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Coronavirus (Recovery and Reform) (Scotland) Bill: health, education, public Services and housing

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A briefing looking at parts of the Coronavirus (Recovery and Reform) (Scotland) (Bill), including those aspects relating to public health, education and the delivery of public services.



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Summary

This briefing looks at parts of the [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill](#) ¹ including those aspects relating to public health, education and the delivery of other public services. It is intended to complement [another SPICe bill briefing](#), which is focused on those parts of the bill dealing with criminal justice and legal aid.

The bill is wide ranging and includes:

- Powers intended to allow Scottish Ministers to respond to future public health emergencies, with for example powers to impose restrictions on individuals, businesses, communities, and educational settings.
- Measures relating to bankruptcy, including the provision to extend the debt threshold at which someone can be made bankrupt to £5,000.
- Provisions relating to the remote registration of births (including still-births) and deaths, with the possibility of further Stage 2 amendments, including on registration services for marriages and civil partnerships.
- Putting on a permanent footing the flexibility for civic and alcohol licensing hearings and meetings to be held remotely, and for civic licensing notices to be published on a local authority website.
- Provisions enabling the digital registration of various legal rights relating to lands and buildings.
- The option for Freedom of information notices to be provided electronically.
- A provision which would remove the need for the signature of a "named person" to be witnessed.
- Arrangements for how the Social Care and Social Work Inspectorate (SCSWIS, or the 'Care Inspectorate') issues formal notices to care service providers.
- Measures relating to tenancies and the evictions process, making two of the temporary measures permanent, with the aim of protecting private rental.

As part of the usual range of bill documents, the government has published [impact assessments of the bill](#) on business and regulation, child rights and wellbeing, equality, fairer Scotland and island communities.

Public health protection

Background

The Coronavirus pandemic required unprecedented action to protect the public health of Scotland, with measures impacting how people have lived, worked, and socialised since March 2020.

[Schedule 19 of the \(UK\) Coronavirus Act 2020](#) provided Scottish Ministers with the power to make regulations “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 (whether from risks originating there or elsewhere).” While England and Wales already had such powers via the [Public Health \(Control of Disease\) Act 1984](#), Scotland did not have these powers through the [Public Health etc. \(Scotland\) Act 2008](#).

The Public Health etc. (Scotland) Act 2008 allows for wide-ranging measures to be taken in order to prevent, protect against, or control, the spread of infection. The 2008 Act, however, did not provide Scottish Ministers with powers to make regulations to protect public health. Furthermore, the powers of the 2008 Act were considered to be insufficient to respond to a global pandemic. The 2008 Act provides powers (such as the power to request a sheriff court order requiring a person to undergo medical examination or be quarantined) for local authorities and health boards to contain localised public health threats. However, the powers in the 2008 Act were considered insufficient to facilitate a response to a global pandemic that required a centrally coordinated response. This perceived deficit led to the inclusion of a specific regulation-making power in the UK Coronavirus legislation.

The provisions of the UK Coronavirus Act 2020 are due to expire in March 2022. Secondary legislation to extend five of the provisions by 6 months was laid before the Scottish Parliament on [3 February 2022](#); if [approved](#) by the Scottish Parliament, [The Coronavirus Act 2020 \(Alteration of Expiry Date\) \(Scotland\) Regulations 2022](#) will extend these provisions until 24 September 2022.

Part 1

Part 1 of the Coronavirus (Recovery and Reform) (Scotland) Bill creates new powers to enable Scottish Ministers to respond to public health emergencies. These new powers are similar to those that Scottish Ministers already have on a temporary basis, via Schedule 19 of the [UK Coronavirus Act 2020](#), to respond to the Coronavirus pandemic (e.g. imposing “lockdown” restrictions on Scotland such as the prohibition and restrictions relating to holding an event or gathering).

Chapter 1: Modifications to the Public Health etc. (Scotland) Act 2008

Chapter 1 is concerned with the following: public health protection measures, international

travel regulations, and the meaning of “premises”. It would modify the Public Health etc. (Scotland) Act 2008 to give Scottish Ministers the power to introduce regulations 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.

Public health protection measures

Scottish Ministers would be able to make regulations in relation to infectious disease and contamination which presents, or could present, significant harm to human health. The Bill includes examples of what restrictions and requirements could be imposed. These include limits on gatherings, a requirement that a pupil is kept away from school, a requirement that someone abstains from working or trading, and a requirement that buildings or vehicles be disinfected or decontaminated.

It should be noted that these regulation-making powers do not seek to predict or define the range of actions that may be required to respond to any future public health threat.

As proposed, Scottish Ministers will have to consider, when making regulations, that restrictions or requirements are **proportionate** to what is sought to be achieved by imposing them.

Chapter 1 outlines the maximum penalties that may be imposed in relation to offences under regulations and when Scottish Ministers must review the regulations (every three weeks for provisions that impose restrictions or requirements on people, things, or premises).

Chapter 1 also outlines a further four distinguished restrictions and requirements that would only be taken in the most extreme circumstances: that a person submits to medical treatment; be moved to a hospital or other suitable establishment; be detained in a hospital or other suitable establishment; or be kept in quarantine. These special restrictions and requirements would only occur where there is a serious and imminent threat to public health and any decisions would need to be proportionate to the overall aim of protecting public health.

Furthermore, this section gives power to Scottish Ministers to make regulations that would confer functions in relation to monitoring public health risks on bodies responsible for safeguarding public health. Examples of such bodies include local authorities, health boards, and environmental organisations. The aim of these powers would be to ensure that public health risks are kept under observation and to maximise the chances of ensuring they are detected at an early stage.

International travel regulations

The Bill would modify [Section 94 of the Public Health etc. \(Scotland\) Act 2008](#). Schedule 94 of the Public Health etc. (Scotland) Act 2008 is a wide and general power that allows Scottish Ministers to make regulations to give effect to the [International Health Regulations \(2005\)](#) and other international arrangements relating to the spread of infectious disease and contamination.

During the Coronavirus pandemic, these powers have been used to introduce necessary travel restrictions and requirements for international travel. The Coronavirus (Recovery

and Reform) (Scotland) Bill modifies Section 94 and inserts new provisions to ensure that these international travel regulation-making powers are aligned with the Bill's new public health powers.

The meaning of “premises”

The Bill extends the definition of premises in [Section 123 of the Public Health etc. \(Scotland\) Act 2008](#) to include tents and offshore installations.

Chapter 2: Arrangements for vaccination and immunisation

Chapter 2 would modify the [National Health Service \(Scotland\) Act 1978](#) by permanently removing the requirement for vaccinations and immunisations to be delivered only under the direction or control of a medical practitioner. This requirement was temporarily removed by the UK Coronavirus Act 2020, thereby allowing vaccinations and immunisations to be delivered by a much wider range of health staff during the Coronavirus pandemic

Key issues and debates raised by Part 1 of the Bill

A consultation on [Covid recovery: public health, public services and justice reforms](#)² ran from 17 August until 9 November 2021, receiving 2,905 valid responses. [Analysis of the consultation](#)³, published on 26 January 2022, found that, overall, “the key message from respondents was that decisions to extend the temporary measures should be made with careful consideration.” 85.8% of **all** respondents opposed permanent powers to make public health protection regulations. 60.5% of **organisations** who gave a view to the consultation were in support of permanent powers to make public health protection regulations.

Support for Part 1

The Scottish Government believes that the Bill has the potential to strengthen Scotland's resilience against future public health threats. In addition to potential new Coronavirus variants, it [seems likely that COVID-19 will not be the last infectious disease or public health threat](#)⁴ that Scotland will face. The Scottish Government believes that the Bill will allow for Scottish Ministers to respond quickly and flexibly to any public health threat that presents a significant risk to Scotland. Part 1 would also ensure that Scottish Ministers have adequate powers to monitor and detect public health threats as early as possible.

Responding to public health threats as quickly as possible is viewed to be important. In the case of the Coronavirus pandemic, Scottish Ministers were able to issue guidance in the earliest days of the pandemic but could not implement legal requirements until the UK Coronavirus Act 2020 came into force (late March 2020). It is felt that this could negatively impact the ability of Scottish Ministers to respond quickly to threats if the UK Coronavirus

Act 2020 expires without the powers introduced by the Coronavirus (Recovery and Reform) (Scotland) Bill.

Furthermore, regarding Chapter 2: Arrangements for vaccination and immunisation, it is felt that the current requirement for vaccinations and immunisations to be delivered under the direction or control of a medical practitioner only prevents the most efficient arrangement and delivery of vaccinations in Scotland. It is believed that, by amending this requirement, Scotland's vaccine capacity could be increased overall.

[The Public Health etc. \(Scotland\) Act 2008](#) already provides local authorities and health boards with the powers to contain public health threats that are localised or where there is little risk that the spread of infection or contamination will result in widespread, large scale consequences. However, the Coronavirus pandemic has required a centrally coordinated response. The powers in the 2008 Act have not been sufficient to allow such a response. The Coronavirus (Recovery and Reform) (Scotland) Bill would ensure that, where a centrally coordinated response is required, Scottish Ministers have the power to deliver this. Local action will still be the default response where there is a low risk of widespread, large scale consequences and restrictions and requirements would not have to apply to all parts of the country. Rather, differences in restrictions and requirements may still be appropriate alongside an approach that is co-ordinated and determined at a national level.

Concerns raised

Concerns have been raised over the appropriateness of the temporary powers provided under [Schedule 19 of the UK Coronavirus Act 2020](#) being made permanent as Scotland moves out of the Coronavirus pandemic. It is felt by some that legislation was created in response to an unprecedented public health emergency, rather than as a permanent power for Scottish Ministers, and should remain a temporary measure delivered as a response to the Coronavirus pandemic specifically.

Responses to the consultation emphasised the negative impact of restrictions during the Coronavirus pandemic, such as their impact on physical health conditions and on mental wellbeing. Furthermore, the most common explanation for opposing the extension or permanence of these powers was a doubt over the "effectiveness of the public health regulations outlined in the consultation document." Specifically, many individuals felt that there was "little or no evidence" that regulations had any impact on the spread of the virus.

There are also concerns over the Bill's potential impact on personal liberties, particularly the powers created by Part 1. Analysis of the Covid recovery consultation highlighted that a recurring theme within responses was the importance of personal responsibility and allowing individuals to make decisions about their own behaviour.

Opponents of the Bill have argued that the Bill reduces parliamentary scrutiny and transparency in decision-making. As proposed, restrictions and regulations could be introduced without prior Parliamentary approval. This is perceived to be an increase in the permanent powers of Scottish Ministers and a reduction in accountability to the Parliament.

Finally, the analysis of the consultation explored opposition to the potential arrangements for vaccination and immunisations. The analysis document stated:

“ Several of the respondents who opposed permanence and extension felt that doctors’ level of training and competence meant that they should deliver vaccinations rather than other professionals. Some respondents felt that doctors should deliver vaccinations because they would be better able to answer patients’ questions about the vaccine and its potential side effects, thereby enabling informed consent, while doctors’ knowledge of their patients’ medical history would allow them to identify any potential risks that the vaccine could pose to an individual.”

Educational establishments and schools

Chapters 1 and 2 of Part 2 of the Bill provide for powers for Ministers to make regulations and directions affecting educational establishments during this or a future pandemic.

Powers under these chapters include:

- Making regulations which could set conditions on the functioning of educational establishments or certain types of accommodation, including potentially restricting access to educational establishments.
- Giving directions on how local authorities could undertake statutory consultations about certain proposals in relation changes to schools.

Educational establishments and student and boarding accommodation

Chapter 1 of Part 2 of the Bill provides for duties and powers in relation to a range of education establishments and accommodation for students and pupils.

The Policy Memorandum (para 93) states:

“ 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.”

The majority of the provisions in this Chapter of the Bill reflect some (but not all) of the powers the Scottish Government currently has under schedules 16 and 17 of the Coronavirus Act 2020.

Permanence of powers in the Coronavirus Act 2020

The Bill provides for Ministers to make regulations which could have a similar effect to directions provided for in schedules 16 and 17 of the Coronavirus Act 2020. [The Consultation on the Bill](#) stated:

“ The proposal is to make permanent provisions in the UK Act that relate to education, namely the duty on all operators of educational establishments to have regard to the advice of the Chief Medical Officer for Scotland (“CMO”), and the powers for Scottish Ministers to give directions in relation to the closure of educational establishments and the continuity of educational provision during the remainder of the current pandemic and future pandemics.”

The Scottish Government [issued ten Education Continuity Directions](#) (“ECDs”) through

2020 and early 2021 to place duties on local authorities to take a range of actions in response to the pandemic, including restricting access to schools for pupils.

The [analysis of responses to the Scottish Government's consultation](#) noted that of the 2,676 responses that gave a view on proposals to make permanent powers under the 2020 Act, 92.7% opposed. All but 40 of those responses were from individuals. The analysis stressed that the responses to the consultation are not necessarily representative of the population as a whole.

The analysis (p9) stated:

“ The most common theme among those supporting permanence [of the powers in the 2020 Act] was that the provision would help the Scottish Government respond quickly if the need to close educational establishments arose again in this or any future pandemic.”

And:

“ Those opposing extension or permanence commonly explained this on the basis of the harm caused by closing educational establishments. Many respondents pointed to the disruption that school closures caused for children and young people's learning, both in terms of curricular education and the wider social and life skills developed through face-to-face education. Several voiced concerns about remote and online learning, suggesting that it is not as effective as face-to-face learning. Inequalities in access to devices, internet and a quiet space to study were highlighted as having the potential to exacerbate the attainment gap between children and young people in affluent and less affluent areas.”

Section 8: Regulations on continuing operation of educational establishments

This section would provide Ministers with the power to make regulations on the operation of educational establishments.

The power would allow for a great deal of flexibility in which educational establishments the regulations could apply to and what may be required of those educational establishments. The Explanatory Notes (para 40) state that the regulations could include:

“ the conferral of additional functions on an educational establishment relating to the provision of education or (only where an education authority or a further or higher education institution is concerned) the use of an educational establishment's premises for the purpose of protecting public health, for example for testing or vaccination; the alteration of term dates and of opening times; the direction of service provision; the restriction or prohibition of access to an educational establishment's premises (or part of such premises). The restriction or prohibition of access may be framed in terms of specified activities. Furthermore, the regulations may require actions to be taken by educational establishments in general terms, or may require particular actions to be taken by them”

Sections 9 and 10: Regulations on school boarding accommodation and student accommodation

Sections 9 and 10 provide for regulations to be made in relation to school boarding accommodation and student accommodation. The Explanatory Notes (paras 42 and 47) state that these regulations:

“ ... may require the restriction or prohibition of access to [student and boarding] accommodation premises (or part of such premises). The restriction or prohibition of access may be framed in terms of specified activities (for example, access could be permitted only for urgent [student or pupil] welfare reasons or for the carrying on of activities which are necessary for the continuing provision of education). Furthermore, the regulations may require actions to be taken by the managers of [student and boarding] accommodation in general terms, or may require particular actions to be taken by them.”

The regulations may require the managers of student or boarding accommodation to provide support to enable residents to comply with any legal requirements in relation to public health (e.g. to self-isolate).

These regulations reflect the powers to give a “boarding accommodation closure direction” and a “student accommodation closure direction” under [Schedule 16 of the Coronavirus Act 2020](#). (paras 10 and 11).

Duty to have regard to public health advice and guidance

The Bill would require operators of educational establishments (including early learning and childcare settings, schools, colleges, and further and higher education institutions), as well as relevant managers of school boarding accommodation and student accommodation, to have regard to advice on protecting public health from the Chief Medical Officer. This duty again reflects the duties under the Coronavirus Act 2020.

In addition, the Bill would provide for the power for Ministers to issue statutory guidance about protecting public health and ensuring the continuity of education. Operators of educational establishments would be required to have regard to such guidance.

Procedure and enforcement

Before making regulations under Chapter 1 of Part 2 of the Bill, Ministers must have regard to any advice from the Chief Medical Officer and be satisfied that making regulations is a necessary and proportionate action for or in connection with protecting public health.

There are two procedures in the Bill for regulations under this part. The first is under the [affirmative procedure](#).

However, should ministers consider the regulations to be required urgently, then regulations may come into force immediately. Under this procedure the regulations would cease to be in force after 28 days (longer if Parliament is in recess for longer than 4 days)

unless agreed by Parliament. Should Parliament not agree to the regulations, Ministers would not be prevented from making further regulations under either procedure.

The rationale for this ‘made affirmative’ procedure is set out in the Delegated Powers Memorandum. This states (para 31):

“ The Scottish Ministers may be required to act quickly in response to rapidly changing circumstances. The timescales involved in the usual draft-affirmative procedure may not allow action to be taken sufficiently quickly, and therefore a form of made affirmative procedure is appropriate to enable the Scottish Ministers to make regulations with immediate effect. 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.”

Ministers would be required to review regulations made under this chapter at least every 21 days.

The regulations may make provision for the carrying out and enforcement of restrictions and requirements contained in them. It is not clear what the scope of “enforcement” could be.

Delegated Powers and Law Reform Committee report on the made affirmative procedure

On 10 February 2022, the Delegated Powers and Law Reform Committee (“DPLRC”) published [a report on its inquiry into use of the made affirmative procedure during the coronavirus pandemic](#). This report noted that prior to the pandemic, the made affirmative procedure was used infrequently. Since the start of the pandemic over 120 instruments were laid using that procedure.

The DPLRC made recommendations in a number of areas in relation to future use of the made affirmative procedure. It sought clarity on how Ministers determine whether a situation is suitably urgent and recommended that Ministers provide a statement to Parliament which provides a “consistent level of detailed justification and evidence as to why the Scottish Ministers consider the regulations need to be made urgently.”

In terms of new legislation which would provide for such a procedure being utilised, the DPLRC suggested a set of principles as the basis of its scrutiny where legislation includes such provision. These principles included, “legislation making provision for the made affirmative procedure must be very closely framed and its exercise tightly limited” and “primary legislation [should include] a requirement to provide an explanation and evidence for the reasons for urgency in each case where the procedure is being used”.

The DPLRC also noted that some witnesses to its inquiry suggested that the use of the made affirmative procedure “should be seen as part of a broader context with a shift in the balance of power between Parliament and the Government over generations”.

School consultations

Chapter 2 of Part 2 relates to duties under the [Schools \(Consultation\) \(Scotland\) Act 2010](#). The 2010 Act provides for statutory duties on local authorities to consult should they wish to make certain changes to schools. These changes, termed “relevant proposals” in the 2010 Act, are set out in [Schedule 1 of the 2010 Act](#), and include:

- closing a school
- establishing a school
- moving a school
- changing the catchment of a school.

Chapter 2 would amend the 2010 Act and provide that local authorities could ask Ministers to allow the statutory consultation process to be amended. Ministers would be able to allow these changes by issuing directions. Such a direction could include one or more of the following:

- Remove the requirement to publish papers and consultation reports on proposed changes to education provision in printed form.
- To treat the duties to make proposal papers and consultation reports available for public inspection as duties to make the documents available in a manner they consider appropriate instead.
- To meet the duty to hold a public meeting by holding the meeting using remote facilities (including by telephone or by video conferencing software).

Before issuing a direction, Ministers must be satisfied that doing so is a necessary and proportionate action for or in connection with the protection of public health.

The [analysis of responses to the Scottish Government’s consultation](#) found that large numbers of those who gave a view (85.6%) opposed these measures. The analysis stated (p13):

“ A common theme among both respondents who supported the proposal and those who opposed it related to digital exclusion. Several respondents noted that people who do not have access to internet-connected devices, who lack the skills to take part online, or who live in areas with poor internet connectivity could be excluded from virtual meetings.”

Bankruptcy

The most significant aspect of the bankruptcy provisions is the proposal to extend the debt threshold at which someone can be made bankrupt to £5,000.

People (including sole traders and partnerships) can only be forced into bankruptcy by their creditors if they owe above a certain amount of money. This threshold was extended from £3,000 to £10,000 by emergency coronavirus legislation. The intention was to provide additional protection to people who may be experiencing extended financial problems as a result of the pandemic.

The Scottish Government's intention in this Bill is to set a suitable ongoing debt threshold for bankruptcy. It notes the need to strike a balance "between the rights and needs of those dealing with unsustainable debt against the rights and needs of their creditors" (Policy Memorandum, paragraph 258).

Note that the threshold for creditors initiating bankruptcy is not the same as the threshold for people in debt themselves to apply for bankruptcy. People can apply for bankruptcy via the Minimal Assets Process (for those with low income and few assets) if they have a debt of at least £1,500. People can apply for bankruptcy via the standard process with a debt of £3,000.

Consultation on the bankruptcy threshold

Those responding to the Scottish Government consultation⁵ expressed a wide range of views on the appropriate level of debt threshold for bankruptcy.

There was no clear preferred outcome, although 35% of organisations giving a view supported a permanent increase to £5,000.

Some respondents welcomed the additional protection a £10,000 threshold would give to people in debt. It was noted that the financial effects of the pandemic are expected to last for some time.

However, there was also concern that a £10,000 threshold would exclude smaller creditors, reducing their options to recover debts. Councils use bankruptcy to recover council tax debts in certain, specific circumstances. One council noted that it would take a number of years to build up sufficient arrears to reach £10,000.

Another issue was that the threat of bankruptcy could act as a trigger for people to deal with their debt. Some respondents felt that people in debt would have a wider range of options if they sought support before their debt reached £10,000.

There were also respondents who argued that there should be a return to the £3,000 threshold. They noted that pre-pandemic this had been the settled view on the correct balance between the interests of creditors and debtors.

Some respondents noted that the Scottish Government body responsible for supervising bankruptcy – [the Accountant in Bankruptcy](#) – is currently undertaking a review of statutory debt solutions⁶. The review is looking at reforms across the range of interlinked formal debt options – bankruptcy, protected trust deeds and the Debt Arrangement Scheme. They

suggested changes in this area should wait until this work was complete.

Other bankruptcy provisions

The Bill would also provide for permanent powers to serve documents electronically and hold creditor meetings remotely.

These powers would replace similar temporary powers in emergency coronavirus legislation.

Bankruptcy-related documents would be able to be sent to those involved by personal delivery, post or electronically. Electronic delivery would only be possible where the recipient had indicated they were happy to receive documents this way. This could be by:

- specific agreement
- general agreement (e.g. on a website)
- by inference from the fact the recipient has been willing to receive documents in this way in the past.

Meetings of creditors are sometimes held to provide input to particular bankruptcies. The Bill would allow the meetings to take place remotely as well as in a physical location. It would be up to the person calling the meeting to decide what was most convenient to the majority of creditors

Moratorium on diligence

A moratorium on diligence is a legally enforceable pause on creditors taking action to recover their debts while the person in debt seeks money advice.

No provisions in relation to the moratorium on diligence appear in the Bill. However, the Scottish Government has stated that amendments in relation to the length of the moratorium period may be included at Stage 2 (Policy Memorandum, paragraph 36).

Before the coronavirus pandemic, the moratorium lasted for six weeks. This was extended to six months by emergency coronavirus legislation. The intention was to give people with debt problems extensive protection from creditor action while the pandemic both exacerbated debt problems and made sorting them out more difficult. There was explicit recognition of the barriers people might face in accessing a money adviser during this period.

However, giving extensive protection for debtors comes at the expense of the rights of creditors – including small creditors like credit unions – to pursue debts owed to them. The Scottish Government's consultation questioned whether a reduction in the period was appropriate (paragraph 74).

Views expressed by consultation respondents

There was no clear overall preference from consultation respondents. However, 34% of

organisations which expressed a view favoured a 12-week moratorium as a permanent feature.

Concerns were expressed from stakeholders, including money advice providers, that the six-month period removed some of the urgency in dealing with a debt problem. This meant that people in debt sometimes disengaged from the process.

Some respondents noted that six weeks had always been a tight period in which to come to a recommendation about dealing with a debt problem. Some called for the six-month extension to be maintained, at least in the short-term, as money advice services were still overwhelmed.

Most felt that an extension to at least 12 weeks was appropriate to reflect both the complexity of debt advice and the ongoing difficulties in accessing free money advice services.

Some respondents called for a 60-day moratorium period, to reflect the period in “Breathing Space”, a similar initiative in England and Wales.

Respondents also noted that this was one of the issues being considered by the [Accountant in Bankruptcy’s review of statutory debt solutions](#). They suggested further action should wait until the outcomes of this review were known. The Accountant in Bankruptcy is the Scottish Government agency responsible for supervising bankruptcy processes.

Registration of births, deaths, marriages and civil partnerships

For significant events, namely, **live births**, **still-births** and **deaths**, sections 18 to 20 of the Bill would amend the [Registration of Births, Deaths and Marriages \(Scotland\) Act 1965](#) ('1965 Act').

This change would enable, but (without a specific national direction from the Registrar General) **not require**, local registration offices to offer registration services via **remote registration**. In this context, remote registration means a process completed by email, over the phone, through video conversations or a combination of these methods.

Prior to the pandemic, the relevant processes were heavily paper-based and usually involved in-person visits to local registration offices. Registration services were significantly affected when offices closed during the first national lockdown associated with the pandemic.

A key point is that the Bill goes beyond the emergency legislation in its provision for remote registration of live births.

Registration of deaths and still-births

For **still-births** and **deaths**, there were provisions enabling remote registration in the [Coronavirus Act 2020](#) (schedule 13, Part 2). Sections 18 and 20 of the Bill would make permanent provision in respect of remote registration of births and deaths, which is similar to, but not identical to, what is contained in that Act.

As a drafting point, it is noted there is no explicit reference to still-births in the Bill, despite the Bill's application to still-births. This is a consequence of the way the 1965 Act itself is framed, which the Scottish Government believes renders such an explicit reference unnecessary. It says that, by virtue of section 21 of the 1965 Act, what section 18 of the Bill aims to do for live births also applies to still-births.

Information about the death which can be provided by a funeral director

Section 19 of the Bill would amend the 1965 Act so that the **funeral director** organising a particular person's funeral can also provide details of the death for registration purposes.

There is a similar, but not identical, provision giving a funeral director this role in the [Coronavirus Act 2020](#) (schedule 13, Part 2). The 2020 Act refers to the need for a relative of the deceased to "**authorise**" the funeral director to provide those details of the death.

In section 19 of the Bill, the funeral director provides the information "on behalf of" the person with the legal duty to provide the particulars under the 1965 Act, such as a relative or the deceased, or a person present at the death. The Scottish Government says this requires authorisation by that person.

Registration of live births

Registration services for live births were heavily affected in the early part of the pandemic⁷, although the emergency legislation did not provide for changes to enable remote registration of live births.

The new provision in section 18 of the Bill for remote registration of live births is significant in policy terms because **jointly registering a birth**, so both parents' names appear on a birth certificate, has two important legal consequences:

- It is the principal means by which fathers who are not (and never have been) married, or in a civil partnership with, a child's birth mother can be recognised as **a child's legal parent**. A parent has a responsibility to support their child financially.
- It is the most frequently used way for **fathers** and **second female parents** who are not (and never have been) married, or in a civil partnership with, a child's birth mother to get **parental responsibilities and rights** (PRRs). PRRs are separate from financial support, and enable a parent to take a range of key decisions relating to their child.

In relation to the second bullet point above, note that **second female parents** are parents whose satisfy certain statutory criteria, including that their same sex partner has had successful fertility treatment at a licensed UK clinic.

Because of the legal consequences of joint registration, there is a need to have robust processes that guard against possible abuse and fraud in the registration system.

Related to this issue, the Scottish Government has said that, although the policy intention is to enable remote registration in future, existing processes around joint birth registration will remain in place. It will continue to be a criminal offence to provide false information to the registrar.

A separate policy issue is that mothers who are not married or in a civil partnership may be uncertain about whether or not to register a birth jointly with the father or the second female parent. Registrars may be able to offer practical information to mothers and signpost them to possible sources of support. Consideration would have to be given as to how to fully preserve any such benefits under a system of remote registration.

Stage 2 – additional measures on marriages and civil partnerships?

Local registration offices play an important role in authorising and registering marriages and civil partnerships, as well as conducting associated ceremonies. [All these services were significantly affected in the early stages of the pandemic](#)⁸.

There are no provisions on marriages and civil partnership registration in the Bill as introduced. However, the Policy Memorandum (at para 37) **says there may be relevant amendments at Stage 2**, further developing digital services, including for **marriage** and

civil partnership registration. This is under what the document refers to as the ‘Calling in the Pages’ project.

There is potential for fraud and abuse of registration services in the context of marriage and civil partnerships. For example, there could be an attempt to create a ‘sham marriage’ for immigration purposes, rather than because of a genuine relationship between the couple. Consequently, a policy change in this area, for example, to enable remote signing of documents by a couple (or purported couple) may carry risks.

On the other hand, if marriage and civil partnership registration processes remain quite paper and office-based, compared to other registration services, then these services may be more vulnerable to future pandemic-related disruption than other registration services.

Scottish Government consultation

When the Scottish Government consulted on making the temporary provisions relating to the remote registration of deaths and still-births permanent, **around 84% of the organisations** offering a view on this topic were supportive. When the Scottish Government asked whether statutory powers should also enable remote registration of live births, **70% of organisations** offering a view on this issue agreed that they should.

Supporters of remote registration suggested advantages including increased efficiency and flexibility in the system. Benefits were also suggested for people living in rural, remote and island communities, who could avoid long journeys to registration offices. Opponents of remote registration were principally concerned with possible increased risks of fraud and abuse in the registration system as a result of removing in-person contact with public officials.

For deaths and still-births, supporters of remote registration also saw benefits in people not having to visit an office during a distressing time. On the other hand, some respondents noted that the experience of visiting a registration office after a live birth might be a celebratory milestone that could not be fully replicated with an online process. Others commented that, even for those experiencing distressing events, the humanity of those staffing registration offices might offer comfort in some circumstances.

The Scottish Government did not consult publicly on developing digital services relating to marriages and civil partnerships, on which there may be relevant Stage 2 amendments. However, the Scottish Government has said that informal consultation with some officials involved with the registration process was supportive of the proposed changes.

Licensing

Civic licensing – remote hearings

The Bill would put the flexibility to hold civic licensing hearings remotely on a permanent footing.

Civic licensing refers to licences issued under the Civic Government (Scotland) Act 1982. This covers a wide range of licences from taxi drivers, through public entertainment, to street traders. A separate part of the 1982 Act deals with licences for sex shops and sexual entertainment venues.

In practice, civic licences are issued by local authorities. They are usually referred to as the “licensing authority” in the legislation. However, for sex shop and sexual entertainment venue licences, the term “local authority” is used.

Emergency coronavirus legislation provided for hearings to be held remotely, including by telephone. This was to ensure that licences could still be issued and administered during the pandemic.

The Bill would provide for hearings to be held in person, remotely or in a hybrid format at the discretion of the licensing/local authority. It makes separate provision for licences under Part 2 of the 1982 Act and licensing under Part 3 (sex shops and sexual entertainment venues).

Local authority respondents to the Scottish Government’s consultation generally welcomed these proposals as providing additional flexibility. However, there were some concern around ensuring that hearings remained accessible to the public.

The Bill as it stands gives the licensing/local authority complete control over how the meeting should be held. Several local authorities called for this discretion. However, other respondents suggested that there should be some obligation to take into account the views of the parties on the form of hearing, or for parties to be able to challenge a decision.

Civic licensing – publishing notices

These provisions would enable notices relating to civic licences to be published on local authority websites as an alternative to local newspapers.

This power appeared in the emergency coronavirus legislation but was not consulted on as part of the Scottish Government’s coronavirus recovery proposals. Stakeholders called for its inclusion in the Bill as a modernising option. The option of advertising in local newspapers would remain.

Allowing notices to be published on the local authority’s website is expected to reduce costs to licence applicants. Notices published in this way have been argued to be at least as, if not more, likely to come to public attention as notices appearing in local newspapers.

Alcohol licensing

The Bill would give licensing boards permanent powers to hold hearings and meetings remotely.

Most venues selling alcohol require to be licensed. Decisions are made by the local licensing board. Licensing boards are administered by local authorities but are separate legal entities.

Emergency coronavirus legislation provided for licensing hearings and meetings to be held remotely, including by telephone. This was to ensure that licences could still be issued and administered during the pandemic.

Hearings deal with representations in relation to specific licences. Meetings cover the general business of the licensing board.

The provisions in the Bill would enable a licensing board to decide whether to hold a hearing in person, remotely or in a hybrid format. The same provision would be made for licensing meetings.

Licensing meetings require to be held in public. The Bill would make clear that, were a meeting is held remotely, allowing the public to observe it remotely would meet this requirement.

Local authority respondents to the Scottish Government's consultation generally supported the additional flexibility of remote hearings and meetings. Some respondents called for an explicit requirement for public access.

Under the Bill's provisions, licensing boards would have complete discretion as to the format of the meeting. As with civic licensing, some respondents called for the parties to a hearing to have input into the format of the meeting, or to be able to challenge a decision.

Registration services relating to land and buildings

Sections 24 and 25 of the Bill relate to land registration or, more accurately, the registration of **various legal rights** relating to land and buildings.

These provisions of the Bill affect the operations of [Registers of Scotland](#) ('RoS'), a sizeable non-ministerial government department, headed up by [the Keeper of the Registers of Scotland](#).

Sections 24 and 25 aim to replace similar temporary provisions in the Coronavirus Act (Scotland) 2020 (schedule 7, paras 11 to 14) and the Coronavirus (Scotland) (No. 2) Act 2020 (schedule 4, para 3).

The provisions would enable, on a permanent basis, digital (i.e. online) registration in three registers relating to land and buildings. These are the [Land Register](#), the [Register of Sasines](#) (both covered by section 24) and the [Register of Inhibitions](#) (covered by section 25). These registers are crucial to the operation of the housing market and to the system of debt recovery.

Why these provisions were necessary during the pandemic

The policy background to these provisions is that [the move to home working in March 2020](#)⁹, for public health reasons, was hugely significant for RoS, more so than for many other organisations. It was then so reliant on paper the registers in question had to close for a period of several months. The 2020 Acts facilitated digital applications for registration on a temporary basis, enabling most of the affected registers to reopen.

The 2020 consultation by RoS

Late in 2020, there was a [specific consultation by RoS on making the measures now contained in sections 24 and 25 permanent](#)¹⁰, which was separate from the main consultation on the Bill. [The proposals received strong support](#)¹¹ from the main business users of the registers in question, such as solicitors' firms and banks.

The Registers of Scotland (Digital Registration, etc.) Regulations 2022

An important point relating to section 24 of the Bill is that there is associated secondary legislation, the draft Registers of Scotland (Digital Registration etc.) Regulations 2022, recently [considered by the Economy and Fair Work Committee](#)¹².

The regulations have been drafted in such a way that they will come into force when or if

the proposed provisions in section 24 become law. For the Land Register and Register of Sasines, the regulations **go further** than section 24, creating a **presumption** (or starting point) in favour of digital registration, subject to various exceptions (regs 2 and 3).

Access to the digital submission service by business customers only

A final policy point to note in relation to sections 24 and 25, is that typically only RoS' **business customers** have access to RoS' digital submission service. These are customers who have been verified by RoS, and comprise mainly law firms, as well as some public bodies (including the courts). In the residential conveyancing system, for example, it is solicitors who interact with RoS to register property rights on behalf of the housebuyer and any mortgage lender.

Who can access the system is important when considering the possibility of abuse and fraud via the digital submission service. Different policy considerations apply compared to when looking at a registration system where a member of the public usually makes the application for registration directly.

Freedom of information: giving notice electronically

What the provisions do

[Paragraph 7 of schedule 6](#) of the Coronavirus (Scotland) Act 2020 made a temporary modification to section 74(1)(a) of the Freedom of Information (Scotland) Act 2002 (FOISA), so as to expressly allow that formal notices under that Act could be given electronically, as well as being delivered in person or posted. This section makes this temporary modification a permanent one.

Prior to the current temporary provision, some authorities took the view that FOISA already permitted them to issue formal notices by electronic means. The Scottish Information Commissioner had expressed no concerns about this but took a clear view that for his own formal notices - sometimes requiring compliance by authorities with instructions of the Commissioner - it was necessary to issue in hard copy by post to ensure that these were valid and therefore ultimately enforceable.

A number of other provisions in the first and second Scottish Coronavirus Acts also related to Freedom of Information, including for example allowing the Information Commissioner some discretion in taking account of the impact of coronavirus, and some [requirements for Ministers to report](#) on Fol backlogs (for example see [the tenth Fol report, February 2022](#)¹³). The Recovery and Reform Bill does not however seek to reprise or continue these particular provisions.

Discussion of the provisions

The Scottish Government says in its Policy Memorandum 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.”

The Scottish Government’s consultation analysis pointed out that some public bodies thought the electronic delivery of notices worked well during the pandemic, and the provisions would enable the use of an efficient communications tool. [The Scottish Information Commissioner said](#)¹⁴ that in 2020-21, the office sent approximately 290 notices by email, and without this ability, it would have “significantly slowed investigations and issuing of decisions, and risked undermining confidence in both the role of the Commissioner and in FOISA”. Overall, the Information Commissioner had previously proposed this change to the [Public Audit and Post Legislative Scrutiny Committee in 2019](#)¹⁵, and was supportive of the provisions for a number of reasons including that:

- They enable more modern, flexible options for issuing notices.

- As public authorities and members of the public generally communicate with the office by email, there is an expectation that decisions and notices to be issued by email.
- The provisions would not exclude or prevent notices being sent by post in those circumstances where this may preferable or required by the requester/applicant.
- They would increase the resilience of FOISA.
- And finally, the office of the Information Commissioner has previously received some negative feedback regarding sending by recorded delivery post as default.

The [Health and Social Care Alliance](#) agreed ¹⁶ that the provisions had made the operation of the freedom of information legislation “more efficient”, and suggested that making the provisions permanent would be “conducive to upholding, protecting and respecting human rights, and in maintaining public trust and confidence in public services”.

On a cautionary note, the government’s consultation analysis reported that some respondents supported the provision being made permanent on the condition that the option to request physical copies is retained. The analysis said that a few respondents felt that moving to an electronic notification system could result in important notices going unread or being sent to the wrong recipient:

“ Possible benefits from making this permanent in terms of speed and sustainability but there would have to be arrangements made to ensure receipt of information as well as accuracy of details.” (Individual)”

Mental health: named person

A [named person](#)¹⁷ is someone chosen by a person with a mental disorder such as dementia, a learning disability or a personality disorder who will help look after their interests should they need to be detained under [The Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#). This Act requires the nominee to have their signature witnessed by a “prescribed person” if they accept the role of named person. This could be by an independent advocate, medical practitioner, person employed in the provision of, or managing the provision of, a care service, registered nurse, social worker or solicitor. The Bill seeks to remove the need for the signature of the named person to be witnessed.

Scottish Government consultation

The Scottish Government’s [consultation analysis](#) noted that those who disagreed with the provision believed having a witness present is an important safeguarding measure. They noted that this step is necessary to verify the identity of the named person and ensure they are competent and have a clear understanding of the role and responsibilities of a named person. Concerns were raised that removing this step could make the process less secure or open to abuse.

Those who supported the provision considered that it would remove bureaucracy from the process and could help to streamline named person procedures. A few noted that the requirement to have a witness to the named person signature can act as a barrier in emergency situations and removing it could reduce potential delays in vulnerable people receiving mental health care and treatment.

Care services: giving of notices by SCSWIS

Section 29, in Part 3 of the Bill, relates to how Social Care and Social Work Improvement Scotland (SCSWIS, or the 'Care Inspectorate') issues formal notices to care service providers.

The [Policy Memorandum](#) states: "Formal notices include those relating to registration, variation of conditions of registration and enforcement action." (Para 39)

The proposed provisions would ensure that the Care Inspectorate can:

- Issue formal notices to care service providers by electronic means instead of by post, if the care service provider had indicated their willingness to receive the notice in that way.
- Issue formal notices on a wider range of persons acting on the care service provider's behalf. If the care service provider is a body corporate, the 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.

Previous legislation

These powers were provided on a temporary basis under the [Coronavirus \(Scotland\) \(No.2\) Act 2020](#), which amended the [Public Services Reform \(Scotland\) Act 2010](#).

Scope and definitions

The [Public Services Reform \(Scotland\) Act 2010](#) defines a care service as any of the following:

- a support service
- a care home service
- a school care accommodation service
- a nurse agency
- a childcare agency
- a secure accommodation service
- an offender accommodation service
- an adoption service
- a fostering service

- an adult placement service
- child minding
- day care of children
- a housing support service.

Rationale

The Coronavirus (Scotland) (No.2) Act 2020 provided these temporary powers to allow notices to be given in a more practical, reliable, and timely way. In the absence of these powers the Scottish Government argues that there may be delays in communicating the need for improved quality of care to care providers, and that service users may be put at risk as a result (Policy Memorandum, para. 223).

The Scottish Government's [Business and Regulatory Impact Assessment](#) ¹⁸ concluded that making these powers permanent would modernise the Care Inspectorate's formal notification process, enable it to deliver its functions more effectively, and bring its practices into line with other similar regulators in the UK. The assessment notes that there are benefits in having a choice of means of communication, depending on the circumstance.

The Scottish Government's [Island Communities Impact Assessment](#) ¹⁹ concluded that, as postal services to island communities can be subject to delays, the continued use of electronic communications would improve the speed and reliability of notice delivery. Findings from a digital inclusion study were reported, which showed that all care homes in the study, including those in remote areas, had internet access. This impact assessment also noted that the Care Inspectorate would attempt to electronically deliver a notice three times before using an alternative method.

Scottish Government consultation

According to the [analysis of the Scottish Government's consultation on the Bill](#), around two thirds of organisations giving a view on the care services provisions were in favour of making them permanent. Organisations in favour included the Care Inspectorate, the Health and Social Care Alliance Scotland, and several local authorities. Reasons given were that the provisions would increase efficiency, remove unnecessary delays, and modernise processes in the care system.

The care services provisions are aimed at providers of care services. Nevertheless, as with other aspects of the bill, a majority of individuals were opposed to making the provisions permanent. Some argued that care home improvement notices were too important to be delivered electronically. Issues with the security and reliability of electronic communications were cited. Respondents noted that proof of receipt of documents would be important.

Tenancies

Part 4 of the Bill relates to private rented tenancies. It proposes to make two of the measures introduced by the temporary coronavirus legislation permanent. The aim is to protect private rented tenants from being evicted unreasonably or unnecessarily from their homes.

The Bill proposes to:

- Make all private rented grounds for eviction discretionary. This means that the First-tier Tribunal (Housing and Property Chamber) ('the Tribunal') can decide whether it is reasonable to grant an eviction order taking all the circumstances of the case into account. Previously, some eviction grounds were mandatory, meaning that if the ground was established the Tribunal had to grant an eviction order.
- Provide for a pre-action protocol that landlords can use to support tenants in rent arrears. The Tribunal will be required to take account of the extent to which a landlord has complied with the pre-action protocol when deciding whether it is reasonable to grant an eviction order for rent arrears

The tenancy provisions attracted many responses to the Scottish Government's consultation on the bill. The analysis of consultation responses noted that the majority of respondents expressing a view, 76.5%, disagreed with the proposals. There was a greater degree of support from organisations, with 52% of organisations responding supporting the proposals.

The pre-action protocol proposal was viewed more favourably than the proposal to make all the eviction grounds discretionary.

Some respondents felt that the provisions would have a negative impact on private landlords and could risk driving them out of the market, potentially resulting in a shortage of affordable accommodation for rent. Some respondents welcomed the measures, noting they strengthen tenants' rights and offered protection against eviction and homelessness.

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Background

The following sections provide some background to the Scottish Government's proposals on tenancies.

In 2020, around 360,000 households (around 14% of all households) lived in private rented housing.²¹ Around 246,000 private landlords in Scotland are registered in the Scottish Landlord Register.²²

A variety of different tenancy types exist. Since 1 December 2017, most new tenancies will be private residential tenancies. The main tenancy types are:

- private residential tenancy governed by the Private Housing (Tenancies)(Scotland) Act 2016
- assured and short assured tenancies governed by the Housing (Scotland) Act 1988

- regulated tenancies governed by the Rent (Scotland) Act 1984.

Summary of the eviction process

To end a tenancy, landlords need to follow specific procedures including giving tenants the correct notice period. The specific procedures will depend on the particular tenancy agreement in place and what the relevant legislation says about how those agreements should be ended.

Landlords must also notify the relevant council (via a 'section 11 order') that they are raising proceedings for possession.

If a landlord ends a tenancy without following the correct procedures or has harassed the tenant into leaving their home early, this may be an illegal eviction which is a criminal offence.

If a tenant does not leave at the end of the notice period, the landlord would need to get an eviction order from the Tribunal before they can get their property back. If the Tribunal approves an eviction order then, after an appeal period, Sheriff Officers can be instructed to carry out the eviction (if the tenants have not already left).

If a landlord wished to try to recoup any rent arrears that may have accrued during the tenancy, they must also apply for a payment order from the Tribunal.

In comparison to the number of tenancies, the number of eviction orders sought from the Tribunal is small. For example, in 2019-20 there were around 1,740 applications for an eviction order made to the Tribunal, representing almost 0.5% of tenancies.²³

However, the majority of tenancies coming to an end through landlord action will not proceed to the Tribunal.²⁴ Tenants may, for example, find alternative accommodation before the end of the notice period. Some tenants may be unaware of their rights to continue to live in the property until an eviction order is enforced. Research has established that there are relatively low levels of awareness amongst tenants of their rights.²⁵

Temporary changes made during the pandemic

In addition to introducing a [pre-action protocol for rent arrears](#) and [making all grounds discretionary](#) (discussed in further detail below), the temporary coronavirus legislation made other changes to tenancy law which the Bill does not propose to make permanent. These are:

- Extending the notice period that landlords must give their tenants to end their tenancy. In many cases (including for rent arrears) the notice period is extended up to six months.
- A time limited ban on the enforcement of eviction orders, this effectively banned evictions from taking place between 11 December 2020 and when areas moved to protection level 3 (in most areas this was 17 May 2021).

During the pandemic period, the Scottish and UK Governments also introduced a range of

other non-legislative measures to support tenants and landlords. Further details of the background and the changes introduced are provided in the SPICe briefing [Covid-19: Support for tenants and landlords \(updated\)](#).²⁶

Further changes to tenancy law may be introduced in the future. The Scottish Government is [currently consulting on a rented sector strategy](#) to give tenants more secure, affordable and stable tenancies.²⁷ It plans to introduce a housing bill to take forward legislative requirements arising from the strategy consultation in year two of this parliamentary session. As the [Policy Memorandum](#) states, “this would be an appropriate opportunity to make further refinement to legislation arising from this Bill.”

Changes in applications to the Tribunal, rent arrears and homelessness during the pandemic

Applications to the Tribunal decreased during the pandemic

In 2020-21, there were 767 applications made for an eviction order to the Tribunal, around 44% of the number received (1,742) in the previous year.²⁸

Not all of applications to the Tribunal will fall within the scope of the temporary emergency legislation. As of 31 October 2021 (around 18 months of the temporary provisions), the Tribunal had received 737 applications that fall within the scope of the emergency legislation.²⁹

As would be expected, the number of eviction orders granted by the Tribunal has also fallen. The Scottish Government's eleventh report on the operation of the coronavirus legislation notes that, between 8 July 2020 and 23 December 2021, there were 230 eviction orders issued relating to PRTs where rent arrears were cited.²⁹ It is not clear how many other eviction orders were granted for other tenancies, or for reasons other than rent arrears, as these statistics are not collated in the Scottish Government report ([although individual case decisions are published on the Tribunal website](#)).

By way of comparison, the Scottish Tribunal's Annual Report for 2019-20 notes that the Tribunal granted 827 eviction orders in 2019-20, most of which were for rent arrears²³ ([the annual report for 2020/21 does not contain comparable information](#)).

There is evidence of increased pressure on tenant incomes and some evidence of increased rent arrears

There is no comprehensive data on rent arrears in private rented housing. Some survey evidence however suggests increasing rent arrears over the pandemic period.

Research by the Resolution Foundation and Joseph Rowntree Foundation has identified that people who rent their homes have been disproportionately affected by the pandemic.³⁰³¹ Renters have fewer savings and are more likely to have lost their job and been on furlough compared to those with mortgages. Despite renters employing strategies to prioritise paying their rent, arrears and debts are increasing.³²³³

[The Scottish Government's ninth report on the operation of the coronavirus legislation](#) cites data from an analysis carried out by PayProp, based on the data that it holds from the

processing of rent payments from tenants in Scotland. This shows that the percentage of tenants in arrears increased at the start of the pandemic period from 5% in the quarter January to March 2020 up to 9% in April to June. Since then this proportion has remained relatively steady, although it has increased slightly in the latest quarter from 9% in October to December 2020 up to 10% in January to March 2021.³⁴

The most recent eleventh report on the Coronavirus Acts does not contain any updated information but instead refers to information in the ninth report.²⁹

In mid-2021, researchers at the University of Glasgow undertook a survey of private landlords to identify the scale of rent arrears and private landlords' perspectives on the temporary legislation.

[The survey](#) found that around one in five (20%) of landlords in the survey reported current tenancies in arrears at July 2021. The arrears had an average duration of 5 months (median 3.4 months) and an average value of £2,800 per tenancy (median £1,900). The report suggests that these figures are substantially higher than earlier estimates from tenant surveys which suggested around 8-10% of tenants were in arrears with an average arrears of £900-£1,000 (there could be reasons for this including the later timing of the survey compared to others). The research argued that:

“ The temporary legislation has clearly succeeded in preventing evictions and enabling tenants to remain in their homes. However, rent arrears for private – and social – landlords have risen substantially despite the many efforts to support household incomes. In effect, therefore, the legislation has transferred some of the costs of the pandemic from individuals and public bodies onto private landlords.”

Source:Watson, 2021³⁵

The report pointed out that landlords are a very heterogeneous group and not all have the ability to easily absorb the resulting losses. Some landlords have been adversely affected by the pandemic in terms of their own employment and their health.

During 2020-21 there was a fall in the number of people becoming homeless from private rented accommodation.

[During 2020-21, the number of households becoming homeless from a private rented tenancy dropped by 42 % from 5,145 to 2,984](#) compared to the previous year. In the City of Edinburgh Council (which has the greatest proportion of private rented accommodation in the country) there was a 67% drop from 802 to 264 households.³⁶

In 2020-21, across Scotland, 11% of households assessed as homeless gave the private rented sector as their previous accommodation type, compared to 16% in 2019-20. This may be due to a reduction in the number of evictions due to emergency coronavirus legislation temporarily extending eviction notice periods.³⁶

[More recent homelessness data, covering the six months April to September 2021,](#) indicates that there appears to be a bit of a return to pre-pandemic proportions, although still lower than pre-pandemic numbers. In the six month period 14% of those being assessed as homelessness or 1,915 households) came from a private rented tenancy, compared to 11% in 2020-21.³⁷

The Bill's proposals : removal of mandatory eviction grounds

Sections 33 to 35 of the Bill proposes to amend existing legislation governing private residential tenancies, assured tenancies, and regulated tenancies with the effect of making all eviction grounds for such tenancies discretionary.

The remainder of this section provides background information and considers responses to the Scottish Government's proposals.

Background - the balance of mandatory and discretionary eviction grounds

The legislation governing tenancies sets out specific reasons why a landlord can end a tenancy (these are known as 'grounds'). Landlords can end a short assured tenancy at the end of its term without having to state a relevant ground.

Some of the eviction grounds are known as 'mandatory' grounds and some are known as 'discretionary' grounds.

Mandatory ground: This means that the Tribunal must approve an eviction order if it finds that the ground exists.

Discretionary ground: This means that the Tribunal has to decide whether it is reasonable for the tenant to be evicted taking all the circumstances of the case into account.

All social housing eviction cases in the Sheriff Court, with the exception of streamlined cases for criminal conviction, are already subject to a reasonableness test.

To take the private residential tenancy (PRT) as an example, there are eighteen grounds for eviction set out in [schedule 3 of the 2016 Act](#). Prior to the temporary coronavirus legislation changes:

- eight grounds were mandatory eviction grounds, including ground 1 - landlord intends to sell the property and ground 2 - landlord intends to live in the property
- eight grounds were discretionary eviction grounds, including ground 5 - landlord family member intends to live in the home and ground 14 - tenant has engaged in antisocial behaviour
- two grounds were a mix of mandatory and discretionary grounds.

The most commonly used ground in applications to the Tribunal for an eviction order is for rent arrears. **Rent arrears (ground 12) is a mix of mandatory and discretionary grounds.** It is:

- **Mandatory** if there have been arrears for at least three consecutive months and at least one month's rent in total is owed on the day of the Tribunal hearing. The Tribunal must also be satisfied that the arrears were not due to a delay or failure in the payment of a relevant benefit.

- **Discretionary** if the tenant has been in arrears of rent for three or more months, and on the first day the Tribunal considers the case, the arrears are less than one month's rent.

The Bill would change this so it would be a discretionary eviction ground if there had been arrears for at least three consecutive months (the Tribunal still has to be satisfied that arrears were not due to a delay or failure in the payment of a relevant benefit).

In its consideration of discretionary eviction grounds, information on [Shelter Scotland Legal website](#), based on case law, suggests that the Tribunal could take a range of factors into account including in its decision making process. For example:

- the amount of arrears
- the likelihood of the tenant being able to repay arrears and meet future rent payments
- the reasons for rent arrears
- the implication of eviction for any 'innocent' joint tenant.

In addition:

“ In all cases the tenant's personal circumstances and those of their family are potentially relevant. Even if the tenant's conduct is 'blameworthy' it may not be reasonable to evict because of the consequences for the tenant and/or her/his family”

Source: Shelter Scotland, Shelter Legal, 2022³⁸

From a landlord's perspective, a key point is that this may introduce an element of risk, i.e. landlords could not be guaranteed they would be able to get their property back in the event of a tenant building up rent arrears.

When the Private Housing (Tenancies) (Scotland) Bill (that introduced the PRT) was progressing through the parliament, a key issue was the extent to which the proposed eviction grounds would provide a balance between the rights of landlords and the rights of tenants.³⁹ As the then lead Committee's Stage 1 report on the bill stated:

“ The Scottish Government Bill Team explained the Scottish Government's thinking behind having a mix of discretionary and mandatory grounds— 'Landlords need to feel confident that they will be able to recover possession of their property. We also need to be fair to tenants and make sure that the ground for their leaving their home is reasonable, which is why some grounds are not totally mandatory. It comes down to seeking an appropriate balance.'”

Source: Scottish Parliament Infrastructure and Investment Committee , 2016⁴⁰

As the Bill progressed through its parliamentary stages there was a move towards more discretionary grounds.

On the issue of the balance between rights of the landlord and rights of the tenant and the Human Rights implications, the Policy Memorandum states:

“ 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. ... 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”

Source:Scottish Government , 2021⁴¹

Impact of the temporary change to make all eviction grounds discretionary

[The Policy Memorandum](#) does not provide any specific evidence about what impact the temporary change to make all eviction grounds discretionary has had. However, it may be hard to separate the specific impact of this change from the [other measures that have been put in place during the coronavirus period](#) and how this has influenced changes in rent arrears and homelessness.

A Scottish Association of Landlords has carried out an analysis of Tribunal cases, over the period 1 October 2020 to 18 March 2021 (mid-pandemic), compared to the period 1 October 2019 to 18 March 2020 (pre-pandemic). This showed that pre-pandemic it was very rare for the Tribunal to grant an eviction order on the grounds of reasonableness with only one eviction application being refused on the grounds of reasonableness. Mid-pandemic, the additional discretion was not resulting in applications for eviction orders being refused. Its analysis indicates that no eviction applications during the mid-pandemic period were refused by the Tribunal on the grounds of reasonableness.⁴²

Removal of mandatory eviction grounds - responses to Scottish Government's consultation

The Scottish Government's analysis of consultation responses noted that many respondents strongly opposed the proposal:

“ ... many respondents strongly opposed the proposal to make all grounds for eviction discretionary. They felt the provision affords too much leniency to tenants and does not consider the potential financial consequences for private landlords, fearing that landlords may be unable to obtain an eviction, or may face lengthy delays in evicting tenants. Respondents suggested the provisions could be open to abuse and that tenants may take advantage of the provisions and choose to stop paying rent because they may think they are protected from eviction. Several respondents called for more provisions to protect the interests of private landlords. Some drew attention to smaller landlords who cannot afford to accrue arrears and may struggle to pay mortgage payments, insurance and other costs if they do not receive rental income timeously. Several respondents feared that making the provision permanent could create undesirable conditions for private landlords, noting that if they decide to withdraw from the rental market, it will reduce the number of affordable homes for rent. Some argued this could have serious implications for homelessness given existing pressures in the housing sector and high demand for social housing. A few were concerned that the provisions could lead to landlords being reluctant to let to tenants whose circumstances may influence the Tribunal exercising its discretion, suggesting that tenants who are elderly, disabled or have young children may be negatively affected.”

Source: Scottish Government, 2022²⁰

Some organisations, including [Citizens Advice Scotland](#) and [Shelter Scotland](#), expressed their support for the proposals arguing that it would help prevent homelessness. As the [Legal Services Agency's response](#) argued:

“ Prior to the 2020 Act 10 of 18 eviction grounds were mandatory, we saw this have a disproportionate negative impact on tenants, particularly in circumstances out with their control. We firmly believe that Tenants should not automatically be evicted when it is the decision of the landlord that has dictated their circumstances in facing potential homelessness. 27% of households made homeless during 20/21 were asked to leave. As a result, we find increased rights afforded to tenants by the 2020 Act to be a step in the right direction. Furthermore, assessing the reasonableness of making an eviction order, having due regard to the circumstances of both parties makes for clearer legislation that can be better understood by clients. From a practical perspective, the former mandatory grounds were difficult for some to comprehend, particularly when a person believes they should have the right to defend the action. The temporary legislation made the application of eviction grounds fairer for both parties on the basis that individual circumstances are given equal merit before the reasonableness test is applied. Previously, the legislation favoured the landlord with remedies for tenants (in mandatory evictions) being limited to negotiating with the other party prior to an order being made, disputing that the ground for eviction was made out or limited technical arguments. Fairer legislation has been long-awaited and should be made permanent as the Scottish Government proposes.”

Source: Legal Services Agency, 2022⁴³

In the [Financial Memorandum on the Bill](#), the Scottish Government argues that the additional costs of the proposals to landlords will be minimal. When this is set against the rental return that landlords can receive, it does "not anticipate that the legislation will have a material impact on the size of the private rented sector." ⁴⁴

The Bill's proposals: pre-action protocols

Sections 35 and 36 of the Bill amends existing tenancy legislation to provide for the introduction of a pre-action protocol (previously referred to as 'pre-action requirements') which will apply in relation to any attempt by a landlord to end a private residential tenancy or an assured tenancy on the ground of rent arrears.

The Bill does not place a legal duty on private landlords to comply with this protocol. Instead, the Tribunal will be required, when considering whether it is reasonable to grant an application for an eviction order on the ground of rent arrears, to take into account the extent to which the landlord has complied with the protocol.

The Bill gives the Scottish Ministers a regulation-making power to stipulate a pre-action protocol which will apply in such cases.

These are similar provisions to the temporary legislation, but will apply to all rent arrears cases whereas the temporary legislation only applied to cases where rent arrears were wholly or partly accrued during the coronavirus period.

Pre-action protocol: background

Details of the current pre-action requirements made under the temporary legislation are set out in the [Rent Arrears Pre-Action Requirements \(Coronavirus\) \(Scotland\) Regulations 2020](#). The requirements are for a landlord to:

Provide the tenant with clear information (which can be by writing or email) relating to:

- the terms of the tenancy agreement
- the amount of rent for which the tenant is in arrears
- the tenant’s rights in relation to proceedings for possession of a house (including the pre-action requirements set out in this regulation and the need for an order to be granted by a tribunal)
- how the tenant may access information and advice on financial support and debt management.

Make reasonable efforts to agree a reasonable plan with the tenant to make payments to the landlord of:

- future payments of rent
- the rent for which the tenant is in arrears.

Give reasonable consideration to:

- any steps being taken by the tenant which may affect the ability of the tenant to make payment to the landlord of the rent for which the tenant is in arrears within a reasonable time
- the extent to which the tenant has complied with the terms of any agreed plan
- any changes to the tenant’s circumstances which are likely to impact on the extent to which the tenant complies with the terms of an agreed plan.

Further advice on the requirements is provided in [Scottish Government guidance](#).⁴⁵ These are similar to existing pre-action requirements for social landlords.

Again, it is difficult to establish the impact of this temporary change in isolation from the range other changes made during the pandemic period.

Pre-action protocols : Scottish Government consultation responses

The Scottish Government's analysis of consultation responses noted that:

“ A prevalent theme in comments was that pre-action requirements in particular were viewed favourably. They were seen as an effective route to resolving issues between landlords and tenants and welcomed as a layer of protection against eviction.”

Source: Scottish Government, 2022²⁰

A range of organisations including Shelter Scotland, Crisis, Legal Services Agency, Scottish Association of Landlords and Citizens Advice Scotland were supportive of the

proposals.

[The Scottish Association of Landlords](#), for example, were supportive, "as these mandate what we have always considered to be best practice."

Crisis's submission noted that:

“ Private tenants on low and/or unstable incomes, or who have other support needs, have tenure-specific needs for financial, welfare and debt advice. Unlike social tenants, whose landlords have expertise in, or strong links to, welfare advice and financial inclusion, and a strategic responsibility to prevent homelessness, Crisis’ recent and previous surveys found private landlords had very low awareness of services tenants may need, not helped by the fact that many private landlords are small-scale and do not use a letting agency. The same surveys have also found that landlords themselves often want more access to advice and support, especially where tenancies are failing. Many entirely depended on their letting agency, though research highlights that agencies as well as landlords can find it unclear where to signpost tenants or who to contact direct if a tenant was in difficulty in their local area.”

Source: Crisis, 2022⁴⁶

[Shelter Scotland’s response to the consultation](#) considered that the pre-action requirements were useful in preventing homelessness but also made the point, as did some other respondents, that their use should be evaluated:

“ It is also important that we ensure that the PARs are effective and working properly. The First-tier Tribunal has a key role to play in ensuring that landlords are adhering to this legislation and are making all reasonable efforts to support tenants to remain in their homes. Alongside the PARs being made permanent we believe they should be evaluated to ensure that they are robust, cover all reasonable steps landlords should take, and that they are working in practice with the Tribunal ensuring that they are upheld. Reporting from the Tribunal on the use of PARs is required to ensure these measures can be monitored effectively.”

Source: Shelter Scotland , 2022⁴⁷

The Legal Service's Agency's submission suggested some practical changes to how the pre-action protocol could work. For example, suggestions included

“ Mandatory pre-action requirements for private landlords to bring private sector tenants into line with social sector tenants. This should be achieved by amending the form of the notice to leave for private tenancies to include a pre-action protocol checklist such as that used by social landlords seeking repossession of social housing in terms of the notice of proceedings required before court proceedings for recovery of possession can be commenced. A declaration confirming the pre-action requirements have been considered and understood being required on the application for first time applicants to the Scottish Landlord Register and the application for those renewing their landlord registration.”

Source: Legal Services Agency, 2022⁴³

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