a timely outcome. There is therefore a need to balance the benefits of the provisions in tackling disruption caused by coronavirus against the risk that people's right to challenge, including a timely redetermination response by Social Security Scotland, might be undermined by delays to redeterminations being allowed under the provisions.

92. Where previously the balance favoured accepting the risk of allowing the extension when weighed against the benefits to clients, the easing of restrictions as part of the strategic approach to outbreak management means the balance now favours expiring these provisions on 30 September.

93. Given the above, and the low numbers of occasions the provisions were engaged, the Scottish Government has concluded that the expiry of the provision will not have any detrimental impact on human rights. The expiry will have a positive effect on individual rights, as it enables clients to proceed to exercise their right to appeal to the First-tier Tribunal more quickly in the event that Social Security Scotland does not make a re-determination within the normal period allowed by the Social Security (Scotland) Act 2018.

## **Island communities**

94. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on

island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

95. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

96. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Irritancy Clauses in Commercial Leases: Non-Payment of Rent or Other Sums Due (Section 8 and Schedule 7, Paragraph 6 and 7 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Expiring this Provision**

97. The Coronavirus (Scotland) Act 2020 modifies the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 so that the period of notice required to evict a tenant holding a commercial lease was extended from 14 days to 14 weeks for a monetary breach (non-payment of rent).

98. As a preventative measure it is not possible to quantify how effective the measures have been since being introduced. However, anecdotally it has been working well in conjunction with the Code of Practice for the Commercial Property Sector to prevent evictions for non-payment of rent. Rather landlords and tenants are coming to mutually beneficial agreements on lease restructuring, rental deferrals, holidays and reductions. The voluntary Code of Practice for the Commercial Property Sector is due to end in June although it may be continued. This is a UK Government initiative but applicable in Scotland. Even if expired it provides voluntary guidance to encourage commercial tenants and landlords to work together to protect viable businesses and save jobs.

99. It is considered that the provisions can now be expired as the economy opens up so rents will start flowing again, possibly with revised lease structures put in place during lockdown. This is in line with other administrations across the UK (England, Wales and Northern Ireland) whose current moratoria are due to expire on 30 June 2021.

100. Eviction was still possible in Scotland during the pandemic and any notices to quit would have been exercised already if that had been the landlord's intention therefore no transitional arrangements are required.

## Consultation

101. The Royal Institution of Chartered Surveyors (RICS) supports the sensible easing and eventual removal of anti-irritancy measures relating to the effective moratorium on commercial rents from 30 September 2021. They welcome the extension until this date, and their support for the removal is dependent on the public health and economic situation over the coming months. The Scottish Property Federation (SPF) does not support any extension past 30 September 2021. They state that the provision for the extension to 14 weeks before tenants can currently be evicted has not been used to any meaningful extent, as a landlord is unlikely to irritate a lease when there is no tenant to fill the vacancy. The landlord would be liable to pay empty property rates, as there is no exemption for COVID related reasons. Landlord members have worked hard to engage with tenants and in the main tenants/landlords should be clear on rent concessions etc. Their view is that it would be helpful if the Code of Practice for the Commercial Property Sector was updated to draw on all the good practice that now exists in terms of agreements reached between property owners and tenants. Going forward the SPF members are clear that those tenants who can pay rent should do so, and those tenants who need support should be helped where a property owner has the means to do so.

**Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.**

### **Equal opportunities**

102. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on

equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

## **Human rights**

103. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on human rights and considers that ECHR issues do not arise.

## **Island communities**

104. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

105. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

106. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Student Residential Tenancy: Termination by Tenant (Schedule 1, Paragraph 3(2)(b)(i), the opening words of Paragraph 3(2)(b)(ii) and Paragraph 3(3) and (4) of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Expiring this Provision**

107. The seven day notice period was for a particularly challenging period in respect of travel restrictions and the move to blended learning last year –

the social, economic and health pressures faced by students now are not the same as they were a year ago so officials now consider that the 28 day notice period provides sufficient protection. The majority of student tenancies are on an annual basis, so the numbers of student tenancies which were entered into prior to 27 May 2020 will now be significantly lower. The 28 day notice period, will therefore cover all students who in halls and PBSA from 30 September 2021 and there will be no detriment to the likely very small numbers who would have had a seven day notice period. All students in halls and PBSA can still terminate their lease but for a small group they will have to give three weeks more notice than before. It is not considered that this extra three weeks creates a disproportionate impact on the students affected. The 28 day notice period aligns with students renting in the private sector giving all students the same rights to terminate their lease.

## Consultation

108. The Scottish Government has not had the opportunity to consult on the expiry of this particular provision.

**Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.**

### **Equal opportunities**

109. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

110. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on human rights and is satisfied that it respects the Convention rights of students and landlords. The removal of the seven-day notice period will ensure landlords have more time to prepare for the termination of a lease

thereby safeguarding their rights under Article 1, Protocol 1. The provision of a 28 day notice period for all students protects the Article 8 rights of tenants who may require to leave their tenancy should the pandemic intensify and further restrictions be imposed on their learning.

## **Island communities**

111. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

112. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

113. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Coronavirus Carer's Allowance Supplement (Section 2 and Schedule 1, Paragraph 6 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Expiring this Provision**

114. The Coronavirus (Scotland) (No.2) Act 2020 modified the effect of Section 81 of the Social Security (Scotland) Act 2018. This has had the effect of adding an additional £230.10 to awards of Carer's Allowance Supplement for the period from 1 April 2020 to 30 September 2020. This addition is known as the Coronavirus Carer's Allowance Supplement ('CCAS').

115. Some backdated payments of Carer's Allowance Supplement made in December 2020 included payments of CCAS. It is envisaged that a modest number of further backdated awards including CCAS will be made

as part of the next Carer's Allowance Supplement payment cycle, in June 2021, and in subsequent rounds.

116. The Scottish Government is content that backdating of CCAS payments can continue beyond expiry of the provision on the basis that the Interpretation and Legislative Reform (Scotland) Act 2010 will protect individual rights acquired while the provision was in force. Therefore, the Scottish Government is of the view that it would be appropriate to expire these provisions on 30 September 2021.

117. Further legislation will be introduced to allow for provision to be made for a subsequent increase to carer's allowance supplement for the period of 1 October 2021 to 31 March 2022.

## Consultation

118. The Scottish Government continues to informally consult with carer organisations in relation to the Coronavirus Carer's Allowance Supplement. There is not expected to be any impact on stakeholders or individuals as a result of expiry of this provision and the Scottish Government is content that backdating can continue beyond expiry of the provision.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### Equal opportunities

119. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### Human rights

120. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on human rights and considers that ECHR issues do not arise.

## **Island communities**

121. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

122. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

123. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Care Homes - Further Provisions (Section 2 and Schedule 1, Paragraphs 22 and 23 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Expiring this Provision**

124. Section 53 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”) provides that Social Care and Social Work Improvement Scotland (otherwise known as the Care Inspectorate) may inspect registered care services, and sets out the purpose of inspections.

125. Paragraph 22 adds section 53A to the 2010 Act, requiring that the Care Inspectorate must lay a report before the Parliament every two weeks during the emergency period. These reports must set out which care home services it has inspected in the two week period as well as the findings of those inspections.

126. Paragraph 23 inserts section 79A into the 2010 Act which introduces new duties about the reporting of deaths in care homes services from or attributable to coronavirus. Section 79A(1) of the 2010 Act requires that care home service providers must provide certain information to the Care

Inspectorate each day in relation to the numbers of deaths which have occurred in a care home service, whether caused by or attributable to coronavirus or not.

127. Section 79A(2) of the 2010 Act requires that the Care Inspectorate must prepare a report of the information provided by care home service providers as soon as practicable at the end of every seven day period during which the Care Inspectorate has been receiving such information. This report is to be shared with the Scottish Ministers.

128. Section 79(3) of the 2010 Act requires the Scottish Ministers to subsequently lay reports prepared by the Care Inspectorate under section 79A(2) before the Parliament as soon as practicable after having received these from the Care Inspectorate and in any event no later than seven days after receipt.

129. The fortnightly reports have been helpful in getting information into the public domain more quickly to provide assurance to the Scottish Ministers, the Parliament and the public at a time where levels of anxiety about the safety and wellbeing of care home residents and staff was understandably high. The weekly reporting of deaths has provided useful data and has been a key part to the overall reporting process during the pandemic.

130. Preparing the fortnightly report has reduced the Care Inspectorate's capacity to carry out wider scrutiny activity, as it is inspectors who are involved in the preparation. Further, there has been a return to a near normal pre-Covid process where full inspection reports are published usually within 10 days of the inspection. The result of this is that in many cases, full reports are being published around the same time as the associated and less detailed parliamentary report. There is unnecessary duplication of effort.

131. The weekly reporting of deaths is heavily reliant on accurate reporting by care homes, which has not always been achievable. Furthermore, the official statistics published by National Records of Scotland (NRS) are now well established.

132. It is therefore the Scottish Government's intention to expire these provisions from 30 September 2021 to enable the Care Inspectorate to

better discharge its statutory duties of scrutiny, inspection and support to all care services.

## Consultation

133. The Scottish Government is in regular contact with the Care Inspectorate, and has met regularly throughout the Covid-19 pandemic to discuss matters of urgency including the outputs of these reporting provisions. Furthermore, the Chair and Executive Team of the Care Inspectorate have been afforded regular meetings with the Cabinet Secretary for Health and Social Care to discuss matters of urgency and the findings from the fortnightly reports on inspections.

134. The Scottish Government recognises the importance of enabling the Care Inspectorate to discharge its statutory duties without any unnecessary and additional burden, which duplication of effort is now creating. It is the Scottish Government's intention to continue to meet regularly with the Executive Team of the Care Inspectorate to discuss matters of urgency, and to revise and keep under review the Executive Framework and other corporate documents to ensure effective data sharing and reporting protocols, and in order to act proactively to ensure the Care Inspectorate can successfully discharge its statutory duties.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

135. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

## **Human rights**

136. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on human rights and considers that ECHR issues do not arise.

## **Island communities**

137. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

138. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

139. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Marriage and Civil Partnership (Section 2 and Schedule 1, Paragraph 24 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Expiring this Provision**

140. This provision requires the Scottish Ministers, in conjunction with the Registrar General of Births, Deaths and Marriages for Scotland, to take such steps as they consider necessary to ensure that the solemnisation of marriages and registration of civil partnerships continue to be available in Scotland whilst it is in force. It specifies that the steps taken must ensure that a person's right to marry, which is protected by Article 12 of the ECHR, is not disproportionately interfered with for reasons relating to coronavirus. It also requires the Scottish Ministers to report on the steps taken and on the number of marriages and civil partnerships that have taken place.

141. It is the Scottish Government's policy to ensure the continued availability of marriage and civil partnership. Further, the right of men and women of marriageable age to marry is already protected by Article 12 of the ECHR. The provision was suspended from 30 March 2021, rather than expired, as it was possible restrictions on marriage and civil partnership could be subject to further adjustment as a consequence of the pandemic. The decision to suspend at that time was deemed more suitable than expiry given the possibility of changing circumstances.

142. At the time of the passing of the Coronavirus (Scotland) (No.2) Act 2020, marriage and civil partnership was only available to those in an emergency situation, for example, if a party to the marriage or civil partnership was seriously ill. This was principally due to the closure of local registration offices where notices of intention to marry or register a civil partnership are processed, where marriage and civil partnership schedules are prepared, and where some ceremonies take place. Since the reopening of local registration offices, this is no longer the case and couples wishing to marry or enter a civil partnership are generally able to do so. While the provision is not currently required, it is not considered appropriate to expire the provision in advance of 30 September 2021. This means that the provision could continue to be revived by further regulations should the availability of marriage and civil partnership be further impacted as a consequence of the pandemic. However, given the general availability of marriage and civil partnership going forward, it is not considered necessary to seek an extension of this provision beyond 30 September 2021. For that reason, this provision will be expired by the Bill on 30 September 2021. The policy underpinning the provision can continue to be delivered after the provision has expired. Guidance published on the Scottish Government website, and updated from time to time, has assisted couples planning to marry or register a civil partnership and celebrants to understand and take account of relevant restrictions. Also, as part of their existing work on publishing statistics on vital events, National Records of Scotland (NRS) provide quarterly figures on their website on the number of marriages and civil partnerships taking place.

## Consultation

143. The Scottish Government has not consulted with stakeholders specifically on the proposal to expire the provision. The Scottish Government engages regularly with key stakeholders, including religious and belief bodies and the wedding industry, concerning the impact of the

pandemic on marriage and civil partnership. The Scottish Government is also in regular contact with NRS who have been working closely with local authority registrars. Specific consultation on the expiry of the provision was considered unnecessary given that expiry will not affect the existence of the ECHR protection, the Scottish Government's policy to ensure the continued availability of marriage and civil partnership and the quarterly figures produced by NRS.

**Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.**

### **Equal opportunities**

144. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

145. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, this measure on human rights and is satisfied that it is compliant with ECHR rights.

146. Couples wishing to marry or enter a civil partnership are generally able to do so. The protection of the right of men and women of marriageable age to marry is afforded by Article 12 of the ECHR. Article 14 also protects against discrimination in the enjoyment of the right and in the enjoyment of the right to respect for family and private life afforded by Article 8. Those protections should be unaffected by the expiry of paragraph 24. It is therefore not considered that expiry would have any impact on the protection of rights or on the protection from discrimination.

147. The Scottish Government will continue to ensure the continued availability of marriage and civil partnership. The Scottish Government will continue to engage with key stakeholders, including religious and belief

bodies, the wedding industry and NRS, to consider the impact of the pandemic on marriage and civil partnership.

148. As the policy underpinning the provision to be expired can continue to be delivered once it is expired, no rights and equality implications have been identified in relation to its expiry.

## **Island communities**

149. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

150. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

151. The Scottish Government has assessed the potential impact of expiring, on the date provided for by the Scottish Acts, the measure on sustainable development and no detrimental effects are anticipated.

## **Extension**

152. The Bill also makes provision to extend Part 1 of the two Scottish Acts which has the effect of ensuring that the following provisions in the Scottish Acts will be available beyond 30 September 2021 to respond appropriately to the on-going situation:

- Eviction from dwelling-houses (Section 2 and schedule 1: paragraphs 1 and 4 of the Coronavirus (Scotland) Act 2020);
- Temporary extension of moratoriums on diligence (Section 3 and schedule 2: paragraphs 1 and 4 of the Coronavirus (Scotland) Act 2020);

- Courts and tribunals: conduct of business by electronic means (Section 5 and schedule 4: paragraphs 1-6 of the Coronavirus (Scotland) Act 2020);
- Fiscal fines (Section 5 and schedule 4: paragraph 7 of the Coronavirus (Scotland) Act 2020);
- Cases beginning with an appearance from custody (Section 5 and schedule 4: paragraphs 8 and 9 of the Coronavirus (Scotland) Act 2020);
- Extension of time limits (Section 5 and schedule 4: paragraph 10 of the Coronavirus (Scotland) Act 2020);
- Exceptions to the rule that hearsay evidence is inadmissible evidence (Section 5 and schedule 4: paragraph 11 of the Coronavirus (Scotland) Act 2020);
- Community orders (Section 5 and schedule 4: paragraphs 13, 15 and 16 of the Coronavirus (Scotland) Act 2020);
- Parole Board (Section 5 and schedule 4: paragraphs 17 and 18(1) and (3) of the Coronavirus (Scotland) Act 2020);
- Release of prisoners (Section 5 and schedule 4: paragraphs 19 and 20 of the Coronavirus (Scotland) Act 2020);
- Legal Aid (Section 5 and schedule 4: paragraphs 21 – 23 of the Coronavirus (Scotland) Act 2020);
- Alcohol licensing (Section 6 and schedule 5 of the Coronavirus (Scotland) Act 2020) and Licensing other than alcohol licensing (Section 7 and schedule 6: paragraph 1 of the Coronavirus (Scotland) Act 2020);
- Freedom of Information (Section 7 and schedule 6: paragraphs 2 and 7 of the Coronavirus (Scotland) Act 2020);
- Freedom of Information (Section 5 and schedule 4: paragraph 12 of the Coronavirus (Scotland) (No.2) Act 2020);
- Duties in respect of reports and other documents (Section 7 and schedule 6: paragraphs 8 – 10 of the Coronavirus (Scotland) Act 2020);
- Local authority meetings (Section 7 and schedule 6: paragraphs 11-14 of the Coronavirus (Scotland) Act 2020);
- Duration of planning permission (Section 8 and schedule 7: paragraphs 8 – 10 of the Coronavirus (Scotland) Act 2020) and

Listed buildings and conservation areas: consents (Section 5 and schedule 4: paragraph 2 of the Coronavirus (Scotland) (No.2) Act 2020);

- Land registration: electronic delivery of copies to Registers of Scotland (Section 8 and schedule 7: paragraphs 11-14 of the Coronavirus (Scotland) Act 2020 and Section 5 and schedule 4: paragraph 3 and 4 of the Coronavirus (Scotland) (No.2) Act 2020);
- Scrutiny of subordinate legislation in urgent cases (Section 8 and schedule 7: paragraphs 23-30 of the Coronavirus (Scotland) Act 2020);
- Student residential tenancy: termination by tenant (Section 2 and schedule 1: paragraphs 1 – 3 of the Coronavirus (Scotland) (No.2) Act 2020, except paragraph 3(2)(b)(i), the opening words of paragraph 3(2)(b)(ii) and paragraph 3(3) and (4) which are being expired);
- Tenancies: pre-action requirements for order for possession or eviction order on ground of rent arrears (Section 2 and schedule 1: paragraphs 4 and 5 of the Coronavirus (Scotland) (No.2) Act 2020);
- Social care staff support fund (Section 2 and schedule 1: paragraph 7 of the Coronavirus (Scotland) (No.2) Act 2020);
- Bankruptcy (Section 2 and schedule 1: paragraphs 8, 10 and 12 of the Coronavirus (Scotland) (No.2) Act 2020);
- Mental Health: named person nomination (Section 2 and schedule 1: paragraph 15 of the Coronavirus (Scotland) (No.2) Act 2020);
- Care Homes - Emergency directions and emergency intervention orders (Section 2 and schedule 1: paragraphs 16 – 17 of the Coronavirus (Scotland) (No.2) Act 2020);
- Powers to purchase care home services and care at home providers (Section 2 and schedule 1: paragraphs 18 to 21 of the Coronavirus (Scotland) (No.2) Act 2020);
- Criminal Justice - Criminal proceedings: extension of time limits (Section 3 and schedule 2: paragraph 1 of the Coronavirus (Scotland) (No.2) Act 2020);
- Criminal Justice - Arrangements for the custody of persons detained at police stations (Section 3 and schedule 2: paragraphs 2 – 5 of the Coronavirus (Scotland) (No.2) Act 2020);

This document relates to the Coronavirus (Extension and Expiry) (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 18 June 2021

- Criminal Justice - Expiry of undertaking under section 25(2)(a) of the Criminal Justice (Scotland) Act 2016 (Section 3 and schedule 2: paragraph 6 of the Coronavirus (Scotland) (No.2) Act 2020);
- Proceeds of Crime (Section 3 and schedule 2: paragraphs 8 and 9 of the Coronavirus (Scotland) (No.2) Act 2020);
- Intimation etc. of documents (Section 3 and schedule 2: paragraph 10 of the Coronavirus (Scotland) (No.2) Act 2020);
- Care services: giving of notices by the Care Inspectorate (Section 5 and schedule 4: paragraph 5 of the Coronavirus (Scotland) (No.2) Act 2020);
- Execution of documents, etc. (Section 5 and schedule 4: paragraph 9 of the Coronavirus (Scotland) (No.2) Act 2020);
- Council tax: exempt dwellings (Section 5 and schedule 4: paragraph 14 of the Coronavirus (Scotland) (No.2) Act 2020);
- Restriction on giving grant to businesses connected to tax havens (Section 5 and schedule 4: paragraph 16 of the Coronavirus (Scotland) (No.2) Act 2020).

153. Details of each of these provisions, including information on the continued necessity and appropriateness of each, are included below.

## **Eviction from Dwelling-Houses (Section 2 and Schedule 1, Paragraphs 1 and 4 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

154. The coronavirus pandemic has led to both job losses and a reduction in income for many households in Scotland. More tenants in both the private and social rented sectors are finding themselves in financial difficulty due to the pandemic and are unable to meet their obligations under their tenancy agreements.

155. With the exception of anti-social behaviour, criminality, abandonment and vacant property eviction grounds, these provisions, as amended by

regulations<sup>9</sup>, increase the notice period across eviction grounds. For the private rented sector, the provisions amend all the eviction grounds a landlord can use to regain possession to make them discretionary.

156. Before the provisions commenced, a tenant with a private residential tenancy could have been asked to leave their home within 28 days of a notice being served by the landlord, if they had been living in the property for six months or less; or if the landlord was using an eviction ground to do with the tenant's behaviour. Where a tenant had lived in a property for six months or more and the eviction ground did not relate to the tenant's behaviour, a landlord was required to give 84 days' notice. This meant that tenants were at risk of having their home repossessed by their landlord, which could have led to more households becoming homeless and requiring local authority assistance. As a result of the provisions in the Coronavirus (Scotland) Act 2020, the tenant can stay for up to six months before an application can be made to the Tribunal to repossess a property for all grounds other than anti-social behaviour, criminality, abandonment and vacant property grounds.

157. It is the Scottish Government's intention that these provisions, and therefore these protections for renters, should be extended beyond 30 September 2021 in order to protect private and social rented tenants from being evicted from their homes as a result of the impacts of coronavirus.

## Necessity of Extending this Provision

158. Extending these provisions beyond September will mean that tenants who may only now be experiencing the negative effects of the pandemic, or who are made redundant following the end of the furlough scheme, can benefit from the additional time provided under the extended notice periods to apply for, and receive, the available support in the short term.

159. This is particularly important since the evidence suggests that tenants in the private rented sector are experiencing financial difficulty due to the coronavirus and are finding themselves unable to meet their obligations under their tenancy agreement.

160. It is also important, that the First-tier Tribunal for Scotland (Housing and Property Chamber) continues to be able to apply discretion in order to

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<sup>9</sup> [The Coronavirus \(Scotland\) Act 2020 \(Eviction from Dwelling-houses\) \(Notice Periods\) Modification Regulations 2020](#)

take into account the full circumstances of a case, including the impact of the pandemic, when determining private rented sector evictions cases.

## Alternative Approaches

161. One alternative approach would be to allow the provision to expire on 30 September 2021, meaning a loss of protection for renters, which is not considered an option at this time, given the concerns around those living in the private rented sector being particularly susceptible to the longer-term economic impact of the pandemic.

162. No alternative to primary legislation is possible to fully achieve the desired outcome. The Scottish Government has not identified any delegated powers which could be used to make these changes to protect tenants.

## Consultation

163. The Scottish Government is in regular contact with those representing landlords, letting agents and tenants in both the private and social rented sectors, local authorities and the Scottish Housing Regulator. Officials have engaged with these stakeholders proactively to respond to the needs of tenants and landlords during the period of the coronavirus pandemic including through the Private Rented Sector and Social Housing Resilience Groups, which were established in response to the pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of these measures.

164. In discussing the intention to continue the existing protection for renters beyond 30 September 2021, consultation took place with tenant representative groups including Shelter Scotland and Citizens Advice Scotland, who broadly welcomed the move and highlighted that the full impact of restrictions easing will not be felt until later in the summer and it is therefore vitally important that there are safeguards there to protect renters and provide certainty. Both Shelter Scotland and Citizens Advice Scotland continue to highlight that there is a need for additional measures to prevent people losing their homes and to help people to move to more sustainable long-term homes where appropriate, and these must be introduced

alongside any extension/replication of the current housing-related Coronavirus legislation as part of Scotland's recovery.

165. The Scottish Association of Landlords was consulted informally on these provisions and highlighted that they have serious concerns about the provisions extending notice periods being continued. They commented that such action does not solve the problem and can result in a tenant building up further rent arrears which then impacts their ability to find alternative housing in the sector. They want to see a recognition that Scotland is now moving out of the emergency response period and are of the view that the emergency provisions in place for the sector since the outset of the pandemic should reflect the progress that has been made.

166. Social landlord representatives expressed their understanding of why the Scottish Government wishes to continue the provisions. They appreciate that having the provisions available for an extended period is a sensible approach in case they are needed, given the ongoing public health uncertainty.

**Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.**

### **Equal opportunities**

167. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it will not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

168. The Scottish Government considers that the temporary legislative changes to protect renters continue, and will continue, to have a positive impact across those with protected characteristics, including women who are more likely to have caring responsibilities and therefore be impacted more significantly - socially and financially - by the consequences of the pandemic. In the social rented sector, an estimated 54% of households have a highest income householder who is female, with the equivalent percentage for private renting households being 43%. The legislative

measures continue to prevent all renters across all protected characteristics from being evicted during the current crisis.

## **Human rights**

169. The Scottish Government has assessed the potential impact of extending this measure on human rights. Consideration has been given to the impact of the provisions on a landlord's human rights with regards to their ability to control their property in relation to Article 1 of Protocol No.1 to the ECHR. The Scottish Government's view is that the temporary nature of the provisions continue to strike an appropriate balance between the landlord's rights in the property, and the rights of the tenant to be protected during the pandemic. The maximum period of notice that the landlord will have to provide will be six months. The Scottish Ministers have a power in section 13 of the Coronavirus (Scotland) Act 2020 to bring forward the expiry of any provision in Part 1 of that Act. This power enables the Scottish Ministers to react quickly to changing circumstances and bring the restrictions in schedule 1 of the Act to an end where they are no longer proportionate in the prevailing circumstances.

## **Island communities**

170. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it has no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

171. The Scottish Government has assessed the potential impact of extending this measure on local government and has determined that no adverse effect on local government is anticipated. It is anticipated that continued action to prevent evictions during the coronavirus pandemic will result in a reduced demand for local authority services, including housing services, that are already under pressure during the coronavirus pandemic.

## **Sustainable development**

172. The Scottish Government has assessed the potential impact of extending this measure on sustainable development and no detrimental effects are anticipated.

## **Temporary Extension of Moratoriums on Diligence (Section 3 and Schedule 2, Paragraphs 1 and 4 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

173. These provisions extend the period of any new moratoria to a period of six months. This extension of the existing moratorium on diligence and bankruptcy from six weeks to six months prevents creditors from taking action against individuals who have financial difficulties, thus allowing those individuals time to find advice on how best to deal with their debts and, in current circumstances, also to recover from time-limited income shocks without having to take serious steps like applying for bankruptcy.

174. Various organisations and published reports highlight the future increased demand for debt advice and solutions as a consequence of the pandemic. These will be driven primarily by income and employment shocks as government business support is withdrawn and a reduction in creditor forbearance is seen, each of which have assisted in keeping the levels of personal insolvency low during the period of the pandemic.

175. It is therefore the Scottish Government's intention that these provisions should be extended beyond 30 September 2021 in order that this continued protection will enable more people to recover fully having sought advice on the available solutions.

### **Necessity of Extending this Provision**

176. The effect of these provisions is to extend the period when creditors are prevented from taking action against a debtor for debts owed by them. This applies on giving of notice by a debtor that they will apply for sequestration, for a protected trust deed for the benefit of creditors or to a statutory Debt Arrangement Scheme. This creates a 'breathing space' in which the debtor can seek money advice, and find the right longer term solution for their circumstances.

177. The evidence shows that the enhanced protection has been utilised – the most recent quarterly statistics highlight that the applications for moratorium protection received from January – March 2021 totalled 778 as compared to 278 in the equivalent quarter in 2019/20 and the figure has been increasing quarter on quarter this year. For the same period,

personal insolvencies have fallen by 47% in 2020/21 as compared to 2019/20. This shows that while the numbers accessing debt solutions remain low, more people are seeking protection and space to consider the options available and stakeholder feedback received is that the numbers requiring this enhanced protection is likely to increase as wider support for business and employees is withdrawn.

## Alternative Approaches

178. Extending the moratorium for different time periods was considered, including three months and up to one year. However, the support for the measures as provided for by the Coronavirus (Scotland) Act 2020 was positive and therefore deemed most beneficial at this stage. There is no alternative to primary legislation to achieve this desired outcome.

## Consultation

179. Scottish Ministers have engaged with stakeholders throughout the period these measures have been in force through a working group on Statutory Debt Solutions. This comprises of a broad range of stakeholders including representatives from the debt advice sector, insolvency profession and key creditor groups including UK Finance. At a meeting hosted in October 2020<sup>10</sup> the group welcomed the measures introduced by the Scottish Acts. Following that Ministerial Working Group meeting, a series of stakeholder meetings were hosted in November 2020<sup>11</sup> to discuss immediate priorities and in particular provisions that could be placed on a permanent footing through regulations (see the information later in this memorandum on Bankruptcy). Views were sought on the extension of this provision from the 39 members of the working group on Statutory Debt Solutions and there was strong support for the extension of this provision.

180. Stakeholder consultation on issues associated with personal debt has revealed a significant degree of uncertainty over the timing and scale of the issues arising as a result of the coronavirus pandemic. While there is agreement that future demand for advice services and statutory solutions will increase – and this is likely to be significant – the timing of this is less clear. Debt issues are unlikely to emerge fully until the existing support for business (e.g. through furlough etc.) and self-employed have been closed

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<sup>10</sup> [Ministerial Stakeholder Meeting Scottish Statutory Debt Solutions - Minutes - October 2020 | Accountant in Bankruptcy](#)

<sup>11</sup> [General review of Scotland's debt solutions - Stakeholder meetings](#)

and the resulting scale of redundancy and business failure is known. It is anticipated that the withdrawal of business support in September would see issues of personal debt becoming more prevalent in the months following.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

181. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

182. The Scottish Government has assessed the potential impact of extending this measure on human rights and consider that creditors' rights to recover their debts can be possessions protected by the ECHR, in particular, Article 1 of Protocol 1 which protects property rights.

183. This measure is proportionate and strikes a fair balance between the general interest and the rights of creditors, in the circumstances of the coronavirus pandemic. Generally the ECHR recognises privileging the property rights of one individual over another can be a legitimate means for promoting the public interest. The justification is strong because of the time necessary for recovery, and the depth of the economic and personal finance shock experienced. Additionally, in respect of individuals, to enter into any of the statutory debt relief or debt management products, as noted they need to go through a money adviser, access to which remains difficult, so there is a need to protect debtors in the meantime. The period is limited to six months, and the restrictions will only last for a similar period (unless there is justification for extending them). Although creditor businesses must also be able to recover their debts, court business will also continue to be affected by the coronavirus pandemic.

184. Debtors do not lightly use the provisions as they incur the publicity in going on the public register in the first place. The aim is to provide debtors

with a breathing space to seek appropriate debt relief and advice on which debt solutions would be the best option. Creditors' claims are not lost, but merely deferred, subject to any ensuing insolvency procedure. It is considered that these mechanisms, recognising that insolvency is likely to reduce the value of claims, again in the general interest, are proportionate not to privilege one creditor taking aggressive enforcement action over others, and to give creditors in general a fair return. In the light of the continued impact of coronavirus, and the limited burden in the effect on claims, there is a fair balance between the interests of debtors and creditors.

### **Island communities**

185. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined that these communities are likely to find it harder to access face to face debt advice during the coronavirus pandemic, so both the extended moratorium itself, and the ability for the individual themselves to apply for the moratorium via the Accountant in Bankruptcy's website, are likely to be of more use to those in such locations.

### **Local government**

186. The Scottish Government has assessed the potential impact of extending the measure on local government and no adverse effect on local government is anticipated.

### **Sustainable development**

187. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Courts and Tribunals: Conduct of Business by Electronic Means (Section 5 and Schedule 4, Paragraphs 1-6 of the Coronavirus (Scotland) Act 2020)**

### **Policy objectives of Extending this Provision**

188. These provisions allow documents produced by a court or tribunal, or connected with criminal or civil proceedings, to be signed and transmitted electronically, removing the requirement for physical movement and contact. This enables documents to be sent, served and lodged by means of email or other electronic means.

189. The provisions also provide that any participant in either criminal or civil proceedings (judge, clerk, legal representatives, parties to proceedings, accused, convicted persons, appellants and witnesses) can take part in any proceedings by way of live visual (television) or audio (telephone) link from any location. This extends to the ability to conduct fully audio or video-enabled procedural hearings, where no one is physically in the same place, or in a court or tribunal building. The provisions create a default position in which requirements for physical attendance at any court or tribunal hearings are suspended, except for trial diets, where the default is that a person will physically attend court. These presumptions can be overridden by the court or tribunal.

190. It is the Scottish Government's intention that these provisions should be extended beyond 30 September 2021 as they are essential in enabling the justice system to be able to continue operating as safely and as effectively as possible.

### **Necessity of Extending this Provision**

191. These provisions have enabled a systemic response to the impact of public health restrictions. The systemic response often represented improvements previously identified as features of a modern criminal justice system. Remote hearings and electronic processes have increased across all areas of criminal and civil business. The Lord President has stated the use of written submissions, the digital transmission of documents and the use of electronic signatures have enabled swift process changes which are necessary to operate court services efficiently.

192. The conduct of virtual courtroom trials has been piloted and criminal justice organisations are working together to develop a model for trials to be conducted virtually where appropriate. With the introduction of remote jury centres, the normal capacity of for High Court and Sheriff and Jury evidence-led trials has been restored with robust public health measures and guidance in place to protect all court users, including jurors and staff. In addition, Sheriff summary trials are now operating, although currently at levels below the pre-COVID average.

193. On 12 March 2021 a Practice Note was issued by Sheriff Principal Derek Pyle. This set out that from May 2021 the majority of domestic abuse summary trials in Aberdeen Sheriff Court will be conducted virtually, with only the accused person and their solicitor having to be present in the court premises. Sheriff Principal Pyle noted that this initiative would improve the experience for witnesses and ensure the rights of the accused are protected during trials. It will allow up to nine trials to take place each week, which would otherwise not be able to proceed because of coronavirus restrictions and also offers the opportunity for a national roll-out to provide much needed additional capacity.

194. As of 8 March 2021 over 4,200 custody hearings have also been completed by remote and electronic methods.

195. Civil business continues to operate virtually and remotely, as has been the case throughout the pandemic - almost all civil court and tribunal business is now conducted online or by telephone with all documents in civil cases lodged electronically; all new summonses signetted electronically and evidential hearings for civil cases being held remotely. In the Sheriff Appeal Court almost all civil hearings are being conducted remotely. From 13 July 2020 the All-Scotland Sheriff Personal Injury Court (ASSPIC) transitioned to a remote basis. The first ASSPIC proof hearings (for hearing evidential cases remotely) commenced in early August and since late November Scotland's Sheriff civil courts are now conducting proofs, debates, evidential and Fatal Accident Inquiry (FAI) hearings virtually using the WebEx video platform. The first blended civil proof (proof using both in person and video evidence) has taken place. Arrangements are currently being made for further blended commercial proofs in the Court of Session and work continues on plans for civil jury trial resumption both in the Court of Session and ASSPIC.

196. Without the provisions enabling business to be conducted by electronic means being extended, the ability of the justice system to continue will be severely adversely affected, as the expiry of these provisions would result in the requirement for physical processes to once again take effect.

197. The justice system is reliant upon these provisions to reduce pressure on physical court estate while enabling business to continue.

## Alternative Approaches

198. The only alternative approach would be to allow the provision to expire on 30 September 2021, meaning a return to requirements for physical movement and contact, which is not a viable option at this time.

199. No alternatives to primary legislation have been identified which would provide the degree of operational flexibility required by justice organisations to maintain the delivery of essential court and tribunal business during the continued disruption caused by coronavirus.

## Consultation

200. The Scottish Government continues to informally consult with Police Scotland, the Crown Office and Procurator Fiscal Service (COPFS) and Scottish Courts and Tribunals Service (SCTS) on these measures. These provisions have been identified by those parties as a key measure to provide for the continued operation of courts and tribunals as a result of the coronavirus pandemic, to allow both civil and criminal proceedings to be conducted in a way which will minimise unnecessary travel and congregation of people, and which will save time for those involved in critical front line service delivery.

**Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.**

### **Equal opportunities**

201. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected

characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

## **Human rights**

202. The Scottish Government has assessed the potential impact of extending the measure on human rights and is satisfied that the measures will not impact on the ability of the courts to operate in accordance with ECHR, noting the ability of the Lord President and Lord Justice General to make exceptions. The courts retain power to override the presumptions against physical attendance and attendance by electronic means is not possible if it would prejudice the fairness of proceedings.

## **Island communities**

203. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

204. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

205. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Fiscal Fines (Section 5 And Schedule 4, Paragraph 7 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

206. The provisions enable a wider range of cases to be dealt with by Fiscal Fine and, thereby, mitigate the impact of coronavirus on the justice system, at a time when no cases are currently proceeding before the

Justice of the Peace Courts, and where Sheriff Court summary trials are only beginning to operate but at levels well below the pre-COVID average. This impact includes, for example, considering how variants of concern might affect continued necessary public health measures, but also reflects the disruption to the management of criminal cases caused by coronavirus which will continue to be felt for a considerable period even after coronavirus is no longer prevalent in communities.

207. It is the Scottish Government's intention that these provisions should be extended beyond 30 September 2021 as they allow less serious offending behaviour to be appropriately dealt with outwith the criminal courts, which is important in helping with the significant backlog of court business, as it frees up courts to deal with more serious offending behaviour.

## Necessity of Extending this Provision

208. In accordance with the revised policy guidance issued by the Lord Advocate in relation to fiscal fines, the increase in fine amounts enables alternative action to be taken in a wider range of cases, where such action is assessed as appropriate by prosecutors.

209. Prosecutors are directed to first consider offering a direct measure, in particular a fiscal fine, in relation to appropriate cases which would otherwise have proceeded in the Justice of the Peace court.

210. These provisions originally came into force on 7 April 2020. In the period since 7 April 2020 up until 30 April 2021, 14,433 people or approximately 26% of individuals who received a first marking action for a Direct Measure (i.e. initial action following report from the police) were offered a fiscal fine. In that same period 451 people or 3% of individuals offered a fiscal fine have been issued a fine amount above the previous scale maximum of £300, up to £500.

211. Providing for the continued expansion of the use of alternatives to prosecution by extending the provisions will continue to enable a greater number of cases to be resolved without the need for court procedure and associated appearance at court. This has and will continue to free up the courts and prosecutors to deal with more serious cases and ease the burden on the courts during a time of significant resource pressure as a result of coronavirus.

212. There remains a significant backlog of cases within the court system as a result of the coronavirus pandemic and retaining the ability for the Crown Office and Procurator Fiscal Service (COPFS) to divert a greater number of cases from the courts is an important part of the wider approach to enabling the justice system to recover from the impact of coronavirus while still ensuring justice is done in individual cases.

213. For as long as court business is affected by coronavirus (both in terms of continued necessary public health measures and restrictions, and the lingering impact of backlogs caused by coronavirus), these provisions will be required. COPFS will continue to monitor and review the use of the measure in line with their pre-existing guidance on the use of fiscal fines where such action in any given case must be considered appropriate in the public interest.

## Alternative Approaches

214. An alternative approach would be to allow the provision to expire on 30 September 2021. This would mean a return to the pre-coronavirus level of available fiscal fine, with an upper limit of £300. However, for the reasons given, this is not considered a viable alternative.

215. The Scottish Government is of the view that this is a key measure in helping to reduce the number of summary proceedings during the coronavirus pandemic while ensuring that justice can still be administered.

## Consultation

216. The Scottish Government has informally consulted with COPFS on these measures throughout the period of the coronavirus pandemic. This informal consultation on this specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of this measure. This consultation has highlighted that it is important to retain the expanded available use of alternatives to prosecution as a means of reducing operational pressures on the criminal courts as a result of coronavirus.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

217. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

218. The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise. Fiscal fines have been an integral part of the Scottish criminal justice system for more than 20 years and although legal challenges do occur from time to time, the Scottish Government is not aware of any specific ECHR issues in relation to increasing the amount of such fines. Any specific ECHR issues would in any case relate to the previously existing system of fiscal fines rather than to the change in the maximum level of a fiscal fine.

219. Moreover, fiscal fines are not mandatory penalties and allow a person offered one to refuse the conditional offer by giving notice to the court to that effect. In such an event, the refusal is treated as a request by the person to be tried for the offence in which case the procurator fiscal will then decide whether to prosecute. Any resulting criminal proceedings would be compliant with the person's Article 6 rights.

### **Island communities**

220. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

221. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

222. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Cases Beginning with an Appearance from Custody (Section 5 and Schedule 4, Paragraphs 8 and 9 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

223. The provision introduced Scotland-wide jurisdiction for sheriffs dealing with first appearances from police custody and any continuation of the case up until a not guilty plea is tendered (or full committal in petition proceedings). This has enabled custody proceedings to be heard in any sheriff court in Scotland by a sheriff of any sheriffdom no matter where the alleged offence took place during the coronavirus pandemic. This has provided the necessary flexibility to allow for police centralised custody suites and to enable custody courts to be conducted in a way that minimises unnecessary travel and congregation of people in accordance with public health guidance.

224. It is the Scottish Government's intention that these provisions should be extended beyond 30 September 2021 as they are essential in enabling the justice system to be able to continue operating as safely and as effectively as possible

### **Necessity of Extending this Provision**

225. Public health measures will continued to be required to support the ongoing public health response to the coronavirus, although these will be kept under review. The provisions are being used to enable custody proceedings to be heard in any sheriff court in Scotland by a sheriff of any sheriffdom, no matter where the alleged offence took place. The provision

creates the necessary flexibility to ensure the continued safe and effective operation of custody courts during the coronavirus pandemic while public health measures remain in place and allows the court to deal with guilty pleas and move them out of the court system, and in doing so, minimise the number of cases that have to be transferred to local court.

226. This provision enables the effective continued operation of custody court business and allows custody courts to be conducted in a way which minimises unnecessary travel and congregation of people in accordance with public health guidance, and allows Police Scotland and the Scottish Courts and Tribunals Service (SCTS) to continue to operate a smaller number of centralised police custody suites and court hubs in response to coronavirus.

227. More generally, it also enables more efficient prioritisation of court resources as the number of judges required to consider custody cases at any given time is reduced. As such, it will continue to be required for as long as there is a risk that coronavirus restrictions will continue to be required. The provisions are also likely to be of assistance to SCTS in managing the significant backlog of court business arising from the coronavirus pandemic and will therefore form an important part of the justice system's recovery from the lingering impacts caused by coronavirus.

## Alternative Approaches

228. The only alternative approach would be to allow the provision to expire on 30 September 2021 which would mean a return to the pre-coronavirus arrangements for custody jurisdiction, relying on mechanisms to transfer business and judiciary between sheriffdoms. In light of how procedurally intensive these mechanisms are, and how coronavirus continues to impact on the justice system, this is not a viable alternative.

229. There is no alternative to primary legislation to achieve the desired outcome. The Scottish Government is of the view that this is a key measure in ensuring the effective continued operation of custody court business by enabling custody proceedings to be heard in any sheriff court in Scotland by a sheriff of any sheriffdom no matter where the alleged offence took place.

## Consultation

230. The Scottish Government has informally consulted with Police Scotland, the Crown Office and Procurator Fiscal Service (COPFS) and SCTS on these provisions throughout the period of the coronavirus pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of this measure. These provisions have been identified by these stakeholders as a key measure to provide for the continued operation of custody courts as a result of coronavirus and for such courts to be conducted in a way which will minimise unnecessary travel and congregation of people. Retaining the flexibility of Scotland wide jurisdiction remains an important part of the response to the pandemic.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

231. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

232. The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.

### **Island communities**

233. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

234. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

235. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

## **Extension of Time Limits (Section 5 and Schedule 4, Paragraph 10 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

236. The provision suspends certain time limits contained in the Criminal Procedure (Scotland) Act 1995 and has the effect of increasing the maximum time period that an accused person can be held on remand prior to trial, together with other time limits for progressing a criminal case including the maximum wait prior to trial where the accused is not in custody.

237. The time limits to which the provision applies are those under:

- a) section 65 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which sets various time limits in respect of trials under solemn procedure;
- b) section 136 of the 1995 Act, which requires that proceedings in summary cases must commence within six months of the alleged offence;
- c) section 147 of the 1995 Act, which makes provision for summary procedure in cases where the accused has been held on remand; and
- d) section 52T, which applies the custody time limits in sections 65 and 147, where the accused is detained in hospital because of an assessment order or a treatment order.

238. The provision applies automatically in respect of any criminal case where one of those time limits was in effect on the date when the

Coronavirus (Scotland) Act 2020 was commenced, or began after that Act commenced

239. The provision ensures that, where competent, the courts are not impacted by large numbers of individual hearings to extend time limits which would impact on the courts' capacity to undertake other business and that, where there is no power to extend the time limits, justice can be progressed without proceedings being declared unlawful. It is therefore the Scottish Government's intention that this should be extended beyond 30 September 2021.

## Necessity of Extending this Provision

240. The court system continues to be under significant pressure as a result of the significant backlog of cases that has built up while coronavirus restrictions limited the courts' capacity to hear cases. Steps are being taken to seek to address this and the introduction of remote jury centres is assisting in preventing further backlogs building up in the High Court and for sheriff and jury trials, but further work will continue to be required to address the existing backlog and the serious issues also present in summary cases.

241. On 11 January 2021, the Lord President announced that during the lockdown period the criminal courts would focus on the most serious trials and the majority of summary trials in the Sheriff Court and Justice of the Peace Court would be adjourned. This reduced the overall number of criminal trials taking place during lockdown by up to 75%.

242. Work continues to collect data to monitor the backlog of cases in the courts, which will help inform future assessments of the continuing need for this extension of time limits. However, with crime levels back to near pre-coronavirus levels and the courts still operating below pre-coronavirus levels, the need for flexibility in time limits clearly remains and is likely to do so for a considerable time even after court business returns to pre-coronavirus levels.

## Alternative Approaches

243. The only alternative approach would be to allow the provision to expire on 30 September 2021 which would mean a return to the pre-coronavirus time limits contained in the Criminal Procedure (Scotland) Act

1995. This is not considered practical in view of the fact that, even once courts are all operating at their pre-coronavirus levels, a backlog of cases will exist whereby the operation of extended time limits will potentially be necessary. Although most of the time limits can be extended on a case-by-case basis where the Crown Office and Procurator Fiscal Service (COPFS) makes an application to the court to do so, if the provisions expired, COPFS would be required to do so for potentially a very large number of cases, and the requirement for time to be made in court programming for such applications to be heard would further reduce the courts' capacity, potentially adding further to the backlog of cases.

244. Furthermore, it should be noted that not all the relevant time limits can be extended on application so, if the extension to time limits at section 136 of the Criminal Procedure (Scotland) Act 1995, which provides for the length of time after the commission of an offence triable only summarily that proceedings in court can begin, the effect would be that such cases would have to be discontinued. At this time, the Scottish Government considers the extended time limits continue to be necessary, and that, therefore, a return to the pre-coronavirus time limits is not a viable alternative.

245. There is no alternative to primary legislation to achieve the desired outcome. The Scottish Government is of the view that this is a key measure in ensuring the effective continued operation of court business.

## Consultation

246. The Justice Board for Scotland, which brings together senior leaders from Scotland's main national justice system organisations, has established a Criminal Justice Board to co-ordinate COVID-19 recovery activity across policing and justice, including in the criminal courts. The Board meets every two weeks to direct and monitor progress and ensure a whole system overview of the work underway.

247. The Scottish Government has informally consulted with the COPFS and the Scottish Courts and Tribunals Service on these provisions throughout the period of the coronavirus pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of this measure. This has been identified as a key measure to ensure the efficient operation

of court business both during the coronavirus pandemic, where it allows for court business to be conducted in a way which minimises unnecessary travel and congregation of people, and to assist in managing the backlog of cases that currently exists and which justice partners are currently working to reduce through the 'Recover, Renew, Transform' Programme.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### Equal opportunities

248. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### Human rights

249. The Scottish Government has assessed the potential impact of extending the measure on human rights and has determined it may have an impact on the rights guaranteed by Articles 5(3) and 6(1) of the ECHR. However, the Scottish Government does not consider that these increases are incompatible with the right guaranteed by Articles 5(3) and 6(1) to a trial within a reasonable time. The increases are necessary to address the disruption to the justice system that is being caused by the coronavirus pandemic.

250. Clearly, the impact of extended time limits in criminal cases is greatest where an accused person is being held on remand prior to trial. In any individual case, where an accused is brought before the court for a custody hearing, in determining whether to grant bail, the court requires to consider the accused's Article 5 and 6 rights in deciding whether it is appropriate to grant bail. Furthermore, an accused person can, at any time, apply to the court for a bail review under section 30 of the Criminal Procedure (Scotland) Act 1995, to enable the court to determine whether their continued detention is justified. The courts remain subject to the requirement to ensure that there is a fair and public hearing within a reasonable time. These safeguards are relevant to ensuring that these

provisions are proportionate. The extensions to time limits for new cases coming into the system remain the same as before, and once these extensions have expired, any further extension will require to be dealt with through an individual application to the court.

## **Island communities**

251. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

252. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

253. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Exceptions to the Rule that Hearsay Evidence is Inadmissible (Section 5 and Schedule 4, Paragraph 11 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

254. This provision should be considered along with the provisions which allow witnesses to give evidence remotely. The provisions, taken together, provide flexibility as regards the way in which evidence can be introduced during the coronavirus pandemic. The provision under schedule 4, paragraph 11 of the Coronavirus (Scotland) Act 2020 allows evidence by statement where there would be a particular risk to the person's wellbeing attributable to coronavirus or a particular risk of transmitting coronavirus to others if they were to physically attend the trial and where it is not reasonably practicable for the person to give evidence in any other competent manner. It is the Scottish Government's intention that this provision should be extended beyond 30 September 2021 as it is important

in enabling the justice system to be able to continue operating as safely and as effectively as possible given the on-going need to limit and control the spread of coronavirus.

## Necessity of Extending this Provision

255. The provisions are intended to ensure that the inability of witnesses to give evidence in court because, for example, they are self-isolating due to coronavirus, does not unnecessarily prevent criminal trials from proceeding. It is a key measure in helping to minimise the impact of the pandemic on the ability of courts to proceed with trials and so ensure that the justice system continues to operate as effectively as possible.

256. As such, it is likely to continue to be necessary for as long as public health measures around self-isolation and coronavirus remain in effect and will be especially important at times when infection rates are high. The test for admitting a statement under this provision will only be met where, to have the person physically attend the trial, would give rise to a particular risk to the person's wellbeing attributable to coronavirus, or of transmitting coronavirus to others. Therefore, the court will be required to assess whether there is such a particular risk in each individual case where an application is made to admit evidence by statement.

257. Courts are still required to consider the fairness of any trial and to keep the fairness of trials under review. Judges will assess the weight to be attached to evidence introduced by statement and may be expected to take into account the fact that it has not been given on oath or subject to cross examination. In appropriate cases, they may disregard such evidence or direct the jury to disregard it.

## Alternative Approaches

258. The only alternative approach would be to allow the provision to expire on 30 September 2021 which would mean a return to requiring witnesses to physically attend court where, for example, facilities are not in place to allow them to give evidence remotely. This has the potential to prevent trials from proceeding if key witnesses cannot attend court in person as a result of having to self-isolate, for example. It is, therefore, not a viable option.

259. No alternatives to primary legislation have been identified which would provide the degree of flexibility required to ensure the justice system continues to operate as effectively as possible during the continued disruption caused by coronavirus.

## Consultation

260. The Scottish Government has informally consulted with COPFS and the Scottish Courts and Tribunals Service (SCTS) on these provisions throughout the period of the coronavirus pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of this measure. This has been identified as a key measure in helping to minimise the impact of the pandemic on the ability of courts to proceed with trials and so ensure that the justice system continues to operate as effectively as possible.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### Equal opportunities

261. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### Human rights

262. The Scottish Government has assessed the potential impact of extending the measure on human rights and has considered Article 6 of the ECHR, which provides that, in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. One of the minimum rights is the right to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

263. However, there is no absolute rule that the defence must have some opportunity to question every witness.

264. In deciding whether to admit evidence by statement in any individual case, the court will have to be satisfied that, to have the person physically attend the trial, would give rise to a particular risk to the person's wellbeing attributable to coronavirus, or of transmitting coronavirus to others. The exception is therefore clearly limited to those cases where there is a particular risk attributable to coronavirus. For the test to be met it also must be established that it would not be reasonably practicable for the person to give the evidence in any other competent manner (such as by way of video link).

265. The judge is required to take the requirements of a fair trial into account in deciding whether the statutory criteria for the admission of the evidence have been satisfied and any decision that a statement is admissible may be changed later if the trial develops in such a way as to render it inadmissible because, for example, it has become clear that to admit it would be to act incompatibly with the ECHR. Although the provision engages Article 6, the fact that the judge is under a duty to keep the fairness of the trial under review means that the provision is not incompatible with any of the ECHR rights.

## **Island communities**

266. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

267. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

268. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Community Orders (Section 5 and Schedule 4, Paragraphs 13, 15 and 16 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending these Provisions**

269. The provisions in paragraph 13 provide that the unpaid work or other activity requirement in Community Payback Orders must be completed within 12 months, from the date when the order was imposed, (or such longer period that the court specifies in the order). This changed the underlying law which applied prior to the coronavirus outbreak; that a level 1 unpaid work and other activity requirement needed to be completed within three months of the date of imposition (or such longer period that the court specified in the order) and a level 2 requirement had to be completed within six months of the date of imposition (or such longer period that the court specified in the order). As capacity issues arising from the impact of coronavirus continue to impact on delivery of unpaid work, and while investment is being made to increase capacity, this change is still required in order to ensure sufficient time to complete orders. It is therefore the Scottish Government's intention that these provisions should be extended beyond 30 September 2021.

270. The provisions in paragraph 15 allow for regulations to be made by the Scottish Ministers to vary or revoke requirements imposed in Community Payback Orders or Drug Treatment and Testing Orders. Ministers may do so only if it is required due to a likely failure to comply with the requirements due to the coronavirus, or in response to the effects of the coronavirus on local authorities or the courts. Regulations<sup>12</sup> made by Ministers under this power came into force at 5pm on Monday 15 March 2021 and vary the unpaid work or other activity requirements imposed in existing Community Payback Orders (except those imposed for domestic abuse, sexual offences, or stalking), reducing these by 35%. It is the Scottish Government's intention that the provisions in paragraph 15, as far as they relate to Community Payback Orders, should be extended beyond 30 September 2021. The policy objective of this extension is to enable similar action to be taken to mitigate the effects of the coronavirus should this appear necessary to ensure the continued effective operation of the community justice system.

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<sup>12</sup> [The Community Orders \(Coronavirus\) \(Scotland\) Regulations 2021](#)

271. The provisions in paragraph 16 are interpretive and are applicable to the powers in paragraph 15, some of which are proposed for extension. However, as it is the Government's intention that paragraphs 12, 14, and 15, as it applies to Drug Treatment and Testing Orders, should not be extended beyond 30 September 2021, paragraph 16 will be extended only as needed.

## Necessity of Extending these Provisions

272. In relation to paragraph 13, there are still significant challenges for local authorities (specifically for justice social work) starting unpaid work or other activity requirements promptly, delivering these requirements at pace and scale, and preventing orders going into breach due to a failure to complete in time. These challenges arise both as a result of continuing public health measures – which will be kept under review in the event of new developments, such as the emergence of a new variant of concern, to ensure that they remain proportionate and necessary - and from the effects of the large volume of outstanding court business which has accumulated over the course of the pandemic (with significant uncertainty about the impact of court capacity increasing throughout 2021). Justice social work services are facing an unprecedented challenge in delivering a significant backlog of cases while capacity restraints are likely to continue for some time, therefore this provision is considered essential in order to allow the effective scheduling and delivery of those orders over a longer time period than would normally be expected.

273. In relation to paragraph 15, while there are currently no plans to use the power to vary community orders again, and action is being taken to reduce the likelihood of needing to do so (for example, the provision of additional funding to justice social work specifically targeted at pandemic recovery work in 2021/22), there remains a risk of justice social work services being overwhelmed if the expected increase in court activity this year is accompanied by any further difficulties in delivery – for example, physical distancing restrictions remaining in place to support public health measures, or other measures required in the event of new developments. As a contingency measure to ensure the continued effective operation of the community justice system, the Scottish Government therefore considers it prudent to retain this power while the pandemic and its immediate consequences are ongoing.

274. From September 2021, expansion of court activity is expected to mean an increase in monthly disposals beyond pre-pandemic levels, as the court system works to steadily bring down criminal case backlogs that have built up. This includes up to 10 additional Sheriff Summary Courts, which equates to an increase of around 30%. The very significant majority of Community Payback Order disposals are imposed by sheriff summary courts (nearly 90% of Community Payback Order disposals in 2019/20) such that increases in disposals in sheriff summary courts are of critical importance. If the change in such disposals matches the anticipated increases in trial court capacity then, from September 2021, there would be nearly 130% of pre-pandemic levels of Community Payback Orders disposed each month. This would place a very high level of demand on justice social work services though uncertainty remains about what the level of demand will be, and it is known that the vast majority of Community Payback Orders include unpaid work or other activity requirements. While additional funding for justice social work services has been allocated and areas are increasing capacity and planning service delivery to meet demand, significant uncertainty remains, not least relating to any potential further impact of coronavirus (as noted above).

275. Current advice from justice partners suggests that such a scenario of court disposal capacity exceeding community justice capacity in the months ahead is a realistic prospect and therefore presents an ongoing risk. While the Scottish Government is working with national justice partners to mitigate this risk as far as possible, an increase in court capacity is considered necessary in order to begin to address the backlog of criminal cases, which is clearly in the interests of individuals with cases pending, victims, and the operation of the justice system.

276. As a result of this combination of capacity issues and potential further developments arising from the pandemic, these provisions are considered necessary to enable the flexibility to take proportionate action to ease pressure on the community justice system should this be required.

## Alternative Approaches

277. Two alternative approaches have been considered. First, the Scottish Government could allow the specified provisions to expire on 30 September 2021. This would mean the loss of Ministers' ability to generally vary or revoke Community Payback Orders. It would also mean that the current default position, of there being at least 12 months for unpaid work

or other activity requirements to be completed, would revert back to three months and six months for completion for level 1 and level 2 requirements respectively. This would lead to the risk that unpaid work or other activity requirements could not be completed and that the community justice system would be overwhelmed if capacity of courts significantly exceeds justice social work capacity. While to a certain extent increases in capacity are controlled by relevant national justice partners, there are clear and compelling reasons in the interest of justice for individuals, victims, the justice system and society why steps are being taken to increase capacity quickly and address the backlog of cases. The Scottish Government does not consider that allowing the timescales for unpaid work or other activity requirements to revert to three or six months is a viable option at this time. Individuals should be able to complete orders in a reasonable and realistic timescale, as part of a planned approach to recovery from the impact of coronavirus. Furthermore, the power to vary orders remains necessary to allow action on system wide basis, if risks to the justice system as outlined above are realised. While steps have already been taken to mitigate the risk of the system being overwhelmed, removing the ability to take action to address significant issues arising is not considered appropriate at this time.

278. Alternatively, should significant issues arise as a result of the pandemic which requires orders to be varied, the courts could be asked to extend or vary every community order with an unpaid work or other activity requirement currently in place, or to review cases where there is insufficient time for a requirement to be completed. This is a time consuming and administratively burdensome task and is not considered to be a practical or effective solution if a system-wide issue threatening the effective operation of community justice services were to arise.

279. No alternatives to primary legislation have therefore been identified which would provide the degree of flexibility required to ensure the justice system continues to operate as effectively as possible during the continued disruption caused by coronavirus.

## Consultation

280. The Scottish Government has informally consulted with a number of stakeholders (including Social Work Scotland, the Scottish Courts and Tribunals Service, the Convention of Scottish Local Authorities, and Community Justice Scotland) on these provisions, as well as the regulations made under them, throughout the period of the coronavirus

pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of the measures. Recent informal discussions have informed the approach being taken on the extension of some provisions, and expiry of others. Social Work Scotland state that they support the extension of the proposals as outlined in the Bill, noting that justice social work continues to face a significant challenge due to the pandemic and the extension will ensure that, should there be a resurgence in COVID-19, action can be taken swiftly to mitigate any further impact. Community Justice Scotland advise that they support the proposed extensions as outlined, given the continued impact of the pandemic on the delivery of community justice services.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

281. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

282. An equalities impact assessment (EQIA) to assess the impact on equal opportunities was prepared in support of the Community Orders (Coronavirus) (Scotland) Regulations 2021, which were made using the regulation making power under paragraph 15, to vary requirements imposed in Community Payback Orders (CPOs). The impact assessments are published alongside the regulations at [legislation.gov.uk](https://legislation.gov.uk).<sup>13</sup> Should the power within these provisions to implement further regulations be required, a further EQIA would be carried out to assess any impact on equal opportunities.

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<sup>13</sup> [The Community Orders \(Coronavirus\) \(Scotland\) Regulations 2021](https://legislation.gov.uk)

## **Human rights**

283. The Scottish Government has assessed the potential impact of extending the measures on human rights. ECHR Article 7 (no punishment without law) precludes the retrospective application of a criminal offence and the retrospective application of a heavier criminal penalty than would have been available at the time of the offence. The extension of the time period in which unpaid work or other activity requirements can be completed does not increase the penalty imposed on the individual, it only alters the rules on the execution of that penalty – the penalty being the amount of hours of unpaid work or other activity which must be completed. The power to vary community orders is qualified so that it could not be used to make the penalty imposed more onerous. As a result the Scottish Ministers consider that these provisions do not breach, and could not be used to breach, the Article 7 rights of individuals who are serving community orders.

284. ECHR Article 6 provides a right to a fair and public hearing by an independent and impartial tribunal. The enabling power to provide for a possible variation of the requirements of CPOs under these provisions do not expressly provide for the offender to have a right to make representations or challenge the changes to their sentence. However, this right is already conferred elsewhere in the Criminal Procedure (Scotland) Act 1995. An offender can apply to vary or revoke their CPO under section 227Y of that Act. Accordingly, the Scottish Ministers consider that these provisions do not breach the Article 6 rights of those sentenced to a CPO.

## **Island communities**

285. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

286. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

287. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Parole Board (Section 5 and Schedule 4, Paragraphs 17 and 18(1) and (3) of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

288. The provisions in paragraph 17 provide that if the Chair of the Parole Board is unable to carry out the duties of the Chair, then the next senior member of the Board is able to do so. They also provide a power for the Chair of the Parole Board to delegate their functions to another member of the Parole Board, should they become incapacitated for any reason.

289. The provisions in paragraph 18(1) allow for modifications to the Parole Board (Scotland) Rules 2001. Paragraph 18(3) allow parole hearings to continue by video/teleconference and avoid postponements. This reduced the number of in-person oral hearings being held to keep members and others safe by avoiding face-to-face contact.

290. It is the Scottish Government's intention that these provisions should be extended beyond 30 September 2021.

### **Necessity of Extending this Provision**

291. Whilst staff and Parole Board members continue to work from home it is important the parole system continues not only to release people from prison, but to recall them when they breach their parole licence in order to keep the public safe.

292. These provisions have allowed the Parole Board to continue to operate almost unaffected by the pandemic. In the period 23 March 2020 to 5 March 2021, over 99% of tribunals/oral hearings scheduled have been heard successfully with only three of 1196 unsuccessful.

293. It is important that the Parole Board can continue to function in this way. While public health measures are being adjusted in line with Scotland's strategic approach, restrictions are being kept under review in the event of new information, such as a new variants of concern, to ensure that they appropriately support the ongoing public health response. If the provisions were not to be extended the Board would not be able to fully carry out its functions were there to be restrictions on physical distancing, travelling and indoor meetings in place. Maintaining the ability to continue to work online also removes the need for the physical transportation of prisoners to and from hearings, with the risks of prisoners contracting coronavirus and return with it to the prison environment, where onward transmission is more likely.

294. The onset of the pandemic highlighted a gap in provisions to enable the Chair of the Parole Board to delegate his functions to others. This meant that the Chair's functions could not be carried out by anyone else on the Parole Board should he become ill or be unavailable for any reason. To address this anomaly provision was made to allow the Chair to delegate his functions to other members of the Parole Board and in the first instance to the most senior member of the Parole Board. This allows the Chair's functions to be fulfilled should he become incapacitated due to Covid or for any other reason. It is important this provision is extended to ensure that there is a succession plan in place and the Chair's functions can always be carried out by others if the coronavirus were to affect the ability of the Chair to discharge their functions.

## Alternative Approaches

295. The only alternative approach would be to allow the provision to expire on 30 September 2021 which would mean the loss of this crucial flexibility. This is not deemed to be a viable option.

296. No alternatives to primary legislation have been identified which would provide the degree of flexibility required to ensure the Parole Board can continue to operate as effectively as possible during the continued disruption caused by coronavirus. A change to the Parole Board Rules could be made by subordinate legislation to continue the carrying out of hearings by telephone or video link. However, the changes which provide that the powers of the Chair of the Parole Board can be exercised by another member of the Board in the event of his incapacity, and which provide a power for the Chair of the Parole Board to delegate his functions

to another member of the Parole Board, should they become incapacitated, can only be continued by way of primary legislation. For that reason, it is considered that the provisions set out in the Act require to be extended in this Bill.

## Consultation

297. The Scottish Government has consulted informally with the Parole Board for Scotland on these provisions throughout the period of the coronavirus pandemic. This informal consultation on these specific provisions has been considered as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of these measures.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### Equal opportunities

298. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### Human rights

299. The Scottish Government has assessed the potential impact of extending the proposed measure on human rights and has determined there are no detrimental effects on human rights. Determinations by the Parole Board engage Article 5(4) ECHR (right to have lawfulness of detention speedily examined by a court) to the effect that if an oral hearing does not take place in certain circumstances, then that can lead to a breach of this right. The extension will therefore enable oral hearings to continue to take place by live link. The extension will also provide for the exercise of the functions of the Chair of the Parole Board in the event of unavailability or incapacity. These measures will secure the continued delivery of Parole Board functions. In particular they will help to avoid postponements of hearings and so ensure the human rights of prisoners

are safeguarded. Further, the Parole Board is required under the existing law to always act in a way that is compatible with the ECHR, including in exercising its discretion as to whether the whole, or part, of a hearing should proceed through a live link.

## **Island communities**

300. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

301. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

302. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Release of Prisoners (Section 5 and Schedule 4, Paragraphs 19 and 20 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

303. The provision allows that the Scottish Ministers may, by regulations, provide that a person who falls within a class of persons specified in the regulations is to be released from prison early. In order to make such regulations a series of tests must be met. The regulations may only be made if it is necessary and proportionate, in response to the effect coronavirus is having or is likely to have on a prison or prisons generally; and for the purpose of protecting the security and good order of a prison, or the health safety or welfare of prisoners or those working in a prison.

304. It is the Scottish Government's intention that that provision should be extended beyond 30 September 2021 in order that it can be utilised, if necessary, to maintain safe operation of the prison system.

## Necessity of Extending this Provision

305. Ministers have deemed that use of this power was necessary and proportionate on one occasion since the Coronavirus (Scotland) Act 2020 came into force and regulations were laid before the Parliament so that emergency release was given effect in May-June 2020 to release a limited number of short-sentence prisoners who were already close to their scheduled released date. This decision was based on detailed consultation with the Scottish Prison Service (SPS) leadership on the potential use of the early release power, and of the scale and scope of action that would be necessary to support the operation of prisons at that point in time. The arrangements for that action were devised in co-operation with justice organisations and wider public and third sector partners, and reflected discussions with victims organisations about the regulations applied. Since then SPS has maintained operations throughout the changing circumstances without, as yet, requiring the further use of these powers. SPS has in the past year gained experience in managing the virus and dealing with its impact, both on prisoners and on staff resilience and numbers; and this has been supplemented by the flexibility provided to SPS by way of the adapted Covid specific prison rules. However, whilst acknowledging the systems in place and current reduction in the virus threat to the health of prison staff and prisoners there remains a real concern that future coronavirus developments, including any emergence of a new variant of concern, could still create circumstances that would require Ministers to instruct its use (in the absence of other powers to give effect to release in this way).

306. Beyond the potential for increased infection rates again directly impacting on prison operations, there is also a current and significant concern that the reopening of court operations, which is essential to complete trials timeously and lawfully, could result in a significant increase in custodial disposals which will directly impact the prison system, by substantially increasing the prison population. Without the power to release in this way there could therefore be not only a risk to the health of prison staff and prisoners, but also to the security and good order of prisons. Given the uncertainty about what ongoing operational mitigations around space and contact may be needed, emergency remedial action might be

required and use might need to be made of this form of early release, under the parameters set out in the Coronavirus (Scotland) Act 2020, to protect the health of prison staff and prisoners, and to protect the security and good order of prisons.

307. Scottish Government and SPS officials have maintained regular detailed discussions on the control of the effects of coronavirus across the prison estate, including (where appropriate) consideration of whether a further application of early release would be a necessary and proportionate action to take in response to current conditions. As in the previous release process in May 2020, if a further use of these powers was considered necessary, detailed regulations could be devised and brought before the Parliament to clearly define and limit the group of prisoners who would be considered for early release (and if required could exclude certain types of prisoner whose release was inappropriate, or who might present a particular risk). The Coronavirus (Scotland) Act 2020 also sets out the authority for Prison Governors to exclude specific individuals from an early release process, if there is evidence that their release would present an immediate risk of harm to an identified person (including if the individual potentially being placed at risk was the prisoner themselves). The scope and parameters of any future release process would have to be devised in co-operation with the SPS (and other stakeholders) in response to the circumstances at that time, to provide the necessary effect on conditions within prisons. As a result, a potential future release process may replicate some of the regulations and arrangements applied in May 2020, but the exact parameters would be set in response to the specific circumstances that were being faced in prisons at that time.

## Alternative Approaches

308. There is no alternative existing executive power for the Scottish Ministers to order the release of groups of prisoners, in the manner set out in the Coronavirus (Scotland) Act 2020. Allowing the provision to expire on 30 September 2021 would mean the loss of this potentially crucial flexibility, should future circumstances make further emergency action necessary. This is not deemed to be a viable option during the current pandemic.

309. The Scottish Government considered two further options that would not have required primary legislation: the use of home detention curfew (HDC), and emergency temporary release. The Scottish Government concluded that there were significant disadvantages and risks in both of

these options. The Scottish Government considers that HDC is not suited to the group release of prisoners because the focus of relevant legislation (section 3AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993) is on the individualised assessment of each prisoner in a prescribed way before permitting release. This would likely preclude the use of HDC to swiftly release a large number of prisoners in an emergency situation. Furthermore, a short term prisoner may not be released under HDC in the final 14 days before their planned release date at the half way point of their sentence, rendering the mechanism an impractical one in being used to swiftly release a large number of prisoners in an emergency situation.

310. A temporary release process would not deliver an effective alternative to the permanent release of prisoners as a response to an emergency situation. Requiring individuals to return to prison at a later date to complete their sentence would create significant additional demands on prison capacity and staffing resources in the medium term, as well as potentially increasing the movement back into prisons at a time when such movement from the community may be undesirable. It would cause significant disruption to the individuals' lives after release, with an outstanding custodial element of sentence reducing the potential for full reintegration back into the community. In addition, individuals on temporary release from prison are not permitted access to benefits, and so would require continuing financial support until such time as they had completed their sentence (which may require the creation of what would be, in essence, a new benefits system in a very short period of time).

311. Therefore, no alternatives to primary legislation have been identified which would provide the degree of flexibility required to maintain safe operation of the prison system, if required, during the continued disruption caused by coronavirus.

## Consultation

312. The regulations for the May 2020 early release process were approved by the Scottish Parliament, following a recommendation to that effect by the Covid-19 committee, and their use was welcomed by HM Chief Inspector of Prisons for Scotland, and stakeholders including Families Outside, Scottish Human Rights Commission and the Howard League. The Scottish Government were subsequently urged by external groups to make further use of the early release power to further reduce the prison population during 2020, but did not consider it proportionate at that

time. HM Chief Inspector of Prisons for Scotland's 2019/2020 annual report particularly welcomed efforts to reduce the prison population, such as emergency early release, and commented that there was "no doubt that the ability to safely manage the detained population and inhibit the risk of transmission has been greatly enhanced by reducing the numbers incarcerated." (HMIPS, Nov 2020) The Scottish Government continues to regularly confer with the Scottish Prison Service about the current operational position, including any potential application of emergency release in the future, and there is regular dialogue between the Cabinet Secretary of Justice and the Interim Chief Executive of SPS. The issue is also included in the wider consideration of the justice sector's response to Coronavirus, through the operation of the Criminal Justice Board established to lead the Recover, Renewal and Transformation programme for justice operations (which includes representation from stakeholders across the justice sector).

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

313. The Scottish Government has assessed the potential impact of extending the measure on their equal opportunities obligations and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

314. The Scottish Government has assessed the potential impact of extending the measure on human rights and has determined that depending on how it is manifest, the impact of coronavirus in prisons (both on prison staff and prisoners) could create a risk of a breach of the Article 3 ECHR rights of prisoners and prison staff. The release of prisoners may therefore be required as a means of safeguarding the Convention rights of prisoners and prison staff. The release of prisoners also creates a risk of contravening the Convention rights of a member of the public who is harmed by a released prisoner. To safeguard against this, the provisions

enable Governors to prevent the release of prisoners who pose an immediate risk of harm to an identified individual.

## **Island communities**

315. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

316. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

317. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Legal Aid (Section 5 and Schedule 4, Paragraphs 21 – 23 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

318. The provisions allow for a reduction of the level of scrutiny required before interim payment may be made, enhanced powers of recovery in the event of overpayments resulting from interim payments, and removal of conditions for counsel to be able to apply for interim payment.

319. Through both these provisions and working with the Scottish Legal Aid Board, a flexible and accessible scheme of interim payments has been introduced to support cash flow to legal aid providers. The scheme has been accessed by many legal aid providers through the pandemic.

320. The Scottish Government remains keen to support legal aid providers through the pandemic and it is therefore the intention that these provisions should be extended beyond 30 September 2021.

## Necessity of Extending this Provision

321. Arrangements remain in place to support the public health response and given that these will continue to impact on the operation of the Scottish court system there will continue to be a substantive reduction in the number of cases proceeding. Restrictions on travel and to support social distancing also impact on businesses providing legally aided services to clients.

322. Many providers of legal aid services will continue to experience disruption to cash flow and the provisions will support access to payment prior to a case concluding. With the ongoing backlog in the courts and impact on businesses of social distancing, etc. it is not appropriate to remove the enhanced interim fee arrangements. It is therefore important that these provisions remain in force.

## Alternative Approaches

323. The Scottish Government considered whether delaying the scrutiny of claims made at the stage of interim payment to the point of final account could be achieved by way of regulations, or a determination by Ministers under powers in the Legal Aid (Scotland) Act 1986 to make other payments. However, it was concluded that making changes to the provisions relating to the Board's assessment of fees and outlays would be most effectively achieved by extending these provisions which make changes to the underlying Act.

324. The only other alternative approach would be to allow the provision to expire on 30 September 2021 which would mean the loss of support for legal aid providers and is therefore not a viable option.

## Consultation

325. The Scottish Government continues to regularly engage with representatives from the Law Society of Scotland, the Faculty of Advocates, the Scottish Legal Aid Board and Bar Associations, all of whom support the extension of these provisions.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development Etc.

### **Equal opportunities**

326. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

327. The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.

### **Island communities**

328. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

### **Local government**

329. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

### **Sustainable development**

330. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Alcohol Licensing (Section 6 and Schedule 5 of the Coronavirus (Scotland) Act 2020) and Licensing other than Alcohol Licensing (Section 7 and Schedule 6, Paragraph 1 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

331. The Licensing (Scotland) Act 2005 (“the 2005 Act”) and the Civic Government (Scotland) Act 1982 (“the 1982 Act”) contain provision for the licensing of different activities such as the sale and supply of alcohol (under the 2005 Act) or taxi and private hire car licensing (under the 1982 Act). Prior to the enactment of the Coronavirus (Scotland) Act 2020 these licensing regimes contained a considerable number of strict timescales and deadlines with little or no discretion available to the relevant authorities if they are not adhered to.

332. The Coronavirus (Scotland) Act 2020 provided necessary discretion and flexibility for Licensing Boards, licensing authorities, licence holders, applicants and others who engage with the licensing systems under the 2005 and 1982 Acts. Extending that discretion and flexibility beyond September 2021 will assist all users of the licensing systems as they begin to recover from the adverse impact (e.g. backlogs of licensing casework, difficulties meeting deadlines for accessing training etc.) of the coronavirus pandemic. In addition, extending the licensing provisions will also assist all users of the licensing systems to be able to react quickly to any further coronavirus related restrictions thus enabling the licensing systems to continue functioning. This will ensure, as far as is practical, the Scottish Government minimises licence holders (for example within pubs/licensed restaurants or taxi/private hire car drivers) and other key licensing interests (for example, Police Scotland, Licensing Boards/authorities) being adversely affected as businesses try to recover from the impact of coronavirus.

### **Necessity of Extending this Provision**

333. The modifications made by the Coronavirus (Scotland) Act 2020 include that Licensing Boards (alcohol licensing) and Licensing Authorities (non-alcohol licensing) are able to exercise discretion so as not to hold in person hearings and to instead provide alternative means for persons to be heard by telephone, video-conferencing or by written communication (including electronic communication).

334. Licensing Boards/Authorities can also exercise discretion and dispense with the requirement to hold meetings in public which enables them to act consistently with physical distancing rules and other requirements. If this was not extended, given the number of attendees at hearings (Licensing Board/Authority members (councillors), clerk to the Board/Authority, licence applicant, licensing solicitor(s), objectors to the licence application/variation/renewal) and the need to travel to attend hearings could prove difficult.

335. These provisions have enabled all 32 Licensing Boards and 32 Licensing Authorities to continue to hold hearings throughout the pandemic and enabled the licensing regimes to continue to function which otherwise would not have been possible to anything like the extent they have functioned. For example, applications made for alcohol licences for new convenience stores have been processed which would not have been possible without remote hearings.

336. Whilst the vaccine programme is being rolled out, coronavirus continues to pose a significant threat to public health in Scotland. Scotland's levels-based approach takes into account the higher transmissibility of the B.1617.2 variant and the impact of the progress made in the vaccination roll-out, with restrictions being kept under review to take account of new developments to ensure that they remain proportionate and necessary to support the ongoing public health response. The flexibility and discretion provided by extending the licensing provisions beyond September 2021 will assist both licensing board/authorities to continue to be able to administer the licensing systems in an effective and practical manner as is reasonably possible and businesses as they take their first steps on their recovery from the coronavirus pandemic.

337. A further example of a modification made by the Coronavirus (Scotland) Act 2020 to the 2005 Act provided that, for the avoidance of doubt, a premises licence will not cease to have effect by virtue of a premises (e.g. a pub or a licensed restaurant) temporarily closing, and therefore unable to sell alcohol, for a reason relating to coronavirus. This provision removed any doubt as to whether the 2005 Act would operate to the contrary – ensuring that when coronavirus restrictions eased the premises can continue to be able to sell alcohol without needing to apply for a replacement licence.

338. These restrictions will be kept under review as the pandemic develops to ensure they remain proportionate and necessary to support the on-going public health response. It is necessary to have the flexibilities provided by this provision to assist both licence holders and Licensing Boards as measures are implemented in relation to Scotland's strategic approach.

## Alternative Approaches

339. The only alternative approach would be to allow the provisions to expire on 30 September 2021 which is not considered to be a viable option.

340. Extending the additional flexibility and discretion contained within the licensing provisions within the Coronavirus (Scotland) Act 2020 beyond September 2021 will enable the licensing regimes to function properly. This in turn will be of benefit to licence holders (for example in bars, restaurants and shops) and other key licensing stakeholders (Police Scotland, Licensing Boards/authorities and Licensing Standards Officers) being adversely affected as businesses begin to recover from coronavirus.

341. No alternatives to primary legislation have been identified which would provide the degree of flexibility and discretion required to allow the proper functioning of the licensing regime during the ongoing pandemic.

## Consultation

342. The Scottish Government has continued to engage with a number of key licensing stakeholders including representatives of SOLAR's (Scottish Local Authority Lawyers and Administrators) licensing sub-committee, the Law Society of Scotland's licensing sub-committee and legal experts in licensing law as well as Licensed Trade representative bodies throughout the duration of the coronavirus pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of these measures.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

343. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

344. The Scottish Government has assessed the potential impact of extending the measure on human rights and is satisfied that the provisions continue to be compatible with ECHR rights. To the extent that decision making by, and proceedings before, Licensing Boards engage the protections of Article 6 (right to fair determination of civil rights and obligations), the Scottish Government is of the view that no issues arise as a result of the provisions. The provisions change various time periods and build more flexibility into the licensing regime but that does not affect an individual's ability to make applications or representations to Licensing Boards. Where a hearing cannot be held in person for reasons related to coronavirus, the provisions require Licensing Boards to provide an opportunity to persons to be heard by telephone, videoconferencing or written representations (including electronic communications). It also remains possible for decisions of Licensing Boards to be appealed and for judicial review proceedings to be taken. Accordingly, the Scottish Government is satisfied that there are sufficient safeguards to enable proceedings to remain compatible with Article 6 of the ECHR.

### **Island communities**

345. The Scottish Government has assessed the potential impact of extending the measures on island communities and has determined that no adverse impact on island communities is anticipated. The flexibility introduced by the ability to hold remote hearings in relation to both alcohol licensing under the 2005 Act and licensing under the 1982 Act will be of benefit to members of the island communities.

## **Local government**

346. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated. The extension of the licensing provisions has assisted local government by providing greater flexibility and discretion during a difficult time when Licensing Board/Authority members (councillors) and legal and administrative staff are generally continuing to work from home.

## **Sustainable development**

347. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no adverse effects are anticipated.

## **Freedom of Information (FOI) (Section 7 and Schedule 6, Paragraphs 2 and 7 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

348. This provision enables the Scottish Information Commissioner and Scottish public authorities to issue formal notices under the Freedom of Information (Scotland) Act 2002 (FOISA) electronically. Prior to the Coronavirus (Scotland) Act 2020, FOISA provided that these notices required to be delivered or posted to the recipient (section 74(1)(a) of FOISA).

349. It is the Scottish Government's intention that this should be extended beyond 30 September 2021 to allow for this continued flexibility.

### **Necessity of Extending this Provision**

350. The provision has been utilised by the Scottish Information Commissioner to issue around 290 notices electronically since the Coronavirus (Scotland) Act 2020 came into force. It is likely that without the provision the Commissioner would have been unable to issue any notices at all during the initial period of the coronavirus outbreak (March to June 2020). After June, the Commissioner would have had to assess whether issuing notices by post would have been classed as essential work, and if

so, to have considered whether notices could have been issued by post safely and in line with the law. This would have involved reopening the Commissioner's office premises to some extent, and sending staff to the Post Office on a regular basis. It would have taken some time to develop the necessary processes and risk assessments to ensure that this could be done legally and safely. The Commissioner has noted that this would have significantly slowed his ability to carry out investigations and issue decisions, which would have risked undermining confidence in the Commissioner and in FOISA. Other authorities would have been in the same position, to the extent that they issue notices under FOISA by post.

351. It is sensible that this ability to issue notices electronically be extended beyond September in order that it can continue to be utilised by the Commissioner and other Scottish public authorities.

## Alternative Approaches

352. The only alternative approaches would be to allow the provision to expire on 30 September 2021, which would remove the flexibility currently being utilised. The Scottish Government does not consider this a viable option.

353. No alternatives to primary legislation have been identified to provide for the desired outcome which would provide the degree of flexibility required during the continued disruption caused by coronavirus.

## Consultation

354. The Scottish Government has engaged with the Commissioner throughout the period of the coronavirus pandemic, and has consulted the Commissioner specifically on the issue of whether the temporary provisions about FOI in the Coronavirus (Scotland) Act 2020 should be expired or extended.

355. The Commissioner is strongly supportive of this provision being extended beyond September and also being made permanent when the opportunity arises.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

356. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully directly discriminate in any way with respect to any of the protected characteristics. This measure provides an additional means of issuing notices. It does not remove the ability of Scottish public authorities to continue having notices delivered or posted. Individuals will continue to advise authorities of an address, electronic or physical, to which notices should be sent. The Scottish Government therefore considers there will be no impact in terms of limiting access to documents for older people and those with long-term health conditions, who use online technologies less than other groups.

### **Human rights**

357. The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.

### **Island communities**

358. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

### **Local government**

359. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

360. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Freedom of Information (Section 5 and Schedule 4, Paragraph 12 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

361. This provision requires the Scottish Ministers to report on their FOI performance to the Parliament every two months while Part 2 of schedule 6 of the Coronavirus (Scotland) Act 2020 is in force.

362. It is the Scottish Government's intention that while Part 2 of schedule 6 of the Coronavirus (Scotland) Act 2020 remains in force, so should this provision.

### **Necessity of Extending this Provision**

363. While the provision allowing transmission of notices by electronic means remains in force, this provision is necessary given the Parliament's view that additional two-monthly FOI reporting by the Scottish Ministers is required.

### **Alternative Approaches**

364. The alternative to extending this provision would be to have it expire in September 2021, which is not considered viable. As the provision resulted from an opposition amendment, the Scottish Ministers consider allowing it to expire while other provisions on Freedom of Information remain in force would run counter to the wishes of the Parliament.

### **Consultation**

365. This provision requires reporting by the Scottish Ministers to the Parliament, therefore consultation with stakeholders is not required.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

366. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully directly discriminate in any way with respect to any of the protected characteristics.

### **Human rights**

367. The Scottish Government has assessed the potential impact of extending the measure on human rights and is satisfied that the provisions are compatible with the ECHR.

### **Island communities**

368. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

### **Local government**

369. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

### **Sustainable development**

370. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Duties in Respect of Reports and other Documents (Section 7 and Schedule 6, Paragraphs 8 – 10 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

371. The provision allows statutory reporting requirements to be postponed, where necessary, to allow public authorities to focus on their continued coronavirus response, although the reports must be provided as soon as possible after the statutory deadline. The provision also allows documents to be made available online instead of requiring them to be made physically available. Documents affected include, for example, Council agendas, Planning documents and site notices for various purposes.

372. It is the Scottish Government's intention that these provisions should be extended beyond 30 September 2021 to ensure that public authorities are able to continue to carry out their business and meet their statutory duties, while also taking action to respond to the coronavirus pandemic.

### **Necessity of Extending this Provision**

373. There are provisions in a wide range of primary and secondary legislation that require public bodies to make certain reports on their activities at particular times. There are also many provisions that require them to publish certain documents in a particular way or make them available for physical inspection, for example in council offices or libraries or by placing them at the site to which the document relates.

374. This provision allows for statutory reports to be delayed where publishing them would impede the organisation's ability to take action against coronavirus. If an authority decides to postpone the publication of a report, they must publish a statement to that effect, and comply with the duty as soon as is reasonably practicable or publish a statement setting out the reasons for not doing so. The provisions also allow for documents to be made available online where making them physically available risks spreading the virus or is ineffective due to restrictions in place.

375. These provisions were introduced because it was clear that some important work by public bodies would have had to stop or be excessively delayed by their inability to meet statutory requirements while responding to

the coronavirus or due to restrictions on movement and requirements for physical distancing. The provisions have enabled public services to continue which otherwise would have largely ceased. As an illustration, without this provision an inability to make information available to people relating to current planning applications would have meant those applications not progressing to decision, with the resultant effect of a large backlog at planning authorities. Maintaining a pipeline of consented development is vital to future economic and societal recovery from the pandemic.

376. The Scottish Government's intention in extending these provisions is to ensure that public authorities are able to continue to carry out their business and meet their statutory duties, while also taking action to respond to the pandemic. It will also ensure that information about the exercise of public functions and decision-making continues to be as widely available as possible, without risking the spread of infection.

377. These provisions will be needed until public authorities fully return to normal operations and with offices open to the public. Since they require public authorities to make a judgement to justify each individual use of the powers, it is considered reasonable to keep the provisions in place while restrictions are kept under review to ensure that they remain proportionate and necessary to support the ongoing public health response.

378. The removal of requirements for certain documents to be made available for physical inspection and provision of information only online has the potential to reduce access to the information for those people who have less access to online technologies at home. However, the measure is necessary to enable local authority business and other public services to continue during times of particular pressure in responding to the pandemic and at any time while offices and libraries are closed to the public to prevent spread of the virus. Without such a change, authorities and public bodies would be unable to comply with some statutory duties.

## Alternative Approaches

379. Possible alternative approaches would be to allow the provision to expire on 30 September 2021, which would mean returning to the existing statutory duties, or removing the duties to publish information completely. Removing the provisions would leave many public bodies unable to comply with statutory duties and conduct their business if and whenever certain

restrictions were in place, and removing the duties completely could mean that the public would not have the opportunity to scrutinise public bodies' business and decision-making. The Scottish Government does not consider either of these is an acceptable or viable option.

380. No alternatives to primary legislation have been identified to provide for the desired outcome which would provide the degree of flexibility required during the continued disruption caused by coronavirus.

## Consultation

381. The Scottish Government continues to informally consult with COSLA and public bodies on these measures given the potential impact on offices, libraries and other public bodies of being required to make documents publicly available. However, given the aim of reducing undue burdens, it is the Scottish Government's view that it would be disproportionate to request authorities to report on the individual uses of these powers. The vital provisions are wide-reaching across the public sector; they exist for all public authorities to allow an option to continue to meet statutory requirements during the pandemic, for publishing reports and for making information available online or at a later date (or not at all if appropriate) rather than in hard copy at physical locations. The Royal Town Planning Institute in Scotland has noted that it is too early to be confident of a firm date when these flexibilities can be brought to an end without putting the continuing functioning of the planning system at risk. Heads of Planning Scotland supports continuing online publication and recognises that, where there are risks of digital exclusion, exceptional provision can be made by authorities.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### Equal opportunities

382. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully directly discriminate in any way with respect to any of the protected characteristics. The Scottish Government considers there may be some impact in terms of limiting access to documents for older people and those with long-term health conditions who use online technologies less

than other groups. However, older people and those with long-term health conditions are also identified as being at greater risk from the virus. As the aim of the policy is to allow business to continue while action is taken to reduce spread of the virus, the Scottish Government considers this to be a reasonable and appropriate temporary measure.

## **Human rights**

383. The Scottish Government has assessed the potential impact of extending the measure on human rights. It is considered that the measures are proportionate and meet a fair balance between the potential impact on the ability of individuals to participate in decision-making which may affect them, and the wider public interest. The exercise of the powers is a matter for the consideration of the authority in the circumstances. It is considered that the provisions are compatible with the ECHR.

## **Island communities**

384. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

385. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

386. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Local Authority Meetings (Section 7 and Schedule 6, Paragraphs 11-14 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

387. The provisions allow local authorities to exclude the public from local authority meetings on the basis that the presence of the public constitutes a real and substantial risk to public health relating to coronavirus. In addition, hard copies or extracts of a document requested by a member of the public in their offices will only be provided if it is reasonably practicable and will no longer be compulsory.

388. It is the Scottish Government's intention that these provisions should be extended beyond 30 September 2021 as they will continue to be needed until such time as council offices can reopen to the public, without the need for physical distancing, and/or other relevant aspects of local authority business resumes.

### **Necessity of Extending this Provision**

389. All 32 councils have arrangements in place for remote meetings. It is the responsibility of councils to determine for themselves the governance arrangements they put in place and it is not appropriate for the Scottish Government to intervene.

390. A briefing<sup>14</sup> prepared by the Improvement Service in October 2020 highlighted around half of councils reported or were found to be livestreaming meetings or allowing members of the public to participate (deputations etc.) in at least one meeting. Many of the councils that did not have the ability to livestream or allow the public to participate, were exploring options for doing so. More recent informal consultation with COSLA and key stakeholders has also indicated that there is support for extending these provisions until such time that people are able to sit next to one another safely without the risk of Covid-19 transmission. As restrictions ease and people once again meet more often in person, local authorities

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<sup>14</sup> [An Update for SOLACE on 'Transitioning to the new normal: political governance \(improvementservice.org.uk\)](https://www.improvementservice.org.uk)

will have to regularly assess the level of risk with a view to allowing public access to meetings again when it is safe to do so.

391. The public are still able to access agendas, papers and minutes of any committee meetings held – there has been no change to the legislation in respect of that as a result of these provisions.

392. Providing hard copies or extracts of a document requested by a member of the public in a local authority office will no longer be a compulsory obligation, and allows the local authority to only provide such hard copies or extracts if it is reasonably practicable to do so. As offices are currently closed, it is not possible to do this.

393. Without an extension of these provisions, the flexibility afforded to local authorities will be lost. These provisions ensure that local authorities can continue to function and conduct committee business while simultaneously taking action to reduce and suppress the spread of Covid-19.

## Alternative Approaches

394. The one alternative approach would be to allow the provision to expire on 30 September 2021, which would mean returning to the existing statutory duties leaving local authorities without necessary flexibility. The Scottish Government does not consider this is a viable option.

395. No alternatives to primary legislation have been identified to provide for the desired outcome which would provide the degree of flexibility required during the continued disruption caused by coronavirus.

## Consultation

396. The Scottish Government continues to informally consult with the Convention of Scottish Local Authorities on these measures given the potential impact on local authorities' decision-making and planning.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

397. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

398. Enabling local authorities to assess their local circumstances and decide whether it is appropriate to exclude the public from their committee meetings on public health grounds associated with coronavirus could, however, have an impact on some particular groupings of the public. All 32 local authorities are currently holding their committee meetings remotely using technology and not in person. This could have a disproportionate impact on older people, people with disabilities or members of the public who do not have the infrastructure or skillset to access public meetings remotely. However, some of these groups are also identified as being at greater risk from the virus. The aim of the policy is to allow council business to continue while action is taken to reduce spread of the virus, and the Scottish Government considers this to be an appropriate measure.

### **Human rights**

399. The Scottish Government has assessed the potential impact of extending the measure on human rights and has determined that no detrimental effects are anticipated. It is considered that the provisions are compatible with the ECHR. The power to exclude the public from meetings is a power the local authority may utilise if it deems it proportionate to do so, and the provision has to be used in a way that respects ECHR rights, in accordance with the local authority's duty as a public body.

### **Island communities**

400. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined that, where there is lower broadband capacity than other areas, island

communities might be more impacted should local authorities only provide access to documents online.

## **Local government**

401. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that excluding the public from local authority meetings on health grounds will have an impact on the openness and transparency of council decision-making. However, the exercise of the powers is a matter for the consideration of the local authority in individual circumstances.

## **Sustainable development**

402. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Duration of Planning Permission (Section 8 and Schedule 7, Paragraphs 8 – 10 of the Coronavirus (Scotland) Act 2020) and Listed Buildings and Conservation Areas: Consents (Section 5 and Schedule 4, Paragraph 2 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending This Provision**

403. These provisions support the construction sector in its recovery from coronavirus restrictions, reduce the burden on authorities needing to reconsider applications and provide consistency to businesses operating across the UK.

404. It is therefore the Scottish Government's intention that these should be extended beyond 30 September 2021 in order that applicants and developers can address any development backlogs or potential further disruptions.

## Necessity of Extending this Provision

405. The purpose and intention of these provisions is to ensure that planning permissions do not lapse due to the inability of applicants or developers to commence development due to previous coronavirus restrictions which disrupted work programmes. Therefore extending these will ensure that any potential further disruptions can be considered accordingly, and that any backlog of developments already in existence due to earlier disruption can be addressed by applicants and developers.

406. The Scottish Property Federation (SPF) has advised that implementation of development projects will have been put on hold during 2020 for a multitude of reasons such as:

- vast numbers of property and consultancy staff furloughed which impacted adversely on the ability to mobilise the required personnel;
- lack of investment capital coupled with inability to raise debt finance as many banks were not lending across all commercial property sectors; and
- the physical inability (due to Covid-19 movement restrictions) to mobilise consultants and contractors required to discharge planning conditions which required on site survey work etc.

407. The SPF supports the need for extending the provisions because “The economic recovery from this negative impact on development projects will not be instantaneous. It can take many months to discharge sometimes complex pre-commencement planning conditions to enable development to start on a site. Also works will have ground to a halt during 2020 for a wide range of reasons some of which are set out above. Even if the required planning conditions are suitably discharged by a planning authority to enable the lawful initiation of development on a site, many development projects across Scotland will still not have been able to commence due to companies not having the full finance package in place to develop out a site. The initiation of development on a site is not the only issue, having the necessary capital in place to enable a project to not only start, but to complete is critical”.

408. Homes for Scotland provided the following reasons for extending the provisions, “There are still coronavirus and restriction-related situations on the ground which mean not all home builders are (or can guarantee they

will continue to be) in a position to move all of their sites forward in a way which aligns with normal planning and implementation timescales. This means that removing the duration of permissions provisions would put some permissions at risk of lapsing without that being something the home builder can avoid or control. Retaining the provision would not have any equivalent risks as home builders are experiencing high demand and are moving all of their sites forward as fast as wider circumstances do allow”.

409. The emergency and extended periods, as amended by SSI 2021/100<sup>15</sup> under powers conferred by these provisions, currently mean the emergency period will end on 30 September 2021 and the extended period on 31 March 2022. A separate SSI will be brought forward to amend these dates.

410. The positive effects of the use of the provisions to date have been clearly felt and articulated by key stakeholders and it is the view of the Scottish Government that the extension of these beyond September will provide further important support for the sector.

## Alternative Approaches

411. The one alternative approach would be to allow the provision to expire on 30 September 2021, which would remove support for the construction sector at this important time. The Scottish Government does not consider this is a viable option.

412. No alternatives to primary legislation have been identified to provide for the desired outcome which would provide the degree of flexibility which continues to be helpful as a result of the disruption caused by coronavirus.

## Consultation

413. The Scottish Government has engaged with relevant stakeholders, including the SPF and Homes for Scotland, throughout the period of the coronavirus pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly

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<sup>15</sup> [The Town and Country Planning \(Emergency Period and Extended Period\) \(Coronavirus\) \(Scotland\) Regulations 2021](#)

reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of the measures.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

414. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

415. The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.

### **Island communities**

416. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined that no detrimental effects are anticipated.

### **Local government**

417. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no detrimental effects are anticipated.

### **Sustainable development**

418. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Land Registration: Delivery of Copy of Deed to Registers of Scotland (Section 8 and Schedule 7, Paragraphs 11-14 of the Coronavirus (Scotland) Act 2020) and Registers Kept by the Keeper of the Registers of Scotland (Section 5 and Schedule 4, Paragraph 3 and 4 of the Coronavirus (Scotland) (No.2) Act 2020)**

### Policy Objectives of Extending this Provision

419. These provisions enable registration in four of the registers under the management and control of the Keeper, including the Land Register, to proceed on the basis of copies of documents submitted electronically, thus allowing for a safer, faster and more reliable way to transmit applications.

420. It is the view of the Scottish Government that these provisions should be extended beyond 30 September 2021 as they are essential for Registers of Scotland to be able to continue operating as safely and as effectively as possible.

### Necessity of Extending this Provision

421. These provisions have ensured that Registers of Scotland were able to operate effectively throughout the disruption caused by the coronavirus. The property market has been able to function, creditors have been able to safeguard their position without debtors being able to transact with heritable property, debtors have been able to discharge responsibilities on time and court judgments from other jurisdictions have continued to be enforced.

422. These provisions also remove the requirement for physical movement and contact which continues to be important in terms of responding to the coronavirus pandemic.

423. The ability to access digital submission services has not only been vital but has also proved extremely popular with those using those services. Their continuation beyond September will continue to be important to limit physical movement and contact, while allowing the continued safe and effective operation of the registers. Were the provisions to expire, both

Registers of Scotland and the conveyancing profession as a whole would have to significantly amend their operating procedures which would incur additional costs and likely be viewed as a backwards step by stakeholders.

## Alternative Approaches

424. The only alternative approach would be to allow the provision to expire on 30 September 2021, meaning a return to requirements for physical movement and contact, which is not a viable option at this time.

425. No alternatives to primary legislation have been identified which would fully provide the desired outcome of delivering essential business by electronic during the continued disruption caused by coronavirus.

## Consultation

426. Registers of Scotland, on behalf of the Scottish Ministers, has consulted with stakeholders throughout the period of the coronavirus pandemic. This consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of the measures.

427. The provisions permitting digital submission of applications have proven to be extremely popular with stakeholders, with the recent public consultation<sup>16</sup> on measures, including making these changes permanent, attracting 223 responses from key stakeholders. Those responses showed overwhelming support for making the provisions permanent<sup>17</sup>, with over 93% responses being positive. As a result, the Scottish Government will seek to make permanent provision in due course.

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<sup>16</sup> [Consultation paper - Registers of Scotland](#)

<sup>17</sup> [Digital submissions analysis - Registers of Scotland](#)

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

428. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

429. The Scottish Government has assessed the potential impact of extending these measures on human rights and is satisfied that the provisions are compatible with the ECHR, in particular, with Article 1 of Protocol 1 which gives protection for property rights. The measures preserve the legitimate expectations of parties as before the closure of the relevant registers. For paragraphs 3 and 4 of schedule 4 of the Coronavirus (Scotland) (No.2) Act 2020 the measures ensure that recourse to diligence and the intended effect of court judgments remains available to the public. The Scottish Government does not consider there is any detrimental effect on human and children's rights.

### **Island communities**

430. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

### **Local government**

431. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

432. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Scrutiny of Subordinate Legislation in Urgent Cases (Section 8 and Schedule 7, Paragraphs 23-30 of the Coronavirus (Scotland) Act 2020)**

### **Policy Objectives of Extending this Provision**

433. These provisions enable accelerated timetabling of regulations that would normally be made under the affirmative procedure where this is necessary by reason of urgency. They do so by providing for regulations to be progressed under the made affirmative procedure (which is the process that has been needed to be used for urgent Covid-related health protection regulations), which enables regulations to be brought into force immediately but only remain in force if parliamentary approval is secured.

### **Necessity of Extending this Provision**

434. There remains a need to have the ability to progress secondary legislation which would otherwise be made under the affirmative procedure. The Scottish Government is satisfied that the provisions are appropriate and proportionate in the current circumstances in order to provide both the Scottish Government and the Scottish Parliament with necessary flexibility to address any unexpected change in circumstances that may still arise due to the coronavirus. The provision has not been used to date and the use of this provision is expected to arise only in the circumstances of the Parliament being unable to facilitate urgent scrutiny of normal affirmative procedure regulations. In line with the approach taken to date the provisions would only be exercised when necessary.

435. It is therefore the Scottish Government's intention that these provisions should be available beyond 30 September 2021.

### **Alternative Approaches**

436. The only alternative would be to allow the provisions to expire on 30 September 2021. There may be a case for this given that the powers have

not yet been used by the Scottish Ministers. However, as public health measures continue to be reviewed to take account of new developments, such as the emergence of a new variant of concern, to ensure that they remain proportionate and necessary to support the ongoing public health response, the Scottish Government is of the view that reducing the Government and the Parliament's ability to legislate effectively and flexibly is not appropriate at this time.

## Consultation

437. No formal consultation has been carried out in relation to this provision.

Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

438. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

439. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and considers that ECHR issues do not arise.

### **Island communities**

440. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

441. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

442. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Student Residential Tenancy: Termination by Tenant (Section 2 and Schedule 1, Paragraphs 1 – 3 of the Coronavirus (Scotland) (No.2) Act 2020, except the provisions creating a seven-day notice period which are to be expired)**

### **Policy Objectives of Extending this Provision**

443. This makes provision in relation to tenancies for students in halls of residence and Purpose Built Student Accommodation (PBSA).

444. There is a 28 day notice period for students who have already entered into a student residential tenancy but have not yet occupied the property and the agreement was entered into while the Coronavirus (Scotland) (No.2) Act 2020 is in force. Students can only terminate tenancies for a reason relating to coronavirus.

445. It is the Scottish Government's intention that this provision should be extended beyond 30 September 2021. The provisions in paragraph 3 of Schedule 1 of the Act which create a seven-day notice period for tenancies entered before 27 May 2020 are being expired.

### **Necessity of Extending this Provision**

446. Extending this provision beyond September ensures that, in terms of notices to leave, student renters in halls of residence and PBSA would remain aligned with those students residing in the mainstream Private Rented Sector.

447. The Scottish Government believes that the seven day notice period has been utilised by students who had returned home prior to lockdown and were no longer occupying their property, and by students who wished to return home prior to the end of their contract. This provision has allowed students to end their contract earlier than existing arrangements would have allowed had these provisions not been in place. This is of particular importance given that colleges and universities adopted alternative learning models from face to face teaching in response to coronavirus.

448. The 28 day notice period has given students looking to find suitable accommodation in the current academic year reassurance that, should restrictions continue or more restrictive measures be re-introduced, either locally or nationally, that prevent students from taking up their accommodation as planned, they will not be held liable to pay for accommodation they are not able to use.

## Alternative Approaches

449. The one alternative approach would be to allow the provision to expire on 30 September 2021, meaning a return to pre-COVID legislative arrangements and therefore a loss of protection for student renters, which is not a viable option at this time.

450. No alternative to primary legislation is possible to fully achieve the desired outcome.

## Consultation

451. The Scottish Government is in regular contact with student accommodation providers including universities, colleges, PBSA providers, their representative bodies, and students' organisations. This includes Universities Scotland, Colleges Scotland, the Scottish Funding Council, Association for Student Residential Accommodation, College and University Business Officers, NUS Scotland, AMOSSHE –The Student Services Organisation and Emily Test. The Scottish Government is engaging with them proactively to respond to the needs of students and accommodation providers during this challenging period. Stakeholders, in the Student Accommodation Group, through an informal consultation advised that they were content to retain the benefits of these provisions beyond September 2021 in light of restrictions and public health measures continuing to be kept under review. It may also be the case that on line

learning continues to be a major part of learning in 2021/22. Officials did not have the opportunity to consult on the expiry of the seven day notice to leave provisions.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

452. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

453. The Scottish Government has reviewed the potential impact of extending this measure on equal opportunities. Typically, the majority of those who have resided in student accommodation are women. Almost half of students in halls are from outside the UK and hence, those staying in PBSA and halls of residence are potentially more likely to have a wider variety of ethnic backgrounds. The majority of students residing in PBSA and halls of residence are 21 and under.

454. Action to protect students from being held liable to pay for accommodation they are not able to use as a result of the pandemic should have a positive impact on outcomes for these groups. The Scottish Government considers that the further extension of these temporary legislative changes are likely to positively impact across those with protected characteristics, as the legislative measures will protect them from the financial impact of being held liable to pay for accommodation they are not able to use.

455. The Scottish Government believes that the provisions are proportionate as the continuation of these measures are necessary for public protection and public health and continue to align notice to leave periods in PBSA with those in the Private Rented Sector. The interests of accommodation providers are safeguarded by the Scottish Ministers'

powers to bring forward the expiry of these measures should they be considered no longer necessary.

## **Island communities**

456. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

457. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

458. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated. Whilst these provisions could lead to loss of rental income for providers of student accommodation, the measures are considered to be fair and proportionate for public protection and public health.

459. It should be noted that a large number of providers of student accommodation have – in light of the coronavirus pandemic – voluntarily changed their policy to enable students to terminate their tenancies earlier.

## **Tenancies: Pre-Action Requirements for Order for Possession or Eviction Order on Ground of Rent Arrears (Section 2 and Schedule 1, Paragraphs 4 and 5 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

460. The provision ensures that, prior to seeking repossession due to rent arrears, landlords must make reasonable efforts to work with tenants to manage arrears. This measure formalises the steps landlords should take when working with tenants to manage arrears, helping to sustain tenancies.

461. It also requires the First-tier Tribunal for Scotland (Housing and Property Chamber) to take account of compliance with the requirements in deciding whether to grant an eviction order. It is the Scottish Government's intention that this should be extended beyond 30 September 2021 in order to support keeping people safe in their homes, who are experiencing financial difficulties due to the continued coronavirus-related disruption.

## Necessity of Extending this Provision

462. The extension of the pre-action requirements provisions beyond 30 September 2021 will continue to encourage sustainment of tenancies during the coronavirus pandemic by ensuring that, prior to seeking repossession of a property on the grounds of rent arrears, landlords make reasonable efforts to work with tenants to manage arrears.

463. This measure complements the action taken to protect tenants from eviction action in the Coronavirus (Scotland) Act 2020 and formalises the steps landlords should take when seeking to work with tenants to manage arrears, helping to sustain tenancies and prevent homelessness.

## Alternative Approaches

464. The one alternative approach would be to allow the provision to expire on 30 September 2021, meaning a loss of protection for renters, which is not a viable option at this time.

465. No alternative to primary legislation is possible to fully achieve the desired outcome.

## Consultation

466. The Scottish Government is in regular contact with those representing landlords, letting agents and tenants in both the private and social rented sectors, local authorities and the Scottish Housing Regulator. Officials have engaged with these stakeholders proactively to respond to the needs of tenants and landlords during the period of the coronavirus pandemic including through the Private Rented Sector and Social Housing Resilience Groups, which were established in response to the pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has

informed decisions on the continued necessity and appropriateness of these measures.

467. Views on these provisions have been sought from tenant, landlord and local authority representative groups and there is general agreement that it is sensible for the pre-action requirements to continue.

**Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.**

### **Equal opportunities**

468. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it will not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

469. The Scottish Government considers that the temporary legislative changes to protect renters continue, and will continue, to have a positive impact across those with protected characteristics, including women who are more likely to have caring responsibilities and therefore be impacted more significantly - socially and financially - by the consequences of the pandemic. In the social rented sector, an estimated 54% of households have a highest income householder who is female, with the equivalent percentage for private renting households being 43%. The legislative measures continue to prevent all renters across all protected characteristics from being evicted during the current crisis.

### **Human rights**

470. The Scottish Government has assessed the potential impact of extending this measure on human rights. Consideration has been given to the impact of the provisions on a landlord's human rights with regards to their ability to control their property in relation to Article 1 of Protocol No.1 to the ECHR. The Scottish Government's view is that the temporary nature of the provisions continue to strike an appropriate balance between the landlord's rights in the property, and the rights of the tenant to be protected during the pandemic. The maximum period of notice that the landlord will

have to provide will be six months. The Scottish Ministers have a power in section 10 of the Coronavirus (Scotland) (No.2) Act 2020 to bring forward the expiry of any provision in Part 1 of that Act. This power enables the Scottish Ministers to react quickly to changing circumstances and bring the restrictions in schedule 1 of the Act to an end where they are no longer proportionate in the prevailing circumstances.

## **Island communities**

471. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it has no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

472. The Scottish Government has assessed the potential impact of extending this measure on local government and has determined that no adverse effect on local government is anticipated. It is anticipated that continued action to prevent evictions during the coronavirus pandemic will result in a reduced demand for local authority services, including housing services, that are already under pressure during the pandemic.

## **Sustainable development**

473. The Scottish Government has assessed the potential impact of extending this measure on sustainable development and no detrimental effects are anticipated.

## **Social Care Staff Support Fund (Section 2 and Schedule 1, Paragraph 7 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

474. The purpose of the Social Care Staff Support Fund (Coronavirus) Regulations 2020 is to provide for the establishment, maintenance and administration of the Social Care Staff Support Fund, under the provisions of the Coronavirus (Scotland) (No.2) Act 2020. The Fund has been set up for a group of workers who, due to the nature of their work or work environment, may be expected to self-isolate on more than one occasion

as part of infection prevention and control. Its purpose is to ensure that social care workers do not experience financial hardship, by providing workers with their expected income if they are ill or self-isolating as a result of coronavirus.

## Necessity of Extending this Provision

475. Providing workers who are eligible for assistance from the Fund with their expected income should they be asked to self-isolate, or fall ill with coronavirus, removes the anxiety among the workforce about the potential financial consequences of testing positive. In turn, it supports infection prevention and control in care home settings and care in the community by encouraging adherence to Test and Protect measures. While coronavirus is still present in the population, it continues to pose a significant threat to public health. Scotland's levels-based approach takes into account the higher transmissibility of the B.1617.2 variant and the impact of the progress made in the vaccination roll-out, with restrictions being kept under review to take account of new developments to ensure that they remain proportionate and necessary to support the ongoing public health response and therefore the assurance these powers provide is considered to be necessary and proportionate.

## Alternative Approaches

476. The alternative is to allow the powers to expire, which will result in social care workers facing financial hardship should they become ill or have to self-isolate due to coronavirus, when their terms and conditions are as such that they will only receive Statutory Sick Pay or another rate of sick pay that is less than their expected income.

477. There are no suitable alternative powers available to the Scottish Ministers for providing financial support to social care workers when they are ill or self-isolating due to coronavirus. It would not be suitable for the Scottish Ministers to use common law powers (should such powers be available in this case) where there is still a statutory power under the Coronavirus (No.2) (Scotland) Act 2020.

## Consultation

478. Scottish Ministers remain in close contact with key stakeholders to respond to issues with the Fund as they arise. These stakeholders include

trade unions and social care provider representative organisations. This informal consultation has been included as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of these measures.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

479. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it will not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

480. The continuation of these powers will continue to have a positive impact on those with protected characteristics, particularly women who make up around 80% of the workforce.

### **Human rights**

481. The Scottish Government has assessed the potential impact of extending the measure on human rights and does not anticipate that these provisions will have significant adverse impact on human rights. Given that the measure provides financial support from the state to members of the general public, the Scottish Government does not consider that human rights are likely to be infringed by extending the provision and enabling the Fund to be continued to be maintained.

### **Island communities**

482. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it has no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

483. The Scottish Government has assessed the potential impact of extending this measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

484. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Bankruptcy (Section 2 and Schedule 1, Paragraphs 8, 10 and 12 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending these Provisions**

485. The provisions include measures to further protect those with unsustainable debt by increasing the minimum debt level a creditor must be owed to petition bankruptcy through the Courts from £3,000 to £10,000. The provisions also provide for greater use of technology in bankruptcy procedures by enabling meetings of creditors to take place by virtual means rather than in a physical environment and to permit documents required during bankruptcy administration to be transmitted to a person electronically.

486. It is the Scottish Government's intention that these provisions should be extended beyond 30 September 2021.

### **Necessity of Extending these Provisions**

487. Paragraph 8 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020 makes modifications to section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 as that section applies to documents which are authorised or required to be sent by or under the Bankruptcy (Scotland) Act 2016. The effect of the amendment is to permit a document to be transmitted to a person electronically and to also modify the rules which apply in relation to the circumstances in which willingness to receive a document electronically may be given or inferred.

488. The provisions have been widely utilised by the insolvency profession, for example in issuing circulars to the creditors involved in insolvency proceedings. Electronic delivery provides for more efficient process, ensuring quicker delivery of information to recipients and reduced costs of administration. Electronic submission also addresses issues that have arisen during the pandemic including uncertainty over home-working and whether mail delivered to business premises will be received. These measures have been supported by the insolvency profession and there is a recognised continuing requirement for these provisions beyond September 2021. The insolvency profession would consider permanent provision for electronic delivery of documents a welcome modernising reform should that option exist.

489. Paragraph 10 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020 modifies the definitions of “qualified creditor” and “qualified creditors” in section 7(1) of the Bankruptcy (Scotland) Act 2016 by raising the amount of money a creditor or a group of creditors must be owed in order to be “qualified” from £3,000 to £10,000. A qualified creditor has the right to petition the court for a debtor’s bankruptcy in terms of section 2(1)(b)(i) of the Bankruptcy (Scotland) Act 2016, where the debtor is apparently insolvent.

490. The volume of creditor petitions has reduced significantly since April 2020 as compared with previous years. For example the provisional figures highlighted in the published statistics for quarter 4, 2020/21 show that there were 169 creditor petitions for the full year 2020/21 as compared with 910 submitted in the 2019/20. There will be a range of factors impacting on this, including the limitations provided by the increase creditor petition debt level, increased creditor forbearance during the pandemic and the protections provided by the moratorium described earlier in this memorandum.

491. In common with the stakeholder views set out in relation to the moratorium, there is a recognition that protection afforded through the increased creditor petition threshold is very likely to be required beyond September 2021. This reflects the significant uncertainty over the timing and scale of demand for debt solutions that will arise.

492. Paragraph 12 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020 modifies the Bankruptcy (Scotland) Act 2016 to allow meetings of creditors to take place using electronic means. Although creditors meetings

in personal insolvency proceedings are now infrequent there are circumstances that give rise to them being convened and with the on-set of the pandemic related restrictions it was essential that provision was introduced to allow those to take place in a virtual environment. This rationale remains and the provisions will be required beyond September 2021. Indeed, there is now broad consensus that a permanent change to allow virtual meetings would be welcomed should the opportunity exist. This is not only in response to the coronavirus pandemic, but as a longer term modernising change to the insolvency process that would improve efficiency and reduce the costs – potentially increasing the returns paid to creditors.

## Alternative Approaches

493. The one alternative approach would be to allow the provisions to expire on 30 September 2021, which would mean removing the enhanced protection for those with unsustainable debt and the mechanisms that enhance the efficiency of bankruptcy procedures during this period. The Scottish Government does not consider this is a viable option.

494. No alternatives to primary legislation have been identified to provide for the desired outcome.

## Consultation

495. Stakeholder consultation on issues associated with personal debt has revealed a significant degree of uncertainty over the timing and scale of the issues arising as a result of the coronavirus pandemic. While there is agreement that future demand for advice services and statutory solutions will increase – and this is likely to be significant – the timing of this is less clear. Debt issues are unlikely to emerge fully until the existing support for business (e.g. through furlough etc.) and self-employed have been closed and the resulting scale of redundancy and business failure is known. It is anticipated that the withdrawal of business support in September would see issues of personal debt becoming more prevalent in the months following.

496. Scottish Ministers have engaged with stakeholders throughout the period these measures have been in force through a working group on Statutory Debt Solutions. This comprises of a broad range of stakeholders including representatives from the debt advice sector, insolvency profession and key creditor groups including UK Finance. At a meeting

hosted in October 2020<sup>18</sup> the group welcomed the measures introduced by the Scottish Acts. Following that Ministerial Working Group meeting, a series of stakeholder meetings were hosted in November 2020<sup>19</sup> to discuss immediate priorities and in particular provisions that could be placed on a permanent footing through regulations. Views were sought on the extension of these provisions from the 39 members of the working group on Statutory Debt Solutions. There was strong support to extend the provision to increase the minimum debt level a creditor must be owed to petition for bankruptcy through the Courts from £3,000 to £10,000.

497. As a result of those discussions, provisions making permanent the financial criteria for Minimal Asset Process bankruptcy; the deadline for sending proposals for debtor contribution orders; the enabling electronic signatures on forms; and the revision to fee structure for bankruptcy debtor applications were made by regulations<sup>20</sup> which came into force on 29 March 2021 and simultaneously therefore expired the equivalent temporary provisions.

498. There is now broad consensus that a permanent change to allow virtual meetings and electronic service of documents in bankruptcy procedures would be welcomed should the opportunity exist. This is not only in response to the coronavirus pandemic, but as longer term modernising changes to the insolvency process that would improve efficiency and reduce the costs – potentially increasing the returns paid to creditors.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### Equal opportunities

499. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity,

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<sup>18</sup> [Ministerial Stakeholder Meeting Scottish Statutory Debt Solutions - Minutes - October 2020 | Accountant in Bankruptcy](#)

<sup>19</sup> [General review of Scotland's debt solutions - Stakeholder meetings](#)

<sup>20</sup> [The Bankruptcy \(Miscellaneous Amendments\) \(Scotland\) Regulations 2021](#)

gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

## **Human rights**

500. The Scottish Government has assessed the potential impact of extending this measure on human rights and considers that creditors' rights to recover their debts can be possessions protected by the ECHR, in particular, Article 1 of Protocol 1 which protects property rights.

501. The Scottish Government considers that this measure is proportionate and strikes a fair balance between the general interest and the rights of creditors, in the circumstances of the coronavirus pandemic. Generally the ECHR recognises privileging the property rights of one individual over another can be a legitimate means for promoting the public interest. The justification is strong because of the time necessary for recovery, and the depth of the economic and personal finance shock coming. Creditors are not prevented from taking other debt recovery action short of bankruptcy, including diligence measures, to recover debts below this threshold, so that creditors' claims are not lost.

## **Island communities**

502. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

503. The Scottish Government has assessed the potential impact of extending the measure on local government and no adverse effect on local government is anticipated.

## **Sustainable development**

504. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Mental Health: Named Person Nomination (Section 2 and Schedule 1, Paragraph 15 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

505. Under the Mental Health (Care and Treatment) (Scotland) Act 2003 a patient aged 16 or over may choose an individual to be their named person. The purpose of a named person is one of safeguarding which not only allows for the patient to be represented, it also helps the patient exercise their rights. This provision keeps the safeguards a named person offers but crucially helps minimise the disruption caused by the pandemic. Both the patient and the proposed named person are still required to fulfil the original process which requires for this to be made in writing.

### **Necessity of Extending this Provision**

506. This provision temporarily removes the requirement for a nominated person to have their signature witnessed by a prescribed person when they agree to become a named person. There are no changes to the process for the patient. The safeguards around the nomination process are unaffected and in particular, nominations continue to have to be made in writing. The patient will still require to have their signature witnessed by a prescribed person. The prescribed person in witnessing the signature will be certifying that they believe that the patient understands the effect of their nomination and that the patient also has not been subject to any undue influence in making the nomination.

507. Mental health legislation in Scotland provides for rigorous safeguards in respect of individuals' human rights which include that any function should be carried out for the maximum benefit of the patient, with the minimum necessary restriction on the freedom of the patient. This temporary change has sought to minimise any impact on the service user while continuing to ensure that patient safeguards remain.

508. These provisions have minimised the delays which were being experienced by the Mental Health Tribunal (MHTS) which had reported a slowing down of processes causing practical difficulties in compliance with the current Mental Health (Care and Treatment) (Scotland) Act 2003. This in turn had caused delays in securing the validity of named persons nominations, and there had been an increase in time having to be

dedicated to liaising with stakeholders by telephone and email which must take place before a Tribunal is able to sit to consider whether the patient should continue to be detained under the Mental Health (Care and Treatment) (Scotland) Act 2003.

509. Given on-going disruption caused by the pandemic, it is the Scottish Government's intention that the temporary removal of the requirement for a nominated person to have their signature witnessed by a prescribed person when they agree to become a named person should be extended beyond 30 September 2021. Extending the provision will continue to ensure that the patient still has the ability to choose their own representation while providing for a named person to act for the patient. It is expected to continue helping reduce any delays in having the patient involved in their care and treatment decisions. This approach continues to respects their rights and allows services to be delivered effectively during the pandemic.

## Alternative Approaches

510. The one alternative approach would be to allow the provision to expire on 30 September 2021, which would mean losing the temporary helpful flexibility provided by it. Even if workarounds were put in place involving email or telephone conversations as well as the postal service, these workarounds would make the process extremely lengthy and contribute to delays, thus not achieving what the current provision currently does. The Scottish Government does not consider this is a viable option.

511. No alternatives to primary legislation have been identified to provide for the desired outcome which would provide the degree of flexibility required during the continued disruption caused by the pandemic.

## Consultation

512. The Scottish Government has engaged with relevant stakeholders, which include members of the Scottish Government's Short Life Mental Health Legislation Commencement Consideration Group, throughout the period of the coronavirus pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of the measures.

513. The Short Life Mental Health Legislation Commencement Consideration Group consists of the MHTS, Social Work Scotland, Mental Welfare Commission, Scottish Courts and Tribunal Service and the Royal College of Psychiatrists who fully supported the need for this provision. The Scottish Government continues to engage with stakeholders in order to gather, analyse and review all available data and evidence concerning provisions relating to mental health.

Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

514. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

515. The Scottish Government has assessed the potential impact of extending the measure on human rights and does not consider that any issues arise. Neither the patient's rights or the named person's rights are affected.

### **Island communities**

516. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

### **Local government**

517. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

518. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Care Homes - Emergency Directions and Emergency Intervention Orders (Section 2 and Schedule 1, Paragraphs 16 – 17 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

519. These provisions make changes to the Public Services Reform (Scotland) Act 2010 (the '2010 Act') for a limited time period to allow for the issuing of Emergency Directions and Emergency Intervention Orders.

### **Emergency Directions**

520. Health Boards can direct care home providers to take specific steps within a specified period where they consider there is a material risk to health within the care home due to coronavirus. These specified steps must relate directly to reducing the risk to the health of people at the accommodation. Where the Health Board is not satisfied that the steps have been complied with, it can, subject to the approval of the Sheriff Court where entry to the accommodation has been refused, take steps to ensure they are carried out.

### **Emergency Intervention Orders**

521. Ministers may apply to the court to appoint a nominated officer to temporarily take over the operation of a care home if there is a serious risk to life, health or wellbeing within the home, for a reason relating to coronavirus. Where there is an imminent and serious risk to life or health due to coronavirus, Ministers can exercise the powers before making an application to the court, if they consider it is essential to do so. Where Ministers intervene in these circumstances, they must make an application to a court for an emergency intervention order within 24 hours.

522. It is the intention of the Scottish Government that these provisions should be extended beyond 30 September 2021 in order that they can be

utilised if they are necessary to safeguard the life, health and wellbeing of care homes residents.

## Necessity of Extending this Provision

523. While neither the Emergency Directions nor the Emergency Intervention Orders have been used to date, there remains a real concern that the unpredictable nature of the virus could still create circumstances that would require the use of Emergency Directions and Emergency Interventions. Significant support to care homes has been required over the pandemic through local systems – Health Boards, local authorities and the Care Inspectorate - without necessitating the use of these powers. However, the nature of the pandemic means circumstances can quickly change which may necessitate the need for such interventions. The majority of care homes are for older people who have been severely impacted by the virus. Public health measures continue to be reviewed to take account of new developments, such as the emergence of a new variant of concern. These concerns, combined with those around the vulnerability of the care home population, mean that the Scottish Government considers that the powers are necessary and proportionate as they provide a safety net and assurance, allowing action to be taken by the Scottish Ministers or Health Boards to protect public health.

524. The availability of the Emergency Directions enables Health Boards to require care home providers to take specific steps where they believe there is a material risk to health within the care home due to coronavirus. Emergency Directions allow Ministers to act immediately to safeguard the life, health and wellbeing of care homes residents – provided the tests for intervening are met.

525. The evolving nature of the pandemic, particularly the potential threat posed by variants of concern, means circumstances can and may quickly change which may necessitate the need for Emergency Directions or Emergency Intervention Orders.

526. If the powers are removed too soon while there are still concerns about the virus and its impact on care homes, in relation to emergency interventions, there is a risk that the Scottish Ministers will not have the means to act imminently to safeguard, the life and health and or wellbeing of residents in a care home from risks arising from the virus.

527. The second wave of the virus, fuelled by the emergence of a new strain, had a significant impact on Scotland. Cases rose dramatically in Scotland across December (peaking at 2,622 new reported cases in the Scottish population on December 31). This rise in community prevalence was mirrored in the care home sector which saw steep increases in cases and deaths at that stage. Where care homes had outbreaks, these were significant, often overwhelming the resources of the care home who required considerable mutual aid and support from NHS and local authority partners. The experience of the second wave demonstrates how quickly the situation can escalate following the spread of new variants and therefore the need to extend these provisions.

528. While the rates of outbreaks from the virus in care homes are considerably lower at this point in time compared to during the first wave pandemic (as at 5 May 2021, 30 (3%) of adult care homes had a current case of suspected COVID-19), the emergence of new variants remains a threat. Despite increased confidence in the sector's ability to handle outbreaks of coronavirus, there have been occasions where excellent care homes have struggled to cope when they have experienced an outbreak. The Scottish Government considers that these powers remain an important safety net for the sector.

529. There is check and balance to these powers, as any exercise of the powers to issue an emergency intervention order will be subject to the scrutiny of the courts.

## Alternative Approaches

530. An alternative approach would have been to expire the provisions, but this was not viable as it was considered retaining these provisions was necessary for the reasons outlined above.

531. In relation to Emergency Directions, there are no other statutory powers that would enable a Health Board to direct a care home about matters which are material to the health of a person in a care home relating to coronavirus and apply to the Sheriff Court for a warrant to gain access to the premises if this was needed. A local authority must provide, or ensure the provision of, facilities and equipment to disinfect premises in its area under Part V of the Public Health etc. (Scotland) Act 2008. These powers are not sufficient to rely on to achieve the aim of protecting the health of anyone in a care home, given these cannot be used to require care home

providers to take specific action. Given local authorities run some care homes, it is appropriate for a Health Board to retain these powers for a further temporary period, particularly as Health Boards have expertise in infection control matters. While the Scottish Ministers also have powers to ask the Care Inspectorate to inspect a specific care home if that is required, the use of this power will not lead to swift action that could protect the health and lives of residents. There are limitations to the powers of the Care Inspectorate to take imminent action that may lead to action which can immediately safeguard health issues arising in the context of this pandemic, for example where access to a care home may be needed for infection control purposes to quickly prevent further outbreak of a virus. For example, issues with the speed at which various enforcement notices can be issued.

532. In relation to the Emergency Intervention Order Powers, there are no other statutory powers which can be relied on to enable the Scottish Ministers to take swift or imminent action for reasons relating to coronavirus to prevent the serious or imminent risks to any person to the life, health or wellbeing of any person a care home as set out in section 65A of the Public Services Reform (Scotland) Act 2010. Whilst the Care Inspectorate has various powers of inspection and entry into care homes – as well as the ability to enforce the standards which it sets, these powers do not enable immediate action to be taken to safeguard the life, health and wellbeing of any person in a care home where this is considered necessary.

533. The Scottish Government considers that it is necessary to extend both the Emergency Directions and Emergency Intervention Orders provisions. Both sets of provisions do different things, are exercised by different bodies and are considered necessary to retain as a package of measures to ensure the life, health and wellbeing of residents of a care home is protected. Health Boards offer support to care homes in their local areas, and in light of their knowledge on infection control matters and are well placed to direct a care home about shorter term actions that may need to be taken to reduce risks which are material to the health of any residents. The Emergency Intervention Order provisions enable the Scottish Ministers to intervene in the running of a care home to protect care home residents from imminent and serious risks to their life, health and wellbeing from the virus. Given Ministers have powers of direction over the Care Inspectorate, Health Boards and other health bodies, they are well placed to assess if an intervention is needed. This process allows swift action to be taken by Ministers to intervene to manage the wider risks in a

care home from the virus which may also require longer term intervention. This is particularly if the powers under section 63A could not be used to address the risk in question (e.g. risk to life) or had been used or were not suitable to address risks to health if those needed longer term action (or indeed imminent action needs to be taken before a court order could be obtained).

## Consultation

534. The Scottish Government has informally consulted representatives from Local Government (SOLACE and COSLA), Chief Executives of Health Boards, Chief Officers of Health and Social Care Partnerships and the Care Inspectorate. Representatives were supportive of the proposal to extend the provisions for the reasons outlined above.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### Equal opportunities

535. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly. The majority of people living in care home are older people or have a disability and the aim of the provisions is to protect the, life health and wellbeing of these vulnerable categories of people.

### Human rights

536. The Scottish Government has assessed the potential impact of extending the provisions on human rights and considers whilst these provisions may, if used, interfere with the property rights of care home providers under Article 1 Protocol 1 of the ECHR, that these provisions are compatible and have safeguards built in to ensure any provisions would be used in a manner that is compatible with the Convention.

537. In relation to Emergency Directions, entry by Health Boards to enforce directions issued under section 63A will either only be taken where permitted by a care home provider or where a court grants a warrant to enter the premises and take the necessary steps. The fact that a court will consider an application for a warrant is an important safeguard to ensuring any impact the granting of a warrant may have on any human rights matters, including any potential interference with the property rights of care home providers under Article 1 Protocol 1 of the ECHR, ensure the courts can oversee that any such action is proportionate. The court may only grant such a warrant if it is satisfied there are reasonable grounds for entering the accommodation. In addition, the powers in section 63A of the 2010 Act can only be used if there is a material risk to the health of any person in the care home, rather than any all circumstances.

538. If the Scottish Ministers decide to take emergency intervention action under section 65A of the 2010 Act, they can do this but only in very specific and serious circumstances. First, the Scottish Ministers can make an application to the court seeking permission to intervene in a care home, if they consider there is a serious risk to the life, health or wellbeing to any person in a care home. Any potential interference with the property rights of care home providers under Article 1 Protocol 1, will therefore be considered by a court which will balance those rights against the need to safeguard the life, health or wellbeing of residents.

539. The Scottish Ministers may also intervene in a care home, without first going to court, if such action is considered essential and to prevent an imminent risk to the life or health of any person in the care home. There may be very rare occasions where action could be needed so urgently and before the timescales in which a court may grant an order. The tests for imminent action are very high and can only be used in very specific circumstances. In considering whether to use these powers, the Scottish Ministers have a duty to balance any competing human rights matters (interference of property rights under Article 1 Protocol 1) and protection of life, health of residents) and ensure any action is necessary, justified and proportionate. As a further safeguard, they must apply to a court within 24 hours of an intervention to an intervention order as a further safeguard to any continuing use of these powers.

## **Island communities**

540. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

541. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

542. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Powers to Purchase Care Home Services and Care at Home Providers (Section 2 and Schedule 1, Paragraphs 18 to 21 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

543. This provision sets out temporary powers available to local authorities to acquire, by agreement, a care home or care at home services. It also sets out the powers available to relevant Health Bodies (a Health Board, the Common Services Agency and Health Improvement Scotland) to acquire a care home, by agreement, on behalf of the Scottish Ministers.

544. Circumstances where this can take place are where, for a reason relating to coronavirus: the provider is in serious financial difficulty; the local authority or relevant health body (where relevant) is satisfied there is a threat to the life, health or wellbeing of people receiving the service; or where a provider has recently stopped providing the services.

## Necessity of Extending this Provision

545. In addition to the points laid out in paragraphs 523 – 528 above, the following points were considered.

546. These emergency provisions create powers in relation to the acquiring of care homes and care at home services by either local authorities or relevant health bodies for reasons relating to coronavirus where a provider of those services is in financial difficulty, the local authority or health board is satisfied there is a threat to the health, life and wellbeing of persons receiving the services or the provider has recently ceased to use the services. While the provisions relating to Emergency Intervention Orders and the Emergency Directions, support interventions directing care home organisations to take action to protect the wellbeing of residents, the powers enable a local authority, or where applicable, relevant health bodies, to acquire a care home service or a care at home service if a social care provider is unable to provide that service due to service failure or financial difficulty, as well as if there is a threat to the wellbeing of person receiving care. The use of such a power in the case of a failing care home service would mean that residents, many of whom may be frail, would not need to be moved to another care home thereby ensuring continuity of care and avoids exposing those most vulnerable to the virus which could happen if they are moved to other premises.

547. Significant support to care homes has been required over the pandemic through local systems – Health Boards, local authorities and the Care Inspectorate - without necessitating the use of these powers. However, the nature of the pandemic means circumstances can quickly change which may necessitate the need for such interventions. The majority of care homes are for older people who have been severely impacted by the virus. Similarly care at home services provide support to vulnerable people who are at risk from the impacts virus. With the ongoing significant threat from emerging new variants of concern, and concerns about the vulnerability of the care home and care at home populations, these powers are considered necessary as they provide a safety net and assurance.

548. Despite increased confidence in the social care sector's ability to handle outbreaks of coronavirus, during this period there have been occasions where some excellent care homes have struggled to cope when they have experienced an outbreak. The Scottish Government considers

that these powers remain an important safety net for the social care sector while coronavirus continues to pose a significant threat to public health in Scotland.

549. These powers enable a local authority or relevant health body to act to safeguard the interests of the residents of a care home. Equally, and where there is agreement in relation to acquisition of the service, these powers seek to ensure a local authority can quickly put in place continuity of care for those who receive a care at home service.

## Alternative Approaches

550. An alternative approach would have been to expire the provisions, but this was not viable as it was considered retaining these provisions was necessary for the reasons outlined above.

551. The powers for voluntary purchase of a care home by a local authority or Health Board were brought in for avoidance of doubt, in case a situation arose where purchase of a care home was by either of these bodies was necessary

552. These provisions are without prejudice to sections 69 to 71 of the Local Government (Scotland) Act 1973 and section 79 of the National Health (Scotland) Act 1978. Whilst it may be that those powers may be able to be used by a local authority or relevant health body, the Scottish Government considers that there is a risk that existing powers may not be sufficient. Given the serious circumstances in which these powers may need to be used, that these relate to voluntary acquisitions of property and that these may enable people in vulnerable circumstances to receive continuity of care (e.g. without the need to move them amid a pandemic to other accommodation), these powers are being retained to ensure the position is beyond doubt.

553. Taken together the Scottish Government considers that these purchasing powers provide a safeguard for the worst case scenario.

## Consultation

554. The Scottish Government has informally consulted representatives from Local Government (SOLACE and COSLA), Chief Executives of Health Boards, Chief Officers of Health and Social Care Partnerships and the Care

Inspectorate. Representatives were supportive of the proposal to extend the provisions for the reasons outlined.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

555. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly. The majority of people who use care home and care at home services are either older people or have a disability and the aim of the provisions is to protect the health and wellbeing of this population.

### **Human rights**

556. The Scottish Government has assessed the potential impact of extending the measure on human rights and given the voluntary nature of the powers and that both parties involved in any transaction are to reach agreement about the acquisition of any property, it does not envisage any adverse impact on human rights.

### **Island communities**

557. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

### **Local government**

558. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

559. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Criminal Justice - Criminal Proceedings: Extension of Time Limits (Section 3 and Schedule 2, Paragraph 1 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

560. These provisions dis-apply certain time limits contained in the Criminal Procedure (Scotland) Act 1995 so that there is a period during which these time limits will not apply and the court can adjourn a case for such period as it considers appropriate.

561. These time limits relate to the power of the court to adjourn a summary case at first calling to allow time for inquiry into the case or for any other cause which it considers reasonable, the power of the court to remand an accused for inquiry into their physical or mental condition where the accused has committed an offence punishable with imprisonment, and the power of the court to adjourn a hearing and remand an offender for inquiry in respect of their apparent failure to comply with a requirement of a community payback order, drug treatment and testing order or restriction of liberty order.

562. It is the Scottish Government's view that these provisions should be extended beyond 30 September 2021 to ensure the courts will not be impacted by large numbers of individual hearings to re-adjourn cases, by ensuring that the courts are able to adjourn cases for a period of time which realistically reflects the length of time required to complete further inquiries and obtain information from other parties.

### **Necessity of Extending this Provision**

563. Without the extension of these provisions, it is possible coronavirus disruption would lead to time limits on adjournments not being met because of the potential impact on the ability of the courts to conduct criminal trials, including by reason of the impact on the ability of the courts to obtain

information from criminal justice social workers and other relevant agencies.

564. A case can be adjourned more than once if sufficient justification exists for doing so, and the coronavirus pandemic would probably be accepted by the courts as sufficient justification. However, this would potentially require a very large number of individual extensions to be sought which could, in itself, cause significant difficulties, in the context of a justice system which may become depleted if judges, sheriffs, prosecutors and defence agents become unwell or self-isolate. These provisions seek to minimise the need for large numbers of hearings to take place to re-adjourn cases for the same underlying reasons and so free up court capacity.

## Alternative Approaches

565. The only alternative approach would be to allow the provision to expire on 30 September 2021, meaning a return to a lack of flexibility in terms of timings and a possible increase in individual re-adjournments being sought, which is not a viable option at this time and would pose a significant risk of disruption if a rise in coronavirus cases led to the reintroduction of restrictions limiting the ability of justice agencies to respond to inquiries from the courts.

566. No alternatives to primary legislation have been identified which would provide the degree of operational flexibility required to maintain the delivery of essential court business during the continued disruption caused by coronavirus.

## Consultation

567. The Scottish Government continues to informally consult with Police Scotland, the Crown Office and Procurator Fiscal Service (COPFS) and the Scottish Courts and Tribunals Service (SCTS) on these measures. These provisions have been identified by those parties as a key measure to provide for the continued operation of courts as a result of the coronavirus pandemic, allowing proceedings to be conducted in a way which minimises unnecessary travel and congregation of people and enabling the effective management of the backlog of court cases.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

568. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

569. The Scottish Government has assessed the potential impact of extending the measure on human rights and has determined that they have the effect of increasing the permitted length of a single adjournment, and so potentially the time period that an accused person is held on remand, prior to sentencing or pending a decision regarding an alleged breach of a court order, together with other time limits for the length of a single adjournment in summary cases after first calling where the accused is not in custody.

570. However, the Scottish Government considers that these provisions are compatible with the right guaranteed by Articles 5(3) and 6(1) of the ECHR to a trial within a reasonable time. A person can, at any time, apply to the court for a bail review under section 30 of the Criminal Procedure (Scotland) Act 1995 to enable the court to determine whether their continued detention is justified. The courts remain subject to the requirement to ensure that there is a fair and public hearing within a reasonable time. The court can adjourn more than once in these situations under the pre-existing legislation, so the effect of the measure is not to remove a fixed time limit but only to remove the potential need for repeated adjournments in the same case.

### **Island communities**

571. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

572. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

573. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Criminal Justice - Arrangements for the Custody of Persons Detained at Police Stations (Section 3 and Schedule 2, Paragraphs 2 – 5 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

574. These provisions enable the Scottish Ministers to make arrangements for Prisoner Custody Officers to carry out their functions within police stations for the purpose of facilitating the appearance before a court by electronic means of prisoners in police custody. This will involve prisoners appearing before the court by video link from police stations.

575. Prisoner Custody Officers are now able to carry out the functions that they normally would carry out in court buildings within police stations. These functions include the service of papers, the management of the timetable of the virtual court, solicitor consultations, the movement of prisoners between cells and the virtual court room, attending to wellbeing, and the release and remanding of prisoners after the hearing.

576. It is the Scottish Government's intention that these provisions should be extended beyond 30 September 2021 in order that the justice system to be able to continue operating safely and as effectively as possible by reducing pressure on physical court estate while enabling business to continue.

## Necessity of Extending this Provision

577. The Scottish Government has worked closely with Police Scotland and the Scottish Prison Service to put these measures in place. These arrangements allow Prisoner Custody Officers to support police officers and court staff in the administration of virtual custody courts, with Prisoner Custody Officers now being deployed in over half of the virtual custody courts in Scotland. This support protects other court users and members of the public from the risks of coronavirus by reducing the amount of physical hearings and the requirement for transport to court.

578. The provisions remain necessary beyond 30 September 2021 to provide for the safety and transfer of detained persons between cells and remote court appearance within the police estate. The use of remote custody courts will likely continue for the foreseeable future and will help release vital capacity within the court estate to resume trials, and to further reduce the movement of persons while the criminal justice system responds to and recovers from the pandemic.

579. The use and support of trained Prisoner Custody Officers within police stations allows the usual duties of police and civilian staff to be protected; the expiry of these provisions while remote custody courts are in place would place additional burden on front line officers and other police staff.

## Alternative Approaches

580. The only alternative approach would be to allow the provision to expire on 30 September 2021, meaning a loss of the important flexibility provided by them.

581. No alternatives to primary legislation have been identified which would provide the degree of operational flexibility required to maintain the delivery of essential court business during the continued disruption caused by coronavirus.

## Consultation

582. The Scottish Government continues to informally consult with Police Scotland, the Crown Office and Procurator Fiscal Service (COPFS), the Scottish Courts and Tribunals Service (SCTS) and the Scottish Prison

Service on these measures. These provisions have been identified by those parties as a key measure to provide for the continued operation of courts as a result of the coronavirus pandemic, to allow proceedings to be conducted in a way which will minimise unnecessary travel and congregation of people.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

583. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

584. The Scottish Government has assessed the potential impact of extending the measure on human rights and has determined that no issues arise. Detention engages a person's right to liberty under Article 5 of the ECHR. The provisions do not change the substantive rules or time limits regarding detention. The provisions only change the location in which Prison Custody Officers can carry out their functions. Prison Custody Officers exercise functions of a public nature and must act compatibility with the ECHR.

### **Island communities**

585. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

586. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

587. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Criminal Justice - Expiry of Undertaking Under Section 25(2)(b) of the Criminal Justice (Scotland) Act 2016 (Section 3 and Schedule 2, Paragraph 6 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

588. Where a person is in police custody and has been arrested under a warrant or arrested without warrant and subsequently charged with an offence, that person may be released if the person gives an undertaking to appear at a specified court at a specified time and to comply with any conditions imposed while subject to the undertaking. The police can impose protective conditions in an undertaking intended, for example, to prevent the person from interfering with witnesses, including the complainer. Breach of these conditions without reasonable excuse is a criminal offence.

589. An undertaking, as well as any conditions attached to it, expires either at the end of the day when a person was required to have appeared at court in accordance with the terms of the undertaking, or at the end of the day when a person appears at court having been arrested on a warrant for failing to appear as required by the terms of the undertaking.

590. During the coronavirus pandemic people have been unable to attend court in accordance with their undertaking due to public health guidance or infection. Without action, in this situation there was a risk that protective conditions attached to undertakings would expire in cases, raising safety concerns and an increased risk for the public, with particular risks associated with domestic abuse cases.

591. These provisions addressed this risk by providing the court with the power to prevent the expiry of an undertaking and any conditions attached to it by changing the time the person is due to appear at court. Where a person fails to appear at court as required by the terms of the undertaking; the court considers that the person's failure to appear is attributable to a reason relating to coronavirus; and the court does not consider it appropriate to grant a warrant for the person's arrest on account of the failure to appear, the court may modify the terms of the undertaking given by changing the time at which the person is to appear at the court.

592. It is the Scottish Government's intention that these provisions should be extended beyond 30 September 2021.

## Necessity of Extending this Provision

593. Where the court exercises the power provided by these provisions, it has the effect of preventing the undertaking and any associated conditions from expiring and ensures that where, for example, protective conditions have been put in place to protect a complainer, they continue to have effect until a court is able to consider whether to impose bail conditions or remand the accused in custody. This continues to be identified as a measure to preserve public and victim safety during the coronavirus pandemic, particularly in sensitive cases of domestic abuse.

594. In terms of the timescales for a person released from custody on an undertaking to appear at court, the provision has also provided the necessary safeguards in the operation of the law in this area to allow the Crown Office and Procurator Fiscal Service (COPFS) to review the previously extended timescales implemented in response to coronavirus in order to maintain public safety and revert back to original timescales, which are the date of appearance at court should generally be within 28 days of liberation, and in respect of domestic abuse offences, within 14 days of liberation.

595. The need to self-isolate because of possible infection with coronavirus (or the continued existence of other coronavirus related reasons which prevent people from attending court) will continue for some time to come. Therefore, it is necessary for this provision to remain in force beyond September to ensure that in any case where an accused is unable to attend court for a coronavirus-related reason, the court has a power to ensure that any conditions associated with the undertakings on which they

were released can continue to have effect until they are able to appear in court.

## Alternative Approaches

596. The only alternative approach would be to allow the provision to expire on 30 September 2021, meaning a loss of the important measure to preserve public and victim safety.

597. No alternatives to primary legislation have been identified which would provide the power to extend the period of an undertaking required to preserve that undertaking and any protective conditions attached to it that may otherwise be lost.

## Consultation

598. The Scottish Government continues to informally consult with Police Scotland, COPFS and the Scottish Courts and Tribunals Service on this measure throughout the pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of the measures.

Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

599. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

600. The Scottish Government has assessed the potential impact of extending the measure on human rights and is of the view that no issues arise. In relation to Article 8, which the Scottish Government acknowledges

is engaged by these provisions, even where an undertaking continues longer than might have initially been anticipated, the conditions are the same as those that the person initially agreed to when entering into the undertaking. The penalty for breaching the undertaking also remains unchanged. The Scottish Government therefore considers that any increased interference with Article 8 rights is in accordance with the law and can be justified as proportionate to achieving the legitimate aim of public safety.

601. In addition, the Scottish Government notes that the power to extend an undertaking and any conditions attached to it is limited to circumstances where the court considers that the accused person has not attended court for a reason relating to coronavirus, and as such, it could not be used by the court as a general alternative to issuing a warrant for the person's arrest in instances where, unrelated to coronavirus, the person has not appeared in court and the undertaking has lapsed. In any event, the power given to the court is exercisable by the court in a manner that is compatible with the ECHR.

## **Island communities**

602. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

603. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

604. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Proceeds of Crime (Section 3 and Schedule 2, Paragraphs 8 and 9 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

605. These provisions temporarily amend Part 3 (Confiscation) of the Proceeds of Crime Act 2002 (“the 2002 Act”) in the following ways:

- The provisions provide that, for the purposes of section 99(4) of the 2002 Act “exceptional circumstances” includes the effect (whether direct or indirect) of coronavirus on the proceedings. This is important as following a conviction in relevant criminal cases, prosecutors can make an application to the court for a criminal confiscation order. These proceedings can be postponed on an application by either the prosecutor or the accused, or by the court by its own motion. The permitted period for any postponement is two years, unless “exceptional circumstances” can be demonstrated for an extension. This provision has the effect of ensuring that reasons directly, or indirectly related to coronavirus are regarded as “exceptional circumstances” for the purposes of extending the period of postponement of confiscation proceedings;
- Section 116 (time limit for payment), is amended to ensure that no individual subject to a confiscation order is disadvantaged if they cannot pay a confiscation order on time for reasons relating directly, or indirectly, to coronavirus and for the court to make a further order extending the period for payment. Without that amendment those required to pay within 12 months may receive a custodial sentence for non-payment due to coronavirus related reasons;
- Section 116A (Further time for payment due to coronavirus) makes provisions for further extensions of the extended period by the court for those same reasons;
- Section 117 is amended to ensure that the defendant will not pay interest on any outstanding confiscation order where an application for extended time to pay has been made, and allowed, under section 116A.

## Necessity of Extending this Provision

606. As a result of coronavirus, a large number of firms that the Crown Office and Procurator Fiscal Service (COPFS) deals with for 2002 Act casework have experienced difficulties ranging from staff on furlough, difficulties obtaining information from financial institutions as well as, and as a consequence of, obtaining accountancy reports. Due to the delays in these processes there has been a consequent delay in COPFS being able to review and settle matters.

607. Whilst COPFS has gained experience in handling the impact of the virus over the last year, there remains a backlog in cases being dealt with for these reasons (both for Crown and Defence). The Scottish Government is of the view that the provisions amending section 99(4) of the 2002 Act should be extended beyond September. COPFS has advised that there are around 35 cases where the permitted period may expire by the end of September 2021, with around a further 30 cases between then and the end of March 2022 when the permitted period could expire. The intention of the provision is to ensure that both the prosecution and the defence have sufficient time to prepare their cases which may have been affected by the pandemic and ensuing restrictions, and to ensure that the making of any confiscation order is not frustrated by the expiry of the permitted period.

608. The provision does not mandate an extension, but it does seek to put beyond doubt that the effect of the coronavirus pandemic on applying for a section 92 order can be considered as an exceptional circumstance by the Court. If the provision was allowed to expire in September this could cast unnecessary doubt on whether coronavirus is to be considered an exceptional circumstance.

609. If a confiscation order is not able to be made within the permitted period as a result of the coronavirus pandemic, then no confiscation order under the 2002 Act can be made in that case. This could allow serious organised criminals to continue to use funds obtained from their criminality to further their criminal activities in communities and be a threat to public safety and public order. COPFS is concerned that, given delays to court proceedings and investigations caused by the coronavirus pandemic, that the “permitted period” of two years may expire before the necessary work in relation to a confiscation order can be completed.

610. In terms of amendments to sections 116 and 117 and the insertion of 116A, information from COPFS indicates that in the period from 23 March 2020 to 27 April 2021, 21 enforcement cases have been administratively adjourned, and there are at least 20 other cases cited by the clerks of the court where the time to pay has expired. There are 55 cases where the time to pay may expire by the end of September 2021 and a further five cases between then and the end of March 2022 where the time to pay could expire. COPFS has indicated that other factors relating to the coronavirus pandemic can have an impact on the progress of confiscation order proceedings. As a consequence, defendants may receive a default sentence as a result of not being able to pay a confiscation order through no fault of their own due to coronavirus and in order to provide fairness within the system the Scottish Government is of the view that the protection offered by these provisions should be extended.

611. These provisions will help to ensure that the confiscation process is not frustrated due to delays in court proceedings as a result of coronavirus-related backlogs. The provisions also ensure that individuals are not treated unfairly or disproportionately throughout this period if they have been unable to pay a confiscation order for reasons related to coronavirus.

## Alternative Approaches

612. The only alternative approach would be to allow the provision to expire on 30 September 2021, meaning casting doubt on whether circumstances where confiscation proceedings are delayed as a direct or indirect result of coronavirus are 'exceptional' in terms of the 2002 Act. This is not a viable option.

613. No alternatives to primary legislation have been identified which would put beyond doubt what constitutes exceptional circumstances.

## Consultation

614. The Scottish Government has engaged with COPFS and the Scottish Courts and Tribunals Service throughout the period of the coronavirus pandemic. This informal consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of the measures.

615. COPFS has noted that whilst there remains a backlog in cases being dealt with (both for Crown and Defence) there is merit in continuation of the current provisions in section 99(4A). Moreover, in relation to sections 116 and 117, COPFS has indicated that if the provisions were not extended it could result in an accused unfairly having to pay interest on an order they cannot pay for reasons outwith their control, and possibly facing a default custodial sentence for non-payment of an order.

**Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.**

### **Equal opportunities**

616. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

617. The Scottish Government has assessed the potential impact of extending the measure on human rights and is satisfied that the measures will not impact on the ability of the courts to operate in accordance with ECHR. Extending the postponement period of a confiscation order due to the coronavirus pandemic is equitable to both prosecution and defence parties. Furthermore, the extension of the provisions would not create any new offences and no heavier penalty will be imposed than would otherwise have been the case.

### **Island communities**

618. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

619. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

620. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Intimation etc. of Documents (Section 3 and Schedule 2, Paragraph 10 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

621. The provisions allow that, where there is provision requiring or permitting a document to be displayed on the walls (or any other part) of a court building or to be made publicly available within a court, it is instead to be done by publication of the document on the Scottish Courts and Tribunals Service (SCTS) website in line with any direction issued by the Lord President or Lord Justice General.

622. Any requirements relating to a document being displayed within a court building, such as specification of a time period for display, continue to apply to publication of the document on the SCTS website, subject to any necessary modifications; and the effect of any provision for alternative methods of publication, such as intimation by advertisement in a newspaper, is also preserved by these provisions.

623. It is the Scottish Government's intention that these provisions should be extended beyond 30 September 2021 as they are essential in enabling the justice system to be able to continue operating as safely and as effectively as possible.

### **Necessity of Extending this Provision**

624. Making documents available on the SCTS website allows court business, most often in relation to commissary and civil matters, to

progress. It also provides a viable alternative where displaying documents on the walls of court is not an option with restricted public access to court buildings and public counters being closed.

625. Even when the SCTS is in the position to re-open public counters, extending these provisions beyond September will remain necessary as they will mean that those who are unable to attend court buildings (for example, if they are shielding, self-isolating or are concerned about the health implications of attending public offices etc.) would still have the ability to view notices online. Further, it will ensure compliance with any remaining social distancing requirements.

626. Without public access, intimation of documents on the walls of court would serve no purpose. Without this provision being in place a number of cases will not be able to proceed. In particular, this would affect the estates of deceased persons where the appointment of an executor is required to be made by dative petition.

627. Indicative data from manual records kept by court staff show that the provisions have been utilised to progress a substantive volume of cases/applications, predominantly in relation to commissary business and provides compelling evidence of their importance and continued relevance. The table below shows the extent to which the provisions have been used to date.

<b>SCTS Website Intimations*</b>					
Type of Action	No. of Intimations Jun - 30 Sep 2020	No. of Intimations 1 Oct 2020 - 1 Nov 2020	No. of Intimations 1 Nov 2020 - 31 Dec 2020	No. of Intimations 1 Jan 2021 - 28 Feb 2021	No. of Intimations 1 Mar 2021 - 31 Mar 2021
Application for Sheriff Officer Commission	44	2	4	13	0
Charge for Payment	36	197	507	628	435
Company Insolvency	49	15	35	12	10
Ordinary Cause	69	29	61	81	17
Petition for Appointment of Executor	1,238	513	588	613	405
Sequestration /Recall of Sequestration	3	9	1	1	0
Simplified Divorce	15	7	5	5	9
Summary Applications	19	6	6	12	5
Summary Cause	4	2	6	88*	26
Other	50	46	70	56	16
<b>Total</b>	<b>1,398</b>	<b>636</b>	<b>1,283</b>	<b>1509</b>	<b>923</b>
*As it is not possible to electronically capture the number of intimations, court staff kept manual records. The information has not been quality assured and as such, should be used with caution					

628. Without the provisions enabling business to be conducted by electronic means being extended, the ability of the justice system to continue will be severely adversely affected, as the expiry of these provisions would result in the requirement for physical processes to once again take effect.

629. The justice system is reliant upon these provisions to enable court business to progress, most often in relation to commissary and civil matters.

## Alternative Approaches

630. The only alternative approach would be to allow the provision to expire on 30 September 2021, meaning a return to requirements for physical movement and contact, which is not a viable option at this time.

631. No alternatives to primary legislation have been identified which would provide the degree of operational flexibility required by justice organisations to maintain the delivery of essential court and tribunal business during the continued disruption caused by coronavirus.

## Consultation

632. The Scottish Government has consulted with the Scottish Courts and Tribunals Service (SCTS) and the Scottish Society for Messengers-at-arms and Sheriff Officers (SMASO) on these measures and continues to do so. These provisions have been identified by those parties as a key measure to provide for the continued operation of courts and tribunals as a result of the coronavirus pandemic, to allow court business to be conducted in a way which will minimise unnecessary travel and congregation of people. SCTS and SMASO have advised that there is no anecdotal or empirical evidence that access to justice or rights to privacy have been negatively impacted by allowing the online publication of documents that were previously displayed on the walls of court. The Lord President has used the direction making powers contained within the provisions to limit the information being published online to that which is necessary. SCTS will continue to provide a telephone service for anyone wishing to access online information. However, to ensure the requirement of public display of documents is achieved SCTS and SMASO have noted that there is no alternative approach.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

633. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

634. The Scottish Government has assessed the potential impact on human rights of extending the measure and considers that whilst the measure may, when used to publish data on the SCTS, engage to a certain degree with the right to respect for private and family life under Article 8 of the ECHR, that the measure is compatible and has safeguards built in to ensure any provisions would be used in a manner that is compatible with the Convention.

635. The Scottish Government acknowledges that there is at least room for debate as to whether any inference associated with public notices is inherently different in respect of online publication as opposed to publication on the walls (or other parts) of court buildings, particularly in view of the operation of search provider caches and web archiving facilities. However the Scottish Government considers that any risk is mitigated by the inclusion of direction-making powers for the Lord President or Lord Justice General. These allow for the exclusion of online publication of specific types of document or provision for documents to be published online in redacted form only. These safeguards would take account of any issues arising from the potential publication of sensitive data on the SCTS website and have already been used by the Lord President since the start of the pandemic.

636. In addition the statutory durations for the publication of information on the walls (or other parts) of court buildings continue to apply to the online publication of information. As a result published information is removed from the SCTS website after the same time period as public notices would

have been removed from the walls (or other parts) of the court. In any event, the SCTS (and the courts themselves) continue to have legal duties under the Human Rights Act 1998 and data protection legislation which provide further reassurance that these provisions will be used in a manner that is compatible with the Convention.

## **Island communities**

637. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

638. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

639. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Care Services: Giving of Notices by the Care Inspectorate (Section 5 and Schedule 4, Paragraph 5 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

640. These provisions provide the Care Inspectorate with powers to send formal notices to registered care service providers by electronic means, in addition to normal post, for the duration of the emergency period. Formal notices include those relating to registration, variation of conditions of registration, and enforcement action. The provisions also make it clear that a notice which is given to a person providing, or seeking to provide, a care service can be served on an individual, if served on a body corporate, to a director, secretary or other similar officer of that body or to a manager (or other similar officer) of the care service provided by that body, or if served on a firm, to a partner of that firm.

641. It is the Scottish Government's intention that these provisions should be extended beyond 30 September 2021 as they are important in enabling the Care Inspectorate to be able to continue operating as safely and as effectively as possible.

## Necessity of Extending this Provision

642. This provision has enabled the Care Inspectorate to serve electronic notices safely and quickly throughout the pandemic, during which its offices have remained closed. This means staff are unable to access printers to enable hard copy correspondence to be issued. Giving of notice by hand delivery would have necessitated face-to-face contact, and therefore risk of spread of the virus.

643. As of 13 May 2021 the power provided by this provision has been used by the Care Inspectorate in relation to 2,858 matters for the issuing of notices relating to registration, variation of conditions of registration, and enforcement action.

644. Without the provisions enabling business to be conducted by electronic means being extended, the ability of the Care Inspectorate to continue in as safe and secure a way as possible will be severely adversely affected, as the expiry of these provisions would result in the requirement for physical processes to once again take effect.

## Alternative Approaches

645. The one alternative approach would be to allow the provision to expire on 30 September 2021, which would mean losing the necessary flexibility provided by it. The Scottish Government does not consider this is a viable option.

646. No alternatives to primary legislation have been identified to provide for the desired outcome which would provide the degree of flexibility required during the continued disruption caused by coronavirus.

## Consultation

647. The Scottish Government has engaged with the Care Inspectorate throughout the period of the coronavirus pandemic. This informal consultation on these specific provisions has been reported on as part of

the statutory two-monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of the measures.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

648. The Scottish Government has assessed the potential impact of extending the measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

649. The Scottish Government has assessed the potential impact of extending the measure on human rights and does not consider that any issues arise.

### **Island communities**

650. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

### **Local government**

651. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

### **Sustainable development**

652. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Execution of Documents, Etc. (Section 5 and Schedule 4, Paragraph 9 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

653. The provisions dis-apply the requirement for the physical presence of certain parties in some circumstances such as the signing of certain documents or the administering of oaths, affirmations and declarations. They create the opportunity for Scottish notaries public, solicitors and advocates, guided by their professional bodies, to adopt alternative appropriate means of executing documents and oaths etc. which have a “physical presence” requirement, for example notaries may now execute remotely, by electronic means such as live video connection.

654. It is the Scottish Government’s view that these should be extended beyond 30 September 2021 as they are essential in enabling the justice system to be able to continue operating as safely and as effectively as possible.

### **Necessity of Extending this Provision**

655. These provisions continue to be required to allow the use of technology to support the legal profession in delivering certain legal services which have a “physical presence” requirement, whilst reducing physical contact.

656. The Law Society of Scotland considers that these provisions continue to benefit both members and the people in Scotland who require these legal services. The Society also consider that were these provisions to expire in September that there may be an adverse impact on those who need such legal services with a greater potential risk of exposure to coronavirus, anxiety, cost and delay for parties. In addition the provisions support Insolvency Practitioners, as oaths are required in a number of insolvency processes. The provisions enable the legal sector to respond to the impact of the coronavirus pandemic, whilst also support in the recovery from the effects of the pandemic.

657. It is the Scottish Government’s view that these measures strike the right balance in terms of access to such legal services whilst reducing

physical contact. The Law Society of Scotland has set out guidance to their members in relation to the use of these provisions.

## Alternative Approaches

658. The only alternative approach would be to allow the provision to expire on 30 September 2021, meaning a return to requirements for physical movement and contact, which is not a viable option at this time.

659. No alternatives to primary legislation have been identified which would provide the degree of operational flexibility required to maintain the delivery of essential business during the continued disruption caused by coronavirus.

## Consultation

660. The Scottish Government continues to informally consult with the Law Society of Scotland and the Faculty of Advocates on these measures. These provisions have been identified by those stakeholders as a key measure to provide for the continued operation of business being conducted in a way which will minimise unnecessary travel and congregation of people.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

661. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

662. The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.

## **Island communities**

663. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

664. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

665. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Council Tax: Exempt Dwellings (Section 5 and Schedule 4, Paragraph 14 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

666. This provision creates an exemption from council tax liability for a property that was exempt from paying council tax due to being occupied by:

- students;
- a student's spouse or dependant(s);
- school leavers; or
- people under the age of 18;

and which then became unoccupied on or after 17 March 2020 for a reason relating to coronavirus. From (and including) 27 May 2020 such a property is exempt from paying council tax until it is occupied or the provisions in the Coronavirus (Scotland) (No.2) Act 2020 come to an end.

667. It is the Scottish Government's intention that this measure should be extended beyond 30 September 2021 to continue the council tax exemption for properties in this situation.

## Necessity of Extending this Provision

668. The Scottish Government is of the view this measure should remain in place as these properties would, in normal times, not be liable for council tax. There remains uncertainty about how exactly the pandemic will unfold in the event of new developments, such as the emergence of a new variant of concern, which will have an impact on which restrictions are likely to remain proportionate and necessary to support the ongoing public health response, including the extent to which in-person teaching will be possible. It is therefore important to retain this provision beyond 30 September 2021 to ensure that landlords of such properties are not required to pay council tax due to the impact of the pandemic, when in normal times they would not be doing so due to the property being occupied by one of the specified groups.

## Alternative Approaches

669. The only alternative approach would be to allow the provision to expire on 30 September 2021, meaning that while it is the intention to enable student accommodation provisions (section 2 and schedule 1: paragraphs 1 – 3 of the Coronavirus (Scotland) (No.2) Act 2020) to continue beyond 30 September, landlords would still be required to pay council tax on student accommodation. The Scottish Government does not view this as a viable option.

670. No alternatives to primary legislation have been identified which would provide the desired outcome.

## Consultation

671. The Scottish Property Federation has expressed support for continuing the measure for as long as the coronavirus-related student accommodation provisions remain in force. COSLA is aware of the Government's intention to extend the measure, and that as this only applies to properties that in normal times would not be paying council tax it will not lead to a reduction in expected income for local authorities from such properties.

## Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

### **Equal opportunities**

672. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

673. The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.

### **Island communities**

674. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

### **Local government**

675. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated. As indicated above these are properties that in normal times would be exempt from paying council tax, and which have been exempt since 27 May 2020, so the measure will not reduce the council tax income a local authority would normally receive from such properties,

### **Sustainable development**

676. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.

## **Restriction on Giving Grant to Businesses Connected to Tax Havens (Section 5 and Schedule 4, Paragraph 16 of the Coronavirus (Scotland) (No.2) Act 2020)**

### **Policy Objectives of Extending this Provision**

677. This provision ensures that businesses with certain connections to tax havens may not receive coronavirus-related grants from the Scottish Ministers. This has applied to all grants for which applications were made since 27 May 2020.

678. In order for a company to receive a coronavirus-related grant, it must not be:

- based in a tax haven<sup>21</sup>;
- the subsidiary of a company based in a tax haven;
- the parent company of a subsidiary based in a tax haven; nor
- party to an arrangement under which any of its profits are subject to the tax regime of a tax haven.

679. It is the Scottish Government's intention that this provision should be extended beyond 30 September 2021 while coronavirus-related grants can still be applied for.

### **Necessity of Extending this Provision**

680. Coronavirus-related grants will continue to be required by businesses in Scotland for some time to come. This measure is intended to ensure that businesses in Scotland contribute a fair share of tax.

681. The Scottish Government believes that it is essential that everyone pays a fair share of tax to fund the vital services and infrastructure on which are relied upon, now more than ever. Those who have chosen not to contribute their fair share should not expect to receive financial assistance and support. This measure therefore continues to be necessary.

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<sup>21</sup> "Tax havens" are as defined in the revised EU list of non-cooperative jurisdictions for tax purposes (2020/C 64/03).

## Alternative Approaches

682. The only alternative approach would be to allow the provision to expire on 30 September 2021, meaning that businesses that do not contribute their fair share of tax would be eligible to receive coronavirus-related financial assistance. The Scottish Government does not view this as a viable option.

683. No alternatives to primary legislation have been identified which would provide the desired outcome. The only alternative approach would be to allow the provision to expire on 30 September 2021. However, with no guarantee that coronavirus-related grants will not still be in use beyond this date, only an extension of the provision provides suitable flexibility to maintain the integrity of the grant-giving process.

## Consultation

684. No consultation has been carried out in relation to this provision.

**Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.**

### **Equal opportunities**

685. The Scottish Government has assessed the potential impact of extending this measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

### **Human rights**

686. The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.

## **Island communities**

687. The Scottish Government has assessed the potential impact of extending the measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

## **Local government**

688. The Scottish Government has assessed the potential impact of extending the measure on local government and has determined that no adverse effect on local government is anticipated.

## **Sustainable development**

689. The Scottish Government has assessed the potential impact of extending the measure on sustainable development and no detrimental effects are anticipated.



This document relates to the Coronavirus (Extension and Expiry) (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 18 June 2021

# Coronavirus (Extension and Expiry) (Scotland) Bill

## Policy Memorandum

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