

Coronavirus (Recovery and Reform) (Scotland) Bill

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 (Recovery and Reform) (Scotland) Bill ("the Bill") introduced in the Scottish Parliament on 25 January 2022.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 9–EN);
 - a Financial Memorandum (SP Bill 9–FM);
 - a Delegated Powers Memorandum (SP Bill 9–DPM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 9–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 Bill is to embed reforms in Scotland's public services and justice system that, though necessitated by the Covid¹ pandemic, have delivered improvements for service users and improved efficiency. The Bill will also help build resilience against future public health threats. Furthermore, the Bill will continue certain temporary justice system provisions on a longer extension basis as part of the Recover, Renew, Transform ("RRT"²) programme and as a response to the impact of Covid on Scotland's justice system, most particularly where backlogs have unavoidably built up. The provisions contained within the Bill demonstrate the Scottish Government's

¹ Covid refers to COVID-19, the disease caused by Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2)

² [Justice - vision and priorities: report - gov.scot \(www.gov.scot\)](http://www.gov.scot)

openness to making legislative reforms that can help respond to the Covid pandemic and support the country's recovery ambitions. This is a non-emergency Bill following on from a full, 12-week public consultation.

5. The Bill supports the Scottish Government's Covid Recovery Strategy 'For a fairer future'³, published on 5 October 2021 with a vision to address inequalities made worse by Covid, progressing towards a wellbeing economy, and accelerating inclusive, person-centred public services. The development of the strategy was informed by many months of open discussions involving Scotland's public, private and third sectors. The strategy highlights the work of The Citizens' Assembly of Scotland⁴, a group established in 2019 comprising of 100 citizens from across Scotland who are broadly representative of the country, as they considered the issues arising from Covid even as those were unfolding. Many of the provisions within the Bill reflect the Scottish Government's ambition to embed measures which have delivered improvements for public service users. During the Covid pandemic, barriers were quickly removed and working processes were quickly adapted. It is in the public interest to retain these improvements in the delivery of the services that people and communities need in a modern Scotland.

6. A number of the provisions contained within the Bill originate from existing temporary Covid legislation, namely:

- Coronavirus Act 2020 ("the UK Act")⁵
- Coronavirus (Scotland) Act 2020 ("the First Scottish Act")⁶
- Coronavirus (Scotland) (No.2) Act 2020 ("the Second Scottish Act")⁷

7. The Coronavirus (Extension and Expiry) (Scotland) Act 2021 ("the Extension and Expiry Act")⁸ extended, on a temporary basis, a range of provisions which have supported various aspects of the ongoing response to the Covid pandemic. Specifically, the Extension and Expiry Act amended the First and Second Scottish Acts to extend Part 1 of each of these Acts until 31 March 2022, with the potential for further extension by secondary legislation to 30 September 2022, subject to the approval of the Scottish Parliament.

8. As part of learning lessons from the Covid pandemic, the Government is committed to reviewing the impact of Covid on the Scottish statute book. In addition to extending necessary provisions, the Extension and Expiry Act also expired certain provisions within the First and Second Scottish Acts which were no longer necessary or appropriate. The Scottish Government is committed to this measured approach and will continue to consider the ongoing necessity of provisions. Further details regarding

³ [Covid Recovery Strategy: for a fairer future - gov.scot \(www.gov.scot\)](https://www.gov.scot/coronavirus-recovery-strategy-for-a-fairer-future/)

⁴ [Report of the Assembly | Citizens Assembly; Citizens' Assembly of Scotland - Doing Politics Differently report: Scottish Government response - gov.scot \(www.gov.scot\)](https://www.gov.scot/report-of-the-assembly-citizens-assembly-citizens-assembly-of-scotland-doing-politics-differently-report-scottish-government-response-gov-scot-www.gov.scot)

⁵ [Coronavirus \(Scotland\) Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2020/10/contents.html)

⁶ [Coronavirus \(Scotland\) Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2020/11/contents.html)

⁷ [Coronavirus \(Scotland\) \(No.2\) Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2020/12/contents.html)

⁸ [Coronavirus \(Extension and Expiry\) \(Scotland\) Act 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2021/1/contents.html)

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Scottish measures that have already been expired from the Coronavirus Acts can be found at Annex A of this Policy Memorandum.

9. The Scottish Government intends to introduce secondary legislation to extend provisions from existing Covid legislation which will continue to be required until September 2022, including those which feature in the Bill. In doing so, the Scottish Government maintains its commitment to expire provisions which are no longer necessary.

10. It is within this wider context of Covid legislation that the Scottish Government has developed the Bill. Certain provisions within the Bill are new and do not exist in current temporary legislation; the Scottish Government considers these provisions as complimentary to the overall purpose of the Bill.

11. The temporary justice system provisions all originate in the Scottish Acts and are proposed to come into force in Autumn 2022 initially until 30 November 2023. This can be extended by regulations, using the draft affirmative procedure, to 30 November 2024 and then finally to 30 November 2025 (a longstop date representing the Government's best estimate of when the court backlog will be cleared).

12. The temporary justice system provisions were consulted on in Chapter 4 of the consultation paper (Responding to the impact of Covid in the justice system) and paragraphs 143 and 144 of that Chapter highlighted the need for a statutory extension mechanism. In the Government's view, this mechanism should be different to the regime set out in the Scottish Acts (which contained extension periods of up to six months), since they were emergency response measures whereas the Government is now proposing longer term Covid response measures. At the point of laying any annual extension SSIs before the Scottish Parliament, the Bill requires the Scottish Ministers to lay a statement of reasons explaining why particular measures are proposed to be extended. Where temporary measures in the schedule are no longer appropriate or proportionate or for any other reason, the Scottish Ministers can terminate them earlier than they would otherwise expire under the Bill. This is consistent with the Government's longstanding commitment to expiring temporary provisions when they are no longer necessary or appropriate. In all cases, in making decisions about the continuing appropriateness and proportionality of the temporary measures in the Bill, the Scottish Government is committed to taking into account the views of those affected by them.

13. In addition to the Bill, the Scottish Government has developed further legislation related to Covid.⁹ The Carer's Allowance Supplement (Scotland) Act 2021¹⁰ received Royal Assent on 15 November 2021 and ensures that certain carers in Scotland who get carer's allowance supplement will receive an increased payment of that supplement in December 2021. The Act also contains an enabling provision that allows for a more

⁹ [Coronavirus \(Covid\) legislation - gov.scot \(www.gov.scot\)](https://www.gov.scot/coronavirus-covid-19-legislation/)

¹⁰ [Carer's Allowance Supplement \(Scotland\) Act 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

flexible approach to future payments should this be required. The Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill¹¹ was introduced to the Scottish Parliament on 15 November 2021 to support health boards' response to Covid and management of their compensation duties during the pandemic. The Scottish Government has also introduced, on 14 December 2021, the Non-Domestic Rates (Coronavirus) (Scotland) Bill¹² which aims to rule out potential reductions in rateable value, and net annual value, due to the effects of Covid, and ensure fairness to all ratepayers.

Public Health Context

14. Covid 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 temporary legislation that have been in place since March 2020 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 businesses in Scotland, and to the way public services are delivered and regulated.

15. 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'¹³ in April 2020, setting out the principles and approach for responding to the pandemic based around managing four key harms: direct health impacts of Covid; non-Covid 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.

16. The Scottish Government published 'COVID-19: Scotland's Strategic Framework' in October 2020.¹⁴ Since then, the Scottish Government has published updates in February¹⁵, June¹⁶ and November¹⁷ 2021. The decision-making process is guided by the strategic intent outlined in the framework. This was updated in June 2021 as the success of Scotland's vaccination programme allowed the country to move beyond a levels-based approach to suppressing the virus. While the initial strategic response was

¹¹ [Coronavirus \(Discretionary Compensation for Self-isolation\) \(Scotland\) Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](#)

¹² [Non-Domestic Rates \(Coronavirus\) \(Scotland\) Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](#)

¹³ [Coronavirus \(COVID-19\): framework for decision making - gov.scot \(www.gov.scot\)](#)

¹⁴ [Coronavirus \(COVID-19\): Scotland's Strategic Framework - gov.scot \(www.gov.scot\)](#)

¹⁵ [Coronavirus \(COVID-19\): Strategic Framework update - February 2021 - gov.scot \(www.gov.scot\)](#)

¹⁶ [Coronavirus \(COVID-19\): Scotland's Strategic Framework update - June 2021 - gov.scot \(www.gov.scot\)](#)

¹⁷ [Coronavirus \(COVID-19\): Scotland's Strategic Framework update - November 2021 - gov.scot \(www.gov.scot\)](#)

to “suppress the virus to the lowest possible level and keep it there”, the updated intent, taking into account the role of vaccination in reducing transmission and hospitalisation rates, was to “suppress the virus to a level consistent with alleviating its harms while we recover and rebuild for a better future.”

17. The Scottish Government will publish a new update to the Strategic Framework in the coming weeks. The purpose of this update will be to set out the approach to managing the virus in the medium to long-term, as it becomes endemic. This will involve an update to the strategic intent reflecting a move towards developing the necessary resilience in Scotland’s health and social care systems, wider public services, economy and society to deal with potential new variants of Covid or other public health threats. It will also consider how lessons learned during the pandemic can be used to benefit Scotland going forward. As in previous updates, an update will be provided on the following six tools used to combat the virus:

- The quickest practical roll-out of vaccinations, in line with advice from the Joint Committee on Vaccination and Immunisation;
- 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.

18. The emergence of the Variants of Concern Alpha and Delta increased the transmissibility of the virus, making it more challenging to effectively suppress. Public health regulations and guidance continued to mean that businesses and public authorities operated very differently to the way they had done previously. All restrictions continued to be kept under review in the event of new developments, such as the emergence of a new variant of concern, to ensure that they remained proportionate and necessary to support the ongoing public health response.

19. Omicron was designated a Variant of Concern by the World Health Organization on 26 November 2021. Scotland confirmed its first cases of the Omicron variant on 30 November 2021. The emergence of this new variant altered the epidemiology of Covid in Scotland with a sharp rise in cases observed over a matter of weeks to mid-December 2021. Early analysis of UK data indicated that Omicron was displaying a growth advantage over the previously dominant Delta variant, and a reduction in immune protection against infection. As expected in the early period of emergence of a new variant, there was insufficient data to make an assessment of immune protection against severe disease and insufficient data to assess severity.

20. Faced with a rapid rise in new infections with the potential to translate into a wave of hospitalisations and deaths, regulations were subsequently laid by the Scottish

Government in response to the emergence of the Omicron variant. These were introduced as short-term protective measures to reduce transmission.

21. New infections now appear to have peaked. In Scotland, the percentage of people testing positive for Covid decreased in the week ending 15 January 2022; and the Office of National Statistics Coronavirus Infection Survey estimates that 236,600 people in Scotland had Covid (95% credible interval: 212,000 to 263,100), equating to around 1 in 20 people.

22. Hospital admissions and overall hospital occupancy associated with Covid remains high, with 1,571 people in hospital with recently confirmed Covid as at 19 January. There is evidence that there is reduced overall risk of hospitalisation for Omicron compared to Delta – the most recent estimate of the risk of presentation to emergency care or hospital admission with Omicron was approximately half of that for Delta.

23. The UK Health Security Agency reported that vaccine effectiveness against symptomatic disease with the Omicron variant is lower compared to the Delta variant and wanes rapidly, however vaccine effectiveness against hospitalisation is high. It is likely that a combination of immunity induced by booster vaccinations, the willingness of the public to adapt their behaviour to help stem transmission, and the temporary protective measures introduced in December 2021, has helped blunt the impact of the Omicron wave.

24. This recent experience with Omicron highlights the importance of being able to rapidly introduce public health measures in an epidemiological situation with high levels of uncertainty, such as the emergence of a new Covid Variant of Concern.

Alternative Approaches

25. The Scottish Government has considered alternative approaches to the one taken by the Bill.

26. Alternative Approach A: Allow all temporary legislation to expire. The Scottish Government does not consider this to be an appropriate approach given the need to build resilience against future public health threats and maintain tangible benefits of modernisations and practices adopted during the pandemic. It would also prove problematic to allow temporary legislation related to the justice system to expire, given the impact of Covid and the backlogs that have built up.

27. Alternative Approach B: Introduce all provisions on a permanent basis or introduce all provisions on a longer extension basis. The Scottish Government considers that a more proportionate approach is required. The Scottish Government proposes that those powers that have played a particularly significant role in managing the Covid response should be available permanently on the Scottish statute book, with adjustments where appropriate, ensuring that Ministers are able to respond swiftly and

appropriately to future public health threats. The current public health protection powers are temporary and will exist only for as long as the current Covid pandemic remains a public health threat. However, it seems likely that Covid will not be the last infectious disease or public health threat Scotland will face. The provision to make public health protection powers permanent would bring Scotland in line with England and Wales, who already have these as permanent powers. Provisions which relate to public service reform should also be made permanent as they have led to modernisations in working practices that in the Scottish Government's view have benefited public service users. The temporary provisions related to the justice system should be continued on a longer extension basis as part of the RRT programme and as a response to the impact of Covid on Scotland's justice system, most particularly where backlogs have unavoidably built up. On 10 June 2021, the Scottish Parliament debated the Scottish Government's ambition to achieve a faster, fairer, and more effective Justice system for the people of Scotland, building on the progressive RRT programme in response to the Covid pandemic. Many of the measures which are possible due to the temporary provisions provided for in the First and Second Scottish Acts remain crucial to the delivery of the recovery programme and facilitate the desired managed move to a more digitalised justice sector. Continuation of many of these provisions would lend themselves well to a sustained progressive response to the pandemic which embraces the opportunity that technology provides whilst safeguarding the key principles of Scotland's justice system for users.

28. Where appropriate, consideration has been given to alternative approaches to primary legislation. The consultation paper included provisions which would allow for the entire proceedings of parole hearings to be conducted by a live link. Following the consultation and further consideration, the Scottish Government has determined that this could be achieved by secondary legislation. The Scottish Government has therefore introduced secondary legislation¹⁸ on 20 January 2022 in relation to this matter.

Consultation

29. The Scottish Government held a full 12-week public consultation on the Bill between 17 August and 9 November 2021. The consultation paper, entitled "Covid Recovery: a consultation on public health, public services and justice system reforms",¹⁹ was publicised widely and a dedicated webpage was established with supporting information.²⁰ A total of 2,905 valid consultation responses²¹ were received, of which

¹⁸ [The Parole Board \(Scotland\) Amendment Rules 2022 \(legislation.gov.uk\)](#) and [The Coronavirus \(Scotland\) Act 2020 \(Early Expiry of Provisions\) Regulations 2022 \(legislation.gov.uk\)](#)

¹⁹ [Covid recovery: a consultation on public health, public services and justice system reforms - Scottish Government - Citizen Space](#)

²⁰ [Coronavirus \(Covid\) legislation - gov.scot \(www.gov.scot\)](#)

²¹ A total of 2978 responses were received, but 73 were identified as duplicates (submitted by duplicate email addresses) and removed during data cleaning. The most recent version of each response was kept.

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2,775 were from individuals and 130 were from organisations.²² The Scottish Government has published a full consultation analysis report.²³

30. A list of the Bill provisions matched with corresponding topics from the consultation paper can be found at Annex B of this Policy Memorandum.

31. During the parliamentary process for the Extension and Expiry Act, the Deputy First Minister made a commitment to include the voices of disabled people in the consultation for the Bill, to help ensure that their human rights would be adhered to in the Bill. As part of this commitment, the Scottish Government co-hosted an online disability consultation workshop with Disability Equality Scotland on 26 October 2021 and heard from 23 people, including people with lived experience and members/representatives of disability organisations. The Scottish Government and Disability Equality Scotland worked together to produce an Easy Read resource²⁴ to help attendees better understand the consultation proposals and participate in the workshop. The Easy Read document summarised the provisions which the Government and disability stakeholders believed would be of most relevance to disabled people. Disability Equality Scotland ensured that the workshop was as accessible as possible, with BSL interpreters and remote captioning available. The viewpoints raised during the workshop were included in the full consultation analysis report and were used to support the development of an Equality Impact Assessment for the Bill.

32. All Impact Assessments for the Bill are available on the Scottish Government website,²⁵ namely:

- Equality Impact Assessment
- Fairer Scotland Duty Impact Assessment
- Island Communities Impact Assessment
- Business and Regulatory Impact Assessment
- Child Rights and Wellbeing Impact Assessment

33. The Scottish Government wrote to the UK Information Commissioner's Office ("ICO") on 10 September 2021 in relation to proposed data processing under the Bill and received a response on 23 September 2021. The ICO confirmed that the Scottish Government fulfilled its obligation under Article 36(4) of the GDPR to consult the ICO and nothing in the Bill engages their current regulatory priorities.

²² Five organisations submitted a total of 11 responses. These were all included in the analysis as they were considered to represent different views across the organisations.

²³ The consultation analysis report is linked to from this webpage - [Coronavirus \(Covid\) legislation - gov.scot \(www.gov.scot\)](#)

²⁴ [Covid recovery consultation: easy read version - gov.scot \(www.gov.scot\)](#)

²⁵ Impact Assessments for the Bill are linked to from this webpage - [Coronavirus \(Covid\) legislation - gov.scot \(www.gov.scot\)](#)

34. Following further consideration and engagement with stakeholders, certain provisions contained within the original consultation paper have been adjusted for introduction of the Bill and the Scottish Government is considering whether amendments may need to be made at Stage 2. Information regarding these changes is provided below and within the main body of the Policy Memorandum.

35. The consultation paper ended with an open question - inviting comments on any further legislative reforms that in respondents' view would support recovery. Examples of comments received in response to this question included a note from Heads of Planning Scotland recommending further digitalisation of practices. The Law Society of Scotland also provided a variety of proposals in relation to digital practice and remote working. The Scottish Government are reviewing relevant comments provided in response to the open question and will consider whether future legislation may be required.

36. The consultation also considered the appropriate length of the moratorium period against diligence. This is a period of time during which creditors are prevented from pursuing formal debt enforcement action, enabling those dealing with problem debt to seek advice and identify an appropriate solution. As a wide range of views were received, further targeted consultation will be undertaken to ensure the option chosen achieves the right balance between the interests of creditors and debtors and, insofar as possible is supported by a wide range of stakeholders. Subject to the outcome of that targeted consultation, it is anticipated that a provision on the moratorium period will be brought forward at Stage 2.

37. The Bill includes provisions related to the remote registration of births and deaths. An additional option is to make provision in the Bill in respect of a project named "Calling in the Pages". Although not included in the consultation paper, the Scottish Government considers this to be in line with the aim of improving services through modernisation. The project covers the marriage and civil partnership registers as well as the death, birth and still birth registers. The overall objective of the project is to enable digital/electronic Death Registration Forms (and register pages) to be produced in local authority registration offices. These would be signed digitally by the informant providing details of the life event and by the registrar. These digital register pages would be stored on the National Records of Scotland ("NRS") IT system until they have been checked. They would then be automatically transferred to a system for the public, NRS staff, and registrars to access. Physical copies of the register pages could still be printed as needed, where registration continues in cases of in-person registration rather than remote, and bound in a register for permanent storage at NRS. Most would be printed by NRS, rather than in local authority registration offices as is current practice. The Scottish Government considers that there may be some advantages – particularly around potential carbon savings from removing large amounts of unnecessary printing and transport of pages – in taking account of this latter project in the Bill and will consider if relevant amendments should be lodged at Stage 2.

38. In addition, further amendments may be considered at Stage 2 once the analysis of the recent consultation²⁶ undertaken by the Scottish Civil Justice Council ("SCJC") on proposed new rules covering the most appropriate mode of attendance at civil court hearings in the Court of Session and in the sheriff courts has concluded. At this stage it is unclear how that will interact and impact on the current Justice longer extension provisions around Courts and tribunals: conduct of business by electronic means etc. (Attending a court or tribunal) and Courts and tribunals: conduct of business by electronic means etc. (Documents). In addition, a report²⁷ has been published by the National Working Group, which has led the pilot of 'virtual summary trials', making recommendation for next steps, which will be considered going forward as part of the RRT programme.

Public Health Protection

Policy objectives

Modifications of the Public Health etc. (Scotland) Act 2008

39. Covid has been the most significant public health challenge Scotland has faced. It has required unprecedented action to protect the health of the people of Scotland, and the measures needed to control its spread have impacted how people lived, worked and socialised.

40. Schedule 19 of the UK Act formed the legal underpinning for many of these measures by providing Scottish Ministers with a regulation-making power for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland.

41. However, along with Northern Ireland, Scotland did not have these powers prior to the pandemic; they were therefore included in the UK Act to provide Scottish Ministers with the tools necessary to react to the Covid threat. While this did not prevent Ministers issuing important guidance in the earliest days of the pandemic, it did mean that legal requirements could not be implemented until late March when the UK Act came into force.

42. As Scotland continues to navigate its way through Covid, and looks to a future beyond it, it must be recognised that the country will face other threats, and the Scottish Government considers that it is important to be prepared even for those that cannot be foreseen. The provisions in the UK Act are due to expire in March 2022. There is potential for them to be extended via secondary legislation with the agreement of the Scottish Parliament, but there is no scope through this mechanism for the powers to be made permanent, or to extend to significant public health threats beyond Covid.

²⁶ [Consultation- Rules Covering the Mode of Attendance at Court Hearings \(scottishciviljusticecouncil.gov.uk\)](https://scottishciviljusticecouncil.gov.uk)

²⁷ [Virtual trials group report calls for domestic abuse online courts \(scotcourts.gov.uk\)](https://scotcourts.gov.uk)

43. Allowing the expiration of these powers without replacement would mean that, in the face of another public health threat, Scottish Ministers would once again need to rely on emergency primary legislation, just as they did for Covid. In doing so, valuable response time could be lost.

44. Failure to make alternative provision would also make Scotland an outlier among the UK nations – England and Wales already have permanent powers in the Public Health (Control of Disease) Act 1984 that cover general public health threats, and Northern Ireland have confirmed proposals to extend their equivalent temporary measures to September 2022; the position beyond then would be for Ministers to take after the Northern Ireland Assembly elections in May 2022.

45. While the suite of public health powers has proved resilient to the evolving nature of the pandemic, it has been stress tested to its limits. The full lessons of Covid will require time and careful consideration to be understood; however, these provisions represent a clear area where long term resilience can be strengthened immediately. These provisions therefore will not preclude further statutory changes should that prove necessary in the fullness of time, but instead have three key objectives that will help strengthen the existing system:

- to ensure that Scottish Ministers can respond quickly and flexibly to any public health threat that presents a significant risk to Scotland;
- to ensure that the Scottish Government has adequate powers to allow monitoring to detect threats at as early a stage as possible; and
- to ensure that, where emergency legislation is necessary, a consistent approach is taken to review and subsequent scrutiny.

Scope of the public health protection power

46. To ensure continuity with existing public health powers, the provisions seek to amend the Public Health etc. (Scotland) Act 2008 (“the 2008 Act”). The provisions can be broken down into three main areas. The first and most significant is provision to enable Ministers to respond to a public health threat, and to ensure important safeguards; the second is to enable the monitoring of potential threats; and the third is to ensure that the international travel regulation-making powers are updated to align with the new public health protection power.

47. As Covid has shown, the nature of a public health threat is difficult to pre-determine, and the impacts of a public health response can have enormous implications for organisations, businesses and individuals. In order to respond to future public health threats which might pose a significant harm the Scottish Ministers must, therefore, have robust and flexible powers to respond appropriately, while ensuring that meaningful safeguards are built into the regulation-making process.

48. To achieve the former, the public health protection provisions allow Scottish Ministers to make regulations in relation to infectious disease and contamination which

present or could present significant harm to human health, both in terms of specific incidences and more generally.

49. The content of any regulations laid using these new public health protection powers will depend on the nature of the threat faced; the actions required to control it; and the potential consequences of failing to mount an effective response. The power, therefore, is a broad one so as not to unduly constrain the range of potential responses. It does, however, provide for a range of potential restrictions and requirements that may be imposed, with additional safeguards where this is considered necessary. Examples of restrictions and requirements which may be imposed include, but are not limited to, limits on gatherings; a requirement that a pupil is kept away from school; a requirement that someone abstains from working/trading; or a requirement that buildings or vehicles be disinfected/decontaminated.

50. Where a public health threat is localised, for example where case numbers are small and easily managed, or where there is little risk of widespread, large scale consequences, local action will remain the default. In this regard, the 2008 Act already provides powers for local authorities and health boards to act to contain such threats, such as the power to request a sheriff court order requiring a person to undergo a medical examination or be quarantined. The 2008 Act already builds safeguards into the exercise of those powers.

51. However, in circumstances where the nature of the public health threat is such that a centrally coordinated response is considered to be appropriate, as has been the case during the Covid pandemic, the powers currently in the 2008 Act have not been sufficient to facilitate such a response. In such circumstances broader powers are needed to respond effectively to significant threats to public health. It should be noted that a centrally coordinated response should not be taken to mean that the same restrictions and requirements must apply to all parts of the country (or that there would need to be restrictions and requirements in place for the whole of Scotland). As Covid has shown, there may be circumstances where different restrictions or requirements are appropriate for different parts of the country, but still requiring to be coordinated and determined at a national level. These provisions could be exercised in such a way.

52. Finally, it should be noted that although the regulation-making powers will be used to tackle both Covid, should it still be a significant risk to public health when the Bill is enacted, and any future public health threat, it does not follow that the response to a future public health threat would be the same as the response to Covid. That is why the provisions are regulation-making powers that do not seek to predict or circumscribe the range of actions that might be required.

Safeguards

53. Although recognising the need for Ministers to have a flexible power to mount a successful response to a significant public health threat, the Scottish Government also recognises that such responses must be proportionate; subject to Parliamentary scrutiny; and offer as much notice as practicable to those affected on their potential implications.

54. These requirements underpin the general case for including these provisions in permanent legislation. Although they must, by necessity, retain the ability for Ministers to respond to an emerging threat, the provisions also allow action to be taken on a contingent basis, for example where Ministers are aware of an emerging significant risk to public health and seek to make provision outlining the planned response.

55. New sections 86B(1) and 86C(1) of the 2008 Act, as inserted by section 1 of the Bill, contain a proportionality test which must be met before any restrictions or requirements can be imposed by regulations, whether directly or indirectly. In addition to the proportionality test, regulations may not enable the imposition of special restrictions and requirements (which are listed in new section 86E) except in response to or contingent upon there being a serious and imminent threat to public health. It is worth noting that this is a higher barrier than “a significant risk to public health”, which is a condition to be met by health boards applying for a medical examination order under section 33 of the 2008 Act, or a quarantine order under section 39 of that Act.

56. What might be considered a serious and imminent threat will by necessity depend on the nature of the threat and consideration of multiple factors, including: severity of disease; transmissibility of infection; the size of the exposed population; the susceptibility of exposed population; availability of diagnostic tests, treatments, and vaccinations; and the potential impact on critical services.

57. Potential scenarios could cover a situation where an individual was likely to spread a particularly infectious disease with high human mortality to a significant number of others, or where there is an immediate risk that a particularly hazardous contaminant could be released with serious consequences for human health. Any assessment of whether the threat was serious and imminent would be done with regard to the advice of the Chief Medical Officer (“CMO”), and emerging local or global scientific advice.

58. The following special restrictions and requirements may only be contained in regulations which indirectly enable their imposition (i.e. they cannot be imposed directly by regulations, they could only be imposed by a decision taken under the regulations):

- a requirement that a person submit to medical treatment,
- a requirement that a person be removed to a hospital or other suitable establishment,
- a requirement that a person be detained in a hospital or other suitable establishment,
- a requirement that a person be kept in quarantine.

59. As a result, a decision to impose those requirements could only be taken in the most extreme circumstances where there was a serious and imminent threat to public health, and it is considered that, because of the nature of the threat and the circumstances at the time, the decision would be proportionate to the overall aim of protecting public health. It should be emphasised that a decision to impose such

requirements would only be taken where individuals did not voluntarily accept such constraints and whose actions in doing so would put the wider population at significant risk.

60. As an additional safeguard, any requirement that a person submit to a medical examination must be carried out without using invasive or intrusive procedures, unless the doctor considers that it is necessary to use such a procedure. Where the doctor considers that it is necessary to use such a procedure, the least intrusive and invasive method must be used.

61. Where regulations are made which contain any restrictions which make provision imposing (directly or indirectly) restriction or requirements on people, things or premises, the Scottish Ministers would be required to review those regulations every three weeks.

62. It should be noted that the safeguards set out above are not contained in the current schedule 19 powers. They have been added here in recognition that these powers have significant implications for individuals, and therefore must be subject to the strictest limits possible, with regular review as to their continuing necessity while still allowing for public health to be protected.

63. With regard to Parliamentary scrutiny, it should be noted that these provisions would allow the use of the made affirmative procedure to make regulations in circumstances where the Scottish Ministers consider that because of the urgency it is necessary to depart from the affirmative procedure. In such situations, the safeguards outlined above would still apply.

64. The made affirmative procedure would only be used in circumstances where there is an urgent need for action; and may be relied upon to remove restrictions or requirements no longer considered to be proportionate, as well as to impose restrictions or requirements as part of a public health response. As is the case now for regulations made under schedule 19 of the UK Act to respond to the Covid pandemic, when exercising these new powers the Scottish Ministers would consider carefully, based on the circumstances at the time, whether regulations were needed urgently, and the use of the made affirmative procedure was justified.

65. By way of example, should an incident such as the Salisbury poisoning happen in Scotland, and be as widespread as to need a strategic, centralised response, it is entirely conceivable that the Scottish Ministers would be required to act so urgently to protect public health that using the made affirmative would be appropriate. In recognition of the role of the Scottish Parliament in scrutinising measures taken using these powers, any regulations made using the made affirmative procedure will cease to have effect at the expiry of the period of 28 days, beginning with the day on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Scottish Parliament. The Scottish Ministers propose that this balances the need for parliamentary scrutiny with the potential need to

respond urgently to the serious, and time sensitive, public health threats posed by an incidence or spread of infection or contamination.

Public health monitoring measures

66. The provisions contain a power to confer functions on bodies responsible for safeguarding public health, such as local authorities, health boards and environmental health organisations, to monitor public health risks. This, too, is a general power to allow for a range of scenarios where early monitoring may be useful – for example, monitoring could cover identification of environmental changes or reported symptoms within a local population that could be the warning signs of a contaminant, or could require the reporting of symptoms potentially resulting from an as yet unknown source of infection. Its aim is to ensure that risks to public health are kept under observation to maximise the chances that threats can be detected at an early stage.

Amendments to section 94 of the 2008 Act

67. Section 94 of the 2008 Act is a wide and general power which allows the Scottish Ministers to make regulations to give effect to the International Health Regulations 2005, as well as other international agreements relating to the spread of infectious disease and contamination, so far as they have effect in or as regards Scotland. Those powers have been relied upon during the Covid response to introduce some necessary restrictions and requirements in the context of international travel.

68. In order to ensure that the new public health powers and the existing international travel powers sit together comfortably once situated in the same Act, a number of amendments to section 94 will be made alongside the insertion of the new provisions. These include provision to clarify that regulations made under section 94 may not include provision requiring persons to undergo medical treatment.

Arrangements for vaccination and immunisation

69. The Scottish Government intends to remove permanently the requirement for vaccinations and immunisations to be delivered only under the direction or control of a medical practitioner. This requirement is a barrier to the most efficient arrangement and delivery of vaccination programmes in Scotland. Removing this requirement would also bring Scotland into line with other parts of the UK.

70. The requirement was temporarily removed by the UK Act (which modified section 40 of the National Health Service (Scotland) Act 1978), allowing vaccinations and immunisations to be delivered by a much wider range of health staff. The Scottish Government wishes to retain that flexibility as the delivery of vaccination programmes continues, such as the expanded seasonal influenza programme and the rollout of Covid immunisations boosters which are on a very large scale.

71. The Scottish Government had agreed with representatives of general practice several years ahead of the pandemic that GP practices should no longer routinely be providing vaccinations and there is an ongoing programme (the Vaccination

Transformation Programme) to transfer vaccinations to health board delivery. This was intended to allow GPs to focus on what only they can do; a residual role for general medical practitioners in the vaccination programmes if the provision expires allows less of that focus.

Alternative approaches

72. The opening section of the Policy Memorandum considers the general alternative approaches to the Bill. This section considers alternative approaches with regard to certain specific provisions.

Arrangements for vaccination and immunisation

73. If the temporary modification is allowed to expire, health boards will need to revisit the arrangements they have made during the pandemic to deliver both the expanded and new programmes outlined above as well as the other routine vaccination programmes they have taken on from GP practices.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

74. An Equality Impact Assessment and Fairer Scotland Duty Impact Assessment have been published.²⁸

Modifications of the Public Health etc. (Scotland) Act 2008

75. As this section of the Bill contains only enabling powers, the provisions themselves have no immediate impact on people with protected characteristics (under the Equality Act 2010) and do not run the risk of discrimination; any such impact would come at the point of regulations being made under the powers contained in the Bill.

76. However, using Covid as an example, it is clear that there may be circumstances where a response to a public health threat could have the potential to be discriminatory. Any such impact will not be known until the regulation-making power is invoked.

77. Impact assessments are required to be produced during the regulation-making process, and so any regulations made under this enabling power will actively consider whether those provisions had the potential to be discriminatory and identify mitigating actions.

²⁸ Impact Assessments for the Bill are linked to from this webpage - [Coronavirus \(Covid\) legislation - gov.scot \(www.gov.scot\)](https://www.gov.scot/coronavirus-covid-legislation)

Arrangements for vaccination and immunisation

78. The pandemic placed GP services under considerable pressure. In addition to the constraints of having to reduce face to face appointments, maintaining physical distancing, and increased frequency of cleaning premises and equipment, GP practices also had to continue despite frequent staff absences due to infection and self-isolation. Health boards were directed by Scottish Ministers to support GP practices to deliver their contracted vaccinations where appropriate. The need for these vaccinations to have been under the direction or control of a medical practitioner would have made this harder to do when the capacity of medical practitioners was limited.

79. The seasonal influenza immunisation programme was expanded during the pandemic from adults over 65 years old or at risk to all adults over 50 years of age. Furthermore it was estimated that vaccinations would take 2 and a half times longer to deliver while maintaining physical distancing. This meant that GP practices would not have capacity to deliver the whole programme without affecting the core services they are contracted to provide. Scottish Ministers directed health boards to secure a minimum commitment from GP practices and complete the remainder of the programme themselves. The need for these vaccinations to have been under the direction or control of a medical practitioner would have made this harder to do when the capacity of medical practitioners was limited.

80. The introduction of vaccinations against Covid required further vaccinating capacity. Scottish Ministers provided terms for health boards to engage GP practices but expected most of the programme to be delivered directly by health boards. The need for these vaccinations to have been under the direction or control of a medical practitioner would have made this harder to do when the capacity of medical practitioners was limited.

81. It is considered that the impact on persons with a protected characteristic due to the policy aims of the vaccination provisions of Bill will be limited. If, and to the extent, there is any differential impact, the public health reasons justify the approach, and there is no alternative way of dealing with the public health risks as effectively.

82. Based on the data available, the Scottish Government believes that the vaccination provisions may have a positive impact on those with the protected characteristics of age or disability, compared with not introducing the provisions. This is because it is chiefly the older and vulnerable who require vaccinations or are most protected by others being immunised.

83. Vaccination programmes, which may benefit from more flexible delivery by virtue of the modification, include the pertussis programme for women who are pregnant. The vaccinations provisions will ensure this can be delivered.

Human rights

Modifications of the Public Health etc. (Scotland) Act 2008

84. These provisions provide Ministers with the powers to make regulations. While the content of these regulations may have significant impacts on the rights of individuals, this would be dependent on the content of the regulations. The numerous safeguards noted above are built into the provisions to help ensure that due consideration is given to the human rights of individuals impacted by regulations as they are developed and implemented. Furthermore, section 86D of the Bill, states that regulations made under these powers may not include provision requiring that persons undergo medical treatment (including vaccination). This type of potential interference with the Article 8 European Convention on Human Rights ("ECHR"²⁹) rights of an individual could not be legislated for in regulations made under these powers.

85. Any interference with ECHR rights which might occur as a result of public health protection regulations would need to be proportionate to the nature of the public health threat faced at the time, and would be kept under constant review. Impact assessments would also be developed and published alongside regulations which would consider the impact of any restrictions and requirements on different sectors and groups.

Arrangements for vaccination and immunisation

86. The Scottish Government has assessed the potential impact of the provisions on human rights and considers that ECHR issues do not arise. The provisions will not affect the human rights of those who are delivering vaccinations or immunisations, or of those who are receiving them. The provisions are concerned with the administration of vaccination and immunisation programmes i.e. who is supervising or managing them, not with the target groups of those programmes or measures to ensure uptake.

Island communities

87. An Island Communities Impact Assessment has been published.³⁰

88. Amongst other things the Island Communities Impact Assessment highlights that a pandemic or other public health threat might impact differently on public health communities. This is demonstrated by the differential approach at times taken to restrictions across the country during Covid, particularly in island communities. The public health protection regulation-making powers will provide this same flexibility, allowing for tailored responses where conditions allow but recognising that this may not always be possible. In particular, it is important to recognise that threats other than Covid may present a different type or scale of risk that could necessitate a consistent country-wide response.

²⁹ [European Convention on Human Rights \(coe.int\)](https://www.coe.int/en/web/european-convention-on-human-rights)

³⁰ Impact Assessments for the Bill are linked to from this webpage - [Coronavirus \(Covid\) legislation - gov.scot \(www.gov.scot\)](https://www.gov.scot/coronavirus-covid-legislation)

Local government

Modifications of the Public Health etc. (Scotland) Act 2008

89. These provisions provide Ministers with the powers to make regulations and therefore the provisions themselves will have no effect on local authorities, as specific circumstances must be met before the regulation-making powers can be enacted. Any effect on local authorities will be dependent on the content of the regulations, and these will be considered as part of the scrutiny process when any regulations are laid. As noted above – depending on the type of public health threat faced, or the scale of the threat a tailored public health response which differs across local authority areas may be possible and would be built in to considerations at the time.

Arrangements for vaccination and immunisation

90. Health & Social Care Partnerships and Integration Authorities (which bring local authorities together with health boards) have responsibility for planning for vaccinations. Removing this requirement will allow a more flexible approach for Health & Social Care Partnerships and Integration Authorities. Removing the requirement that vaccinations and immunisations be delivered under the direction or control of a medical practitioner will have more of a positive impact for local authorities where medical practitioners are in shorter supply.

Sustainable development

91. A pre-screening report was undertaken and submitted to the Strategic Environmental Assessment Gateway in December 2021 seeking views on whether the duties in the Bill would have a significant environmental effect and whether a Strategic Environmental Assessment is required. It was determined that a Strategic Environmental Assessment was not necessary and that the provisions are therefore deemed to be exempt from strategic environmental assessment under section 7(1) of the Environmental Assessment (Scotland) Act 2005.

92. It is not envisaged that the public health protection provisions in the Bill will have a detrimental effect on sustainable development or the environment. Although difficult to quantify, future regulations could have a positive effect on sustainable development and deliver environmental benefits as a result of a reduction in international travel.

Education

Policy objectives

Educational establishments etc.

93. This part of the Bill is designed to ensure that the Scottish Ministers have powers at their disposal in relation to educational establishments, to enable them to take necessary and appropriate action to protect public health and ensure the continuity of educational provision, and mitigate against some of the wider harms that can be caused

by threats to public health. These may be required, for example, in relation to the current pandemic and other circumstances where action is necessary to protect public health. These powers are subject to safeguards to ensure that they are used only when necessary, and in a proportionate manner. The provisions apply to all types of schools (i.e. public, grant-aided and independent schools), early learning and childcare settings, out of school care settings, and higher education and further education institutions.

94. The Bill places a duty on all operators of educational establishments, as well as managers of school boarding accommodation and student accommodation, to have regard to the advice of the CMO and to have regard to any guidance issued by the Scottish Ministers.

95. The Bill allows Scottish Ministers to make regulations to provide for the continuity of educational provision, during the remainder of the Covid pandemic and future pandemics or other public health emergencies.

96. The provisions also confer the power on Scottish Ministers to restrict access to, or close, boarding school and student accommodation, and to require managers of such establishments to provide support to pupils / students to comply with legal requirements placed on them or follow public health-related requests made of them. This is to restrict access to such accommodation where that is necessary and proportionate and to ensure broader welfare provision is made available, for example to those self-isolating, such as requiring providers to provide food to rooms, internet access, effective security and age-appropriate pastoral support.

97. Ministers may only make regulations under these provisions if they have had regard to any advice from the CMO in relation to the protection of public health, and they are satisfied in view of that advice that it is necessary and proportionate to do so.

School consultations

98. The effect of these provisions is to create a process by which education authorities may be relieved of the requirement to hold in-person public meetings and to make available paper copies of relevant consultation documents at council offices or other locations, in relation to consultations required under the Schools (Consultation) (Scotland) Act 2010 (“the 2010 Act”). Such provisions are needed during the remainder of the current pandemic, and in the event of a future public health emergency, where holding an in-person public meeting risks the transmission of infection and danger to public health or where paper copies cannot be provided because places are closed.

99. Under the process these amendments to the 2010 Act will establish, Ministers may only give a direction on application by an education authority, and where Ministers are satisfied that giving the direction is necessary and proportionate for or in connection with the protection of public health.

100. The current statutory requirement on education providers to hold public meetings in-person and to make available paper copies remains in place, except where a direction outlined above has been given.

Alternative approaches

101. The opening section of the Policy Memorandum considers the general alternative approaches to the Bill. This section considers alternative approaches with regard to certain specific provisions.

Educational establishments etc.

102. It would be possible to hold “in reserve” draft legislation providing for the proposed powers. Such draft legislation could be kept under review so that it could be brought into force via the emergency procedures in the Scottish Parliament’s Standing Orders in the event of a public health emergency.

103. While this approach may be feasible, it would be unusual, and it is not certain that it would be possible to introduce the draft provisions via emergency legislation with the urgency required by the circumstances of a developing public health crisis.

104. Therefore, the Scottish Government has concluded that it is important to have suitable flexible powers available to deal with a future public health emergency swiftly and decisively. Bringing forward these provisions using the normal legislative process will also allow in-depth scrutiny of the provisions following a full public consultation which would not be possible if emergency primary legislation was used instead.

105. With regard to Parliamentary scrutiny, it should be noted that these provisions would allow the use of the made affirmative procedure to make regulations. In such an event, the regulations must contain a declaration that the Scottish Ministers are of the opinion that because of the urgency it is necessary to depart from the affirmative procedure. In such situations, the safeguards outlined above would still apply.

106. It would also have been an option to replicate the approach used in the UK Act and provide for powers which are exercisable by direction. The Scottish Government has concluded that regulation-making powers are more appropriate as they provide the opportunity for further parliamentary scrutiny of the specific requirements placed upon operators of educational establishments or managers of boarding accommodation or student accommodation at any time the powers are exercised. The Scottish Government has chosen not to pursue a separate power to close educational establishments as is present in the UK Act. The provisions within the educational continuity power provide sufficient flexibility to enable appropriate action to be taken, including restricting or prohibiting access to educational establishments.

School consultations

107. It would be possible to not legislate for this change and rely on local authorities to postpone or delay school consultations until such time that it is considered safe to hold in-person public meetings or make available paper copies.

108. However, postponements of statutory consultation activity could lead to significant delays to changes to school infrastructure, many of which have long lead-in times, for example, in implementing school building projects. These delays could also have associated costs and negatively impact on the quality of educational experience of young children and school pupils.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

109. An Equality Impact Assessment and Fairer Scotland Duty Assessment have been published.

Educational establishments etc.

110. As per Modifications of the Public Health etc. (Scotland) Act 2008, this section of the Bill contains only enabling powers, the provisions themselves have no immediate impact on people with protected characteristics (under the Equality Act 2010) and do not run the risk of discrimination; any such impact would come at the point of regulations being made under the powers contained in the Bill. While it is more challenging at this stage to identify potential impacts of regulations in relation to the public health powers (as it is impossible to predict which protective measures would be required for a future public health threat), and although it is not possible to predict the nature of a future health emergency or pandemic and what effects that would have on educational provision, it is not unreasonable to assume it could involve use of restrictions similar to those used during Covid.

111. Future regulations will be capable of being used in relation to all educational establishments - all types of schools (i.e. public, grant-aided and independent schools), early learning and childcare settings, school age childcare settings, and higher education and further education institutions. Therefore, regulations could affect anyone attending an educational establishment, their families, staff that work in these establishments, and wider communities where local schools and settings are a hub for community activities. Future regulations could have various impacts, and these may be more acute for individuals with some protected characteristics. It is likely, however, that not all types of educational establishment will be affected at the same time or in the same way and this will depend on the nature of a future health emergency. The overarching purpose of the powers is to help to prevent the spread of infection and therefore those subject to its provisions will, along with wider society, benefit from this policy. The evidence that has emerged so far from the experience of the Covid pandemic is that groups such as children with Additional Support Needs, including

those with disabilities, have had to adapt to many changes throughout the course of the pandemic resulting from restrictions to in-person learning. Evidence suggests that some have found this difficult time particularly challenging while others have found benefits in remote learning, such as a release from school-generated stress.

112. Future regulations would be accompanied by an Equality Impact Assessment which will provide a more detailed assessment of the likely impacts arising at that time.

School consultations

113. As outlined under the following themes of 'Online meetings and hearings' and 'Communicating by phone or online', the use of technology to hold virtual meetings and send electronic documentation may provide enhanced access opportunities for people across multiple protected characteristics. The option to communicate digitally may help people with limited mobility who are unable to travel or encounter difficulties in doing so.

114. Digital exclusion is a significant issue to consider in relation to the increased use of technology. Lack of access to remote technology, lack of digital skills and connectivity issues may present a barrier to certain individuals.

115. However, the provisions here would only be applicable in the event of a public health emergency, where holding an in-person public meeting risks the transmission of infection and danger to public health or where paper copies cannot be provided because places are closed. The current statutory requirement on education providers to hold public meetings in-person and to make available paper copies remains in place, except where a direction outlined above has been given.

116. It will be possible to remind education authorities when approval is given for requests to hold wholly virtual public meetings of their responsibilities under the Equality Act 2010 and to take steps to ensure that those with disabilities are able to engage with such meetings. In addition, the statutory guidance (to which education authorities must have regard) that supports the Schools (Consultation) (Scotland) Act 2010 will be updated to reflect the legislative changes and will help ensure that education authorities are clear on their responsibilities towards disabled people in this regard.

117. In the event that education authorities would be relieved of the requirement to make available paper copies of relevant consultation documents at council offices or other locations, it would be the responsibility of local authorities to make alternative arrangements on request.

Human rights

Educational establishments etc.

118. These provisions have the potential to interfere with the following ECHR rights:

- Article 8 right to respect for private and family life;

- Article 11 freedom of assembly;
- Article 14 non-discrimination;
- Article 1 of Protocol 1 protection of property (“A1P1”); and
- Article 2 of Protocol 1 right to education (“A2P1”).

119. These provisions confer powers on the Scottish Ministers to make regulations. Any interference with the above rights would have to be justified, and there are safeguards in place which will ensure that that will be the case. The regulations would be in pursuit of the legitimate aims of protecting public health and safety. The Scottish Ministers will be required to have regard to the advice of the Chief Medical Officer for Scotland before exercising these powers, and Ministers must be satisfied in that context that making the regulations is a necessary and proportionate action. The use of these powers would be subject to Parliamentary scrutiny. These requirements will safeguard against the arbitrary and disproportionate exercise of these powers.

120. Furthermore, in exercising the powers conferred by these provisions, the Scottish Ministers will be required to act compatibly with the ECHR rights, and the Equality Act 2010 will continue to apply. In relation to each of the rights, when exercising the powers the Scottish Government will need to consider the extent to which the provisions would interfere with that right is justified and lawful. The Scottish Government does not consider that the provisions breach ECHR rights. The powers will be exercised on a temporary basis and for an emergency period, and in a proportionate and evidence-based way, based on the nature and severity of the public health threat.

School consultations

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

Island communities

122. An Island Communities Impact Assessment has been published.

123. Amongst other things the Island Communities Impact Assessment highlights the benefits to residents of island communities, of reducing the need for travel to and from schools consultation meetings.

Local government

Educational establishments etc.

124. The Scottish Government has assessed the potential impact of the provisions on local government and has determined that no adverse effect on local government is anticipated, though they may have a substantial impact on how local government functions are delivered where any regulations made under these powers apply to education authorities.

School consultations

125. The purpose of the amendments to the 2010 Act is to enable education authorities to meet the statutory obligations under the 2010 Act and avoid any significant delays to consultations on school infrastructure and organisation changes. This will have a positive effect for education authorities, enabling them to take forward consultations as far as possible during a future public health emergency or pandemic.

Sustainable development

126. Please see paragraph 91.

127. With regard to Educational establishments etc., depending on the nature and severity of the public health emergency in which these powers may be used, regulations made under these powers could mean that children, students and pupils may be unable to – or choose not to - travel to their normal place of study. This would have a short-term impact on local and international travel, particularly for further and higher education institutions, which have a high level of students travelling from different parts of the UK and overseas.

128. With regard to School consultations, although difficult to quantify, virtual communications would have a positive effect on sustainable development and deliver environmental benefits as a result of reduced printing and paper usage and also lower climate impact through reducing the level of travel required.

Public Service Reform

Online meetings and hearings

129. The First and Second Scottish Acts contain important, practical measures to help public services and public service users deal with the operational, service delivery challenges and wider impacts of the pandemic.

130. The Scottish Government wants to capture the good practice that has helped people during the pandemic, for example where moving to the use of technology, or improving existing digital services, has increased access to services and made them simpler and easier for service users.

131. The Covid pandemic has shone an intense spotlight on the importance of public services which are not only secure, resilient and accessible to all, but which are also able to work across organisational boundaries, adapt and scale in response to changing demands. It has increased the pace of digital adoption and innovation, as organisations and businesses in every sector of the economy have had to, almost overnight, become digital organisations. An unprecedented opportunity therefore exists to reimagine public services, and to ensure that they are designed and delivered in Scotland; are based around the lives and needs of users; and drive better outcomes for people. The Covid pandemic has shown that the public sector can act at speed to design and deliver new

services that meet the needs of users and reflect a rapidly changing environment. By utilising new services the public sector has been able to innovate, provide insights and enable effective decision-making. User-centred design specialists have supported high-profile Covid programmes and the Digital Transformation Service continues to provide products and support that help a wide range of organisations deliver services that are well designed, accessible and inclusive for the citizens of Scotland.

132. The provisions here (and under the subsequent theme of ‘Communicating by phone or online’) conform in particular to the digital principle “inclusive, ethical and user focussed” from the Scottish Government’s March 2021 Digital strategy: “A changing nation: how Scotland will thrive in a digital world”.³¹ The Digital Strategy is creating the building blocks that will enable (and support) the continuing transformation of public services into truly digital organisations and will deliver improved public services for all. Of course this will not ever be the only approach; this is about increasing access without creating barriers for those who do not want to or cannot always use digital means.

Policy objectives

Bankruptcy: remote meetings of creditors

133. This provision provides 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. This provision was introduced on a temporary basis in response to the Covid pandemic to deal with the impact of physical distancing. The temporary reform has led to greater efficiency in process and there is now broad consensus that this measure should be introduced on a permanent basis. The measure has proved to be a sensible modernising change to bankruptcy administration.

Civic licensing: how hearings may be held

134. The Civic Government (Scotland) Act 1982 (“the 1982 Act”) confers functions on licensing authorities and local authorities in relation to the regulatory regimes set out, respectively, in Parts II and III of the 1982 Act. Part II concerns the licensing of various activities such as taxi and private hire cars, public entertainment and knife dealers. Part III concerns the control of sex shops and the licensing of sexual entertainment venues. The licensing authority for an area is the local authority for that area.

135. The First Scottish Act made a number of temporary modifications to the 1982 Act. The purpose of these modifications is to provide licensing authorities and local authorities with a degree of flexibility and discretion in terms of meeting strict deadlines set out in the legislation to enable the licensing regime to function effectively during the pandemic.

136. Under the 1982 Act, before reaching a final decision on an application for a grant or renewal of a licence, a licensing authority may give the applicant and a person who

³¹ [A changing nation: how Scotland will thrive in a digital world - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/a-changing-nation-how-scotland-will-thrive-in-a-digital-world/)

has made a relevant objection or representation an opportunity to be heard. There are a number of other instances whereby a change may be made to a licence – either at the instigation of the applicant (e.g. variation of a licence) or by the licensing authority (e.g. revocation of a licence) which necessitates certain parties being given the opportunity to be heard.

137. The modifications made by the First Scottish Act include that licensing authorities and local authorities can, for a reason relating to Covid, exercise discretion to not hold in person hearings and to instead provide alternatives for persons to be heard by remote means. This was in response to the pandemic and the difficulties faced by authorities in holding in person hearings. As Scotland moves through the pandemic it has become clear that this particular discretion for licensing authorities may have value in general and not just during a public health emergency.

138. The Scottish Government wishes licensing authorities to have the flexibility to exercise their discretion to be able to hold remote hearings where they consider it appropriate. These provisions will amend the 1982 Act to provide that licensing authorities may determine that a hearing under the 1982 Act is to be held in person, wholly through the use of remote facilities, or partly in person and partly through the use of remote facilities (a “hybrid” format). The policy intent is that remote hearings are hearings with live participation (for example by telephone conference or video conference) by licensing authority members, applicants and objectors and others entitled to speak at a hearing. The provisions do not require that a hearing is held remotely but make clear that authorities have the option as to whether a hearing is held in person, remotely or in a hybrid format.

139. Enabling licensing authorities to hold remote hearings can offer efficiencies to all parties, both from a time and environmental perspective, by avoiding the need to travel to licensing authority premises for what may be a very short hearing. During the winter months, travel within rural local authority areas can prove difficult and thus the ability to hold remote hearings avoids the need for all parties to travel long distances in potentially treacherous conditions and reduces the potential for licensing authorities having to reschedule hearings.

140. While the above refers to licensing authorities, the points made apply equally in respect of local authority functions under Part III of the 1982 Act and the amendment of Part III and schedule 2 of that Act.

141. The Scottish Government considers that this provision will assist the civic government licensing regime to operate in an efficient and effective manner.

Alcohol licensing: how hearings may be held

142. The Licensing (Scotland) Act 2005 (“the 2005 Act”) contains provision for the licensing of the sale of alcohol. There are three types of licences: premises licence, personal licence and occasional licences. Licences are granted by the licensing board(s) for their council area (although some council areas are divided into licensing

divisions, with a board for each division area). Licensing boards are independent bodies, separate from local government but with a close relationship: members of boards are local authority councillors and local authorities provide material support, such as staff and facilities. In addition to considering applications for the grant of a licence, licensing boards also hold hearings to deal with other matters such as reviews of licences, variations of licences or licence renewal applications.

143. The First Scottish Act made a number of temporary modifications to the 2005 Act. The purpose of these modifications is to provide licensing boards with a degree of flexibility and discretion in terms of meeting strict deadlines set out in the legislation to enable the licensing regime to function effectively during the pandemic. All but one of those modifications are still in place. By virtue of the Extension and Expiry Act, the temporary modification which allowed for licensing board meetings to be held in private for a reason relating to Covid expired on 30 September 2021.

144. The modifications made by the First Scottish Act include that licensing boards can, for a reason relating to Covid, exercise discretion to not hold in person hearings and to instead provide alternatives for persons to be heard by remote means. This was in response to the pandemic and the difficulties faced by licensing boards in holding in person hearings. As Scotland moves through the pandemic it has become clear that this particular discretion for licensing boards may have value in general and not just during a public health emergency.

145. The Scottish Government wishes licensing boards to have the flexibility to exercise their discretion to be able to hold remote hearings where they consider it appropriate. These provisions will amend the 2005 Act to provide that a licensing board may determine that a hearing is to be held in person, wholly through the use of remote facilities or partly in person and partly through the use of remote facilities (a “hybrid” format). The policy intent is that remote hearings are hearings with live/real time participation (for example by telephone conference or video conference) by board members, applicants and objectors and others entitled to formally speak at a hearing. The provisions do not require that a hearing is held remotely but make clear that boards have the option as to whether a hearing is held in person, remotely or in a hybrid format. Similar provision is made in respect of meetings of licensing boards.

146. Hearings of licensing boards are held at meetings of the board. The 2005 Act requires that board meetings are held in public. The policy intention is that, where a licensing board meeting is held remotely or partly remotely, then licensing boards should facilitate members of the public being able to observe the proceedings through the use of remote facilities such as making a web-link to the meeting publicly available.

147. Enabling licensing boards to hold remote hearings can offer efficiencies, both from a time and environmental perspective, by avoiding the need for applicants and their legal agents having to travel to licensing board premises for what may be a very short hearing. During the winter months, travel to / within rural licensing board areas can prove difficult for applicants, their legal agents and licensing board members. Licensing boards being able to hold remote hearings means that meetings do not have to be

rescheduled due to adverse weather conditions and the licensing regime is able to continue function in the most efficient and effective manner.

Requirements of writing: Disapplication of physical presence requirements

148. This provision will allow Scottish notaries public, solicitors or advocates to provide specific legal services such as the taking or administering of oaths, affirmations or declarations, and the execution of certain documents, without being in the physical presence of those seeking such legal services.

149. This is a departure from the position prior to the Second Scottish Act where such legal services needed to be carried out by legal professionals in the physical presence of those requiring those services.

150. This provision creates the opportunity for Scottish notaries public, solicitors and advocates, while still being guided by their professional bodies, to adopt alternative appropriate means of executing documents and taking oaths etc., for example notaries may now execute certain documents remotely, for example by way of live video connection.

151. It is the Scottish Government's view that this provision will allow greater access, convenience, and flexibility to those who may require such legal services, whilst also facilitating a move to a more digitalised and efficient justice sector.

Custody at police stations: Custody officers' functions

152. These provisions enable the Scottish Ministers to make arrangements for Prisoner Custody Officers ("PCOs") to carry out their functions within police stations. In doing so, this allows PCOs to attend to the general welfare of prisoners and to facilitate their appearance before a court by electronic means while in police custody. While these provisions allow for arrangements to be made to facilitate the appearance of a prisoner before court they do not enable or mandate the use of these online hearings; instead, this change allows additional resources to be made available to support these hearings in a safe and accessible manner.

153. PCOs 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, setting up solicitor consultations, the movement of prisoners between cells and the virtual court room, attending to wellbeing, and the release or transfer to prison after the hearing.

154. It is the Scottish Government's intention that these provisions should be made permanent in order that the justice system can continue to operate and transform to meet the needs and requirements of the 21st century.

155. The Scottish Government has worked closely with Police Scotland and the Scottish Prison Service ("SPS") to put these measures in place. These arrangements

allow PCOs to support police officers and court staff in the administration of virtual custody courts. This support reduces the requirement for the transport of detained persons for custody courts and the amount of physical hearings within the court estate; this additional capacity allows the justice system to prioritise courts for the use of evidence-led trials.

156. The use and support of trained PCOs within police stations is also vital to allow the usual duties of police officers and civilian staff to be protected; the expiry of these provisions would place additional burden on front line officers and other police staff to service and maintain the remote custody centres as they are continued.

Consultation

157. The opening section of the Policy Memorandum outlines the overall consultation process for the Bill. This section highlights further consultation activity with regard to certain specific provisions.

Bankruptcy: remote meetings of creditors

158. In addition to the formal consultation, Accountant in Bankruptcy has been taking forward other targeted consultation and focussed work, including stakeholder-led working groups undertaking a wider policy review of statutory debt solutions³² operating in Scotland. The targeted consultation has shown strong support for the modernising reforms to the insolvency process in terms of virtual meetings of creditors.

Custody at police stations: Custody officers' functions

159. Throughout the development of these provisions policy officials have actively engaged with key stakeholders to assess the impact of related measures and to inform next steps. This has included engagement through the RRT programme and its workstreams, including for example the work on the introduction of remote jury centres and custody courts. Criminal justice stakeholders have continued to call for these provisions to allow them to work in new ways to recover and transform beyond the pandemic into ways that are fit for the 21st century. However, some stakeholders have asked for a fuller consideration on the impact of those workers outside the immediate criminal justice sector. For example, this work has highlighted that a small number of local authorities have faced new challenges around the availability of Criminal Justice Social Work within some virtual hubs. The Scottish Government will work with criminal justice partners, such as Police Scotland and the Scottish Courts and Tribunals Service ("SCTS"), in their engagement with other service providers, such as local authorities and health boards, to ensure the support needs of custody prisoners are met.

³² [Wider review - stage 2 | Accountant in Bankruptcy \(aib.gov.uk\)](https://www.aib.gov.uk)

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

160. An Equality Impact Assessment and Fairer Scotland Duty Assessment have been published.

161. The provisions may provide enhanced access opportunities for people across multiple protected characteristics. The option to communicate digitally may help people with limited mobility who are unable to travel or encounter difficulties in doing so.

162. Digital exclusion is a significant issue to consider in relation to the increased use of technology for participation in meetings and hearings. Lack of access to remote technology, lack of digital skills and connectivity issues may present a barrier to participation. However, it is important to note that none of the provisions make virtual meetings and hearings the only option available.

163. It is the responsibility of the service providers to ensure that these virtual meetings and hearings are conducted in a manner that meets the accessibility requirements of attendees. This includes making appropriate adjustments for those who may have particular needs (for example, BSL interpretation services and use of subtitles).

Human rights

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

165. With regard to Civic licensing: how hearings may be held and Alcohol licensing: how hearings may be held, to the extent that decision making by, and proceedings before, licensing boards and licensing authorities (or, as the case may be, local authorities) 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 build more flexibility into the licensing regime as to the format of hearings but do not remove the need for a hearing to take place when one is required, nor do they remove the requirements in the 1982 Act for relevant persons to be given the opportunity to be heard. It also remains possible for decisions of licensing boards and licensing authorities to be appealed and for judicial review proceedings to be taken.

166. With regard to Custody at police stations: Custody officers' functions, detention in a police station following arrest 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 this. The provisions only change the location in which PCOs can carry out their functions. PCOs exercise functions of a public nature and must act compatibility with the ECHR.

The functions which they perform in relation to virtual courts correspond to those they have long performed in relation to physical court appearances. The fundamental principle around access to justice has been applied when considering the development of these provisions and the impact on all court users of delays in proceedings if remote custody courts are not supported by PCOs.

Island communities

167. An Island Communities Impact Assessment has been published.

168. Amongst other things the Island Communities Impact Assessment highlights the benefits to residents of island communities, or professionals serving island communities, of reducing the need for travel to and from the mainland for meetings or hearings. It is important to note that none of the provisions make virtual meetings and hearings the only option available.

Local government

169. The Scottish Government has assessed the potential impact of the provisions on local government and has determined that no adverse effect on local government is anticipated with regard to the majority of the provisions.

170. With regard to Bankruptcy: remote meetings of creditors, the reductions in administration costs in bankruptcy proceedings through the facility for virtual meetings in favour of physical meetings may deliver an increase in the funds ultimately payable to local authorities.

171. With regard to Civic licensing: how hearings may be held and Alcohol licensing: how hearings may be held, the provisions do not require that a hearing is held via remote means but give flexibility to authorities as to the format of the hearing. Licensing board members (local councillors), clerks to the licensing boards and licensing authority staff have welcomed this increased flexibility. More specifically licensing boards in more rural areas welcome the flexibility of being able to hold remote hearings during the winter months where travel may be impractical.

172. With regard to Requirements of writing: Disapplication of physical presence requirements, a number of local authorities were supportive of the provisions in their consultation responses. Argyll and Bute Council commented: "There is an increased use of Affidavits in legal proceedings in which the Council is involved and it has proved particularly beneficial, both in terms of convenience, time and efficiency, to be able to finalise these through remote means."

173. With regard to Custody at police stations: Custody officers' functions, the Scottish Government has considered the responses from local government. It is understood from some areas that the use of remote custody courts may have some adverse effect on the ability of social workers and other support workers to participate in remote custody

centres; however, other areas identified the ability to work more digitally, and reduce travel to court, as a positive move. The Scottish Government and its partners will continue to work with local government to better understand the impacts of providing remote social work provision and how this can be improved through better access and planning. It should be noted that the availability of PCOs to support remote custody centred would be a benefit to enabling access to detained persons. As noted, the expiry of these provisions would place additional burden on police staff and other justice workers to facilitate remote custodies.

Sustainable development

174. Please see paragraph 91.

175. Although difficult to quantify, the provisions here (and under the subsequent theme of 'Communicating by phone or online') will have a positive effect on sustainable development and deliver environmental benefits as a result of reduced printing and paper usage and also lower climate impact through reducing the level of travel required. All of the provisions to enable online meetings and hearings / communicating by phone or online support the Scottish Government's commitment to achieve a 20 per cent reduction in car kilometres by 2030.³³

Communicating by phone or online

176. As outlined under the previous theme ('Online meetings and hearings'), the Scottish Government wants to capture the good practice that has helped people during the pandemic, for example where moving to improved digital services, or the use of technology, has increased access to services and made them simpler and easier for service users.

177. The provisions within this theme would enable a range of important information to be shared electronically or over the phone.

Policy objectives

Bankruptcy: service of documents

178. The provision provides for greater use of technology in bankruptcy procedures by permitting documents required during bankruptcy administration to be transmitted to a person electronically. This provision was introduced on a temporary basis in response to the Covid pandemic to deal with the impact of physical distancing. The temporary reform has led to greater efficiency in process and there is now broad consensus that

³³ [A route map to achieve a 20 per cent reduction in car kilometres by 2030 \(transport.gov.scot\)](https://www.transport.gov.scot)

this measure should be introduced on a permanent basis. The measure has proved to be a sensible modernising change to bankruptcy administration.

Registration of births

179. Birth registration is carried out by local authority registrars, under the direction of the Registrar General for Scotland (“Registrar General”) at NRS, a non-ministerial department of the Scottish Government.

180. Prior to the Covid pandemic, under existing registration law an informant (e.g. a parent) would need to attend the local authority registration office in person to register a birth.

181. As a result of the Covid pandemic and the need to reduce unnecessary mixing, the process for birth registration has changed. Someone wishing to register the birth of a child contacts a registrar for an appointment, as normal.

182. The registrar then arranges a phone conversation with the informant and takes as much of the information required as possible down remotely, by phone. The registrar uses the information provided to complete the required form. The informant(s) still have to attend the registration office to sign the form and attest that the information provided is correct. This procedure significantly reduces the time the informant(s) spend in the registration office compared to the standard in-person birth registration appointment.

183. The intention is that in future it will be possible across Scotland to register a live birth remotely or by in-person attendance at a registration office. Under remote birth registration, the informant/s would contact the registrar by either email or phone. The registrar will arrange a convenient time to call the informant. During the phone call the registrar will obtain the required information. The information required would be the same as the information required when a birth is being registered in person.

184. If the informant is a mother who is not married or in a civil partnership and wishes to jointly register the birth of their child with either the father of the child or a second female parent, the father or second female parent would need to be present with the mother for the phone call and participate in it, as required.

185. It is already the case that both parents may not be present when joint birth registration takes place: for example, one of the parents may be ill or working overseas. In these cases, there is existing provision on the use of declarations by the mother and the father/second female parent, and these can enable the birth to be registered jointly. The intention is that this ability to submit declarations should continue if the registration is by a remote means. If both parents are unable to be present for a joint birth registration, and are not married or in a civil partnership with each other, the registrar may ask the informant to provide the declarations to confirm that the registration is joint.

186. On completion of the phone call the registrar would email a copy of the draft register page to the informant(s), where the informant is comfortable using that

technology. The informant (and second parent if applicable) would need to sign to attest that they are content the information provided is correct.

187. If the informant or the second parent (if applicable) does not have access to email, or is otherwise uncomfortable with such technology, it is envisaged that the registrar would read back each data field containing the information verbally for checking, before inserting a transcribed signature on behalf of the informant(s), once the accuracy of the information has been agreed. In some rare instances it may still be necessary for a physical copy of the information to be posted to the informant(s) for checking, but once this check has occurred a second phone call with the informant could confirm its accuracy and a transcribed signature then be applied.

188. Local authorities will, after formal consultation with the Registrar General, configure future services in the way which best meets local needs.

189. For example, rural authorities, including the island authorities, may wish to encourage remote registration, with in-person registration happening as needed. Urban authorities, by contrast, may wish to return to primarily delivering in-person registration with remote registration happening on occasions as necessary. In all cases, authorities would be expected to make appropriate provision to deliver the service to informants who need to use one or other model of delivery (for instance an informant with a disability necessitating their use of an in-person interpreter or other physical support).

190. Jointly registering a birth is the principal means by which fathers and second female parents who are not married or in a civil partnership with the mother can be recognised as a child's legal parent.

191. In addition, jointly registering the birth of a child is the most frequently used way for fathers and second female parents who are not married or in a civil partnership with the mother to obtain parental responsibilities and rights.

192. When the option of remote birth registration is introduced, the intention is to retain the right of the mother, if the father or second female parent is not married or in a civil partnership with her, to act as sole informant to the birth if she so wishes.

193. Informants providing information so a birth can be registered may need to provide relevant documents (e.g. if the parents are married or in a civil partnership, it may be helpful to provide the registrar with the relevant extract from the marriage or civil partnership – the marriage or civil partnership certificate). The intention is that any "relevant document" may be given or delivered by any electronic or other means.

194. There are no current provisions in Covid legislation on the remote registration of live births. Therefore, this is a new provision although it builds on the existing administrative practice used during the pandemic, as outlined above, and on practice in relation to parallel remote registration of deaths and still-births.

Registration of deaths

195. Death registration is carried out by local authority registrars, under the direction of the Registrar General at NRS.

196. Prior to the Covid pandemic, under registration law an informant (e.g. a parent) would need to attend the local authority registration office in person to register a death or still-birth.

197. As a result of the Covid pandemic and the need to reduce unnecessary Covid exposure, the process for death and still-birth registration was changed through incorporation of provisions allowing remote registration of these life events in the UK Act.

198. Informants contact the registrar as normal to arrange a registration appointment. The registrar then arranges a phone conversation to take as much of the information required as possible down remotely, by phone. The registrar uses the information provided to complete the required form, which is checked over for accuracy by the informant remotely (either by receipt of a copy over e-mail, by the registrar reading back the information over the phone or occasionally by return of a posted copy).

199. The informant's signature attesting to the accuracy of the information recorded is then usually applied as a transcribed signature to the death or still-birth register page, and the informant is issued an extract by post, as well as the Form 14 (the official NRS form confirming completion of death or still-birth registration, without which burial or cremation cannot proceed), usually by e-mail. The Form 14 can also be sent electronically to funeral directors, cremation and burial authorities, and so on. This fully remote procedure eliminates the need for informants to spend any time physically present in the registration office.

200. The intention is that in future it will be possible across Scotland to register a death by fully remote means, or by in-person attendance at a registration office, as required (for instance where an informant has a disability and requires an interpreter or other physical support). The information required is the same in both cases. In addition, in order to facilitate this process it is intended that transmission of documents relating to the registration of a death will be possible by electronic or other means, and that in order to assist families at a very challenging time, funeral directors (if requested and consenting to undertake this duty) will be able to provide the particulars of a death to the local authority registrar.

201. Local authorities will, after formal consultation with the Registrar General, configure future services in the way which best meets local needs.

202. More rural authorities, including island authorities, may wish to encourage remote registration, with in-person registration provided as needed. More centralised urban authorities, by contrast, may wish to return to primarily delivering in-person registration, with remote registration provided as necessary. In all cases, authorities

would be expected to make appropriate provision to deliver the service to informants who need to use one or other model of delivery (for instance an informant with a disability, as noted).

203. There are current provisions in Covid legislation for the remote registration of deaths and still-births. These provisions will allow local authorities to exercise the choice of how best to configure local services (in consultation with the Registrar General) between in-person registration and remote registration as a permanent option, replacing any temporary provision allowed for in Covid legislation.

Civic licensing: how notices may be published

204. In relation to Part II licences, the 1982 Act provides that licensing authorities must give public notice of certain applications that are made to them and may give public notice in other cases. For example, a licensing authority must give public notice of every application for a knife dealers licence made to it and may decide to give public notice in the case of an application for a second hand dealer licence made to it. Public notice must be given via publication of a notice in newspaper, or newspapers, circulating in the area of the authority.

205. The First Scottish Act modified the 1982 Act to enable licensing authorities to choose whether to give public notice of Part II licence applications through the publication of a notice in a newspaper, or newspapers, circulating in their licensing area or instead by publishing such a notice on their website.

206. In relation to Part III licences, the public notice requirements depend on whether the licence relates to a sex shop or to a sexual entertainment venue. In the case of a sex shop licence application it is the applicant who is required to give notice of the application. Public notice of the licence application is achieved by publishing an advertisement in a newspaper specified by the local authority and the applicant must send a copy of the advertisement to the local authority. In the case of sexual entertainment venue licence applications, the process is similar except that the local authority, if it considers appropriate, may dispense with the requirement placed on the applicant to publish an advertisement in a newspaper and may instead publish notice of the advert electronically.

207. The First Scottish Act modified the 1982 Act to enable an applicant for the grant or renewal of a Part III licence to give public notice of the application either by publishing an advertisement in a newspaper specified by the local authority or by publishing an advertisement on the local authority's website.

208. The provisions here replicate the effect of the temporary modifications. The policy intention is to continue to provide licensing authorities / local authorities (in relation to Part II licences) and applicants (in relation to Part III licences) with a degree of flexibility in terms of how they choose to give public notice of a licence application. The options being publication of a notice on an authority's website or publication of a notice in a newspaper or newspapers circulating in the area of the authority. The option to publish

notification of a relevant licence application online could result in cost savings for the applicant as placing newspaper advertisements can run to several hundreds of pounds. Additionally, there can be timing difficulties in placing an advertisement in a newspaper as the edition the advertisement appears in is dependent on space being available.

209. The Scottish Government considers that this provision will assist the civic government licensing regime to operate in an efficient and effective manner.

Land registration

210. These provisions will continue to enable registration in three of the registers under the management and control of the Keeper of the Registers, including the Land Register, allowing it to proceed through copies of traditional documents being submitted to the Keeper electronically. This allows for a safer, faster and more reliable way to transmit applications, providing applicants with greater flexibility with regard to their place of work.

211. These provisions have ensured that Registers of Scotland (“RoS”) were able to operate effectively throughout the disruption caused by the Covid pandemic, and will provide similar resilience in the case of future disruption. Against a backdrop of continuing public health guidance, they enable the property market to continue to function fully, allow creditors to safeguard their position without debtors being able to transact with heritable property, and allow debtors to discharge responsibilities on time.

212. In addition to the increased operational resilience provided by the provisions, the ability to submit applications digitally has proven extremely popular with customers, providing a safer, faster and more reliable way of transmitting applications, whilst also allowing applicants to work from a location which suits them best. This is well-aligned with the changes in the way people are likely to work in the future following the pandemic.

213. Digital submissions have also led to positive impacts on RoS’ environmental footprint. As a predominately paper-based organisation previously using over approx. 4 million sheets of paper per year, these provisions allowed RoS to operate digitally throughout the pandemic and led to an 84% reduction in their paper use.

214. The impact of the Covid pandemic has accelerated existing RoS plans for fully digital registration and transitioning customers to digital services will serve as a useful stepping stone towards this goal. To ensure the momentum provided by this transition to digital registration is not lost, the provisions in this Bill will be accompanied by regulations³⁴ which will make digital submission of applications to the Land Register and Register of Sasines the default method of submission, subject to limited exceptions.

³⁴ [The Registers of Scotland \(Digital Registration, etc.\) Regulations 2022 \(legislation.gov.uk\)](#)

Freedom of information: giving notice electronically

215. This provision gives the Scottish Information Commissioner and Scottish public authorities the option to issue formal notices under the Freedom of Information (Scotland) Act 2002 (“FOISA”) electronically. Prior to the First Scottish Act, FOISA provided that these notices required to be delivered or posted to the recipient (section 74(1)(a) of FOISA).

216. The Scottish Government considers that allowing greater flexibility in the way that formal notices can be issued has been positive. It means that authorities can tailor their communications to requesters’ preferences more closely, by providing electronic notices to requesters who choose to communicate electronically. The provision ensures that authorities retain the option to issue notices by post, for example where a requester chooses to communicate by post or where electronic communications are unsuccessful.

Care services: giving of notices by SCSWIS

217. The purpose of this provision is to ensure that Social Care and Social Work Improvement Scotland (SCSWIS – the “Care Inspectorate”) can continue to issue formal notices to care service providers by electronic means, in addition to physical means, on a permanent basis. Further aims of this provision are to improve certainty of delivery and ensure that physical delivery of formal notices by the Care Inspectorate to corporate bodies can continue to be delivered on a wider range of persons acting on such body’s behalf. Formal notices include those relating to registration, variation of conditions of registration and enforcement action.

218. At present, these powers are provided on a temporary basis under the Second Scottish Act. This temporarily amended the Public Services Reform (Scotland) Act 2010 in order to create more flexibility in relation to the giving of notices as a consequence of the Covid pandemic.

219. Temporary powers enabling the electronic sending of formal notices have enabled the Care Inspectorate to issue notices safely and quickly throughout the pandemic and have allowed a practical approach to be adopted where its offices have been closed, staff have been unable to access physical documents and where the postal service has been affected due to the pandemic.

220. These powers have also enabled electronic notices to be deemed received on the day they are sent (unless the contrary is shown). Increased certainty over the date of deemed receipt remains essential since this date often triggers the beginning of statutory time periods within which, for example, written representations must be lodged with the Care Inspectorate or appeals made to the sheriff court.

221. The temporary powers also expand the list of persons to whom a physical notice may be delivered on behalf of a corporate body. Where a person providing, or seeking to provide, a care service is a body corporate, a physical notice may be delivered 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. This provision continues to be useful

and allows more reliable and more timely delivery of a notice where, for example, the office holders are not physically on the care service premises at the time of attempted delivery.

222. The Care Inspectorate have found the temporary provisions to be extremely useful and are in favour of retaining these. Since the commencement of the temporary provisions, it has used the power to issue electronic notices in relation to more than 4,000 matters.

223. Without the power to issue notices by electronic means, the ability of the Care Inspectorate to continue giving notices in the safest, quickest and most secure way is greatly affected. If physical notices were to once again become the only option for delivery, delays to enforcement action will likely increase. Should a service not be quickly and reliably informed of the necessary requirements to make to improve its quality of care, the health, safety and wellbeing of service users may ultimately be put at risk. Where the challenges of the pandemic continue or any similar future situation arises, the ability to issue electronic notices will also ensure continuity of service where physical delivery is problematic.

224. There is an opportunity to modernise the way in which the Care Inspectorate is permitted to give formal notices and bring its practices into line with other similar regulators in the UK. Having the ability and choice to issue notices either by personal delivery, post, or electronic means, depending on the circumstance, makes sense. Although there may be occasions in future when notices must still be issued by post, this is an issue which cannot realistically be eliminated. In any case, this represents a very small percentage of the formal notices issued.

Alternative approaches

225. The opening section of the Policy Memorandum considers the general alternative approaches to the Bill. This section considers alternative approaches with regard to certain specific provisions.

Registration of births

226. An alternative approach would be to use provision resulting from amendments made by the Local Electoral Administration and Registration Services (Scotland) Act 2006 ("the 2006 Act").³⁵ The amendments made by the 2006 Act include that one way in which births could be registered is by "submitting to the registrar by a prescribed means a birth registration form concerning the birth which has been completed by the person and attested by him in the prescribed manner". The 2006 Act amendments have not yet been fully implemented.

³⁵ [Local Electoral Administration and Registration Services \(Scotland\) Act 2006 \(legislation.gov.uk\)](#)

227. The procedure envisaged by the 2006 Act would involve the informant (e.g. a parent) directly providing the birth registration form by suitable electronic or online means so the birth could be registered. That is not what is envisaged now. What is envisaged now is that the informant would still provide the information to the registrar and the registrar would then make an entry in the birth register. The procedure envisaged by the 2006 Act would mean that the informant could directly register the birth, albeit quality assurance checks would still be carried out. It will be a number of years before significant IT and other procedural changes could be made to facilitate this type of process. Therefore, this is not the preferred option for this Bill.

Consultation

228. The opening section of the Policy Memorandum outlines the overall consultation process for the Bill. This section highlights further consultation activity with regard to certain specific provisions.

Bankruptcy: service of documents

229. In addition to the formal consultation, Accountant in Bankruptcy has been taking forward other targeted consultation and focussed work, including stakeholder-led working groups undertaking a wider policy review of statutory debt solutions³⁶ operating in Scotland. The targeted consultation has shown strong support for the modernising reforms to the insolvency process in terms of electronic delivery of documents.

Civic licensing: how notices may be published

230. The provisions outlined above in relation to the public notification of Part II and Part III license applications did not form part of the main formal consultation mentioned above. During the consultation process, this relatively minor matter was raised by licensing authority staff and, given the benefits for both licensing authority staff and potential applicants, the Scottish Government felt it appropriate to include this minor provision within the Bill. Targeted consultation by the Scottish Government with a number of licensing authority staff indicated that they would welcome the Bill replicating the effect of the modifications made by the First Scottish Act to the 1982 Act provisions around the public notification of certain Part II and Part III licence applications: the general consensus being that having the option to make public notification through the relevant website could benefit all parties.

Land registration

231. The provisions outlined above in relation to RoS did not form part of the main consultation. As mentioned in the main consultation paper, the reasoning behind this was that RoS, on behalf of Scottish Ministers, ran a public consultation on digital submission between 22nd December 2020 and 1st February 2021,³⁷ prior to the main

³⁶ [Wider review - stage 2 | Accountant in Bankruptcy \(aib.gov.uk\)](#)

³⁷ <https://www.ros.gov.uk/about/publications/consultations-and-surveys/2020/digital-submissions-2020>

consultation. This consultation has been reported on as part of the statutory two-monthly reporting cycle to Parliament during the period the emergency Acts have been in force,³⁸ and has informed the decision to bring forward measures to place these provisions on a permanent statutory footing.

232. The consultation received 223 responses from key stakeholders, and provided clear evidence of the popularity and continuing need for digital submission; some 93% of responses to the consultation as a whole were positive, with 97% of respondents exhibiting a view that the emergency provisions should be retained.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

233. An Equality Impact Assessment and Fairer Scotland Duty Assessment have been published.

234. As per the provisions under the previous theme ('Online meetings and hearings'), the provisions here relating to communication by phone or online may provide enhanced access opportunities for people across multiple protected characteristics. The option to communicate digitally may help people with limited mobility who are unable to travel or encounter difficulties in doing so.

235. Digital exclusion is a significant issue to consider in relation to the increased use of technology for the transfer of information. Lack of access to remote technology, lack of digital skills and connectivity issues may present a barrier to electronic communication.

236. Similarly, communication by phone may create issues for people across multiple protected characteristics. For example, certain disabled people, certain older people and those who are not fluent in English may not be able to participate in a conversation by phone.

237. However, it is important to note that the provisions will not remove the option of traditional means of communication. Service providers will be able to adapt communication methods to users' preferences. For example, with regard to Freedom of information: giving notice electronically, authorities retain the option to issue notices by post, such as where a requester chooses to communicate by post or where electronic communications are unsuccessful.

³⁸ The reports referred to are available from this page [Coronavirus \(Covid\) legislation - gov.scot \(www.gov.scot\)](https://www.gov.scot/coronavirus-covid-legislation)

238. It is the responsibility of service providers to ensure that information provided by phone or online is accessible.

Registration of births

239. There may be an impact on victims of domestic abuse as a perpetrator of domestic abuse may seek to force the victim to jointly register the birth of a child and therefore give them parental responsibilities and rights. Statistics³⁹ show that around four out of every five incidents of domestic abuse had a female victim and a male perpetrator. This is not a straightforward issue when there is coercive control. A victim of domestic abuse may prefer to visit a registration office to register a birth in person and that option will still be available; however, an abuser may ask a victim where the victim is going. If the registration is carried out remotely, the victim may be able to provide the information when the abuser is out anyway. Remote birth registration cannot solve the problem of domestic abuse and coercive control but it may give a victim more options to carry out the registration.

Civic licensing: how notices may be published

240. The provision provides licensing authorities/local authorities (in relation to Part II licences) and applicants (in relation to Part III licences) with a degree of flexibility in terms of how they choose to give public notice of a licence application. Applicants will retain the option to publish an advertisement in a newspaper (in relation to Part III licences) should they wish to do so. It is the responsibility of licensing authorities/local authorities to ensure their online notices are accessible.

Land registration

241. This provision continues the option for applications to be submitted digitally to RoS. Although not within the scope of this provision, the digital submission service is likely to become the default method of submission to RoS. Processes will be put in place to support the small number of applications that still require to be submitted on paper. Such applications may be required because the applicant has no access to RoS online services (for example, because they are a citizen carrying out their own conveyancing), or where the applicant is unable to use online services for accessibility reasons.

Human rights

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

³⁹ [Domestic abuse: statistics recorded by the police in Scotland - 2019/20 - gov.scot \(www.gov.scot\)](https://www.gov.scot/statistics/domestic-abuse-statistics-recorded-by-the-police-in-scotland-2019-20/)

243. With regard to Registration of births, Article 7(1) of the United Nations Convention on the Rights of the Child⁴⁰ provides that the “child shall be registered immediately after birth”. In Scotland, births must be registered within 21 days.⁴¹ That will remain the case.

244. With regard to Registration of deaths, deaths in Scotland must be registered within 8 days. This will remain the case under remote death registration, if implemented.

245. With regard to Land registration, the Scottish Government has assessed the potential impact of the provisions on human rights and is satisfied that the provisions are compatible with the ECHR, in particular, with A1P1 which gives protection for property rights. The measures preserve the legitimate expectations of parties as before the closure of the relevant registers to paper applications. For the Register of Inhibitions, the measures also ensure that recourse to diligence remains available to the public. The Scottish Government does not consider there is any detrimental effect on human and children’s rights.

Island communities

246. An Island Communities Impact Assessment has been published.

247. Amongst other things the Island Communities Impact Assessment highlights the benefits to residents of island communities, of reducing the need for travel to and from the mainland to access public bodies’ buildings or to rely on the post. The provisions do not remove the option of an in-person or postal service where appropriate.

Local government

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

249. With regard to Bankruptcy: service of documents, the reductions in administration costs in bankruptcy proceedings through the electronic service of documents may deliver an increase in the funds ultimately payable to local authorities.

250. With regard to Registration of births and Registration of deaths, local authorities, following consultation with NRS, would be able to choose to deploy the arrangements for the remote provision of birth and death registration. As indicated above, local authorities may wish to take different approaches, depending on geography and other logistical factors. The intention is that the option of registering in person would remain

⁴⁰ [OHCHR | Convention on the Rights of the Child](#)

⁴¹ See section 14 of the [Registration of Births, Deaths and Marriages \(Scotland\) Act 1965](#)

across Scotland. Learning from the pandemic, any future emergency may require the national re-imposition of remote arrangements for a given period of time.

251. With regard to Civic licensing: how notices may be published, licensing authority and local authority staff have indicated that the proposed provisions around the public notification of certain civic government license applications would result in a more streamlined and quicker process for administrative staff.

Sustainable development

252. Please see paragraph 91.

253. Although difficult to quantify, and as per the provisions under the previous theme ('Online meetings and hearings'), the provisions here will have a positive effect on sustainable development and deliver environmental benefits as a result of reduced printing and paper usage and also lower climate impact through reducing the level of travel required. All of the provisions to enable online meetings and hearings / communicating by phone or online support the Scottish Government's commitment to achieve a 20 per cent reduction in car kilometres by 2030.

254. With regard to Registration of births and Registration of deaths, in 2020, there were 46,809 live births in Scotland and 198 stillbirths and 64,093 deaths.⁴² The introduction of remote birth registration and putting remote death registration on a permanent footing means that some of these life events will be registered remotely. The distance travelled to register a life event in person will vary depending on how far informants are physically from registration offices. In general terms, life events will be more likely to be registered remotely than in person when the informant lives some distance from the registration office. Therefore, journeys saved are likely to be longer rather than shorter.

255. With regard to Care services: giving of notices by SCSWIS, this could help to reduce the carbon foot print by saving on stationary, printing costs and indirectly the need for postal carriers to make delivery journeys for these purposes. Furthermore, a reduction in physical notices will also reduce paper waste, which may or may not be recycled.

256. With regard to Land registration, RoS was a predominately paper-based organisation prior to digital submission, using over approx. 4 million sheets of paper per year. These provisions will allow RoS to continue to operate digitally and maintain the 84% reduction in their paper use realised since the introduction of the temporary provisions. Placing these provisions on a permanent footing should also realise environmental benefits arising from reduced reliance on physical transmission of

⁴² [List of Data Tables | National Records of Scotland \(nrscotland.gov.uk\)](https://www.nrscotland.gov.uk/statistics-and-data/statistics/list-of-data-tables) Please see tables 3.11 and 5.02.

documents, with significantly reduced courier and postal use by both the Scottish Administration and users of the Keeper's services.

Miscellaneous

Policy objectives

Bankruptcy: meaning of “qualified creditor” and “qualified creditors”

257. The provision permanently increases the minimum debt level a creditor must be owed to petition the court for bankruptcy of a debtor. The minimum debt level is being increased from £3,000 to £5,000. The response to the exceptional circumstances arising from the Covid pandemic resulted in temporary provisions increasing this threshold to £10,000 to provide enhanced protection for those facing issues with problem debt. The temporary provisions are due to expire on 31 March 2022 – with the option to extend them further until 30 September 2022 by secondary legislation, subject to the approval of the Scottish Parliament. The policy objective is now about achieving a minimum debt level that is fair and proportionate on an ongoing basis.

258. The minimum debt level is set with the policy objective of helping to ensure that the right balance is struck between the rights and needs of those dealing with unsustainable debt against the rights and needs of their creditors. Bankruptcy is generally considered as a last resort mechanism for recovery of debt as it can result in some far-reaching consequences for the debtor. The question to be considered is what would be a reasonable level of debt that would permit a creditor to petition the court for bankruptcy of a debtor. Although the minimum debt level has been reviewed over time, the existing £3,000 level was introduced through the Bankruptcy and Diligence etc. (Scotland) Act 2007 and has been in force since 1 April 2008. Prior to this the level was fixed at £1,500.

259. A further review of the minimum debt level is now appropriate given the period of time since the last revision. The consultation undertaken confirms that protection afforded through the increased creditor petition threshold of £5,000 is proportionate and strikes an appropriate balance between the interests of creditors and those facing issues of problem debt.

Legal aid and advice: Claim for interim payment of fees and outlays

260. These provisions make amendments to the Legal Aid (Scotland) Act 1986 to establish a permanent system whereby interim payments can be made to solicitors and counsel, with corresponding powers of recovery in the event of overpayments resulting from such payments.

261. Expanded interim payment measures were introduced by the First Scottish Act and, with the support of the Scottish Legal Aid Board, a flexible and accessible scheme of interim payments is in place to support cash flow to legal aid providers. The scheme has been accessed by many legal aid providers through the pandemic. The Scottish Government considers that it is appropriate to continue to support legal aid providers as

this sector of the profession recovers from the impacts of the pandemic, and permanently putting in place the ability to make payments in this way will ensure continued support of cash flow to solicitors and counsel who provide legal aid services.

262. Many providers of legal aid services will continue to experience disruption to cash flow through the course of the recovery, and provisions to allow for provisional payment prior to a case concluding will provide a significant support for businesses. With the ongoing backlog in the courts and impact on businesses further to the impacts of the pandemic, it is appropriate that these provisions remain in force, to meet the policy objective of ensuring that a robust legal aid system is in place as the country recovers.

263. The temporary system has operated effectively since its introduction, and is considered to have been an improvement to the legal aid system. Accordingly, it is considered appropriate to retain the system as the country recovers from Covid, but also in the longer term, as a permanent improvement to payment arrangements.

Mental health: removal of need for witnessing of signature of nominated person

264. 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 safeguarding: it allows someone to look after a patient's interests when they are subject to the compulsory powers under the law. It therefore not only allows for the patient to be represented, it also helps the patient exercise their rights.

265. This provision keeps the safeguards a named person offers as both the patient and the proposed named person (nominee) are still required to fulfil the original process which requires for the nomination and acceptance to be made in writing. The change only affects the process for the nominee as there will no longer be a requirement for them to have a person of a class prescribed by regulations witness their signature, should they choose to become a named person.

266. By making this provision permanent it will continue to ensure that the patient still has the ability to choose their own representation, should they choose to do so 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 respect the patient's rights and allows services to be delivered effectively.

Parole Board for Scotland: Chairperson's functions

267. The provisions require the Parole Board Chairperson to prepare, as a minimum, a scheme setting out the person or persons by whom the Chairperson's functions may be exercised if the Chairperson is unavailable for reasons of incapacity, illness, or other absence from the post for an extended period e.g. the post is vacant for a significant period of time. This will ensure that business of the Parole Board is able to continue in such circumstances.

268. The Chairperson will also be able to make other delegation arrangements for the Chairperson's statutory functions as they considered appropriate.

269. The provisions put beyond doubt that these other arrangements made by the Chairperson would continue to apply even in the event that the Chairperson is incapacitated or unable to act. This ensures minimal disruption to the Board, and ensures a manageable workload for the member acting as Chairperson in the Chairperson's absence.

Alternative approaches

270. The opening section of the Policy Memorandum considers the general alternative approaches to the Bill. This section considers alternative approaches with regard to certain specific provisions.

Bankruptcy: meaning of "qualified creditor" and "qualified creditors"

271. Consideration has been given to alternative approaches in relation to the debt level that enables creditors to pursue the bankruptcy of a debtor through the courts.

272. Firstly, the temporary provisions introduced by the Second Scottish Act and which are currently in place could be allowed to expire. These provisions modified 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. If the temporary provisions were to be allowed to expire the monetary threshold would revert to the sum of £3,000. This would mean removing the enhanced protection for those with unsustainable debt.

273. Secondly, the current temporary provisions increasing the minimum debt level to £10,000 could be adopted on a permanent basis. While offering continued enhanced protection for those with unsustainable debt during this period of recovery and beyond, this measure would disadvantage the interests of creditors and potentially allow for accrual of higher sums of unsustainable debt.

274. Finally, the consultation has invited views from stakeholders on an alternative minimum debt level of £5,000. The revised £5,000 minimum debt figure is considered to represent the right balance between the respective needs of debtors and creditors.

Legal aid and advice: Claim for interim payment of fees and outlays

275. The Scottish Government has committed to introduce a Legal Aid Reform Bill in this Parliament. Provisions could form part of that legislation with the attendant timescale that would be involved for commencement. However, it is likely that the most significant benefit of the interim payment arrangements will be felt in the coming year – inclusion in the Bill is accordingly considered more appropriate.

Parole Board for Scotland: Chairperson's functions

276. The provisions take a different approach to that provided for in the First Scottish Act which set out more specific delegation arrangements e.g. Chairperson to most senior member of the Parole Board or to other member or members.

277. The Scottish Government considers there are clear benefits in framing the provisions in this alternative way such as:

- Leaving the detail of the scheme in the hands of the Chairperson will allow it to be more specific about who should exercise particular functions than would be feasible in primary legislation (e.g. by naming individuals or referencing positions of members).
- It opens the door to the scheme being more nuanced than would be feasible in primary legislation. For example, a function might be delegated to member A, whom failing member B, and so forth.
- It allows the scheme to be more easily adjusted to reflect changing circumstances than would be the case if the delegation arrangements were specified in primary legislation and could therefore only be adjusted by a further parliamentary process.
- Having a single scheme allows all delegation arrangements to be made in the same manner – as it may contain arrangements applying in the event of the Chairperson's incapacitation as well as the ordinary day-to-day delegation of the Chairperson's functions. This removes the scope for uncertainty about which arrangements take precedence. The Scottish Government believes that this clarifies the position compared to the provisions in the First Scottish Act.

Consultation

278. The opening section of the Policy Memorandum outlines the overall consultation process for the Bill. This section highlights further consultation activity with regard to certain specific provisions.

Bankruptcy: meaning of “qualified creditor” and “qualified creditors”

279. Stakeholder consultation carried out by the Scottish Government on issues associated with personal debt has revealed support for the extension and permanent adoption of provisions modifying the definitions of “qualified creditor” and “qualified creditors” in section 7(1) of the Bankruptcy (Scotland) Act 2016. The broad support is in favour of raising the amount of money a creditor or a group of creditors must be owed in order to be “qualified” from £3,000 to £5,000, which is less than the current temporary threshold of £10,000.

280. Views expressed in support of this option from a broad range of sector stakeholders highlight the additional protection for debtors with unsustainable debt, affording further opportunity to address the issue and seek debt advice. Some of the

consultation responses support reversion to the existing £3,000 debt threshold, while others express a view that the temporary £10,000 level introduced as a consequence of the Covid pandemic should be placed on a permanent footing. The option that has attracted most support through the consultation process has been an increase to £5,000, with most respondents in favour highlighting that this approach strikes a reasonable balance between the interests of those facing issues with debt and the creditors seeking to recover their debts. Responses to the consultation from advice sector organisations, local authorities and creditors have shown support for the level being fixed at £5,000 through a permanent provision. It has also been supported by R3, the trade association for the entire community of the UK's insolvency and restructuring professionals.

281. In addition to the formal consultation, Accountant in Bankruptcy has been taking forward other targeted consultation and focussed work, including stakeholder-led working groups undertaking a wider policy review of statutory debt solutions⁴³ operating in Scotland. Initial findings from the policy review indicate a good level of support for the "qualified creditor" debt level being fixed at £5,000.

Legal aid and advice: Claim for interim payment of fees and outlays

282. Policy officials engage regularly with the Scottish Legal Aid Board and have been in close communication to ensure the provisions will operate effectively, with minimal bureaucracy for legal aid providers.

Mental health: removal of need for witnessing of signature of nominated person

283. Engagement was carried out throughout with relevant stakeholders which include members of the Scottish Government's Short Life Mental Health Legislation Commencement Consideration Group which include the Mental Health Tribunal for Scotland, Social Work Scotland, the Mental Welfare Commission, the SCTS and the Royal College of Psychiatrists. These stakeholders fully support the need for this change.

284. This targeted consultation on this specific provision has been reported on as part of the statutory two monthly reporting to the Scottish Parliament and has informed decisions on the continued necessity and appropriateness of the measure.

285. Stakeholders are very clear that when the provision requiring a nominated person's signature to be witnessed by a prescribed person was originally introduced through the Mental Health (Scotland) Act 2015, it added no new safeguard for patients. Instead that provision added a new final step to the overall nomination process, which the provision in the Bill will remove. "Prescribed person" means an independent advocate; medical practitioner; arts therapist, dietician, occupational therapist, physiotherapist, practitioner psychologist and speech and language therapist; person

⁴³ [Wider review - stage 2 | Accountant in Bankruptcy \(aib.gov.uk\)](https://www.aib.gov.uk)

employed in the provision of, or managing the provision of, a care service; registered nurse; social worker; and solicitor when they agree to become a named person.

Parole Board for Scotland: Chairperson's functions

286. Policy officials consulted specifically with the Parole Board for Scotland who were supportive of this approach.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

287. An Equality Impact Assessment and Fairer Scotland Duty Impact Assessment have been published.

288. The Scottish Government has assessed the potential impact of the provisions on the protected characteristics and has determined that no adverse effect on protected characteristics is anticipated.

289. With regard to Bankruptcy: meaning of “qualified creditor” and “qualified creditors”, the increase of the debt threshold that allows a creditor to petition the court for bankruptcy of a debtor provides greater protection for those facing issues of problem debt. This affords enhanced opportunity to seek advice and route to debt resolution without bankruptcy proceedings being pursued by creditors. The Wyman review⁴⁴ highlights 40% of debt advice clients suffer from a disability or long-term health condition. The Money Advice Service⁴⁵ estimates that 64% of over-indebted people are female, whilst the Wyman Review suggests that 59% of debt advice clients are female. The measure would enhance the opportunities to receive that advice for all debtors including disabled people.

290. With regard to Legal aid and advice: Claim for interim payment of fees and outlays, a proportionate, fair and effective justice system underpinned by the right to access to justice is an essential requirement to eliminate unlawful discrimination, harassment and victimisation. The provisions on legal aid are aimed at preserving the level and quality of Legal Aid services beyond 31 March 2022. Consequently the Scottish Government considers that it promotes the protection of the right to access to justice.

291. With regard to Mental health: removal of need for witnessing of signature of nominated person, service users with a longer-term mental disorder are included within the protected characteristic of disability under the 2010 Equality Act. This provision will

⁴⁴ [Peter Wyman Review of Debt Advice Funding 2018.pdf
\(moneyadviceplus.org.uk\)](https://www.moneyadviceplus.org.uk/sites/default/files/2018-06/Peter_Wyman_Review_of_Debt_Advice_Funding_2018.pdf)

⁴⁵ [Money Advice Service: Indebted lives: The complexities of life in debt \(November 2013\)](https://www.moneyadviceservice.org.uk/en/articles/indebted-lives-the-complexities-of-life-in-debt)

continue to ensure that the patient still has the ability to choose their own representation. It also provides for a named person to act for the patient, and will help 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.

Human rights

292. The Scottish Government has assessed the potential impact of the provisions on human rights and considers that ECHR issues do not arise with regard to the majority of the provisions.

Bankruptcy: meaning of “qualified creditor” and “qualified creditors”

293. The Scottish Government has assessed the potential impact of the provision increasing the minimum debt level a creditor must be owed to petition the court for bankruptcy of a debtor from £3,000 to £5,000 on human rights. A creditors’ rights to recover their debts can be possessions protected by the ECHR, in particular, A1P1 which protects property rights.

294. The Scottish Government considers that the minimum debt level of £5,000 is proportionate and strikes a fair balance between the general interest and the rights of creditors. Generally the ECHR recognises privileging the property rights of one individual over another can be a legitimate means for promoting the public interest. Sequestration is a serious undertaking with significant long-term consequences for the debtor and the threshold of £5,000 strikes an appropriate balance between the interests of debtors and the interests of creditors seeking to recover their debts. The stakeholder consultation has revealed a broad support from advice sector organisations, local authorities and creditors in favour of the level being fixed at £5,000. Importantly, the measure does not prevent the affected creditors from taking other debt recovery actions short of bankruptcy, including diligence measures, to recover debts below this threshold, so that creditors’ claims are not lost. The Scottish Government is accordingly satisfied that the provisions are compatible with the ECHR.

Island communities

295. An Island Communities Impact Assessment has been published.

296. Amongst other things the Island Communities Impact Assessment highlights that the Royal College of Psychiatrists note the benefits of the mental health named person provision given its value when nominated named persons are living in remote areas.

Local government

297. The Scottish Government has assessed the potential impact of the provisions on local government and has determined that no adverse effect on local government is anticipated with regard to the majority of provisions.

298. With regard to Bankruptcy: meaning of “qualified creditor” and “qualified creditors”, the Scottish Government considers that these provisions will have minimal impact on local authorities. In relation to local authorities’ role as creditors, for example in collecting unpaid council tax, the increase in creditor petition debt threshold does not extinguish the debt or prevent other means of recovery. It will, however, remove the option to petition the court for the bankruptcy of a debtor where the debt level is below £5,000.

Sustainable development

299. Please see paragraph 91.

Tenancies

Policy objectives

300. The effect of Covid has led to a reduction in income for many households in Scotland. Some tenants in both the private and social rented sectors are finding themselves in financial difficulty due to the pandemic.

301. Due to the emergency legislation, tenants have benefitted from additional legal protections – including the Housing and Property Chamber of the First Tier Tribunal for Scotland (“the Tribunal”) having greater discretion to consider all relevant factors in eviction cases.

302. Other protections included the introduction of “pre-action requirements” which make clear that private landlords should support tenants who are struggling with rent arrears and are at risk of being evicted on that ground. These actions provide greater protections for those in the private rented sector, and reflect what was already in place in the social sector.

303. To protect private rented tenants from being evicted unreasonably or unnecessarily from their homes, the Bill:

- makes pre-action requirements permanent for private landlords by introducing what is now referred to as a pre-action protocol, so that support is given to tenants who are struggling with rent arrears and are at risk of being evicted as a result;
- gives the Tribunal a discretion to grant eviction in private rented sector tenancies regardless of the ground on which it is sought (the Tribunal previously being obliged to grant eviction on certain grounds) thereby enabling the Tribunal to consider all relevant circumstances before determining whether an eviction is reasonable.

304. This part of the Bill also supports the Scottish Government’s Covid Recovery Strategy and the Scottish Government’s overall objective of addressing the harms

caused by the pandemic, and tackling systematic inequalities made worse by the pandemic.

305. It also supports the Scottish Government's draft Rented Sector Strategy⁴⁶ which delivers a new deal for tenants, giving them more secure, stable, affordable tenancies with improved standards of accommodation, new controls on rent and more flexibility to personalise homes. The Scottish Government is consulting on the new strategy. There will be a forthcoming Year 2 Housing Bill to take forward legislative requirements arising from the strategy consultation, and this would be an appropriate opportunity to make further refinement to legislation arising from this Bill.

Alternative approaches

306. The opening section of the Policy Memorandum considers the general alternative approaches to the Bill. This section considers alternative approaches with regard to certain specific provisions.

307. There is a continuing need to respond to the effects of the pandemic, and it is good practice for private landlords to adhere to the current "pre-action requirements" for rent arrears cases, where there is a risk of eviction. These benefit tenants who are struggling with rent arrears by encouraging landlords to provide greater information and assistance to tenants and they also benefit landlords who may find it helps them to preserve a tenancy (for example, via a repayment plan) and thereby avoid the costs associated with finding a new tenant and creating a new tenancy. As such, doing nothing and allowing the current provisions to lapse without replacement is not considered an acceptable alternative.

308. An alternative approach to the pre-action protocol introduced by the Bill would be to introduce a pre-action protocol for all eviction grounds. However, this would require bespoke requirements to be considered for each ground of eviction, which would place an additional burden on landlords. In addition, it is not clear what value a pre-action protocol could add where the tenant's conduct is not an issue and the reason that eviction is being sought is because the let property is required for another purpose (such as for the landlord to live in) or because there is a legal impediment to the let continuing (such as an Housing in Multiple Occupancy licence having been revoked). The Scottish Government considers that restricting the pre-action protocol to rent arrears cases is more proportionate given the clear benefits for both the landlord and the tenant in these circumstances.

309. An alternative approach to making grounds for all eviction cases discretionary for the private rented sector, would be to limit the Tribunal's discretion to only certain grounds of eviction (either by reverting to the pre-pandemic position, or by changing some but not all grounds from mandatory to discretionary). However, this would limit the

⁴⁶ [A New Deal for Tenants - draft strategy: consultation - gov.scot \(www.gov.scot\)](http://www.gov.scot)

Tribunal's ability to consider all the relevant circumstances before making a decision, creating a risk that mitigating factors would not be taken into account.

310. By limiting the pre-action protocol to cases of rent arrears, and by giving the Tribunal discretion to grant eviction on all grounds, the Scottish Government considers that the rights of tenants and landlords are balanced appropriately.

311. The draft Rented Sector Strategy, published in December, reflects the Scottish Government's policy aim of ensuring quality, affordability and fairness for everyone who rents their homes. The consultation will give everyone an opportunity to discuss how these two sets of provisions should operate in the longer term. The forthcoming Housing Bill will provide an opportunity to further refine these provisions in light of that discussion should that be necessary.

Consultation

312. The opening section of the Policy Memorandum outlines the overall consultation process for the Bill. This section highlights further consultation activity with regard to certain specific provisions.

313. In addition to the formal consultation, the Scottish Government has directly consulted with public bodies affected by the measures in the Bill. The Scottish Government also met with a range of stakeholders including both landlord and tenant representative bodies. The Minister for Zero Carbon Buildings, Active Travel and Tenants' Rights has also undertaken a number of informal stakeholder meetings with both tenant and landlord representative groups, discussing a wide range of issues relating to the private rented sector, including Tribunal discretion and pre-action protocol.

314. On the pre-action protocol provisions, there is a general consensus across all stakeholder groups that the provisions are an effective route to resolving issues between landlords and tenants, as well as a layer of protection against eviction. Landlord representative groups commented that many landlords will already undertake such procedures and therefore this formalises what is already seen as best practice. On the Tribunal discretion provisions, stakeholder views were mixed, with tenant representative organisations welcoming the ability for the Tribunal to take all matters into account when considering an eviction order, and landlord representatives feeling the provision affords too much leniency to tenants and does not take into account the significant financial impacts that a private landlord may already have had to incur.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

315. An Equality Impact Assessment and Fairer Scotland Duty Impact Assessment have been published.

316. The policy is not intended to impact, directly or indirectly, on any group of people with protected characteristics, or on the wider equality duties.

317. However, people from non-white backgrounds are more likely than people from white backgrounds to live in the private rented sector. Women and people with disabilities are more likely to rely on social security as part or all of their income, and to live on low incomes. Women are more likely to have caring responsibilities and therefore be impacted more significantly – socially and financially – by any action for eviction. These proposals should have a positive impact on outcomes for these groups.

Human rights

318. Consideration has been given to the impact of the pre-action protocol and discretionary grounds of eviction on a landlord's property rights under A1P1 to the ECHR. Both of these provisions could be argued to constitute a control of a landlord's use of their property for the purposes of A1P1. The Scottish Government considers that both of these provisions strike an appropriate balance between the landlord's rights in the property and the protection of the tenant from unnecessary eviction. Accordingly, these provisions are both considered to be proportionate.

319. In relation to the pre-action protocol, the Scottish Government considers that a fair balance has been struck between the rights of landlords and tenants by encouraging landlords to engage with tenants in cases of rent arrears and, if the tenancy cannot be saved, landlords would be in a better position to demonstrate that eviction is reasonable in the circumstances. A landlord is not prevented from obtaining an eviction as compliance with the pre-action protocol is simply something the Tribunal must take into account when determining whether eviction is reasonable. The things that landlords ought do under the protocol will all be actions which are within the gift of the landlord to deliver.

320. In relation to discretionary grounds of eviction, the Scottish Government considers that a fair balance has been struck between the rights of landlords and tenants by enabling the Tribunal to consider all of the circumstances of a case before making a decision on eviction. The Tribunal can consider the ECHR rights of landlords and tenants and arrive at a decision which ensures appropriate respect for both. The removal of mandatory grounds of eviction does not in itself prevent eviction; it merely ensures that eviction should be granted only where it is reasonable to do so.

Island communities

321. An Island Communities Impact Assessment has been published.

322. Amongst other things the ICIA highlights that island communities have significantly less rental stock than other areas of Scotland and can often face supply issues that are impacted by wider issues such as the prevalence of second homes and short term lets. Therefore the extra layer of protection against eviction and homelessness afforded by the pre-action protocol and Tribunal discretion provisions may particularly benefit those living in the rental sector in island communities.

Local government

323. These provisions will make the private rented sector a more attractive proposition to tenants and will help ensure appropriate protection should they come to have difficulties. Through both the pre-action protocol and the Tribunal having discretion, and the existing requirement for the landlord to serve a section 11 notice (landlords and creditors must notify the relevant council when they raise proceedings for possession of a home⁴⁷), this gives local authorities more time to work with both the tenant and the landlord to help prevent an eviction. An eviction is undoubtedly stressful for the household, and rehousing by the local authority incurs considerable costs. These measures will ease the pressure on homelessness services, as preventing tenants in the private rented sector from requiring local authorities to provide temporary accommodation protects the local authority from increased housing costs for this group.⁴⁸ Tenants from the private sector are more likely to need these services, as social landlords would only evict as a last resort.

Sustainable development

324. Please see paragraph 91.

325. Given that the pre-action protocol and Tribunal discretion provisions provide an extra layer of security against the eviction and potential homelessness of individuals or families living in the private rented sector, this will bring short term savings and benefits in relation to the prevention of the need for temporary accommodation etc. Furthermore, the pre-action protocol provision in particular formalises the most appropriate way for landlords to engage with and support those tenants who have fallen into rent arrears or are facing their tenancy being brought to an end due to other reasons. In the longer term, this change to private landlord working practices should see better engagement between landlord and tenant.

⁴⁷ <https://www.gov.scot/policies/homelessness/homelessness-guidance/>

⁴⁸ Homelessness in Scotland: 2020 to 2021 - gov.scot (www.gov.scot)

Temporary Justice Measures

Policy objectives

Courts and tribunals: conduct of business by electronic means etc.
(Documents)

326. The RRT programme for the justice system aims to recover essential services and transform how the system operates to ensure a resilient, effective justice system now and for the future. The measures in the RRT programme of work have contributed to recovering a viable justice system, responding flexibly to meet the challenges which Covid presents, whilst delivering a more effective and efficient justice system. This is fundamental to protecting peoples' rights and freedoms and addressing inequality.

327. These provisions enable documents produced by a court or tribunal, or connected with criminal or civil proceedings, to be signed and transmitted electronically (for example by email), and in certain circumstances be sent to a party's solicitor instead of to the party themselves in a case, 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.

328. Electronic processes have increased across all areas of criminal and civil business. The use of these measures has enabled swift process changes that have allowed court and tribunal services to operate more efficiently. This has been evidenced by the Faculty of Advocates who in their response to the consultation supported both the extension and permanency of these measures, saying that "In this digital age it makes sense for documents to be signed electronically and transmitted by email. It is difficult to see what circumstances would require actual signing and physical delivery." Similarly, the Law Society of Scotland commented that, "There is no doubt that digital interaction between court users and the courts for procedural and administrative business has brought tangible benefits in terms of cost, time and efficiency savings. It may well be appropriate to ultimately make these provisions permanent in due course but it is premature to do so."

329. The Lord President of the Court of Session has previously 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.

330. 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 signed electronically and evidential hearings for civil cases being held remotely.

331. While it is recognised that the consultation on the aims of these provisions delivered a broad consensus for making them permanent, it is considered that longer

extension would be more appropriate to deliver time for further consideration of the impact of the measures, and for wider engagement, to ensure that they are future proofed from an equalities perspective.

332. The provisions also allow the intimation of certain court documents by way of online publication on the SCTS website. The Scottish Government is of the view that this provision remains essential to the delivery of the court recovery programme, both in terms of continued necessary public health measures and restrictions and the lingering impact of backlogs caused by the Covid pandemic. It is also an important part of the digital transformation of the justice system and ensures that the gains achieved through accelerated deployment of data and digital solutions in response to the Covid pandemic are maintained.

333. This provision will allow the alternative that, where a document is required or permitted to be displayed on the walls (or any other part) of a court building (or to be made publicly available within a court), it can also be done by publication of the document on the SCTS website in line with any direction issued by the Lord President or Lord Justice General. 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 website and will be subject to any direction made by the Lord President or the Lord Justice General to account for website publication. The effect of any provision for alternative methods of publication, such as intimation by advertisement in a newspaper, is also preserved by this provision.

334. Responses from stakeholder organisations and justice partners to the consultation have provided a broad consensus supporting the permanent introduction of measures that allow intimation of certain court documents to take place by way of online publication. There is widespread agreement that this is a sensible change to how the intimation of certain court documents is achieved, with website intimation likely to reach a wider audience, make the accessibility of documents easier and improve access to information.

335. While it is recognised that the consultation sought views on making this provision permanent, it is now considered that the longer extension of this provision is more appropriate at this time.

336. Changing this provision from a permanent to a longer extension provision will support the continued operation and recovery of the courts, particularly in respect of ongoing necessary public health measures and restrictions (such as public access to court buildings) in response to the Covid pandemic. The Scottish Government is of the view that this continues to be an appropriate and proportionate measure.

337. Longer extension of this provision will also allow further consideration to be given to implementation of this measure on a permanent basis to build resilience against future public health threats and to facilitate the desired managed move to a more digitalised justice sector. This will include consideration as to the most appropriate legislative vehicle to achieve permanent provision, and rightly provide further

opportunity for targeted consultation to ensure that permanent measures avoid digital exclusion and will provide options for people who do not have the equipment, data, skills, knowledge or desire to connect digitally.

Courts and tribunals: conduct of business by electronic means etc. (Attending a court or tribunal)

338. The last 18 months has seen the development and application of business conducted by virtual means. This is considered to remain a key element of the RRT programme and interlinked to addressing the current backlog of cases accumulated because of the pandemic.

339. These provisions provide that any participant in either criminal or civil proceedings (judge, clerk, legal representatives, parties to proceedings, accused, convicted persons, appellants, jury members 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. Trial diets in this context are intended to include civil diets where evidence is heard, in addition to criminal trial diets. These presumptions can be overridden by the court or tribunal.

340. The provisions also enable those proceedings under Part 10 of the Children's Hearings (Scotland) Act 2011, specifically those relating to applications for grounds of referral to the Children's Hearings whether for offence or welfare grounds (which go to proof if agreement cannot be reached), are not held remotely by default. This is to be consistent with the position on other "trial diets".

341. These provisions have enabled the justice sector to respond to the challenges of the pandemic and to deliver improvements which are seen as features of a modern criminal justice system. 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 Covid 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.

342. Behind each delayed jury trial are victims, witnesses and accused, who are all anxious to have their day in court and move on with their lives. These provisions enable that process to continue effectively and the cost of not retaining would be to the detriment of court users, and broader perceptions of the Justice sector.

343. In their consultation response, SCTS said, "These provisions have been essential in enabling court business to continue whilst minimising the number of people required to attend our buildings. For as long as public health measures restrict the number of people we can safely have within our buildings remain in place, these provisions are

crucial to ensuring court and tribunal business can continue. They are also crucial in ensuing that we have the flexibility to use different modes of hearings in order to maximise case capacity and throughput both on and off-site, as we strive to reduce the significant backlogs that have accumulated during the pandemic.”

344. In parallel with this Bill, the SCJC has conducted a consultation⁴⁹ on proposals for new court rules, which do not cover tribunal hearings, covering the mode of attendance at civil court hearings in the Court of Session and sheriff courts. In their response to the consultation, SCTS were also clear that while they are of the view that the provisions should be retained permanently for both civil and criminal proceedings, they do not think that they should be retained in their current form. Instead, they believe that the provisions should be enabling, and subject to rules development by the SCJC and the Criminal Courts Rules Council. That position further strengthens the approach for longer extension at this juncture.

345. It is also recognised that some elements of a virtual justice sector remain open to contention and further work before they could be considered on a permanent basis. That is why these provisions are presented in a longer extension capacity, recognising the requirement for further assessment and analysis to support their future application. This approach has been supported by the consultation responses, where the Law Society of Scotland, supported partly extending the provisions and said, “it is too early to make permanent change. We support an extension of the practice of holding virtual hearings for procedural business but consider it is essential to review matters as and when there has been an opportunity to hold live proofs etc as it may well be the case that it is appropriate to adopt a default position of live attendances in court for those types of hearing. In short, it is too early to make permanent change. We support an extension of the practice of holding virtual hearings for procedural business but consider it is essential to review matters as and when there has been an opportunity to hold live proofs etc as it may well be the case that it is appropriate to adopt a default position of live attendances in court for those types of hearing.”

Fiscal fines

346. The provisions seek to retain for a further period the increase in the maximum level of fiscal fine from £300 to £500 that was originally made through the First Scottish Act.

347. While the level of £500 as the maximum is sought to be retained in the Bill, new temporary adjustments to the fiscal fine scale (that provides for the different amounts of fiscal fines that can be offered up to and including the £500 level) are also proposed to better facilitate achievement of the full policy intent of the provisions.

348. In accordance with the revised policy guidance issued by the then Lord Advocate in relation to fiscal fines following the original increase in April 2020, prosecutors are

⁴⁹ [Consultation- Rules Covering the Mode of Attendance at Court Hearings \(scottishciviljusticecouncil.gov.uk\)](http://scottishciviljusticecouncil.gov.uk)

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.⁵⁰ As set out in the revised guidance, the increase in the maximum level of fiscal fine is intended to enable alternative action to be taken in a wider range of cases, but not to increase the fine amount in individual cases which would previously have been dealt with by way of fiscal fine.

349. Providing for the continuation of the increased maximum level of fiscal fine (or ‘conditional offer of a fixed penalty’) of £500 to be available to prosecutors as a non-court disposal will continue to be helpful in minimising the significant and ongoing impact of Covid on the criminal courts system. This is because it will enable a wider range of cases to continue to be dealt with by way of fiscal fine as an alternative to prosecution in court than was the case prior to the introduction of the higher maximum level. The availability of such an option will help address the backlog of cases that has built up in the summary courts system as a result of the Covid pandemic.

350. In the period between 7 April 2020 and 31 October 2021, 21,297 people, or approximately 25% of individuals who received a first marking action for a Direct Measure (i.e. initial action by a prosecutor following report from the police) were offered a fiscal fine. Of those 21,297 people, 595 (3% of the individuals offered a fiscal fine) were issued a fine amount above the previous scale maximum of £300, up to £500.

351. Having regard to and learning from the operation of the provisions since they originally came into force in April 2020, consultation with the Crown Office and Procurator Fiscal Service (“COPFS”) has highlighted that minor adjustments to the temporary fiscal fine scale would be beneficial in order to provide for a more balanced, better calibrated scale overall.

352. Since implementation of the measure in April 2020, data from COPFS illustrates that while there has been some limited use of the increased fiscal fine levels, their use remains predominantly focussed at the very lowest levels of the scale and that the biggest increase has been in the use of the very lowest levels of fiscal fine.

353. It is considered likely a significant factor as to why fiscal fine disposals have concentrated at the lowest levels is due to the starker jumps in increments of the new scale put in place during passage of the First Scottish Act. It is within this context that the Bill proposes changes to the fiscal fines scale.

354. Following engagement with COPFS, it is understood that prosecutors are often requiring to offer a fine at the lower end of the scale in order to avoid increasing the fine amount in individual cases which would previously have been dealt with by way of a certain level of a fiscal fine. An illustrative example is, a prosecutor identifies that the circumstances of an offence would merit a Level 2 fine of £75 under the pre April 2020 scale. Level 2 on the new scale in place since April 2020 is £125. In order to ensure

⁵⁰ [20200608Lord_AdvocateMMFiscal_Fines.pdf \(parliament.scot\)](#)

there is no increase in the fine level offered under the new scale for similar criminal conduct, a prosecutor would have to select a fine of £50 (level 1) to avoid “up-tariffing”.

355. The policy response is that the Bill proposes minor changes to the different levels of fiscal fine available up to £500, providing for more balanced increments, as a means of fully achieving the original policy intent of the provision and facilitating appropriate use of fiscal fines as part of the court system’s recovery.

356. In particular, the proposed temporary revised scale now contains nine levels of fiscal fine which may be offered by a prosecutor, ranging from £50 to £500. Levels one to seven of the proposed new scale reinstate each of the original seven levels of fiscal fine which were available as alternatives to prosecution pre April 2020, and two new levels have been added at £400 and £500.

357. This new nine point scale will better enable alternative action to prosecution to be taken in a wider range of summary cases without the need for court procedure and associated appearance at court while also ensuring there is no increase to the level of fiscal fine offered in individual cases which would previously have been dealt with in this way.

358. There is a significant backlog of cases within the court system as a result of the Covid pandemic. With the Recovery Programme in place SCTS estimate that the summary court backlog will take until 2024 to be cleared. Providing for the continuation of an increased level of maximum fiscal fine coupled with minor adjustments to the available fiscal fine scale 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 the ongoing impact of Covid.

359. These provisions form an important part of the wider approach to enabling the justice system to recover from the impact of Covid while still ensuring justice is done in individual cases. For as long as court business is affected by Covid (both in terms of continued necessary public health measures and restrictions, and the lingering impact of backlogs caused by Covid), the provisions will help recovery of the court system. 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.

Failure to appear before court following police liberation

360. The provision seeks to retain for a further period the measure originally made in the Second Scottish Act which provides the court with a power to prevent the expiry of an undertaking and any protective conditions attached to it when a person is unable to attend court for reasons related to Covid.

361. 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 a written undertaking to appear at a specified court at a

specified time and to comply with any conditions imposed while subject to the undertaking.

362. There are certain standard conditions of undertaking the police may impose, for example, that the person does not commit an offence or interfere with witnesses. The police may also impose other “further conditions” if considered necessary and proportionate to ensure the standard undertaking conditions are observed. For example, to prohibit an accused approaching or contacting witnesses, including the complainant. Breach of these conditions without reasonable excuse is a criminal offence.

363. Undertaking conditions can be seen as a means of regulating a person’s behaviour before they make their first appearance in court. Once they have made their first appearance in court, it becomes a matter for the court to determine whether the person should be held in custody, admitted to bail or ordained to appear through the court process.

364. 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.

365. During the Covid 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.

366. These provisions, which the Bill seeks to retain, addressed this risk by providing the court with a power to prevent the expiry of an undertaking and any conditions attached to it. Under this new power, the court is able to change the time the person is due to appear at court in specific circumstances; namely when 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 Covid; and the court does not consider it appropriate to grant a warrant for the person’s arrest on account of the failure to appear.

367. 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 complainant, they continue to have effect until a court is able to consider whether to impose bail conditions or remand the accused in custody.

368. This continues to be identified as an important measure to preserve public and victim safety while Covid remains a threat to public health. Retention of this measure also enables the undertaking regime, which operates as an alternative to a person’s

remand in custody, to continue to work effectively whilst providing the necessary protections for the public as a whole.

369. The need to self-isolate because of possible infection with Covid (or the continued existence of other Covid related reasons which prevent people from attending court) are likely to continue for some time to come. Given the uncertainty as to prevalence of Covid within communities, it is considered prudent and necessary for this provision to remain in force while infection and/or public health measures remain in place. This is in order to ensure that in any case where an accused is unable to attend court for a Covid-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.

National jurisdiction for callings from custody etc.

370. The provisions seeks to retain for a further period the measure originally made in the First Scottish Act which 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).

371. This measure enables 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 and allows that court (the ‘national 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 a local court.

372. Accordingly, retention of these provisions through the Bill will continue to enable more efficient prioritisation of court resources and assist SCTS in managing the significant backlog of court business arising from the Covid pandemic, which will be an important contribution to the justice system’s overall recovery from the lingering impacts caused by Covid, expected to last for a number of years.

373. The provisions also allow custody courts to be conducted in a way which minimises unnecessary travel and congregation of people that could increase the spread of Covid, and enable Police Scotland and SCTS to operate a smaller number of centralised police custody suites and court hubs in response to Covid. Retention of the provision for a further period will therefore maintain the necessary flexibility to ensure the continued safe and effective operation of custody courts while Covid remains a threat to public health and safety and while public health measures remain in place.

374. Having regard to, and learning from, the operation of the provisions since they originally came into force in April 2020, the Bill incorporates minor changes to the provisions to make clearer their effect in practice and to fully deliver the original policy intent of the measure.

375. Under the original provisions in the First Scottish Act, which have been retained in the Bill, in addition to dealing with first appearances from police custody until a plea of

not guilty is tendered, or full committal in a petition case, the national court can also deal with what are termed ‘ancillary proceedings’ as distinct matters in their own right.

Ancillary proceedings include the failure of an accused person or a witness to attend a court hearing which they have been given notice of, for example, a first diet in indictment cases, or an intermediate diet or trial diet in summary cases.

376. This means where the national courts’ jurisdiction ends as a result of, for example, a plea of not guilty in a summary case which is not accepted by the prosecutor, or full committal in petition proceedings, and the case is transferred to the local court (ultimately for trial), if an accused person or witness in the ongoing criminal proceedings subsequently fails to appear at a future court hearing resulting in a warrant for their arrest, the national court will continue to have jurisdiction over the person’s fresh appearance from police custody on the warrant due to their failure to appear, as this constitutes ‘ancillary proceedings’.

377. While the Bill retains the approach set out above, following engagement with COPFS and SCTS, the Bill makes additional provision to make clear the extent of the national court’s jurisdiction where a person finds themselves in police custody once again due to their failure to appear at a court hearing.

378. The effect of the additional provision is that it revives the national court’s jurisdiction over the substantive criminal proceedings, enabling the national court to set fresh dates for the person’s substantive criminal case as needed for transfer back to the local court, avoiding the need for a further separate hearing at the local court, simply to set fresh dates.

379. In addition, as it is not uncommon in summary criminal proceedings for an accused person to elect to change their plea to guilty to a charge or charges against them in their substantive criminal case when appearing from custody due to their failure to appear, the provision also enables the national court to deal with any such change of plea through to its conclusion where it is accepted by the prosecutor, and move guilty pleas out of the court system, in line with the original, overarching policy of minimising the number of cases that have to be transferred to local court.

380. This further provision can be said to fulfil the original policy intent of providing for a custody court of national jurisdiction that may efficiently deal with first appearances from police custody and minimise the number of cases that require to be diverted to call at the local court.

381. Overall, this measure forms a part of the wider approach to enabling the justice system to recover from the impact of Covid by helping SCTS efficiently manage scarce court resources in response to the substantial backlog while ensuring the continued safe operation of custody courts while Covid infection remains within communities. For as long as court business is affected by Covid (both in terms of continued necessary public health measures and restrictions, and the lingering impact of backlogs caused by Covid), the provisions will aid recovery of the court system.

Criminal procedure time limits

382. The provision seeks to retain for a further period the measures originally made in the First and Second Scottish Acts which extend certain time limits contained in the Criminal Procedure (Scotland) Act 1995 (“1995 Act”) and remove upper limits on the maximum length of certain adjournments. These provisions have the effect of increasing the maximum time period that an accused person can be held on remand prior to trial without the court granting an extension, together with other time limits for progressing a criminal case including the maximum wait prior to trial where the accused is not in custody (again, without the court granting an extension).

383. The pandemic has had a significant impact on the criminal justice system. The impact of necessary public health restrictions, combined with increased demand in specific areas, have significantly extended the time required by:

- Police Scotland to investigate alleged crimes including scientific analysis;
- the Procurator Fiscal to prepare cases for criminal court; and
- the criminal courts to resolve cases.

384. The backlogs are evident at every stage of the system. However, the criminal justice system’s ability to deliver justice in the most serious cases, tried on indictment has been most significantly impacted. For example, for many months in 2020 the criminal justice system was not able to conduct any jury trials.

385. It is within this stark context that the policy of extending time limits remains necessary to facilitate the operation of the criminal justice system.

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

- section 65 of the 1995 Act which sets various time limits in respect of trials under solemn (High Court or sheriff and jury) procedure;
- section 136 of the 1995 Act, which requires that proceedings in statutory offences which can be tried only summarily must commence within six months of the alleged offence;
- section 147 of the 1995 Act, which makes provision for summary procedure in cases where the accused has been remanded in custody; and
- 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.

387. The pandemic legislative changes also remove any time limits at all on the length of time for which a court can adjourn a case for certain purposes. These apply in relation to:

- section 145 (power of the court to adjourn a summary case at first calling where the accused is present and is not remanded in custody, to allow time

for inquiry into the case or for any other cause which it considers reasonable);

- section 145A (corresponding provision where the accused is not present at first calling);
- section 200 (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);
- section 201 of the 1995 Act which enables a court to adjourn a case prior to sentencing to enable inquiries to be made;
- section 245J (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).

388. The purpose of the provisions is to ensure delivery of justice is not further adversely affected by prosecutors, the defence and the courts requiring to spend scarce resource and time on preparing for and conducting large numbers of individual hearings on applications to extend time limits or renew adjournments on a case-by-case basis.

389. Such a requirement would impact on prosecutors, the defence and the courts' capacity to undertake other business and, where there is no power to extend the time limits, as is the case for the time limit on the commencement of trials for certain summary-only offences, justice would not be able to be progressed without proceedings being declared unlawful. It is within this context that the provisions in the Bill provide that the extended time limits in force since April 2020 should be extended beyond 30 September 2022.

390. The time limit extension provisions were first introduced to address the anticipated impact of the Covid pandemic on the justice system in the expectation that court business would be significantly impacted by measures taken to prevent the spread of Covid.

391. This undoubtedly has proved to be the case with the necessary public health restrictions significantly impacting on all aspects of the criminal justice process.

392. No jury trials took place between April and July 2020. High Court trials re-commenced in July 2020, though the number of trials that it was possible to accommodate while having necessary public health measures in place was considerably reduced.

393. Six months after the pandemic hit, sheriff and jury trials re-commenced in October 2020, with measures in place to enable juries to participate remotely though, again, initially, in the same volume as had been the case prior to the pandemic.

394. The effect of this is that a significant backlog of criminal cases has built up especially with regard to the most serious cases which are tried by a jury.

395. While the volumes of cases being progressed each month in the High Court of Justiciary, Sheriff Court and Justice of the Peace Courts from April 2021 is now broadly equivalent when compared to monthly averages for 2019/20 (pre-Covid), the impact of the pandemic has led to significant backlogs. The court system and COPFS continue to be under significant pressure, as a result of the significant backlog of cases that has built up during this period.

396. The time limit at section 136 of the 1995 Act sets the time limit from the date of the alleged commission of an alleged offence to criminal proceedings being commenced for certain summary-only offences. These include drink and drug driving offences. The pandemic has impacted on the time taken for necessary scientific analysis in such cases. COPFS have noted that, as at November 2021, approximately 13,000 cases await marking.

397. At least 25% of these cases would rely upon the current extended summary time limit to start proceedings. This would mean that if the summary time limits provisions were not to be retained, COPFS would require to mark and bring these cases to court either within six months of the date of the alleged offence or prior to the expiry of the provisions extending the time limit. In view of the limitations on court capacity, prioritising these cases would mean that court and COPFS resource would have to be diverted to these cases, adding to the backlogs that exist elsewhere in the system.

398. The time limits at section 65 of the 1995 Act are procedural time limits for solemn cases, with different time limits applying depending on whether the accused person is remanded in custody or has been released on bail.

399. COPFS note that there has been an increase in cases reported to the Procurator Fiscal involving offending prosecuted on indictment at sheriff and jury level. The current level in 2021-22 is an increase of 36% from 2017-18 levels. The combination of an increased volume of cases and the extended time taken to investigate and prepare cases (due to the impact of the Covid pandemic and associated public health measures) has led to the number of cases being prepared to bring before the court increasing by 74% since March 2020 (from 3,442 cases in March 2020 to 5,986 in November 2021).

400. As an illustration of the severity of the impact of not retaining the extended time limits, if the extended time limits were not in place as of November 2021, 786 of these cases would already be past the pre-pandemic time limits and a further 653 cases would be approaching that limit.

401. If the time limit provisions were to expire now, COPFS would require to make at least 786 applications to the court to extend the time bar, which would divert limited prosecutorial, defence and court resources from dealing with the backlog of cases that has built up. In many of these cases, it is likely that applications would require to be

made to both extend the time limit applying to commencing a preliminary hearing/first diet (and thus the serving of an indictment), and to extend to the time limit for commencement of a trial. This requirement for repeat applications in some cases adds to the impact of extended time limits not being retained.

402. COPFS informed the Scottish Government that as of November 2021, the number of High Court cases being prepared to be brought before the court has risen by 62% since March 2020 (526 in March 2020 compared to 851 in November 2021). Again as an illustration of the severity of the impact of not retaining the extended time limits, as of November 2021, there are 530 cases which are already older than the pre-pandemic time limits. COPFS also note that none of the High Court trials scheduled to commence between 10 November 2021 and 28 February 2022 meet the pre-pandemic time limits.

403. This illustrates the fact that, if the time limit extension provisions are not in place, a large number of applications would require to be made to extend time limits on a case-by-case basis. As is the case with sheriff and jury trials, in many of these cases, it is likely that repeat applications would be required to amend time limits in each case.

404. Significant steps and additional investment has taken place to help address the backlog of cases that has built up in the courts. To tackle backlogs built up, the Scottish Government committed £50 million in 2021/22 to the RRT programme. This will drive recovery from the impact of the pandemic as well as reform, including greater use of digital tools and improved support for victims and witnesses.

405. Using the additional funding, SCTS introduced from September 2021 the daily operation of four additional High Court trial courts, two additional Sheriff Court trial courts and up to ten additional sheriff summary trial courts. The High Court will sit in Airdrie, Dundee, Inverness and Stirling, with the sheriff and jury courts sitting in Dumfries and Dunfermline. All trial courts will be linked to remote jury centres. The ten additional sheriff summary trial courts will be provided at varying locations across Scotland, based on the workload and safe court capacity, with at least one additional court in each of the six sheriffdoms in Scotland. Recent statistics published by SCTS suggest that these are already having a positive impact.⁵¹

406. However, as has been set out above, it is clear that there will continue to be a very significant backlog of cases for the foreseeable future and the time limit extension provisions are important in not adding to the backlog by placing additional demands on prosecutors and the courts in terms of applications and hearings to extend time limits on a case by case basis.

407. The SCTS undertook work to estimate how long it is likely to take to clear the backlog of cases that has built up during the pandemic. They estimated that, with this additional resource in place, it is likely to take until 2024 to clear the backlog of

⁵¹ [scts-quarterly-criminal-court-statistics---bulletin-q2-2021-22.pdf \(scotcourts.gov.uk\)](https://www.scotcourts.gov.uk/statistics-and-research/statistics/quarterly-criminal-court-statistics---bulletin-q2-2021-22.pdf)

summary cases while it is likely to take until at least 2025 to clear the backlog of sheriff-and-jury and High Court cases.

408. The requirement to consider a very large number of individual applications to extend time limits on an on-going basis for a number of years would be resource-intensive and have a substantial negative impact on the ability of the justice system to address the backlog of cases that has built up in the system.

Proceeds of crime

409. This provision continues the amendment at section 99(4A) of the Proceeds of Crime Act 2002 ("the 2002 Act"), made by the Second Scottish Act, in the following way:

- Following a conviction in relevant criminal cases, prosecutors can make an application, under section 92 of the 2002 Act, to the court for a criminal confiscation order. These proceedings can be postponed on an application by either the prosecutor, the accused or by the court by its own motion. The permitted period for any postponement is two years from the date of conviction, unless, as per section 99(4), "exceptional circumstances" can be demonstrated. The provision at section 99(4A) provides that, for the purposes of section 99(4) of the 2002 Act, "exceptional circumstances" includes the effect (whether direct or indirect) of Covid on the proceedings. This provision has the effect of putting beyond any doubt that reasons directly, or indirectly related to Covid may be regarded as "exceptional circumstances" for the purposes of extending the period of postponement of confiscation proceedings. If the court is satisfied that there are exceptional circumstances it can postpone the process for more than two years.
- 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). COPFS has advised that there are currently five cases where the permitted period is likely to expire by the end of March 2022, with a further 10 cases where the permitted period could expire before September 2022. There have been 31 occasions where an extension of the permitted period has been sought, 23 of these being in the last six months.
- The Scottish Government has no plans to make this provision permanent, but intend to keep it in place until such time as it is no longer required due to progress with the court backlog.

410. The consultation for the Bill also included proposals to continue amendments to section 116 (time limit for payment), section 116A (further time for payment due to Covid) and to section 117 (interest on unpaid sums) of the 2002 Act, which were made in the Second Scottish Act. Those amendments were intended to acknowledge the effect of restrictions put in place at the time of Covid lockdown, such as those affecting the housing market or difficulties encountered in obtaining legal and financial advice. The amendments were designed to ensure that no individual subject to a confiscation order was unfairly disadvantaged if they could not pay a confiscation order on time for reasons relating directly, or indirectly, to Covid. They did so by amending section 116 to allow the court to make an order extending the period for payment. New section 116A

set out the circumstances under which such an order could be further extended, with amendments to section 117 dis-applying the accrual of interest on an outstanding confiscation order when an order under section 116A had been granted.

411. The Scottish Ministers consider that many of the barriers to fulfilment of a confiscation order caused by the pandemic (e.g. the stagnation of the housing market) have been significantly reduced and that after expiry of the Scottish Acts it will be appropriate to revert to the pre-pandemic legislation. This will still allow an individual to apply for a maximum of 12 months to pay, however after which time, if payment has not been made, the individual will be called back before the court for further consideration of the case, including the imposition of a default sentence if a valid reason for non-payment cannot be shown. Scottish Ministers will continue to review the need for the further time to pay provisions should further restrictions be required to deal with the pandemic.

Prisons and young offenders institutions

412. The provision allows that the Scottish Ministers may, by regulations, provide that a person who falls within a description specified in the regulations is to be released from prison early.

413. 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 Covid 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.

414. Before this provision can be applied, Scottish Ministers must present the necessary regulations for the planned action to Parliament.

415. With regard to Parliamentary scrutiny, it should be noted that these provisions would allow the use of the made affirmative procedure to make regulations. In such an event, the regulations must contain a declaration that the Scottish Ministers are of the opinion that because of the urgency it is necessary to depart from the affirmative procedure. In such situations, the series of tests outlined here would still apply.

416. The equivalent provision in the First Scottish Act has been applied once to date, on 4 May 2020, when a limited number of prisoners were released early (all of whom were serving sentences of 18 months or less, and were within 90 days of their scheduled release date – and with certain prisoner types excluded).

417. This decision was based on detailed consultation with the 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.

418. Covid has continued to have significant impact on the operation of the prison system, whether in response to any cases of infection amongst prisoners or prison workers, changes necessary to the operation of the prison estate to mitigate and prevent the effects of potential spread of infection, and the changing effects of public health instructions on the overall operation of the prison estate.

419. 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 Covid developments 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).

420. The Scottish Government has sought views on the potential development of a power for Scottish Ministers to instruct the release of prisoners under emergency circumstances (under the “Bail and Release from Custody” consultation published on 15 November 2021⁵²), and this may subsequently lead to such provisions being sought in primary legislation scheduled for introduction in 2022. However, until such arrangements are in place, it will be necessary for the early release provisions made under the First Scottish Act to remain in place, to protect the safe operation of prisons, and the wellbeing of prisoners and prison staff.

Alternative approaches

421. The opening section of the Policy Memorandum considers the general alternative approaches to the Bill. This section considers alternative approaches with regard to certain specific provisions.

Courts and tribunals: conduct of business by electronic means etc. (Documents)

422. As outlined above, there is a strong case to progress future measures through the development of rules by the SCJC and the Criminal Courts Rules Council. The law firm CMS Cameron McKenna Nabarro Olswang LLP supports this view commenting that “these provisions have improved transparency / ease of access to information and that they support the principle of open justice. Any permanent provisions would most appropriately be dealt with in the relevant court rules as it is desirable that all matters of civil court procedure should be located so far as possible within the same rules framework. This is important for all court users, but particularly for court users who may not have access to professional representation.”

423. However, the Scottish Government is not yet able to formalise this position and the absence of a longer extension of these provisions would risk having a period whereby there was no legislative underpinning of these measures. It is recognised that

⁵² [Bail and release from custody arrangements in Scotland - Scottish Government - Citizen Space \(consult.gov.scot\)](https://www.gov.scot/citizen-space/bail-and-release-from-custody-arrangements-in-scotland/)

further consultation and consideration is required during development of appropriate court rules, and this may result in amendments at stage 2.

Courts and tribunals: conduct of business by electronic means etc. (Attending a court or tribunal)

424. As part of the RRT programme the Scottish Government continues to review the opportunity to progress initiatives designed to address the backlog and to evaluate the success of current activity. It is considered that at present the continued progression and option to utilise virtual attendance represents the best opportunity to respond to the challenges and implications of the pandemic. It is also recognised that use of video or remote technology must be accompanied by proactive efforts to understand individuals' needs, reasonable adjustments where these are required, and alternative means of conducting business where video or remote technology makes effective participation unlikely.

425. It is recognised that the outcome of the SCJC consultation and further consideration of the merit of court rules may evidence the need to consider amendments as the Bill progresses through the Parliamentary process. This may include amending the provisions at stage 2 to allow different measures for civil, tribunal and criminal hearings.

Criminal procedure time limits

426. An alternative approach would be to allow the provisions to expire on 30 September 2022 without any replacement (which would mean a return to the pre-Covid time limits contained in the 1995 Act). This is not considered practical in view of the fact that, even with the courts operating at their pre-Covid levels, as set out above, the backlog of cases that has developed would mean that there would be a continuing need for COPFS to make a large number of applications to extend time limits in individual cases for a number of years and in each of those cases, for defence agents to respond to such applications and courts to determine them.

427. The resulting requirement for time to be made in court programming for such applications to be heard would further reduce the courts' capacity to address the backlog of cases, with the paradoxical result that removing the time limit extension provision would be likely to increase the time that it would take for cases to come to trial.

428. Furthermore, it should be noted that there is no power to apply to the court to extend the time limit relating to certain summary cases at section 136 of the 1995 Act. If this time limit extension provision, which provides for the length of time after the commission of an offence triable only summarily that proceedings in court can begin, were expired, the effect would be that significant numbers of prosecutions could not be initiated. Ensuring that cases close to the pre-Covid time limits are prosecuted would involve diverting prosecution and court resources to these cases, further increasing the backlog of cases that has built up with regard to solemn court cases. This would be

likely to have a significant impact on prosecutions for summary offences such as drink driving and drug driving.

429. A number of consultees expressed particular concern about continuation of the provisions extending the length of time for which a person can be remanded in custody prior to trial and some consultees suggested an approach of specifically expiring the remand time limit extension provisions while retaining other time limit extension provisions. This, in their view, would ensure greater scrutiny by the courts of the use of remand.

430. However, essential safeguards for those held on remand are embedded in the criminal procedure rules governing the court process. Cases where the accused is held on remand make up a significant proportion of all solemn court cases and expiry of this provision would, on its own, have a significant negative impact on COPFS and the courts' ability to progress trials.

431. It is important to note how the rights of the accused are safeguarded. In the case of *JD v. HMA* (2020, HCJAC 15, para 15) from April 2020, the High Court of Justiciary Appeal Court stated that: "In the present Covid crisis, it is not known when accused persons are likely to be tried. In solemn cases, it may be several months before jury trials can be resumed. Meantime there may be an increasing number of those remanded in custody. The length of time during which a person is likely to remain on remand is a factor in deciding whether to grant bail. This factor must be given greater weight than hitherto."

432. As can be seen, the court must give weight, when assessing the question of bail to the likely progress of a case. In addition, section 30 of the 1995 Act provides that a person remanded in custody can apply to the court for a bail review, if circumstances change. Such circumstances could include the delay in a trial progressing due to the impact of the pandemic.

433. Taken together, these important safeguards are vital in protecting the rights of those held on remand. This is because a person held on remand has the ability to seek to have their remand reviewed and that the impact of the pandemic on the courts' processing of cases can be a relevant factor in considering continuation of an accused's remand.

434. The Scottish Government is of the view that this is a key measure in ensuring that the justice system is able to focus as much as possible on addressing the backlog of cases that has built up during the pandemic and that, therefore, a return to the pre-Covid time limits is not a viable alternative until the backlog has been cleared.

Proceeds of crime

435. An alternative approach would be to seek to continue the amendments made at section 116, 116A and 117 of the 2002 Act, however the reasons for the amendments made by the Second Scottish Act have now dissipated and they are no longer required.

The pre-pandemic legislation can now be relied on, which allows an individual to apply for an extension of up to 12 months to fulfil a confiscation order.

Prisons and young offenders institutions

436. As previously highlighted, the Scottish Government is currently consulting on the possibility of creating a power that would enable Scottish Ministers to instruct the early release of groups of prisoners in response to emergency situations. However, it is not yet decided whether and how such a provision will be made, and as such it is necessary that the existing power should be retained on a longer extension basis.

Consultation

437. The opening section of the Policy Memorandum outlines the overall consultation process for the Bill. This section highlights further consultation activity with regard to certain specific provisions.

Courts and tribunals: conduct of business by electronic means etc. (Documents)

438. Throughout the development of these provisions policy officials have actively engaged with key stakeholders to assess the impact of related measures and to inform next steps. This has included engagement through the RRT programme and its workstreams, including for example the work on the introduction of remote jury centres and virtual custody courts. Meetings have also taken place during the consultation period both on the content of the consultation, the basis for the approach taken and the supporting narrative. Where issues have been raised, these have been discussed and have helped inform decisions on the drafting of the provisions and their broader intent. Recent meetings have also taken place and continue with the SCJC as the Scottish Government looks to align the aims of the provisions with the Bill alongside developments in response to the SCJC's own consultation process.

Courts and tribunals: conduct of business by electronic means etc. (Attending a court or tribunal)

439. Throughout the development of these provisions policy officials have actively engaged with key stakeholders to assess the impact of related measures and to inform next steps. This has included engagement through the RRT programme and its workstreams, including for example the work on the introduction of remote jury centres and virtual custody courts. Meetings have also taken place during the consultation period both on the content of the consultation, the basis for the approach taken and the supporting narrative. This includes proactive engagement with the SCJC who have held their own separate consultation on this matter. As the position and potential next steps on that consultation become clearer, the Scottish Government will consider with the SCJC any implications for the Bill.

Fiscal fines

440. In addition to the Scottish Government formal consultation, the Scottish Government has also consulted with COPFS on this measure throughout the period of the Covid pandemic. 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 Covid. This consultation also led to development of the new nine point fiscal fine scale proposed in the Bill.

Failure to appear before court following police liberation

441. In addition to the Scottish Government formal consultation, the Scottish Government has also consulted with COPFS on this measure throughout the period of the Covid pandemic. This consultation has highlighted that it is important to retain the ability of the court to prevent the expiry of an undertaking when the specified conditions are met as a means of preserving public including victim safety.

Prisons and young offenders institutions

442. Scottish Government and SPS officials have maintained regular detailed discussions on the control of the effects of Covid 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.

443. The regulations for the May 2020 early release process were approved by the Scottish Parliament, following a recommendation to that effect by the Covid 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. HM Chief Inspector of Prisons for Scotland's 2019/2020 annual report⁵³ 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."

444. The Scottish Government continues to regularly confer with the SPS 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 Covid, through the operation of the Criminal Justice Board established to lead the RRT programme for justice operations (which includes representation from stakeholders across the justice sector).

⁵³ [HM Chief Inspector of Prisons for Scotland: Annual Report 2019-20 | HMIPS \(prisonsinspectoratescotland.gov.uk\)](https://www.hmips.gov.uk/prisonsinspectoratescotland.gov.uk)

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

445. An Equality Impact Assessment and Fairer Scotland Duty Impact Assessment have been published.

446. The Scottish Government has assessed the potential impact of the provisions on the protected characteristics and has determined that no adverse effect on protected characteristics is anticipated with regard to the majority of the provisions.

447. With regard to Courts and tribunals: conduct of business by electronic means etc. (Documents), these provisions align closely with the provisions under the theme of 'Communicating by phone or online'. These provisions may provide enhanced access opportunities for people across multiple protected characteristics. The option to communicate digitally may help people with limited mobility who are unable to travel or encounter difficulties in doing so.

448. Digital exclusion is a significant issue to consider in relation to the increased use of technology for the transfer of information. Lack of access to remote technology, lack of digital skills and connectivity issues may present a barrier to electronic communication. However, it is important to note that the provisions will not remove the option of traditional means of communication.

449. Information from documents published on the SCTS website, as an alternative to physical display on walls of court, can be relayed to any member of the public via a telephone call to the court during court opening hours. In addition, the option of viewing published documents on the walls (or other parts) of court buildings will be retained as an alternative option, but will only have the potential to be operational once court buildings open back up to public access. The SCTS follow W3C Web Accessibility standards in the creation of their website which will ensure documents are displayed in an accessible format. Furthermore, the SCTS plans to draft an Assisted Digital Strategy which will ensure that digital services are straightforward and convenient so that all those who can use them will choose to do so, whilst those who cannot are not excluded. This strategy will apply across all SCTS systems and websites. An assisted digital user is someone who cannot use a digital service independently. This includes people who are offline with no digital skills, and people who are online but only have limited digital skills.

450. With regard to Courts and tribunals: conduct of business by electronic means etc. (Attending a court or tribunal), this provision aligns closely with the provisions under the theme 'Online meetings and hearings'. This provision may provide enhanced access opportunities for people across multiple protected characteristics. The option to communicate digitally may help people with limited mobility who are unable to travel or encounter difficulties in doing so.

451. Once again, digital exclusion is a significant issue to consider in relation to the increased use of technology for participation in virtual court and tribunal procedures. However, the court and tribunal in every case retains the power to make directions which take account of the specific circumstances affecting parties to the proceedings and the ability to adjourn where representations are made on this. This includes the power to direct that persons attend court where remote attendance would prejudice the fairness of proceedings or otherwise be contrary to the interests of justice. Courts must also ensure that proceedings are fair in terms of the Article 6 ECHR right to a fair hearing, which includes ensuring that parties, for example vulnerable accused, are able to participate effectively in their hearing.

Failure to appear before court following police liberation

452. This provision has been identified as a key measure to preserve public and victim safety during the Covid pandemic, particularly in sensitive cases of domestic abuse. It may therefore help to ensure that the particular impacts of gender based violence, which includes women and girls across all protected characteristics (including those that experience a higher rate of domestic abuse than others), will continue to be addressed.

National jurisdiction for callings from custody etc.

453. The policy will apply to anyone who is arrested in connection with an alleged criminal offence and remanded in police custody for first appearance at court in connection with the offence to which the custody proceedings relate. However, as this legislative measure is not targeted at a specific group, it is anticipated that it will have minimal impact in respect of the protected characteristics.

454. As people may be held in a smaller number of designated police custody suites (as facilitated by these jurisdictional provisions) they may also require to travel greater distances than they ordinarily would to the centralised custody suite prior to their appearance in court. An example is where an individual is arrested in, for illustrative purposes, Stonehaven for a crime allegedly committed there and is then taken to a centralised custody facility in Dundee, for appearance the next day at Dundee Sheriff Court by live link. Conversely, as this measure supplements the approach taken in virtual court appearances more generally, it may reduce the overall time an individual spends in police custody by enabling all matters to be heard in one court, which prevents the accused having to be transported across the country to appear at different courts on different days. Any issues that may arise relating to individuals who have difficulty travelling greater distances for custody hearings, for example by virtue of their age or disability, will be taken into account on a case-by-case basis.

Criminal procedure time limits

455. The direct impact of the provisions extending certain time limits will be on COPFS, SCTS and defence agents who would otherwise require to apply for, respond to, and determine large numbers of applications to extend time limits in individual cases on a case-by-case basis and the accused people to whom these time limits relate.

456. Indirectly, as the provisions are intended to assist the justice system in addressing the backlog of cases that has built up during the Covid pandemic, they will affect anyone involved in the criminal justice process – most obviously complainants, accused people and witnesses.

457. Data indicates that younger people aged between around 18 and 40 are more likely to be involved in court cases both as victims and accused people and that men are much more likely than women both to be charged with criminal offences and to be remanded in custody prior to trial.

458. Measures to reduce the backlog of cases in the justice system should ensure that cases take less time to be determined in court than would be the case if the time limits extension policy did not continue to remain in place, and in particular, should have the effect of reducing the length of time that accused people spend being remanded in custody prior to trial.

Human rights

Courts and tribunals: conduct of business by electronic means etc. (Documents)

459. The Scottish Government has assessed the potential impact of extending the measure on human rights. It considers that whilst the measure may, when used to publish data on the SCTS website, engage Article 8 (right to respect for private and family life) to a certain degree by making personal information from documents readily available to a global audience, that the current system has inbuilt safeguards to ensure the provision would be used in a manner that is compatible with the Convention.

460. 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. However, the Scottish Government considers that this risk is mitigated by the inclusion of direction-making powers for the Lord President or Lord Justice General. This safeguard has already been used on one occasion by the Lord President since the start of the pandemic. The Law Society of Scotland is supportive of the inclusion of the direction-making powers commenting that: “The proposal includes appropriate safeguards to redact sensitive information.” Sheriffs Principal also agree “that the Lord President/Lord Justice General should retain a power to direct the categories of documents to which these provisions will apply and to direct whether any such document should be redacted.”

461. In any event, the documents displayed on the walls of court that are affected by this measure are already public domain documents and the statutory durations for the publication of information on the walls (or other parts) of court buildings continue to apply equally to the online publication of such 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.

462. In addition, 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 this provision will be used in a manner that is compatible with the Convention.

Courts and tribunals: conduct of business by electronic means etc. (Attending a court or tribunal)

463. The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that, although Article 6 of the ECHR is engaged by the provisions, there is no breach of Article 6 and the provisions are ECHR compliant. The courts are obliged to make decisions about remote proceedings in an ECHR compliant manner, and to ensure that due process is being followed during proceedings. Guidance is currently in place for the courts, and efforts will be increased to widen awareness in response to concerns identified during the consultation process. These issues will continue to be monitored so long as the provisions are applied. There is a legitimate policy objective in extending the provisions, which is to address the court backlog and assist in the recovery of the courts from the pandemic.

Fiscal fines

464. 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.

465. 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.

Failure to appear before court following police liberation

466. The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not 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. Where a person is subject to any further conditions of undertaking, the person retains the right to apply to the court to have a condition/(s) reviewed. If the court is not satisfied that the further condition is necessary and proportionate for the purpose for which it was imposed, the sheriff may modify the terms of the undertaking by removing the condition or imposing an alternative condition. 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.

467. 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 Covid, 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 Covid, 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.

National jurisdiction for callings from custody etc.

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

Criminal procedure time limits

469. 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 the measures 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 Covid pandemic.

470. 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 1995 Act, 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.

Proceeds of crime

471. The Scottish Government has assessed the potential impact of extending the measure on human rights and in particular any impact that it may have on a person's rights under Article 6 of ECHR to have their case determined in a reasonable time. The Government considers that ECHR issues do not arise. Extending the permitted period of postponement for applying for a confiscation order due to the Covid pandemic is equitable to both prosecution and defence parties, further, as the court retains the power to determine not to grant an extension and can therefore refuse such a request, a

person's Article 6 right will always be capable of being safeguarded. The extension of the provision would not create any new offences and no heavier penalty will be imposed than would otherwise have been the case.

Prisons and young offenders institutions

472. The Scottish Government has assessed the potential impact of extending this power on human rights and has determined that depending on how it is manifest, the impact of Covid in prisons (both on prison staff and prisoners) could create a risk of a breach of the Articles 2, 3 and 8 ECHR rights of prisoners and prison staff. Therefore the release of prisoners, by way of regulations under this provision, may be required as a means of safeguarding the ECHR rights of prisoners and prison staff. As certain prisoners are not eligible for release, there is a risk of contravening the Article 14 rights of those prisoners who are not released. Any difference in treatment which arose would need to be objectively justified as it would seek to protect the public from the risks that would be posed by the release of prisoners serving sentences for more serious offences and those who pose a flight risk from ongoing proceedings. The release of prisoners also creates a risk of contravening the ECHR 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

473. An Island Communities Impact Assessment has been published.

474. The Island Communities Impact Assessment highlights amongst other things that levels of recorded crime are lower in the three island local authorities than anywhere else in Scotland. Therefore it is likely that fewer people from island communities are directly affected as victims, witnesses or accused people by delays in criminal proceedings caused by the Covid pandemic. The temporary justice measures are nonetheless in the Government's opinion essential for all of Scotland's communities.

Local government

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

Prisons and young offenders institutions

476. When the current prisoner early release provision was utilised in May 2020, the Scottish Government consulted widely with COSLA, justice social work, housing authorities and NHS Boards before regulations for the release process were decided, and continued to liaise with stakeholders throughout the process. The extension of these provisions have been supported by COSLA and numerous local authorities during consultation.

Sustainable development

477. Please see paragraph 91.

478. It is not envisaged that the temporary justice provisions in the bill will have a detrimental effect on sustainable development or the environment. Although difficult to quantify, and as per the provisions under the previous themes ‘Online meetings and hearings’ and ‘Communicating by phone or online’, some of the measures here will have a positive effect on sustainable development and deliver environmental benefits as a result of reduced printing and paper usage and also lower climate impact through reducing the level of travel required to courts and tribunals across the country and enabling remote working. All of the provisions to enable online meetings and hearings / communicating by phone or online support the Scottish Government’s commitment to achieve a 20 per cent reduction in car kilometres by 2030.

Annex A

Coronavirus Acts Scottish Provisions Expired

Act	Provision	Expired
First Scottish Act	Section 3 and schedule 2 – Temporary extension of moratoria on diligence	Paragraphs 2 and 3 of schedule 2 expired at the end of 30 September 2021 as part of the Extension and Expiry Act.
First Scottish Act	Section 4 and schedule 3 – Children and vulnerable adults	Paragraph 2(2) ⁵⁴ of schedule 3 expired on 30 March 2021 and paragraph 6 ⁵⁵ of schedule 3 expired on 29 September 2020. As part of the Extension and Expiry Act, the whole of schedule 3 expired at the end of 30 September 2021, subject to transitional and saving provisions, and section 4 was repealed.
First Scottish Act	Section 5 and schedule 4, Part 5 – Evidence	As part of the Extension and Expiry Act, part 5 of schedule 4 expired at the end of 30 September 2021 subject to saving provision in the Extension and Expiry Act (Evidence) (Saving Provision) Regulations 2021. ⁵⁶
First Scottish Act	Section 5 and schedule 4, Part 6 – Community orders	As part of the Extension and Expiry Act paragraphs 12 and 14 of schedule 4 expired at the end of 30 September 2021. In addition, paragraph 15 was partially expired at the end of 30 September 2021 such that the regulation making power in that paragraph can no longer be used in relation to drug treatment and testing orders.
First Scottish Act	Section 5 and schedule 4, Part 7 – Parole Board	Paragraphs 18(2), 18(4) and 18(5) of schedule 4 expired on 14 June 2021. ⁵⁷
First Scottish Act	Section 6 and schedule 5 – Alcohol Licensing	Paragraph 4(5)(d) of schedule 5 expired at the end of 30 September 2021 as part of the Extension and Expiry Act.
First Scottish Act	Section 7 and schedule 6, Part 2 – Freedom of Information (FOI)	Paragraphs 3, 4 and 5 of schedule 6 were repealed by the Second Scottish Act. As part of the Extension and Expiry Act paragraph 6 of schedule 6 expired at the end of 30 September 2021.

⁵⁴ [The Coronavirus \(Scotland\) Acts \(Early Expiry and Suspension of Provisions\) Regulations 2021](#)

⁵⁵ [The Coronavirus \(Scotland\) Acts \(Early Expiry of Provisions\) Regulations 2020](#)

⁵⁶ [The Coronavirus \(Extension and Expiry\) \(Scotland\) Act 2021 \(Evidence\) \(Saving Provision\) Regulations 2021 \(legislation.gov.uk\)](#)

⁵⁷ [The Coronavirus \(Scotland\) Act 2020 \(Early Expiry of Provisions\) \(No. 2\) Regulations 2021 \(legislation.gov.uk\)](#)

First Scottish Act	Section 7 and schedule 6, Part 4 – Local Authority meetings	As part of the Extension and Expiry Act paragraph 11(a) of schedule 6 was repealed and paragraph 13 of schedule 6 was expired.
First Scottish Act	Section 7 and schedule 6, Part 5 – Duties under the Public Finance and Accountability (Scotland) Act 2000	As part of the Extension and Expiry Act, part 5 of schedule 6 expired at the end of 30 September 2021.
First Scottish Act	Section 8 and schedule 7, paragraphs 1 to 5 – Social security	Paragraphs 1(a), 2, 3 and 4 of schedule 7 expired on 29 September 2020. ⁵⁸ Paragraphs 1(b) and 5 of schedule 7 expired at the end of 30 September 2021 by the Extension and Expiry Act.
First Scottish Act	Section 8 and schedule 7, paragraphs 11 to 19 – Land Registration	Paragraphs 15 to 18 of schedule 7 expired on 30 March 2021. ⁵⁹ Paragraph 19 of schedule 7 expired on 30 June 2021. ⁶⁰
First Scottish Act	Section 8 and schedule 7, paragraphs 20 to 22 – Anatomy Act	Paragraphs 20 to 22 of schedule 7 expired on 30 March 2021. ⁶¹
First Scottish Act	Section 8 and schedule 7, paragraphs 23 to 30 – Scrutiny of subordinate legislation in urgent cases	As part of the Extension and Expiry Act, paragraphs 23 to 30 of schedule 7 expired at the end of 30 September 2021.
First Scottish Act	Section 8 and schedule 7, paragraph 31 – Business Improvement Districts	Paragraph 31 of schedule 7 expired on 30 June 2021. ⁶²
First Scottish Act	Section 8 and schedule 7, paragraphs 32 and 33 – Muirburn	Paragraphs 32 and 33 of schedule 7 expired on 30 March 2021. ⁶³

⁵⁸ [The Coronavirus \(Scotland\) Acts \(Early Expiry of Provisions\) Regulations 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2020/1033/the-coronavirus-scotland-acts-early-expiry-of-provisions-regulations-2020)

⁵⁹ [The Coronavirus \(Scotland\) Acts \(Early Expiry and Suspension of Provisions\) Regulations 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2021/1033/the-coronavirus-scotland-acts-early-expiry-and-suspension-of-provisions-regulations-2021)

⁶⁰ [The Coronavirus \(Scotland\) Act 2020 \(Early Expiry of Provisions\) Regulations 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2021/1034/the-coronavirus-scotland-act-2020-early-expiry-of-provisions-regulations-2021)

⁶¹ [The Coronavirus \(Scotland\) Acts \(Early Expiry and Suspension of Provisions\) Regulations 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2021/1035/the-coronavirus-scotland-acts-early-expiry-and-suspension-of-provisions-regulations-2021)

⁶² [The Coronavirus \(Scotland\) Act 2020 \(Early Expiry of Provisions\) Regulations 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2021/1036/the-coronavirus-scotland-act-2020-early-expiry-of-provisions-regulations-2021)

⁶³ [The Coronavirus \(Scotland\) Acts \(Early Expiry and Suspension of Provisions\) Regulations 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2021/1037/the-coronavirus-scotland-acts-early-expiry-and-suspension-of-provisions-regulations-2021)

Second Scottish Act	Section 2 and schedule 1, Part 1 – Student residential tenancy: termination by tenant	Part 1 of schedule 1 was partially expired to remove the provisions on 7 day notice periods for termination of student residential tenancies. Specifically, sub-paragraphs (2)(b)(i), (3) and (4), and words in sub-paragraph (2)(b)(ii), of paragraph 3, schedule 1 expired at the end of 30 September 2021 as part of the Extension and Expiry Act. Words in sub-paragraph (3) of paragraph 1, schedule 1 were repealed at the end of 30 September 2021 as part of the Extension and Expiry Act.
Second Scottish Act	Section 2 and schedule 1, Part 3 – Coronavirus Carer's Allowance Supplement	As part of the Extension and Expiry Act, part 3 of schedule 1 expired at the end of 30 September 2021.
Second Scottish Act	Section 2 and schedule 1, Part 5 – Bankruptcy	Paragraphs 9, 11, 13 and 14 of schedule 1 were expired on 29 March 2021. ⁶⁴
Second Scottish Act	Section 2 and schedule 1, Part 10 – Marriage and civil partnership	As part of the Extension and Expiry Act, part 10 of schedule 1 expired at the end of 30 September 2021.
Second Scottish Act	Section 3 and schedule 2, Part 1 – Criminal Justice	Paragraph 7 of schedule 2 was expired on 30 March 2021. ⁶⁵
Second Scottish Act	Section 4 and schedule 3 – Reports, Accounts and Other Documents	Schedule 3 expired on 29 September 2020. ⁶⁶
Second Scottish Act	Section 5 and schedule 4, Part 1 – UEFA European Championship	Part 1 of schedule 4 expired on 29 September 2020. ⁶⁷
Second Scottish Act	Section 5 and schedule 4, Part 5 – Land and Buildings Transaction Tax: additional amount	Part 5 of schedule 4 expired on 29 September 2020. ⁶⁸

⁶⁴ [The Bankruptcy \(Miscellaneous Amendments\) \(Scotland\) Regulations 2021 \(legislation.gov.uk\)](#)

⁶⁵ [The Coronavirus \(Scotland\) Acts \(Early Expiry and Suspension of Provisions\) Regulations 2021 \(legislation.gov.uk\)](#)

⁶⁶ [The Coronavirus \(Scotland\) Acts \(Early Expiry of Provisions\) Regulations 2020 \(legislation.gov.uk\)](#)

⁶⁷ [The Coronavirus \(Scotland\) Acts \(Early Expiry of Provisions\) Regulations 2020 \(legislation.gov.uk\)](#)

⁶⁸ [The Coronavirus \(Scotland\) Acts \(Early Expiry of Provisions\) Regulations 2020 \(legislation.gov.uk\)](#)

Second Scottish Act	Section 5 and schedule 4, Part 6 – Non-Domestic Rates relief	Part 6 of schedule 4 expired on 29 September 2020. ⁶⁹
Second Scottish Act	Section 5 and schedule 4, Part 8 – Freedom of Information	Paragraphs 10 and 11 of schedule 4 were repealed by the Extension and Expiry Act.
Second Scottish Act	Section 5 and schedule 4, Part 9 – Low emission zones	Part 9 of schedule 4 expired on 30 March 2021. ⁷⁰
Second Scottish Act	Section 5 and schedule 4, Part 11 – Traffic Regulation	Part 11 of schedule 4 expired on 30 March 2021. ⁷¹
UK Act	Section 23 – Time limits in relation to urgent warrants etc under Investigatory Powers Act	Section 23 expired on 9 December 2021. ⁷²
UK Act	Sections 25 to 29 and schedule 15 – Food supply	Sections 25 to 29 and schedule 15 expired on 17 July 2021. ⁷³
UK Act	Section 52 and Schedule 22 – Powers to issue directions relating to events, gatherings and premises	Section 52 and schedule 22 expired on 12 December 2021. ⁷⁴
UK Act	Sections 69 and 70 – Postponement of elections: Scotland	Sections 69 and 70 were spent as of 6 May 2021 (date of the Scottish Parliament election). They remain in force but can no longer be used / no longer have effect.

⁶⁹ [The Coronavirus \(Scotland\) Acts \(Early Expiry of Provisions\) Regulations 2020 \(legislation.gov.uk\)](#)

⁷⁰ [The Coronavirus \(Scotland\) Acts \(Early Expiry and Suspension of Provisions\) Regulations 2021 \(legislation.gov.uk\)](#)

⁷¹ [The Coronavirus \(Scotland\) Acts \(Early Expiry and Suspension of Provisions\) Regulations 2021 \(legislation.gov.uk\)](#)

⁷² [The Coronavirus Act 2020 \(Early Expiry\) \(No. 2\) Regulations 2021 \(legislation.gov.uk\)](#)

⁷³ [The Coronavirus Act 2020 \(Early Expiry\) Regulations 2021 \(legislation.gov.uk\)](#)

⁷⁴ [The Coronavirus Act 2020 \(Early Expiry of Provisions\) \(Scotland\) Regulations 2021 \(legislation.gov.uk\)](#)

Annex B

Bill Provisions and Corresponding Topics from Consultation Paper

Consultation	Bill
H1 Education: powers to make directions to close educational establishments, and to ensure the continuity of education	Educational establishments etc.
H2 Power to make public health protection regulations	Modifications of the Public Health Etc. (Scotland) Act 2008
H3 Vaccinations and immunisations	Arrangements for vaccination and immunisation
H4 Virtual public meetings under the Schools (Consultation) (Scotland) Act 2010	School consultations
P1 Alcohol licensing remote hearings	Alcohol licensing: how hearings may be held
P2 Bankruptcy: debt level that enables creditors to pursue the bankruptcy of a debtor through the courts	Bankruptcy: meaning of “qualified creditor” and “qualified creditors”
P3 Bankruptcy: electronic service of documents	Bankruptcy: service of documents
P4 Bankruptcy: moratoriums on diligence	N/A - not included in the Bill (as explained in the opening section of the Policy Memorandum)
P5 Bankruptcy: virtual meetings of creditors	Bankruptcy: remote meetings of creditors
P6 Care services: giving of notices by the Care Inspectorate	Care services: giving of notices by SCSWIS
P7 Civic government licensing remote hearings	Civic licensing: how hearings may be held
P8 Courts: intimation, etc. of documents	Courts and tribunals: conduct of business by electronic means etc. (Documents)
P9 Criminal justice: arrangements for the custody of persons detained at police stations	Custody at police stations: Custody officers’ functions
P10 Freedom of Information: giving notice electronically	Freedom of information: giving notice electronically
P11 Legal aid	Legal aid and advice: Claim for interim payment of fees and outlays
P12 Legal writings etc.	Requirements of writing: Disapplication of physical presence requirements
P13 Mental health: named person nomination	Mental health: removal of need for witnessing of signature of nominated person
P14 Parole Board: delegation	Parole Board for Scotland: Chairperson’s functions
P15 Parole Board: live link	N/A - not included in the Bill (as explained in the opening section of the Policy Memorandum)
P16 Remote registration of deaths and still-births	Registration of deaths
P17 Remote registration of live births	Registration of births

P18 Tenancies: protection against eviction (discretionary grounds of eviction); and pre-action requirements for eviction proceedings on ground of rent arrears	Removal of mandatory eviction grounds Pre-action protocol in respect of evictions relating to rent arrears
J1 Courts and tribunals: conduct of business by electronic means	Courts and tribunals: conduct of business by electronic means etc. (Documents)
J2 Courts and tribunals: virtual attendance	Courts and tribunals: conduct of business by electronic means etc. (Attending a court or tribunal)
J3 Criminal justice: early release of prisoners	Prisons and young offenders institutions
J4 Criminal justice: expiry of undertaking	Failure to appear before court following police liberation
J5 Criminal justice: fiscal fines	Fiscal fines
J6 Criminal justice: national court for cases beginning with an appearance from custody	National jurisdiction for callings from custody etc.
J7 Criminal justice: time limits	Criminal procedure time limits
J8 Proceeds of crime	Proceeds of crime
N/A - not included in the consultation paper (as explained in the body of the Policy Memorandum)	Civic licensing: how notices may be published
N/A - not included in the consultation paper (as explained in the body of the Policy Memorandum)	Land registration

This document relates to the Coronavirus (Recovery and Reform) (Scotland) Bill (SP Bill 9) as introduced in the Scottish Parliament on 25 January 2022

Coronavirus (Recovery and Reform) (Scotland) Bill

Policy Memorandum

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