

# **Covid Recovery**

**A consultation on public services, justice system and other reforms**

**August 2021**

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## **Ministerial foreword**

The Scottish Government's highest priority is to continue to lead Scotland safely through and out of the Covid pandemic and to re-open the country as quickly and safely as possible. But we now also have a real opportunity to achieve a fairer and more equal post-Covid Scotland, where no one is left behind.

That is why we are developing a Covid Recovery Strategy focused on key outcomes, such as tackling child poverty. People have told us they want a Scotland that achieves financial security for all: through good quality work and sustainable employment; that supports health and well-being for young people in particular; that promotes equalities; and that strengthens people's rights. This consultation paper contributes towards that aim - beginning with discussion of our ambitions for Covid recovery and ending with an open question, to invite comments on the action that respondents think is required to support a fair, safe and secure recovery.

We recognise that achieving our ambitions will need a range of transformative measures, and also requires that we fully take the time to learn from the country's experience of the pandemic. The Scottish Government has and will continue to consult widely on these issues. This consultation has a particular focus on a review of legislative powers that have supported our response to Covid.

As one of the steps to harness lessons from the pandemic, the Government is committed to reviewing the impact of Covid on the Scottish statute book: removing measures no longer needed in order to be able to respond to the current pandemic; keeping those where there is demonstrable benefit to the people of Scotland; and considering what new provisions we might make.

The Chapters of this consultation invite views on specific legislative proposals that we think have the potential to support Covid recovery:

- Proposals for greater public health resilience, to protect Scotland against future public health threats;
- Proposals for public services and justice system reform, to ensure that the

benefits of practical modernisations put in place during the pandemic are not lost; and

- Proposals to respond to the impact of Covid in the justice system specifically, where backlogs have unavoidably built up.

I look forward to hearing your views on how legislation can support a strong recovery from Covid.



**John Swinney MSP**  
**Deputy First Minister and Cabinet Secretary for Covid Recovery**

## Responding to this Consultation

We are inviting responses to this consultation by 9 November 2021.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/constitution-and-cabinet/covid-recovery/>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 9 November 2021.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

Catherine Hodgson  
Scottish Government  
Room 4N.01-02  
St Andrew's House  
Regent Road  
Edinburgh  
EH1 3DG

[Covid.Leg.Consultation@gov.scot](mailto:Covid.Leg.Consultation@gov.scot)

## Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

## Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially unlawful or offensive material (for example defamatory material), or personal data, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email. Responses containing

consistently and strongly offensive or defamatory language may be wholly removed from analysis and publication.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

### **Comments and complaints**

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or at

[Covid.Leg.Consultation@gov.scot](mailto:Covid.Leg.Consultation@gov.scot).

### **Scottish Government consultation process**

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work. You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

## Glossary

**AiB** – Accountant in Bankruptcy<sup>(1)</sup>;

**COPFS** – Crown Office and Procurator Fiscal Service<sup>(2)</sup>;

**Covid** - Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2);

**Extension and Expiry Act** – the Coronavirus (Extension and Expiry) (Scotland) Act 2021<sup>(3)</sup>, introduced to the Scottish Parliament on 18 June 2021<sup>(4)</sup>, passed on 24 June 2021 and which received Royal Assent on 4 August 2021;

**First Scottish Act** – the Coronavirus (Scotland) Act 2020<sup>(5)</sup>, introduced to the Scottish Parliament on 31 March 2020, passed on 1 April 2020 and which received Royal Assent on 6 April 2020;

**Second Scottish Act** – the Coronavirus (Scotland) (No.2) Act 2020<sup>(6)</sup>, introduced to the Scottish Parliament on 11 May 2020, passed on 20 May 2020 and which received Royal Assent on 26 May 2020;

**RoS** – Registers of Scotland<sup>(7)</sup>;

**SCTS** – Scottish Courts and Tribunals Service<sup>(8)</sup>;

**SPS** – Scottish Prison Service<sup>(9)</sup>;

**UK Act** – the Coronavirus Act 2020<sup>(10)</sup>, introduced to the UK Parliament on 19 March 2020, passed on 25 March 2020 and which received Royal Assent that day.

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(1) [Accountant in Bankruptcy | Scotland's Insolvency Service \(aib.gov.uk\)](https://www.aib.gov.uk)

(2) [copfs.gov.uk](https://www.copfs.gov.uk)

(3) [Coronavirus \(Extension and Expiry\) \(Scotland\) Act 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

(4) [Coronavirus Extension and Expiry Scotland Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](https://www.scottish.parliament.uk)

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

(6) [Coronavirus \(Scotland\) \(No.2\) Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

(7) [Registers of Scotland - Scotland's land and property registers \(ros.gov.uk\)](https://www.ros.gov.uk)

(8) [Scottish Courts \(scotcourts.gov.uk\)](https://www.scotcourts.gov.uk)

(9) [Scottish Prison Service \(sps.gov.uk\)](https://www.sps.gov.uk)

(10) [Coronavirus Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

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## Chapter 1: Introduction and policy background

### Background

1. The Scottish Government is working to lead Scotland safely through and out of the Covid pandemic and to re-open the country as quickly and safely as possible. The Scottish Parliament passed the Coronavirus (Extension and Expiry) (Scotland) Bill (now the “**Extension and Expiry Act**”) on 24 June 2021, contributing to that objective by extending on a temporary basis a range of existing legislative measures which support various aspects of the ongoing response to the public health emergency caused by the global pandemic.
2. This consultation paper begins with discussion in this Chapter of the Scottish Government’s ambitions for Covid recovery and ends in Chapter 5 with an open question, inviting comments and proposals on the boldness of action that respondents think is required. The core Chapters 2 to 4 of the paper invite views on specific legislative proposals that we think have the potential to support Covid recovery:
  - Proposals for greater public health resilience, to protect Scotland against future public health threats (Chapter 2);
  - Proposals for public services and justice system reform, to ensure that the benefits of practical modernisations put in place during the pandemic are not lost (Chapter 3);
  - Proposals to respond to the impact of Covid in the justice system specifically, where backlogs have unavoidably built up (Chapter 4).
3. The Extension and Expiry Act extends Parts 1 of the Coronavirus (Scotland) Act 2020 (the “**First Scottish Act**”) and the Coronavirus (Scotland) (No.2) Act 2020 (the “**Second Scottish Act**”) which otherwise would have expired on 30 September 2021. Broadly, temporary provisions are extended for 6 months to the end of March 2022, with the potential for further extension by secondary legislation to September 2022, subject to the agreement of the Scottish Parliament. The Act also expires a number of temporary measures that are no longer required to respond to the pandemic. Some of the provisions contained in the First and Second Scottish Acts have already been expired in line with the Government’s commitment to remove provisions that are no longer necessary to support the ongoing public health response. Further details of the policy for the Extension and Expiry Act, in particular the public health context underpinning it, are contained in the Policy Memorandum published together with the Bill<sup>(11)</sup>.

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(11) [PM \(parliament.scot\)](https://www.parliament.scot).

The provisions of the First and Second Scottish Acts are complemented by provisions in the Coronavirus Act 2020 (the “**UK Act**”) applicable to Scotland. The majority of the UK Act expires at the end of March 2022, with the potential for extension by secondary legislation, subject to the agreement of the Scottish Parliament.

### **Covid recovery policy**

4. As we emerge from the pandemic we are committed to addressing the underlying inequalities that have been exacerbated by recent events. To inform not just what we do but how we do it, the Deputy First Minister and Cabinet Secretary for Covid Recovery held a number of Stakeholder Recovery Roundtables over the summer recess and the outputs from those meetings will be reflected in a Covid Recovery Strategy that will be published in autumn 2021<sup>(12)</sup>.
5. People have told us they want a Scotland that achieves financial security for all: through good quality work and sustainable employment; that supports health and well-being for young people in particular; that promotes equalities; and that strengthens people’s rights.
6. Achieving these ambitions will in some instances require changes to the law and to the practices that determine how the law is enforced and affects the lives of individuals, families, businesses and the third sector in Scotland.
7. Chapters 2, 3 and 4 set out specific proposals where the Scottish Government considers that specific legislative reforms have the potential to support our recovery from Covid. Chapter 5 does not seek views on specific legislative proposals but more widely asks for views on the sort of changes that respondents believe will help us to achieve the transformation we are seeking.

### **Proposals in this paper**

8. The Scottish Government proposes that some of the legislative measures from the First and Second Scottish Acts and the UK Act be given permanent effect. These are the measures that are clearly showing a benefit and are discussed in Chapters 2 and 3. We want 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. In other cases, the Scottish Government considers that there is a case for longer extension of some temporary justice system measures than has been provided for in the Extension and Expiry Act, to deal

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(12) Detail of the discussions can be found at [Coronavirus \(COVID-19\): Stakeholder Recovery Roundtable - gov.scot \(www.gov.scot\)](https://www.gov.scot/Topics/consultations/coronavirus-stakeholder-recovery-roundtable).

with backlogs that have unavoidably built up during the pandemic. These measures are discussed in Chapter 4.

9. Primary legislation – a Bill or Bills in the Scottish Parliament - would be required to extend provisions from the First and Second Scottish Acts and the UK Act beyond what is permitted by those Acts, or to give measures permanent effect or to amend them. This consultation paper invites views on the Scottish Government’s proposal to develop and introduce such primary legislation. Finally, Chapter 5 addresses equalities, human rights, financial and other impacts of the Government’s proposals, as well as setting out the general Covid recovery question mentioned.

### **A guide to legislative references**

10. This consultation paper makes reference to sections and schedules of the First and Second Scottish Acts and the UK Act. These legislative provisions will be more familiar to some readers than others, and therefore hyperlinks are offered to key provisions of these Acts from [www.legislation.gov.uk](http://www.legislation.gov.uk). A “section” is a numbered provision in the main body of an Act and a “schedule” is a numbered annex, introduced by a section and sitting at the end of the Act after the sections. The numbered provisions within a schedule are known as paragraphs. Each of the First and Second Scottish Acts and the UK Act are distinct Acts with their own schedules.

### **What is meant by ‘making permanent’**

11. In Chapters 2 and 3, ‘making permanent’ means bringing forward primary legislation making equivalent provision which is not temporary. The Scottish Government is considering what adaptations might be required to existing provisions so that they function effectively as permanent provisions and would not be limited to use only for a Covid pandemic. It should be noted, however, that permanent changes to the law are permanent only in the sense that they will not expire; there will be nothing to prevent the law being changed again by subsequent legislation in the usual way.
12. Respondents are invited to express any particular views on these points, including to propose adaptations or comment on any already included in the “free text” box assigned to each question for each topic.

## **Chapter 2: Public health resilience**

13. During the Covid pandemic, a number of powers have been used to safeguard public health. This has included specific powers to make public health protection regulations, but has also included powers to impose requirements on educational establishments, and to ensure we could deliver a vaccine programme of unprecedented speed and scale.
14. In the cases highlighted above, the powers that have enabled this 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. As a result, and based on the experience of managing Covid, the Government considers that building public health resilience in the future requires action to ensure a permanent suite of powers that will allow Scottish Ministers to tackle any type of infectious disease or contamination that may pose a significant health threat.
15. While there is still much to be learned from this pandemic over the months and years ahead to influence future responses, the 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, ensuring that Ministers are able to respond swiftly and appropriately to infectious diseases or pandemic threats.

### **Proposals within this Chapter**

16. The first three of the four public health proposals set out in this Chapter originate in the UK Act and are set to expire in March 2022, although there is potential for them to be extended via secondary legislation with the agreement of the Scottish Parliament (or to be expired earlier). The Scottish Government is working on the basis that if those powers are still required to respond to the Covid pandemic, we anticipate the power to delay their expiry will be used to retain the powers. However, because the UK Act is specifically about responding to Covid, any extension will only operate in relation to Covid. Therefore, the consultation proposals set out here are that these public health powers will be made permanent via further primary legislation, and that this permanent legislation should provide much greater scope to protect against future spread of infection or contamination that could be a significant threat to human health in Scotland.
17. The fourth measure (Topic H4 - Virtual public meetings under the Schools (Consultation) (Scotland) Act 2010) is a new, and in the Scottish Government's view, complementary proposal.
18. Topics within this Chapter are listed in alphabetical order rather than by their position in the UK Act. No First or Second Scottish Act provisions are within this Chapter.

## Topic H1 – Education: powers to make directions to close educational establishments, and to ensure continuity of education

Legislative references: [Part 2 of schedule 16 of the UK Act \(legislation.gov.uk\)](#) and [Part 2 of schedule 17 of the UK Act \(legislation.gov.uk\)](#)

19. 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.
20. Scottish educational establishments have been very significantly impacted by the pandemic, closing for significant periods and following stringent guidance on re-opening. The actions taken by the Scottish Government have been underpinned by provisions in the UK Act which placed a duty on the relevant operators of educational establishments<sup>(13)</sup> to have regard to the advice of the CMO. The UK Act also gave powers to Scottish Ministers to - where it is necessary and proportionate - direct the closure of educational establishments, and give directions relating to the continuity of education. This could include directing the operator of an educational establishment to take specified actions as Ministers consider reasonable; require safe hygiene standards etc.; take on additional functions; close or restrict access to educational establishments; or keep open, or reopen either partially or fully. It may also provide that a failure to comply with a specified statutory duty or time limit is to be disregarded to the extent it can be attributed to the direction being in place.
21. During the current Covid pandemic the educational closure direction making power was not used. However, the educational continuity direction making power was used extensively<sup>(14)</sup> to support actions in society to prevent the spread of the virus, and to ensure that educational provision was maintained for children and young people in a way that was safe. This included measures such as ensuring the provision of free school meals to eligible pupils via alternative means and the provision of education and childcare for vulnerable children and young people and children of key workers. It also provided the education sector, in particular schools and day care of children settings, with certainty about the requirements being placed upon them during the pandemic.
22. While Scottish Ministers had the power to give educational continuity directions to higher and further education institutions, independent or grant-aided schools

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(13) Defined in the UK Act as 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.

(14) [Coronavirus Act 2020: educational continuity direction - gov.scot \(www.gov.scot\)](#)

sectors, private and voluntary and independent (PVI) day care of children settings, none of the directions that were issued applied to these sectors. However, all adhered to the guidance issued by the Scottish Government and closed their in-person provision in the same way as the education authority run schools and day care of children settings which were subject to the directions (and maintained these restrictions even where they were being relaxed for schools and day care of children settings). Whilst these powers have not been used previously, maintaining these in relation to all types of educational establishment would mean that Ministers have the appropriate powers to ensure all types of educational establishment take the necessary action to address infection risk if that is required.

23. Future pandemics may have an impact on educational provision, given the large gatherings of children and young people involved, and action may need to be taken to control transmission. Scottish Ministers are minded to provide for permanent powers – either in their entirety or adapted to reflect our experience of the use of the powers in the various types of educational institution during the Covid pandemic or with additional safeguards – so they can be deployed as necessary during the remainder of the pandemic. In the event of a future pandemic, the broad nature of the powers will provide Ministers with the flexibility to take the action needed to address the specific circumstances of the health emergency.

24. Underpinning these powers would be significant safeguards including a requirement that Ministers must have regard to the advice of the CMO before giving a direction, that Ministers be satisfied that giving a direction is necessary and proportionate, and that any directions should apply for a defined period and be subject to regular review.

**Question 1:**

**It is proposed that the provisions for Topic H1 (Education: powers to make directions to close educational establishments, and to ensure continuity of education) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic H1 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic H1 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic H1 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic H1, or the proposal for permanence, please write them below.

## **Topic H2 – Power to make public health protection regulations**

Legislative reference: [Schedule 19 of the UK Act](#)

25. In order to ensure the continuance of the provisions which enable the Scottish Ministers 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 which presents or could present significant harm to human health in Scotland, we are proposing to make permanent the provisions in schedule 19 of the UK Act.
26. Schedule 19 of the UK Act provides the 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 by Covid in Scotland. These powers are limited to Covid infection by virtue of section 1(2) of the UK Act.
27. These powers have been appropriately relied upon during the response to the Covid pandemic in Scotland and have enabled necessary and proportionate legal restrictions and requirements to be implemented to protect public health. During the pandemic, among other uses, they have been the means of prohibiting or limiting numbers at gatherings; introducing lockdown measures; and requiring that face coverings are worn.
28. Our experience of using these regulations during the pandemic has demonstrated the importance of ensuring the Scottish Ministers can respond effectively and rapidly to any future threats to public health in Scotland. The proposal is therefore to give the Scottish Ministers the same powers to protect the people of Scotland from any incidence or spread of infection or contamination which presents or could present significant harm to human health in Scotland, not just Covid. It should be noted that, although the regulation-making powers are proposed to remain the same as those used throughout the pandemic, it does not follow that future public health responses using these powers would involve the same restrictions or measures. The benefit of adopting the approach set out in



schedule 19 is that it will enable Scotland to respond flexibly and proportionately to specific threats as they arise.

29. Powers equivalent to those included in schedule 19 (although not restricted to use in response to the Covid pandemic) are already in statute in England and Wales in the Public Health (Control of Disease) Act 1984 and these are not temporary measures. As mentioned, the proposal is to put Scotland in a similar position in having permanent powers available to protect against the spread of infection or contamination that is or could present a significant threat to human health in Scotland.
30. As mentioned above, because the UK Act is specifically about responding to Covid, extension of provisions using the powers in the UK Act would only operate in relation to Covid; it should therefore be stressed the consultation proposal is for permanent legislation that would operate to protect against the spread of any infection or contamination that is or could be a significant threat to human health in Scotland.

**Question 2:**

**It is proposed that the provisions for Topic H2 (Power to make public health protection regulations) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic H2 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic H2 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic H2 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic H2, or the proposal for permanence, please write them below.

### Topic H3 – Vaccinations and immunisations

Legislative reference: [Section 36 of the UK Act \(legislation.gov.uk\)](https://www.legislation.gov.uk)

31. The proposal is to make permanent the relaxation of the restriction within the National Health Service (Scotland) Act 1978 on vaccinations and immunisations being carried out by doctors or persons acting under their direction and control.
32. The purpose of this proposal is to allow a wider range of health professionals to administer vaccinations and immunisations (in accordance with existing regulatory provisions about the administration of vaccines in the Human Medicines Regulations 2012) in order to make it easier to quickly protect the population from infectious diseases.
33. There are currently requirements set out in the National Health Service (Scotland) Act 1978 which provide that vaccinations and immunisations must be administered by medical practitioners or persons acting under their direction and control.
34. Scottish health boards are restricted to delivering vaccination programmes through doctors, or persons acting under their direction or control in terms of section 40 of the National Health Service (Scotland) Act 1978. Section 36 of the UK Act removes this requirement until March 2022. The purpose of this provision was to give health boards the ability to arrange for any vaccinations during the pandemic to be delivered more flexibly – this would include routine vaccinations such as the seasonal influenza programme, as well as Covid vaccinations.
35. The expanded seasonal influenza programme and the possibility of having to provide “boosters” for Covid immunisation will both require large vaccination workforces and flexibility within delivery models. This is currently supported under section 36 of the UK Act, and we are now proposing that this should be a permanent change in order to run effective vaccination programmes to protect the population from infectious diseases.
36. The Scottish Government had also 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.

#### Question 3:

**It is proposed that the provisions for Topic H3 (Vaccinations and immunisations) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic H3 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic H3 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic H3 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic H3, or the proposal for permanence, please write them below.

#### **Topic H4 – Virtual public meetings under the Schools (Consultation) (Scotland) Act 2010**

Legislative reference: proposed new provisions so no existing legislative reference

37. The Schools (Consultation) (Scotland) Act 2010 (“the 2010 Act”) sets out the requirements education authorities must comply with when consulting on particular changes to how school provision is organised in their area. The definition of ‘school’ is wide and includes any institution that provides primary and/or secondary education (including a nursery school and a special school) that is under the management of an education authority. It does not include private, voluntary or independently run early learning and childcare settings.
38. The requirements of the 2010 Act are aimed at ensuring that local communities have an opportunity to have their views heard. This will help ensure that proposals meet the needs of communities and support education authorities’ decision making.
39. The 2010 Act requires that a public meeting is held as part of the consultation process. Public meetings are a crucial part of the consultation process and enable members of the local community to give their views on proposals. Importantly, they allow attendees to hear the range of views there may be in the wider community. The Scottish Government sees a continuing role for public meetings in the 2010 Act consultation process. The 2010 Act also requires paper

copies of proposal papers and reports to be made available physically at council offices and other locations.

40. The Covid pandemic has, however, brought unprecedented changes to the operation of public services to minimise the risk of spread of the virus. It has meant that education authorities face uncertainty over whether it is safe to hold such meetings both for their own staff and the public who may wish to attend. Other public services, such as planning, had the flexibility during the pandemic to issue regulations permitting public meetings to be held virtually.

41. We intend to legislate so that in the event of a significant health emergency in the future, akin to the Covid pandemic, local authorities will have the flexibility to hold public meetings virtually. We wish this to be in place on a permanent basis so it can be utilised during any future pandemic. This will provide education authorities with greater certainty about what arrangements to make and help keep the public safe. The current statutory requirement on education providers to hold public meetings in-person would remain in place during normal times. Similarly, we intend to legislate to introduce more flexibility in these circumstances around the current requirement for paper copies of documents to be made available at council offices or other locations.

**Question 4:**

**It is proposed that new permanent legislative provisions for Topic H4 (Virtual public meetings under the Schools (Consultation) (Scotland) Act 2010) as described will be developed. Which of the following best describes what you think about this?**

- I think the proposed provisions for Topic H4 should be developed
- I do not think the proposed provisions for Topic H4 should be developed
- Unsure
- I have no view

If you have any comments on the proposed provisions for Topic H4 please write them below.

### **Chapter 3: Public services and justice system reform**

42. The First and Second Scottish Acts, and UK Act, contain important, practical measures to help public services and public service users deal with the operational, service delivery challenges and wider impacts of the Covid pandemic. In some cases measures have led to modernisations in working practices that in the Scottish Government's view have benefited public service and justice system users.
43. Therefore, in this Chapter, the Government sets out why it proposes specific, listed measures to be made permanent even for times where there is no public health risk. Modern, practical legislation that benefits public service and justice system users supports the Government's Covid recovery ambitions (as set out in Chapter 1) more widely.

#### **Proposals within this Chapter**

44. With one exception, the public services and justice system measures in this Chapter originate in the First Scottish Act, Second Scottish Act and UK Act and expire in March 2022. The Scottish Government proposes, in the first instance, to extend those measures to September 2022 via secondary legislation subject to the agreement of the Scottish Parliament and proposes that they be made permanent thereafter, via further primary legislation.
45. The new proposal (Topic P17 - Remote registration of live births) is similar to and in the Scottish Government's view complementary to Topic P16 - Remote registration of deaths and still-births, which is an existing temporary measure considered in this Chapter.
46. Topics within this Chapter are listed in alphabetical order rather than by their position in the First Scottish Act, the Second Scottish Act or the UK Act. What is meant by "making permanent" is explained at the beginning of the preceding Chapter 2.

#### **Digital government context**

47. Many of the topics being consulted on in this Chapter have a "digital" element in that the provisions remove some of the older working practices in public and justice system services and make things more convenient for users. The Covid crisis has shone an intense spotlight on the importance of public services which are not only secure, accessible to all and resilient, but which are 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 in key areas like health and social care,

learning and justice, 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, and our response to it, 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. The provisions being consulted on 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”<sup>(15)</sup>.

48. As we become a digital nation, the nature of government, at a national and local level, will change. The people we serve expect services that are responsive and tailored to their needs and they expect to hold us to account for the quality and efficiency of these services. This requires us to both re-think how we design and deliver services and change the operating model of the organisations that provide them. The new 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 us all. Of course this will not ever be the only approach we offer; this is about increasing access without creating barriers for those who don’t want to or can’t always use digital means.

49. For many Scottish public services, their governing legislation was already sufficiently digital-ready so there was no need to use Covid legislation to modify it for pandemic-related reasons.

### **Other previous and ongoing consultation activities**

50. The Policy Memorandum for the Bill for the Extension and Expiry Act highlights where targeted consultation has already taken place on a number of the topics being further consulted on in this Chapter.

51. In relation to justice system proposals specifically, the Government is consulting directly with an independent Advisory Group which was established to support the work of Covid recovery and renewal across the justice system. Its membership of third sector organisations provides regular feedback and a mechanism for consultation on human rights issues, equalities and overall impact on system users.

52. In relation to the Accountant in Bankruptcy (“AiB”), in October 2020 the then Minister for Business, Fair Work and Skills agreed to carry out a wider review of Scotland’s statutory debt solutions. As part of that commitment AiB established three working groups to help carry out that review. The groups consist of 39 key

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(15) [A changing nation: how Scotland will thrive in a digital world - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/digital-strategy-2021/pages/10-introduction-to-the-digital-principles.aspx).

stakeholders from a broad range of sector interests including the advice community, insolvency and legal professions and creditors.

53. In recent months AiB has undertaken targeted consultation with stakeholders relating to the bankruptcy provisions introduced through the First and Second Scottish Acts. A series of consultation meetings focussing on immediate priorities were hosted in November 2020, following the Ministerial stakeholder meeting. This process led to some of the provisions – namely the bankruptcy application fee structures, the increase in Minimal Asset Bankruptcy debt thresholds, the extended time period for a trustee to submit debtor contribution proposals and electronic signatures on forms – being introduced permanently (i.e. not temporarily) through the Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021<sup>(16)</sup>.
54. On 18 May 2021, AiB issued a further targeted consultation to the members of the policy review working groups on the remaining provisions. The feedback highlighted full support for placing the provisions on virtual meetings and electronic service of documents in bankruptcy proceedings on a permanent footing. There were some mixed responses around the moratorium on diligence and on the debt threshold enabling a creditor to petition for a person’s bankruptcy but overall strong support. On these issues, while the specific provisions included on a temporary basis are not widely considered appropriate for permanence, stakeholders have highlighted the merits of amended provisions being put in place; these could have advantages over a reversion to the earlier time limit and debt threshold set in bankruptcy legislation prior to the provision introduced through the First and Second Scottish Acts.
55. In relation to Registers of Scotland (“RoS”), the organisation has consulted with stakeholders throughout the period of the Covid pandemic. This consultation on these specific provisions has been reported on as part of the statutory two-monthly reporting by the Scottish Ministers to the Scottish Parliament and has informed decisions on the continued necessity and appropriateness of the measures<sup>(17)</sup>.
56. The provisions permitting digital submission of applications, in addition to providing vital access during the period of restrictions, have proven to be extremely popular with stakeholders and also represent a key stepping stone on RoS’ roadmap towards a fully digital registration system. Ahead of seeking permanent provisions, RoS recently ran a public consultation on behalf of the Scottish Government<sup>(18)</sup> on a number of proposals related to digital submission,

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(16) (2021 No. 148): [The Bankruptcy \(Miscellaneous Amendments\) \(Scotland\) Regulations 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

(17) The reports referred to are available from this page [Coronavirus \(COVID-19\) legislation - gov.scot \(www.gov.scot\)](https://www.gov.scot).

(18) [Consultation paper - Registers of Scotland – 22 December 2020](#)

including making these changes permanent. The consultation attracted 223 responses from key stakeholders, with over 93% of responses being positive, demonstrating overwhelming support for making the provisions permanent<sup>(19)</sup>. In order to implement the proposals RoS has already consulted on, secondary legislation is also being developed.

## **Topic P1 – Alcohol licensing remote hearings**

Legislative reference: [Schedule 5 of the First Scottish Act \(legislation.gov.uk\)](https://www.legislation.gov.uk)

57. This proposal relates to retention, in an amended form, of one aspect of the alcohol licensing provisions in the First Scottish Act. This relates to the holding of Licensing Board hearings. Topic P7 below concerns Civic government licensing remote hearings.
58. The proposal would enable Licensing Boards to make discretionary decisions as to whether it would be appropriate for a hearing to be held remotely as opposed to “in person”. The additional flexibility will be of benefit to users (e.g. licence holders) of the licensing system as well as Licensing Boards. Where a Licensing Board decides to make use of this discretion to hold a remote hearing, it is proposed that no dilution of public access will be permitted with the Licensing Board requiring to put in place appropriate arrangements to allow for the public to observe the hearing and, where relevant, participate as an objector.
59. The First Scottish Act gives discretion for Licensing Boards to provide parties with an opportunity to be heard by remote means where an in person hearing is not possible because of reasons relating to Covid. This was a response to the pandemic and the inability of Licensing Boards to be able to hold face-to-face meetings. As we move through the pandemic, it has become clear this particular discretion for Licensing Boards may have value outwith times of pandemic.
60. We propose to ensure flexibility in this specific area is available on a permanent basis so that, whilst it may be expected that the norm would be that hearings should take place “in person”, Licensing Boards would have flexibility to hold remote hearings where they consider it appropriate. The exact format of a remote hearing would be for a Licensing Board to determine, but alternative means for the holding of hearings could include persons to be heard by telephone, video or audio-conferencing.
61. The importance of the public being able to observe Licensing Board proceedings was recently debated in the Scottish Parliament during proceedings for the Extension and Expiry Act. The views offered indicated considerable importance being placed on ensuring access for the public and the Scottish Government is

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(19) [Digital submissions analysis - Registers of Scotland – 22 March 2021](#)



committed to ensuring the operation of any reforms will mean public access happens.

62. In light of these considerations, where a Licensing Board elects to hold a remote hearing, it would be expected that Licensing Boards will be required to take appropriate steps to ensure members of the public are able to observe hearings. This could be through a web link or some other mechanism. It is also proposed that members of the public who are engaging formally with the subject of the hearing e.g. as an objector can do so remotely. This will ensure members of the public can observe and, where appropriate, participate in remote hearings held by the Licensing Board.

63. The Scottish Government takes the view that ensuring the availability of remote hearings will allow Licensing Boards to consider how best to conduct their business and as such continue to provide welcome flexibility that will benefit and assist all users of the licensing systems as they begin to recover from the adverse impact of the Covid pandemic. In given situations, there are advantages of remote hearings such as reduced travel for participants which creates both benefits for the environment and time-savings for individuals. It may be that in some cases an "in person" hearing is more suitable in the circumstances and it is intended for Licensing Boards to assess when remote hearings should be used subject to them weighing up all relevant factors which may arise in any given situation.

**Question 5:**

**It is proposed that the provisions for Topic P1 (Alcohol licensing remote hearings) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P1 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P1 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P1 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P1, or the proposal for permanence, please write them below.

**Topic P2 – Bankruptcy: debt level that enables creditors to pursue the bankruptcy of a debtor through the courts**

Legislative reference: [Part 5 of schedule 1 of the Second Scottish Act \(legislation.gov.uk\) \(paragraph 10\)](#)

64. The proposal is to strengthen the protections available for those dealing with problem debt by making permanent measures that increase the minimum debt level a creditor must be owed to petition for bankruptcy through the courts.

65. Paragraph 10 of schedule 1 of the Second Scottish Act modifies the definitions of “qualified creditor” and “qualified creditors” in section 7(1) of the Bankruptcy (Scotland) Act 2016 by raising the amount of money a creditor or a group of creditors must be owed in order to be “qualified” from £3,000 to £10,000. A qualified creditor has the right to petition the court for a debtor’s bankruptcy in terms of section 2(1)(b)(i) of the Bankruptcy (Scotland) Act 2016, where the debtor is apparently insolvent.

66. The volume of creditor petitions has reduced significantly since April 2020 as compared with previous years. For example, the provisional figures highlighted in the published statistics for quarter 4 2020/21 show that there were 169 creditor petitions for the full year 2020/21 - compared with 910 submitted in 2019/20. There will be a range of factors involved, including the limitations provided by the increased creditor petition debt level, increased creditor forbearance during the pandemic and the protections provided by the moratorium described earlier in this memorandum.
67. In common with the stakeholder views set out in relation to the moratorium, there is a recognition that the protection afforded through the increased creditor petition threshold is very likely to be required beyond March 2022. This reflects the significant uncertainty over the timing and scale of demand for debt solutions that will arise. There have however been questions raised as to whether the £10,000 minimum debt level introduced on a temporary basis is appropriate for the longer term. It was suggested that such an amount would frustrate smaller creditors as it would prevent them from initiating sequestration proceedings. Equally, stakeholders have suggested that a reversion to the previous £3,000 minimum debt level might not afford sufficient protection as the economic consequences of the pandemic emerge. This consultation seeks views on the appropriate debt level that should enable creditor petition bankruptcy to be pursued through the Scottish courts, including whether a figure of £5,000 would strike a more appropriate balance between the interests of debtors and creditors were the provision to be placed on a permanent footing.

**Question 6:**

**It is proposed that the provisions for Topic P2 (Bankruptcy: debt level that enables creditors to pursue the bankruptcy of a debtor through the courts) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P2 should be extended beyond March 2022 and made permanent (i.e. with a creditor petition debt level of £10,000 as per the current provisions)
- I think the provisions for Topic P2 should be extended beyond March 2022 and made permanent with an amended creditor petition debt level of £5,000
- I think the provisions for Topic P2 should be extended beyond March 2022 (i.e. with a creditor petition debt level of £10,000 as per the current provisions), but not made permanent
- I think the provisions for Topic P2 should be extended beyond March 2022 with an amended creditor petition debt level of £5,000, but not made permanent
- I do not think the provisions for Topic P2 should be extended or made

permanent

Unsure

I have no view

If you have any comments on either the provisions for Topic P2, or the proposal for permanence, please write them below.

### **Topic P3 – Bankruptcy: electronic service of documents**

Legislative reference: [Part 5 of schedule 1 of the Second Scottish Act \(legislation.gov.uk\) \(paragraph 8\)](#)

68. The proposal is to improve the use of technology in bankruptcy proceedings by permitting documents required during bankruptcy administration to be transmitted to a person electronically.

69. Paragraph 8 of schedule 1 of the Second Scottish Act makes modifications to section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 as that section applies to documents which are authorised or required to be sent by or under the Bankruptcy (Scotland) Act 2016. The effect of the amendment is to permit a document to be transmitted to a person electronically and also to modify the rules which apply in relation to the circumstances in which willingness to receive a document electronically may be given or inferred.

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

#### **Question 7:**

**It is proposed that the provisions for Topic P3 (Bankruptcy: electronic service of documents) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P3 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P3 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P3 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P3, or the proposal for permanence, please write them below.

#### **Topic P4 – Bankruptcy: moratoriums on diligence**

Legislative reference: [Schedule 2 of the First Scottish Act \(legislation.gov.uk\)](https://www.legislation.gov.uk)

71. The proposal is to protect those with unsustainable debt by increasing the length of the moratorium against diligence. This topic follows on from the discussion of AiB’s specific consultation earlier in this Chapter.

72. Schedule 2, paragraphs 1 and 4 of the First Scottish Act increased the length of the moratorium against diligence established under sections 195 to 198 of the Bankruptcy (Scotland) Act 2016 (‘the 2016 Act’) from a period of six weeks to a period of six months. The rationale behind the provisions was to extend the period during which individuals with financial difficulties could secure protection from creditors taking action against them, allowing such individuals more time to find advice on how best to deal with their debts as well as to recover from time-limited income shocks. The provisions in the 2016 Act allow for a ‘breathing space’ in which the debtor can seek money advice, and find the right longer term solution for their circumstances.

73. The new provisions have been used and there were 2,152 applications for moratoriums granted in the 12 months to April 2021 (inclusive) compared with 1,060 for the previous 12 months.

74. While the provisions have been welcomed and representations have been made from stakeholders mentioned earlier in this Chapter on the need for permanent provisions that provide enhanced protection, the general view is that the 6 month

period provided for is not appropriate on a longer term basis. Concerns have been raised that a 6 month period may result in individuals losing that sense of urgency and disengaging from the advice seeking process to find a solution to their debt problems. In response to the previous consultations referenced earlier in this Chapter on the moratorium on diligence provisions, respondents have indicated that a 12 week period might be the preferred option and offer advantages over reverting to the earlier 6 week period prescribed in bankruptcy legislation prior to the amending provision brought forward by the First Scottish Act. This consultation aims to seek further views and confirm that this is still the case.

**Question 8:**

**It is proposed that the provisions for Topic P4 (Bankruptcy: moratoriums on diligence) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P4 should be extended beyond March 2022 and made permanent (i.e. with a moratorium period of 6 months as per the current provisions)
- I think the provisions for Topic P4 should be extended beyond March 2022 and made permanent with an amended moratorium period of 12 weeks
- I think the provisions for Topic P4 should be extended beyond March 2022 (i.e. with a moratorium period of 6 months as per the current provisions), but not made permanent
- I think the provisions for Topic P4 should be extended beyond March 2022 with an amended moratorium period of 12 weeks, but not made permanent
- I do not think the provisions for Topic P4 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P4, or the proposal for permanence, please write them below.

## Topic P5 – Bankruptcy: virtual meetings of creditors

Legislative reference: [Part 5 of schedule 1 of the Second Scottish Act \(legislation.gov.uk\) \(paragraph 12\)](#)

75. The proposal is to improve the use of technology in bankruptcy proceedings by enabling meetings of creditors to take place by virtual means rather than in a physical environment.

76. Paragraph 12 of schedule 1 of the Second Scottish Act modifies the Bankruptcy (Scotland) Act 2016 to allow meetings of creditors to take place using electronic means. Although creditors' meetings in personal insolvency proceedings are now infrequent there are circumstances that give rise to them being convened and with the onset of the pandemic-related restrictions it was essential that provision was introduced to allow those to take place in a virtual environment. This rationale remains and the provisions will be required beyond March 2022. There now appears to be broad consensus that a permanent change to allow virtual meetings would be welcomed should the opportunity exist. This is not only in response to the Covid pandemic, but as a longer term modernising change to the insolvency process that would improve efficiency and reduce the costs – potentially increasing the returns paid to creditors.

### Question 9:

**It is proposed that the provisions for Topic P5 (Bankruptcy: virtual meetings of creditors) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P5 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P5 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P5 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P5, or the proposal for permanence, please write them below.

## Topic P6 – Care services: giving of notices by the Care Inspectorate

Legislative reference: [Part 4 of schedule 4 of the Second Scottish Act \(legislation.gov.uk\)](https://www.legislation.gov.uk)

77. The proposal is to enable the Care Inspectorate to send formal notices to care service providers by electronic means.

78. Schedule 4, paragraph 5 of the Second Scottish Act provides the Care Inspectorate with powers to send formal notices to care service providers by electronic means, in addition to normal post, for the duration of the emergency period. Formal notices include those relating to registration, variation of conditions of registration, and enforcement action. The provisions also make it clear that notices can be served on a wider range of persons including, most notably, managers of care services provided by a corporate body as well as that body's directors.

79. As of 13 May 2021 the power provided by this provision has been used by the Care Inspectorate in relation to 2,858 matters for the issuing of notices relating to registration, variation of conditions of registration, and enforcement action. The Scottish Government considers that there is an opportunity to modernise and expedite the pre-pandemic arrangements, to retain the ability to give notices by electronic means.

### Question 10:

**It is proposed that the provisions for Topic P6 (Care services: giving of notices by the Care Inspectorate) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P6 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P6 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P6 should be extended or made permanent
- Unsure
- I have no view



If you have any comments on either the provisions for Topic P6, or the proposal for permanence, please write them below.

### **Topic P7 – Civic government licensing remote hearings**

Legislative reference: [Part 1 of schedule 6 of the First Scottish Act \(legislation.gov.uk\)](https://www.legislation.gov.uk)

80. This proposal relates to retention, in an amended form, of one aspect of the civic government licensing provisions in the First Scottish Act. This relates to the holding of licensing authority hearings. Topic P1 above concerns Alcohol licensing remote hearings.
81. This enables licensing authorities to make discretionary decisions as to whether it would be appropriate for a hearing to be held remotely as opposed to “in person”. The additional flexibility will be of benefit to users (e.g. licence holders) of the licensing system as well as licensing authorities. Where a remote hearing is to be held, it is proposed that no dilution of public access will be permitted with the licensing authority requiring to put in place appropriate arrangements to allow for the public to observe the hearing and, where relevant, participate as an objector.
82. The First Scottish Act gives discretion for licensing authorities, when discharging functions under the Civic Government (Scotland) Act 1982, to provide parties with an opportunity to be heard by remote means where an in person hearing is not possible because of reasons relating to Covid. This was a response to the pandemic and the inability of licensing authorities to be able to hold face-to-face meetings. As we move through the pandemic, it has become clear this particular discretion for licensing authorities may have value outwith times of pandemic.
83. We propose to ensure that this flexibility in this area is available on a permanent basis so that, whilst it may be expected that the norm would be that hearings should take place “in person”, licensing authorities have the flexibility to hold remote hearings where they consider it appropriate. The exact format of a remote hearing would be for licensing authorities to determine, but alternative means for the holding of hearings could include persons to be heard by telephone, video or audio-conferencing.
84. The importance of the public being able to observe discussions held by local authorities (which in effect is what licensing authorities are) was recently debated

in the Scottish Parliament during proceedings for the Extension and Expiry Act. The views offered indicated considerable importance being placed on ensuring access for the public and the Scottish Government is committed to ensuring the operation of any reforms will mean public access happens.

85. In light of these considerations, where a licensing authority elects to hold a remote hearing, it would be expected that licensing authorities will take appropriate steps to ensure members of the public are able to observe hearings. This could be through a web link or some other mechanism. It is also proposed that members of the public who are engaging formally with the subject of the hearing e.g. as an objector can do so remotely. This will ensure members of the public can observe and, where appropriate, participate as an objector in remote hearings held by the licensing authority.

86. The Scottish Government takes the view that ensuring the availability of remote hearings will allow licensing authorities to consider how best to conduct their business and as such continue to provide welcome flexibility that will benefit and assist all users of the licensing systems as they begin to recover from the adverse impact of the Covid pandemic. In given situations, there are advantages of remote hearings such as reduced travel for participants which creates both benefits for the environment and time-savings for individuals. It may be that in some cases an “in person” hearing is more suitable in the circumstances and it is intended for licensing authorities to assess when remote hearings should be used subject to the licensing authority weighing up all relevant factors which may arise in any given situation.

**Question 11:**

**It is proposed that the provisions for Topic P7 (Civic government licensing remote hearings) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P7 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P7 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P7 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P7, or the proposal for permanence, please write them below.

### **Topic P8 – Courts: intimation, etc. of documents**

Legislative reference: [Paragraph 1A of schedule 4 of the First Scottish Act](#)

87. It is proposed that the law be permanently changed so that any requirement to display a document on the walls (or any other part) of a court building or to make it publicly available within a court can also be fulfilled by publishing the document on the Scottish Courts and Tribunals Service’s (“SCTS”) website. This would be subject to the power of the head of the courts to adjust the operation of the new rule as necessary which allows, for example, redaction of sensitive information to account for any issues arising from the potential online publication of sensitive data. In more modern times, nothing has prevented any person from accessing a court building to photograph information posted publically on the court wall and then posting this online for a worldwide audience to access.

88. Initially implemented as a key measure to provide for the continuation of court business during Covid and the resultant impact of public health restrictions, these provisions have been used to good effect – progressing a substantial volume of cases and applications, predominantly in relation to commissary business, for example, the appointment of an executor of a deceased person. In addition, SCTS have expanded existing functionality within their IT system to automate the publication process which has resulted in reduced staff costs and efficiency savings. Aligning with SCTS strategy to maximise the opportunities afforded by technology to improve processes, provide easy access to information for court users, minimise physical appearance in court buildings and support quicker outcomes, website notices provide a modern day equivalent to walls of the court. These provisions have been identified as a desirable feature of a modern justice system and something that should be made permanent.

89. It is the view of the Scottish Government that the change brought about by these provisions has been beneficial for court users – primarily because documents are available to a wider audience, allowing anyone to view notices online and have the opportunity to make representations to the court at an earlier stage which can, for example, reduce costs or allow a person to properly defend a claim against them. This might be of particular benefit to anyone who does not access

court buildings regularly or finds it more challenging to do so, for example, vulnerable users or those with disabilities.

90. It is envisaged that online publication would entirely replace the requirement to display documents on walls of the court. However, to ensure that there is a viable contingency process the option to display a document on the walls (or any other part) of a court building would still be retained. To mitigate any unintended consequences these provisions do not alter existing safeguards and they preserve existing powers for judicial office holders to direct how specific documents are to be made available.

91. The Scottish Government is very supportive of the ability to use website publication of court documents in a way which does not impede access to justice; respects rights to privacy and is equitable for all court users.

**Question 12:**

**It is proposed that the provisions for Topic P8 (Courts: intimation, etc. of documents) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P8 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P8 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P8 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P8, or the proposal for permanence, please write them below.

## Topic P9 – Criminal justice: arrangements for the custody of persons detained at police stations

Legislative reference: [Part 1 of schedule 2 of the Second Scottish Act \(legislation.gov.uk\)](https://legislation.gov.uk) (paragraphs 2 – 5)

92. The proposal concerns arrangements for the custody of persons detained at police stations. These provisions enable the Scottish Ministers to make arrangements for duties to be carried out by prisoner custody officers with escort functions within police stations. Specifically, this power allows these officers to carry out their functions of transfer or custody of prisoners within police stations for the purpose of facilitating the appearance before a court by electronic means, and functions of an administrative character in connection with those appearances.
93. The proposal is not to change the duties of prisoner custody officers, but to allow their duties to be carried out at police stations, as well as where they have normally been carried out. If prisoner custody officers could not carry out these duties within police stations, then those would have to be carried out by police officers and custody support staff who would not normally be conducting this work.
94. These powers will provide permanent and additional flexibility to help modernise the criminal justice system. It will allow the Scottish Ministers to direct the necessary resources and skills to operate more remote business, thereby minimising the movement of detained persons between custody in police stations and the court estate. Importantly, the use of these provisions will also continue to reduce pressure on front line police officers and staff.
95. It is proposed that remote custody appearances be used beyond the period of the pandemic and become part of future working practice, freeing capacity within the physical court estate for evidence-led trials and priority procedural matters. As with all custody appearances, this could either result in the release of the person or remand to prison; in either case, transfer to the court estate is minimised.

### Question 13:

**It is proposed that the provisions for Topic P9 (Criminal justice: arrangements for the custody of persons detained at police stations) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P9 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P9 should be extended beyond March 2022, but not made permanent

- I do not think the provisions for Topic P9 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P9, or the proposal for permanence, please write them below.

### **Topic P10 – Freedom of Information: giving notice electronically**

Legislative reference: [Part 2 of schedule 6 of the First Scottish Act \(legislation.gov.uk\)](https://legislation.gov.uk)

- 96. The proposal is to enable the Scottish Information Commissioner and Scottish public authorities to issue formal notices under the Freedom of Information (Scotland) Act 2002 (“FOISA”) electronically.
- 97. Prior to the First Scottish Act, FOISA provided that formal notices required to be delivered or posted to the recipient (section 74(1)(a) of FOISA). The First Scottish Act enables the Scottish Information Commissioner and Scottish public authorities to issue formal notices electronically as an alternative to delivering or posting them.
- 98. This provision has been utilised by the Scottish Information Commissioner to issue around 290 notices electronically since the First Scottish Act came into force.
- 99. The Commissioner has noted that had this provision not been in place, it would have significantly slowed his ability to carry out investigations and issue decisions during the coronavirus pandemic, which would have risked undermining confidence in the Commissioner and in FOISA. Other authorities would have been in the same position, to the extent that they issue notices under FOISA by post.
- 100. The Public Audit and Post-legislative Scrutiny Committee of the Scottish Parliament carried out post-legislative scrutiny of FOISA in 2019 and 2020<sup>(20)</sup>,

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(20) [Public Audit and Post-legislative Scrutiny Committee – post-legislative scrutiny of the Freedom of Information \(Scotland\) Act 2002.](#)

reporting in May 2020<sup>(21)</sup>. Modernising the notice provisions was one of a suite of minor and technical changes identified by the Commissioner as being desirable to improve the operation of the legislation. The Committee recommended that the Scottish Ministers should consider and consult on those proposed changes. The temporary modification of the notice provisions by the First Scottish Act means that we now have a greater understanding of how such a change would operate in practice.

101. In our view, the efficiencies brought about by allowing formal notices to be issued electronically have been beneficial. Given the pre-existing calls to make a change of this nature, we now propose to legislate so that the Commissioner and other Scottish public authorities have the option to issue notices electronically on a permanent basis.

**Question 14:**

**It is proposed that the provisions for Topic P10 (Freedom of Information: giving notice electronically) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P10 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P10 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P10 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P10, or the proposal for permanence, please write them below.

**Topic P11 – Legal aid**

Legislative reference: [Part 9 of schedule 4 of the First Scottish Act \(legislation.gov.uk\)](https://legislation.gov.uk)

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(21) [Post-legislative scrutiny – Freedom of Information \(Scotland\) Act 2002 – Report.](#)

102. The proposal is to make permanent existing temporary provisions which allow for increasing the availability of interim payments to solicitors, with corresponding powers of recovery in the event of overpayments resulting from interim payments, and removal of conditions for counsel to be able to apply for interim payment.
103. Through these provisions and working with the Scottish Legal Aid Board, a flexible and accessible scheme of interim payments has been introduced to support cash flow to legal aid providers. The scheme has been accessed by many legal aid providers through the pandemic. The Scottish Government remains keen to support legal aid providers and extending the ability to make payments in this way, beyond March 2022, will continue to support cash flow to solicitors and counsel providing legal aid services.

**Question 15:**

**It is proposed that the provisions for Topic P11 (Legal aid) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P11 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P11 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P11 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P11, or the proposal for permanence, please write them below.

**Topic P12 – Legal writings etc.**

Legislative reference: [Paragraph 9 of schedule 4 of the Second Scottish Act \(legislation.gov.uk\)](#)



104. This proposal would make permanent the disapplication of the requirement for the “physical presence” of certain parties, and allows for Scottish notaries public, solicitors and advocates to adopt alternative appropriate means of executing documents, and administering of oaths, affirmations and declarations.

105. These powers will allow Scottish notaries public, solicitors and advocates, guided by their professional bodies, the ability to execute documents and administer oaths etc. by other means such as live video connection on a permanent basis. Thus allowing greater access, convenience, and flexibility to those who may require such legal services, whilst facilitating a move to a more digitalised justice sector. In addition the provisions will support Insolvency Practitioners, as oaths are required in a number of insolvency processes.

**Question 16:**

**It is proposed that the provisions for Topic P12 (Legal writings etc.) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P12 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P12 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P12 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P12, or the proposal for permanence, please write them below.

**Topic P13 – Mental health: named person nomination**

Legislative reference: [Part 6 of schedule 1 of the Second Scottish Act \(legislation.gov.uk\)](https://www.legislation.gov.uk)

106. The proposal removes the need for a person to have their signature witnessed

when they agree to become a named person.

107. 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 role of a named person is to allow someone to look after a patient's interests and represent a patient when they are subject to compulsory powers under the law. It is a safeguard which allows and assists the patient to be represented and helps them to exercise their rights. The nomination of a named person by the patient must be made in writing and requires to be witnessed. Likewise, the nominated named person, if content to accept the nomination, must do so in writing and have it witnessed. The legislation states that only a certain group of people who are defined in law as "prescribed persons" can act as a witness.
108. Schedule 1, paragraph 15 of the Second Scottish Act removed the requirement for a nominated person to have their signature witnessed by a "prescribed person" when they agree to become a named person. Importantly, there is no change to the corresponding process for the patient. Named person nominations will continue to be made in writing and the patient will still require to have their signature witnessed by a prescribed person. The role of the prescribed person in witnessing the patient's signature is to certify that the patient understands the effect of their nomination and the patient has not been subject to any undue influence in making the nomination. An individual will have a named person only if they wish to appoint one and they can also revoke the appointment of a named person.
109. The proposal to permanently remove the requirement for witnessing the acceptance of a nomination aims to reduce barriers within the named person process which can lead to delays in the appointment of a named person while ensuring that adequate safeguards remain. The named person nominee retains the right to accept or refuse the nomination and, if they do agree to become a named person, can also withdraw their consent providing they submit their decision in writing.
110. In practice, the temporary removal of the process of witnessing for nominees has reduced delays experienced by the Mental Health Tribunal for Scotland caused by practical difficulties in complying with signature requirements. Additional time previously had to be spent to secure the validity of named person nominations before the Tribunal was able to hold a hearing. The requirement for a prescribed person to witness someone agreeing to become a named person adds no additional safeguard for a patient but has added an additional layer of bureaucracy to the overall process.
111. We are not aware of comparable provisions in legislation, requiring the need for a witness (from a prescribed list of persons) to certify a person's agreement in similar circumstances. The proposal to permanently remove the requirement

for witnessing the acceptance of a nomination is expected to continue to help to reduce any potential for delay in completing the named person process. In addition it will ensure the patient can continue to be treated and cared for in a way which respects their rights and allows services to be delivered effectively.

**Question 17:**

**It is proposed that the provisions for Topic P13 (Mental health: named person nomination) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P13 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P13 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P13 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P13, or the proposal for permanence, please write them below.

**Topic P14 – Parole Board: delegation**

Legislative reference: [Part 7 of schedule 4 of the First Scottish Act \(legislation.gov.uk\) \(paragraph 17\)](#)

112. The proposal is to continue to allow the Chairperson’s functions to be delegated to another member of the Parole Board should the Chairperson become incapacitated for any reason. To also continue to provide that the Chairperson may delegate functions for other reasons e.g. should another member have a particular expertise that would assist in carrying out the Chairperson’s functions.

113. Prior to the pandemic there was no scheme of delegation set out in legislation which allowed the Chairperson of the Parole Board to delegate functions to another member of the Board. These provisions have provided delegation

powers to allow the operation of the Chairperson’s functions to continue should they become incapacitated for any reason and for those functions to be carried out by the most senior member of the Parole Board. This has the benefit of continued leadership and guidance in the absence of the Chairperson. There are also benefits where the Chairperson requires another member to carry out functions of a particular nature which enable the Chairperson to delegate functions to another member for a particular purpose. This allows the Chairperson to share functions amongst members where it is appropriate to do so.

**Question 18:**

**It is proposed that the provisions for Topic P14 (Parole Board: delegation) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P14 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P14 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P14 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P14, or the proposal for permanence, please write them below.

**Topic P15 – Parole Board: live link**

Legislative reference: [Part 7 of schedule 4 of the First Scottish Act \(legislation.gov.uk\) \(paragraph 18\(3\)\)](#)

114. A further proposal related to the Parole Board is to allow the entire proceedings of a parole hearing to be held by video/teleconference (“live link”) so the Board or tribunal members, the parties, witnesses and others can provide evidence and participate remotely. Prior to the pandemic, only some witness evidence was able to be provided in this way. The ability to hold the full proceedings by

live link has reduced the number of in-person oral hearings being held to keep members and others safe by avoiding face-to-face contact and postponements. These provisions have allowed the Parole Board to continue to operate almost unaffected by the pandemic.

115. It is important that the Parole Board can continue to function in this way going forward to provide future proofing, for example in the event of any new variants or the emergence of other public health concerns, or indeed where a remote hearing might be appropriate for any other reason.
116. It is proposed to allow the Parole Board to hold a part or the whole of a hearing by live link, provided the Board considers it is in the interests of justice. This ensures fairness to the parties is provided, but allows flexibility for live link to be used for any reason in the future.
117. Maintaining the ability to continue to work online also removes the need for the physical transportation of prisoners to and from hearings and reduces the need for other participants to travel for the purpose of a hearing.

**Question 19:**

**It is proposed that the provisions for Topic P15 (Parole Board: live link) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P15 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P15 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P15 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P15, or the proposal for permanence, please write them below.

## Topic P16 – Remote registration of deaths and still-births

Legislative reference: [Part 2 of schedule 13 of the UK Act \(legislation.gov.uk\)](#)

118. The measures which are proposed to be put onto a permanent footing are:

- provision which enables the option of giving the particulars of a death or still-birth by phone or other methods than in-person attendance at the registration office;
- provision which enables alternative methods by which a person who is required to give information about a death or still-birth to the registrar may attest the death registration form, or the register page for a still-birth, rather than attending at the registration office to manually sign the form or page;
- provision which enables the giving or delivery of documents relating to a death or still-birth under the Registration of Births, Deaths and Marriages (Scotland) Act 1965 by electronic or other means;
- provision which enables discretion within local authority areas as to how those provisions would be implemented;
- provision for a funeral director who is responsible for the arrangement of a funeral to give information to the district registrar concerning a death (as an option), if the funeral director is willing and so authorised by a relative.

119. The Scottish Government considers the benefits of the proposal to be:

- maintaining the flexibility, convenience and accuracy of a remote death and still-birth registration process which has allowed the registration system in Scotland to maintain high standards of data collection while protecting staff and members of the public;
- significantly reducing travel and other logistical difficulties associated with more remote/outlying registration offices (as well as facilitating appropriate rationalisation of office provision across the country); and
- expanding the range of persons able to assist a family by serving as informant to a death or still-birth registration.

### Question 20:

**It is proposed that the provisions for Topic P16 (Remote registration of deaths and still-births) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P16 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P16 should be extended beyond

March 2022, but not made permanent

- I do not think the provisions for Topic P16 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P16, or the proposal for permanence, please write them below.

### **Topic P17 - Remote registration of live births**

Legislative reference: proposed new provisions so no existing legislative reference

120. As a result of the Covid pandemic, and the need to minimise exposure of both registration staff and members of the public to the virus, the process for live birth registration has altered from the established procedure.
121. Currently, someone wishing to register the birth of a child initially contacts a registrar to make an appointment to do so, as happened previously under the established procedure. However, as a result of the Covid pandemic, the registrar arranges a phone conversation with the informant and takes as much of the information required as possible down by remote means, principally by phone, before the appointment at the registration office.
122. The registrar uses the information gathered in the phone call to prepare the required form, and to generate a sample birth register page for checking by the informant. The informant(s) require to attend the registration office to sign the form and attest that the information provided is correct. This procedure significantly reduces the time informant(s) spend in the registration office, from a previous appointment time averaging perhaps half an hour.
123. The Scottish Government is proposing to develop permanent legislative provisions in relation to registration of live births. The proposed changes will build on the above revised 'hybrid' process for live birth registration that has been adopted as a result of the Covid pandemic. This will:
  - enable giving the particulars of a live birth by remote methods, as an alternative option to in-person attendance at the registration office;

- retain the existing option for local authorities and informants of in person attendance at a registration office;
- enable alternative methods by which a person who is required to give information about a live birth to the registrar may attest the register page rather than attending at the registration office to sign the page. These alternative methods would allow people not to have to attend a registration office to attest to the veracity of the information contained on the register page;
- enable documents relating to a live birth under the Registration of Births, Deaths and Marriages (Scotland) Act 1965 to be given or delivered by the informant to the registrar by remote means. “Remote” may mean predominantly via email but could also be by using video conferencing, where email or video could be appropriate for the particular documents. Similarly, the registrar could send documents onwards to the informant and other key recipients by remote means.

124. 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. Local authorities may, after consultation with the Registrar General, configure services in the way which best meets local needs. For example, rural authorities may wish to encourage remote registration, with in-person registration happening as needed. Urban authorities, by contrast, may wish to primarily deliver in-person registration with remote registration happening on occasions as necessary. In all cases, we would expect authorities to make appropriate provision for delivery of the service to informants who for specified reasons 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 support).

125. Birth registration has significant legal implications. 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<sup>(22)</sup>.

126. 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. In 2020 there were 22,038 jointly registered births where the mother was not in a civil partnership or a marriage<sup>(23)</sup>.

127. When the option of remote birth registration is introduced, the intention is to

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(22) [Section 5 of the Law Reform \(Parent and Child\) \(Scotland\) Act 1986 \(legislation.gov.uk\)](https://legislation.gov.uk)

(23) [List of Data Tables | National Records of Scotland \(nrsotland.gov.uk\)](https://nrsotland.gov.uk)



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.

128. The Scottish Government considers the benefits of the proposal to be:

- future proofing the requirement for expeditious birth registration services;
- introducing greater flexibility to the configuration of local registration services; and
- significantly reducing travel and other logistical difficulties associated with more remote/outlying registration offices (as well as facilitating appropriate rationalisation of office provision across the country, as necessary).

**Question 21:**

**It is proposed that new permanent legislative provisions for Topic P17 (Remote registration of live births) as described will be developed. Which of the following best describes what you think about this?**

- I think the proposed provisions for Topic P17 should be developed
- I do not think the proposed provisions for Topic P17 should be developed
- Unsure
- I have no view

If you have any comments on the proposed provisions for Topic P17 please write them below.

**Topic P18 – Tenancies: protection against eviction (discretionary grounds of eviction); and pre-action requirements for eviction proceedings on ground of rent arrears**

Legislative references: Paragraphs 1, 3 and 5 of [schedule 1 of the First Scottish Act \(legislation.gov.uk\)](#) and [Part 2 of schedule 1 of the Second Scottish Act \(legislation.gov.uk\)](#)

129. The intention is to ensure the continuance of the provisions which provide the

First-tier Tribunal (Housing and Property Chamber – the “Tribunal”) with discretion to consider all matters relating to eviction cases going before them (First Scottish Act, schedule 1) and also provisions that set out pre-action requirements for orders for possession or eviction orders on the ground of rent arrears (Second Scottish Act, schedule 1, Part 2).

130. While the proposal is to enact the provisions in relation to pre-action protocols and Tribunal discretion on a permanent basis, the Scottish Ministers intend to bring forward further housing legislation in this parliamentary term, which will provide an opportunity to further refine these provisions if required.
131. Schedule 1 of the First Scottish Act introduced provisions providing the First-tier Tribunal with discretion to grant an eviction order in all private rented sector eviction cases regardless of the grounds on which eviction is sought. Previously, where eviction was sought on certain grounds – such as where a tenant under a private residential tenancy had been in rent arrears for at least three consecutive months and owed at least one month’s rent on the day of the Tribunal hearing – the Tribunal were obliged to grant an eviction order if satisfied that the eviction ground applied.
132. This new discretion given to the Tribunal was further enhanced by schedule 1, Part 2 of the Second Scottish Act, which introduced private landlord pre-action protocol procedures for the private rented sector where eviction is being sought on the basis of rent arrears accruing during the pandemic. These pre-action protocols were designed to improve communication between the tenant and landlord, ensure that tenants have all the information they need about their rights and place more responsibility on the landlord to ensure the correct procedures are followed.
133. Both discretionary grounds of eviction and pre-action protocols have long been established in the social rented sector. In *Housing to 2040*, published in March 2021<sup>(24)</sup>, the Scottish Ministers indicated their intention to introduce pre-action protocols for the private rented sector on a permanent basis. While the current proposal is to make pre-action protocols permanent, the Scottish Ministers will bring forward further housing legislation, which will offer an opportunity to further refine the pre-action protocol provisions if required.
134. Ensuring the First-tier Tribunal continues to be able to exercise discretion on all grounds for eviction, will enable them to take all matters and circumstances into account, which is particularly important as we move towards the potential ending of key support for individuals, such as the UK Government’s Job Retention Scheme. In addition, it will ensure the effective operation of pre-action protocols provisions, meaning a Tribunal can take into account how well

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(24) [Housing to 2040 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/housing-to-2040/pages/100/index.aspx)

a landlord has followed the requirements before commencing eviction proceedings.

135. The current proposal would make permanent the provisions creating discretionary grounds of eviction and pre-action requirements for the private rented sector, until such time as future housing legislation is passed and implemented. Pre-action protocols would be made permanent for evictions proceedings brought on grounds of rent arrears of any nature and not just arrears accruing during the pandemic. The proposals in this paper are intended to prevent a gap between the expiry of these provisions (as laid out in the Extension and Expiry Act) and future housing legislation coming into force.

**Question 22:**

**It is proposed that the provisions for Topic P18 (Tenancies: protection against eviction (discretionary grounds of eviction); and pre-action requirements for eviction proceedings on ground of rent arrears) as described will be made permanent. Which of the following best describes what you think about this?**

- I think the provisions for Topic P18 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P18 should be extended beyond March 2022 and made permanent, but only to the extent that rent arrears should continue to be a discretionary eviction ground – with all other eviction grounds returning to their pre-pandemic status
- I think the provisions for Topic P18 should be extended beyond March 2022, but not made permanent
- I think the provisions for Topic P18 should be extended beyond March 2022, but not made permanent, but only to the extent that rent arrears should continue to be a discretionary eviction ground – with all other eviction grounds returning to their pre-pandemic status
- I do not think the provisions for Topic P18 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic P18, or the proposal for permanence, please write them below.

## **Chapter 4: Responding to the impact of Covid in the justice system**

### **Background**

136. The justice system measures in this Chapter originate in the First and Second Scottish Acts and expire in March 2022. The Scottish Government currently proposes to look at further extending them to September 2022 via secondary legislation, subject to the agreement of the Scottish Parliament. In the particular case of the provisions in this Chapter, the Government is also looking at the evidence for extending provisions beyond September 2022, but not making them permanent, via further primary legislation. This position is based on a recognition that in the interim period evidence might support a view that certain provisions are no longer required and/or that there may be case to consider how these might be adapted and modified at a future date to form part of further legislative changes.
137. Topics within this Chapter are listed in alphabetical order rather than by their position in the First Scottish Act or the Second Scottish Act. No UK Act provisions are within this Chapter.

### **Rationale for considering extended justice system provisions**

138. 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 Recover, Renew and Transform (RRT) programme in response to the Covid pandemic. The programme aims to recover essential services and transform how the justice sector operates to ensure a resilient and effective system for now and for the future.
139. Work of course also continues on developing a new broader and progressive Justice Strategy for Scotland, building on the achievements over the last five years and the initiatives introduced as part of the Justice recovery programme. The ability to continue recovery from Covid will be potentially dependent on retaining the provisions in this Chapter for a further period of time; and also provides the opportunity to progress wider practical and cultural changes in the system, benefiting all those who come into contact with our Justice sector and helping drive towards a faster, fairer and more effective Justice System for Scotland.
140. During the pandemic significant progress has been made on the operation and expansion of remote jury centres for the High Court and sheriff and jury trials (solemn criminal process). We have seen changes to summary (non-jury) criminal process, in community justice and preventing offending. We have seen the arrival of fully virtual summary trials and virtual custody courts. This

work has progressed under the common goal of recovering a viable justice system which is able to respond flexibly to meet the public health challenges of Covid, and deliver a more effective and efficient justice system.

141. There have been many challenges over the last 18 months and lessons learned, especially where operational decisions have come hand in hand with delivering possible benefits to court and tribunal users. Key issues have been court backlogs, the impacts on victims and witnesses, and the impacts for all those accused of offences including those prisoners on remand. Many of the measures which are possible due to the temporary provisions provided for in the First Scottish Act and Second Scottish Act 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 our justice system for users. In that context, operational decisions will always be considered alongside the impact on users, with appropriate analysis and evaluation.
142. On the assumption that the existing court system has returned to pre-pandemic capacity by March 2022, and subject to the service delivery organisations being able to recruit staff for the additional courts to allow them to start in September 2021, it is envisaged that the backlog of solemn trials will be cleared in 2025. This is of course by no means certain and the summary trial backlog is not expected to be cleared until 2024 and the consequences of this backlog for community services will not begin to reduce until 2027. If more courts could be established, the backlog could be cleared earlier. The use of digital technology to allow procedural steps to be taken electronically and virtual courts to be convened will potentially also facilitate and enhance the ability of the courts to deal with the backlog. Continuing the provisions which impact on community sentencing will also be critical in allowing the backlog of community sentences to be progressed quickly and effectively. Not retaining on a longer term basis key elements of the temporary primary legislation, as it impacts on the criminal justice system, would seriously undermine the progress and ultimate achievement of this ambition.

### **How extended provisions should work**

143. The Scottish Government welcomes views on how further extended provisions would work. In the case of Parts 1 of each of the First and Second Scottish Acts, these initially were to expire on 30 September 2020 but provided a delegated power (regulation making power conferred on the Scottish Ministers) to extend provisions to a later date, with the approval of the Scottish Parliament. Delegated powers were also conferred on Ministers to earlier expire, suspend or revive suspended provisions. How these powers were used

was explained in the 9 June 2021 publication: “Coronavirus Acts: seventh report to Scottish Parliament”<sup>(25)</sup> and the Policy Memorandum supporting the Bill for the Extension and Expiry Act.

144. The Scottish Government considers that a regime for extending the provisions in this Chapter ought be more flexible than the regime set out in the First and Second Scottish Acts. Where this Chapter proposes longer extension of temporary provisions, it means that changes to the law on the topics below would still only be temporary and there would still be the ability for the Scottish Ministers to expire these provisions earlier than the temporary limit if this should be needed. This is in contrast to what are described in Chapters 2 and 3 as permanent changes. However, there is the option when answering the questions in this chapter to express the view that the provisions should be made permanent – when considering whether to legislate in this way, the Government would require to consider human rights implications. Where respondents have particular views on how longer extension should work for particular proposals, views can be submitted using “free text” boxes under the appropriate question or questions.

#### **Topic J1 – Courts and tribunals: conduct of business by electronic means**

Legislative reference: [Part 1 of schedule 4 of the First Scottish Act \(legislation.gov.uk\) \(paragraphs 1, 5 and 6 - excluding paragraph 1A which is within Topic P8 \(Courts: intimation, etc. of documents\)\)](#)

145. It is proposed that the provisions around electronic signing and sending of documents in courts and tribunals should be extended beyond March 2022.

146. Those provisions provide:

- that documents which would normally have to be signed in ink can instead be signed electronically;
- that documents which would normally have to be physically delivered can instead be transmitted electronically (for example by email);
- that documents which would normally have to be sent to a party in a case can instead be sent to the person’s solicitor;
- that the head of the Scottish courts (the Lord President of the Court of Session, known as the Lord Justice General as regards the criminal courts) can direct that there should be exceptions to the rules described above so that for some types of document, or in certain cases, electronic signing and sending will not be appropriate and physical documents and signatures

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(25) Available from [Coronavirus \(COVID-19\) legislation - gov.scot \(www.gov.scot\)](#).

should instead be used.

147. The use of written submissions, the digital transmission of documents and the use of electronic signatures have enabled swift process changes that have enabled court services to operate more efficiently.

**Question 23:**

**It is proposed that the provisions for Topic J1 (Courts and tribunals: conduct of business by electronic means) as described will be extended beyond March 2022. Which of the following best describes what you think about this?**

- I think the provisions for Topic J1 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J1 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J1 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic J1, or the proposal for extension beyond March 2022, please write them below.

**Topic J2 – Courts and tribunals: virtual attendance**

Legislative reference: [Part 1 of schedule 4 of the First Scottish Act \(legislation.gov.uk\) \(paragraphs 2 to 5 and 6 - excluding paragraph 1A which is within Topic P8 \(Courts: intimation, etc. of documents\)\)](#)

148. It is proposed that the rules allowing people to attend a court or a tribunal by electronic means (for example, by live video link) should be extended beyond March 2022.

149. Those provisions provide:

- that by default anyone who would normally have to physically attend a court or tribunal (other than a trial) can attend by electronic means, but the court or

tribunal has the power to require a person to physically attend in a particular case;

- that by default people who have to physically attend a trial will still have to do so, but the court has the power to allow a person to attend a trial by electronic means in a particular case;
- that where someone is to attend a hearing by electronic means, the court or tribunal will set out how that is to happen in a direction.

150. The Scottish Government supports an extension to ensure that courts and tribunals can continue to function as efficiently as possible in a way which does not impede access to Justice. The proposal is to retain the default position in which requirements for physical attendance at any court or tribunal hearings will not apply, except for trial diets, where the default is that a person will physically attend hearings. The presumption for non-trial diets can be overridden by the court or tribunal, where it considers that the default position would prejudice the fairness of proceedings, or would otherwise be contrary to the interests of justice. A court or tribunal can allow a person to appear by electronic means for a trial diet, provided that doing this would not prejudice the fairness of proceedings or otherwise be contrary to the interests of justice.

151. These provisions have been utilised to good example, most particularly through the remote jury model, and have enabled the justice sector to respond to wider challenges out with their control in order for business to continue and adapt.

152. These provisions have enabled a systemic response to the impact of public health restrictions. The systemic response often represented improvements previously identified as features of a modern criminal justice system and something that should be retained in the immediate term.

**Question 24:**

**It is proposed that the provisions for Topic J2 (Courts and tribunals: virtual attendance) as described will be extended beyond March 2022. Which of the following best describes what you think about this?**

- I think the provisions for Topic J2 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J2 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J2 should be extended or made permanent
- Unsure
- I have no view



If you have any comments on either the provisions for Topic J2, or the proposal for extension beyond March 2022, please write them below.

### **Topic J3 – Criminal justice: early release of prisoners**

Legislative reference: [Part 8 of schedule 4 of the First Scottish Act \(legislation.gov.uk\)](https://legislation.gov.uk)

153. The proposal is to continue to provide Scottish Ministers with the power – where it is considered a necessary and proportionate action to maintain the safe and effective operation of prisons, and to protect the health of prison staff and prisoners – to instruct that the group of prisoners who fall within criteria set out in regulations would be released from prison earlier than their scheduled release date.
154. Covid can have a severe impact on the operation of prisons, given the risk of infection spreading amongst prisoners and staff, and the substantial changes in prison operation that are necessary to deliver daily operations in line with public health guidance. Prisons require more capacity to ensure that prisoners can be quarantined or can self-isolate, as well as ensuring there is enough flexibility to manage any necessary changes safely. There is an increased workload for prison officers to maintain day-to-day operations alongside any action required to manage any potential infections. There will also be increased pressure on staffing within prisons, when officers and other staff members may be unable to work due to ill health, self-isolation due to possible contact, shielding, or family and other caring responsibilities.
155. In order to reduce pressure on the prison system, and help prison management to maintain safe and effective operations under these capacity and staffing challenges, the First Scottish Act gave Scottish Ministers powers to release a limited number of prisoners earlier than their scheduled release date. The specific criteria identifying which prisoners were to be released early had to be set out in regulations, which were to be approved by the Scottish Parliament. This power was only to be used when it was necessary and proportionate to do so, to deal with problems arising from Covid.
156. The Scottish Government works closely with the Scottish Prison Service

("SPS") to consider how circumstances in prison are being affected by Covid, and in May 2020 the Scottish Government instructed that a small number of prisoners would be released early in the four weeks after 4 May. 348 prisoners were released, under specific regulations which were approved by the Parliament. All of them had been serving short sentences, and all were already due to be released in the following 90 days. Prisoners serving sentences for domestic violence, harassment or Covid related offences were excluded automatically, and Prison Governors were able to veto the early release of specific individuals if there was evidence that if released early they would be a risk to a specific individual. Local authorities, Health boards, housing services, benefits agencies and other support services were involved in planning the process. Victims groups were notified of the proposals, and their views guided the selection criteria that were applied. The Victim Notification Service was used to notify any individuals who had requested information about the prisoners involved.

157. The Scottish Government and SPS have kept the situation under close observation since then, and despite the fact that there is ongoing pressure on the SPS due to Covid, it has not been considered necessary to use these powers again. However, it remains possible that circumstances may change in the future (such as the possibility of new variations increasing the rate of infections, and the continuing impact that the 2020-21 restrictions are having on the wider justice system in Scotland), and if so, it may become necessary and proportionate to take further action in the future.
158. There are no equivalent executive powers for Scottish Ministers to order the release of groups of prisoners in this way, so it would be prudent to extend the powers established in the First Scottish Act. Whilst the specifics of any future early release process would have to be devised in response to the circumstances at that time, the May 2020 action referred to above has demonstrated that this power can be applied in a controlled manner, to deliver a quick and effective support to the SPS when it is required.

**Question 25:**

**It is proposed that the provisions for Topic J3 (Criminal justice: early release of prisoners) as described will be extended beyond March 2022. Which of the following best describes what you think about this?**

- I think the provisions for Topic J3 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J3 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J3 should be extended or made permanent

- Unsure
- I have no view

If you have any comments on either the provisions for Topic J3, or the proposal for extension beyond March 2022, please write them below.

#### **Topic J4 – Criminal justice: expiry of undertaking**

Legislative reference: [Part 1 of schedule 2 of the Second Scottish Act \(legislation.gov.uk\) \(paragraph 6\)](#)

159. Where a person is in police custody and has been arrested under a warrant or arrested without warrant and subsequently charged with an offence, that person may be released if the person gives an undertaking to appear at a specified court at a specified time and to comply with any conditions imposed while subject to the undertaking. The police can impose protective conditions in an undertaking intended, for example, to prevent the person from interfering with witnesses, including the complainer. Breach of these conditions without reasonable excuse is a criminal offence.
160. 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.
161. 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 is a risk that protective conditions attached to undertakings will expire in an increasing number of cases, raising safety concerns and an increased risk for the public, with particular risks associated with domestic abuse cases.
162. These provisions addressed this risk by providing the court with the power to prevent the expiry of an undertaking and any conditions attached to it by changing the time the person is due to appear at court. Where a person fails to appear at court as required by the terms of the undertaking; the court considers that the person's failure to appear is attributable to a reason relating to Covid;

and the court does not consider it appropriate to grant a warrant for the person's arrest, the court may modify the terms of the undertaking given by changing the time at which the person is to appear at the court.

163. Where the court exercises the power provided by these provisions, it has the effect of preventing the undertaking and any associated conditions from expiring and ensures that where, for example, protective conditions have been put in place to protect a complainer, they continue to have effect until a court is able to consider whether to impose bail conditions or remand the accused in custody.
164. 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) will continue for some time to come. Whether this provision would be required beyond March 2022 will depend on whether Covid infection remains an issue at that time. The picture may be clearer by Autumn 2021.
165. Given the uncertainty as to prevalence of Covid within communities, it is considered prudent and necessary for this provision to remain in force. 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.
166. Where an undertaking continues longer than might have initially been anticipated arising from this provision, the conditions are the same as those that the person initially agreed to when entering into the undertaking and the penalty for breaching the undertaking also remains unchanged.
167. 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.
168. This continues to be identified as a measure to preserve public and victim safety during times of Covid pandemic, particularly in sensitive cases of domestic abuse.

**Question 26:**

**It is proposed that the provisions for Topic J4 (Criminal justice: expiry of undertaking) as described will be extended beyond March 2022. Which of the following best describes what you think about this?**

- I think the provisions for Topic J4 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J4 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J4 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic J4, or the proposal for extension beyond March 2022, please write them below.

### **Topic J5 – Criminal justice: fiscal fines**

Legislative reference: [Part 2 of schedule 4 of the First Scottish Act \(legislation.gov.uk\)](https://legislation.gov.uk)

169. The proposal is to seek views on whether there is merit in continuing for a longer, time-limited period policy that allows for maximum fiscal fines up to £500 to be offered by prosecutors as a non-court disposal.
170. The new scale of fixed penalties introduced by the First Scottish Act contains seven levels of fixed penalty which may be offered by the Crown Office and Procurator Fiscal Service (“COPFS”) as an alternative to prosecution, ranging from £50 to what was a new maximum level of £500. The pre-Covid maximum level was £300.
171. These types of disposal are commonly known as fiscal fines. Fiscal fines are offered as a penalty and allow the alleged offender to refuse the offer by giving notice to the court to that effect. In such an event, the refusal is treated as a request by the alleged offender to be tried for the offence in which case the procurator fiscal will then decide whether to prosecute. The new higher maximum (as well as adjustments to the increments allowed for) mean proportionate penalties can be offered by prosecutors for lower level offences including use of the higher maximum penalty for appropriate cases.
172. In accordance with the revised policy guidance issued by the Lord Advocate as head of the COPFS in relation to fiscal fines, the increase in fine amounts has

enabled alternative action to prosecution to be taken in a wider range of summary cases during the impact of Covid on the justice system, where such action is assessed as appropriate by prosecutors.

173. In line with pre-existing guidance, prosecutors are directed to first consider offering a direct measure, in particular a fiscal fine, in relation to appropriate cases which would otherwise have proceeded in the lowest level of criminal court in Scotland - the Justice of the Peace court.
174. It can be argued that providing for the continuation of an expansion of the use of alternatives to prosecution will help allow for the continuation of a greater number of cases to continue to be resolved without the need for court procedure and associated appearance at court. This 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 lingering impact of Covid, which is expected to last for a number of years.
175. This would not be a permanent change. While there can be arguments made that it may be appropriate to re-assess the maximum value of a fiscal fine (given, for example, the maximum level of a fiscal fine has been set at £300 for nearly 15 years and so re-assessment merely to reflect the effects of inflation may be justified), it is not proposed to make permanent changes in this area in this forthcoming legislative process. If such changes are to be considered, they will be progressed through development of separate justice reform legislation

**Question 27:**

**It is proposed that the provisions for Topic J5 (Criminal justice: fiscal fines) as described will be extended beyond March 2022. Which of the following best describes what you think about this?**

- I think the provisions for Topic J5 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J5 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J5 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic J5, or the proposal for extension beyond March 2022, please write them below.

### **Topic J6 – Criminal justice: national court for cases beginning with an appearance from custody**

Legislative reference: [Part 3 of schedule 4 of the First Scottish Act \(legislation.gov.uk\)](#)

176. The proposal is to extend the provision in the Act that introduces 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). Normally in criminal proceedings, cases are dealt with on the basis of where offences are committed. This would be within the sheriffdom where the offence was committed (usually also in the sheriff court district where it was committed) and that would include first appearances.
177. A sheriffdom is a geographical area governed by a sheriff principal for the purposes of splitting Scotland into six areas for processing of cases. Sheriffdoms are further broken down into sheriff court districts. The provisions contained in the First Scottish Act are being used to enable custody proceedings to be heard in any sheriff court in Scotland by a sheriff of any sheriffdom no matter where the alleged offence took place. This has provided the necessary flexibility to allow for a smaller number of police centralised custody suites and to enable custody courts to be conducted in a way that minimises unnecessary travel and congregation of people in accordance with public health guidance. It also allows 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 local court.
178. Providing for a Scotland wide jurisdiction for sheriffs in this way has also enabled more efficient prioritisation of court resources by allowing cases calling from custody to be dealt with by a smaller number of sheriffs as the number of judges available to consider custody cases at any given time has been reduced as a result of Covid.
179. The provision has created greater flexibility in the programming of court business to help the Scottish Courts and Tribunals Service (“SCTS”) manage

the significant backlog of cases arising from the Covid pandemic and this flexibility is necessary as an important part of the justice system’s ongoing recovery from the lingering impacts caused by Covid, which is expected to last for a number of years.

**Question 28:**

**It is proposed that the provisions for Topic J6 (Criminal justice: national court for cases beginning with an appearance from custody) as described will be extended beyond March 2022. Which of the following best describes what you think about this?**

- I think the provisions for Topic J6 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J6 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J6 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic J6, or the proposal for extension beyond March 2022, please write them below.

**Topic J7 – Criminal justice: time limits**

Legislative references: [Part 4 of schedule 4 of the First Scottish Act \(legislation.gov.uk\)](#) and [Part 1 of schedule 2 of the Second Scottish Act \(legislation.gov.uk\) \(paragraph 1\)](#)

180. We are seeking views on whether none, some or all of the extensions of the time-limit provisions in the First and Second Scottish Acts, extended by the Extension and Expiry Act, should continue in effect beyond March 2022. These provisions extend a number of statutory time limits contained in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which set out the maximum time within which different parts of the summary and solemn criminal prosecution process must take place



181. Statutory time-limits are in place for a reason. They help ensure criminal cases proceed through the court process within a time period that gives sufficient time for appropriate preparation of cases to the parties involved while respecting the need for justice to be carried out within a reasonable time period.
182. At the outset of the Covid pandemic, the exceptional circumstances arising required an exceptional response to reflect the severe impact of the pandemic on the delivery of justice. Without extension to various time-limits, scarce court time would have been required to be used to consider extension of time-limits in individual cases. Furthermore, if the time limit concerning certain summary-only cases had not been extended, it is likely that cases would have been lost as pre-existing law did not permit extensions at all.
183. This was the context within which the Scottish Government was forced to propose temporary changes to time-limits. None of the changes made would have been proposed by the Scottish Government but for the severe impact of the pandemic. The policy sought to balance the need to minimise disruption on the operation of criminal courts with the continuing need for fairness for those involved in the court process including accused persons, especially those on remand, and victims and witnesses.
184. This document does not propose a specific approach on time-limits. Instead, it discusses various issues relating to the different time limit extensions and seeks views from key interests as to the extent to which the extension of time-limits, should continue in effect, if at all, post March 2022.
185. Specifically, the First and Second Scottish Acts modify the following time limits contained in the 1995 Act so that there is a period in each case during which the running of time towards the relevant time limit is suspended for 6 months<sup>(26)</sup>:
- a) Time limits at section 65 of the 1995 Act which set various time limits in respect of trials under solemn procedure:
- if accused is being held on remand, the indictment must be served within 80 days, failing which there is an entitlement to bail;
  - if the accused is being held on remand and an indictment has been served for the High Court, the preliminary hearing must commence within 110 days, (or if an indictment has been served for the sheriff court, the first diet must commence within 110 days) failing which there is an entitlement to bail;

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(26) With the exception noted below of the time limit at section 147 of the 1995 Act relating to summary cases where the accused is held on remand, where the suspension is for a 3 month period.

- if the accused is being held on remand, trial must commence within 140 days, failing which there is an entitlement to bail;
  - whether or not the accused is in custody, where an indictment has been served in respect of the High Court the preliminary hearing must commence within 11 months of first appearance of the accused on petition, failing which the accused is entitled to be discharged;
  - whether or not the accused is in custody, where an indictment has been served in respect of the sheriff court, the first diet must commence within 11 months of first appearance of the accused on petition, failing which the accused is entitled to be discharged;
  - whether or not the accused is in custody, the trial must commence within 12 months of the accused's first appearance on petition, failing which the accused is entitled to be discharged.
- b) Time limits at section 136, which requires that proceedings in certain summary cases must commence within 6 months of the alleged commission of the offence.
- c) Time limits at section 147, which provides that a person charged with an offence in summary proceedings shall not be detained in that respect for a total of more than 40 days after the bringing of the complaint in court unless their trial is commenced within that period, failing which they shall be liberated forthwith and the prosecution cannot continue. (This is extended by 3 months rather than 6 months).
- d) Time limits at section 52T, which applies the custody time limits in section 65 and 147 where the accused is detained in hospital because of an assessment order or a treatment order.
186. The overall effect of the suspension of time-limits for 6 months can be illustrated through an example. For an accused held on remand in a solemn case, the time-limit for the indictment being served becomes 80 days plus 6 months (failing which there is an entitlement to bail).
187. As noted above, statutory time limits are important in helping to prevent undue delay in the progress of criminal cases. This is especially important where the accused person is being held on remand prior to trial, though it should be acknowledged that long delays in a case coming to trial can have a significant impact on victims, witnesses and accused people, whether or not the accused person is being held on remand.
188. Notwithstanding that the direct impact of Covid on operation of the criminal courts is reducing as the severe impact of Covid on communities reduces, a significant backlog of cases has built up as a result of the reduced level of court

business during the Covid pandemic, and the continuing need for social-distancing measures, self-isolation etc. has meant that the courts remain unable to operate at full pre-Covid capacity.

189. Even as the courts return to pre-Covid levels of business, it is anticipated that there will continue to be a significant backlog of cases in the system for years to come. COPFS prosecutors can apply to the court to extend most of the time limits<sup>(27)</sup> on a case-by-case basis. The size of the backlog of cases that has built up in the system means that, if the time limit extensions expire at some point in 2022, prosecutors may have to seek extension on a case-by-case basis on a reasonably routine basis. The requirement for courts to schedule numbers of hearings (potentially a significant number) to extend time limits in the majority of all cases being prosecuted in the courts risks impacting on both court and prosecutorial time and resources, impeding the ability of the justice system to reduce the backlog of cases that has built up.
190. As such, there is a balance to be struck between, on the one hand, ensuring that there is sufficient judicial oversight where there is a long period between an accused person initially being charged with an offence and their case coming to trial, especially where the accused person has been remanded in custody, and on the other hand, not impeding the ability of the courts to address the backlog by requiring them to hold large numbers of hearings to extend time limits on a case-by-case basis.
191. This suggests possibly adopting a selective approach to which time limit extension provisions, if any at all, should remain in effect beyond March 2022 (or September 2022 if current period of effect is extended by 6 months).
192. It may be considered that there is a strong case for retaining the extension to the time limit at section 136 which relates to the maximum time after the alleged commission of the offence within which criminal proceedings for certain summary offences must be commenced (referred to as **Topic J7(i)**). This was previously set at 6 months and was extended to 12 months by the Coronavirus (Scotland) Act 2020.
193. As part of the prioritisation of scarce court resources, efforts have been made to progress cases at all levels of the system, but there has been a necessary specific focus on delivering justice in more serious (solemn) cases.
194. Within this context, the case for retaining the extended summary time limit is because of an important key difference between the operation of this specific time-limit and the other time-limits. In contrast with the other time limit

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(27) The exception is the time limit at section 136, which sets out the time within which proceedings for certain summary offences must commence after the date of the alleged commission of the offence.

extensions, there is no ability for the court to extend this time limit and once it has expired, it is not possible for proceedings to be continued or brought afresh.

195. In addition to this key point, it is also the case that at the point at which this time limit extension is expired, it may have a more immediate impact than the other time limits because the time limit relates not to the date on which an accused person is first charged but the date on which it alleged that the offence has been committed. As such, it is likely that there would be a significant number of cases where the time limit would expire at once, while the case was still under investigation, and a real risk that justice could not be done in these cases if the backlog of summary cases has not been reduced to a manageable level at the point at which it is repealed.

**Question 29:**

**It is proposed that the provisions for Topic J7(i) (relating to the time limit on summary-only cases at section 136 of the 1995 Act (Criminal justice: time limits)) as described will be extended beyond March 2022. Which of the following best describes what you think about this?**

- I think the provisions for Topic J7(i) should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J7(i) should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J7(i) should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic J7(i), or the proposal for extension beyond March 2022, please write them below.

196. More generally, the Scottish Government wants a balance to be struck between managing the capacity of the courts and the impact of the backlog of cases on those awaiting trial. As such, an approach could be to consider allowing the expiry of those provisions extending the limit on the length of time that an

accused person can be held on remand prior to trial (at section 65(4) and section 147(1) of the 1995 Act) (referred to as **Topic J7(ii)**), while retaining the time limit extension provisions which relate to the maximum time between first appearance on petition and the first diet/preliminary hearing and commencement of the trial (at section 65(1) of the 1995 Act) (referred to as **Topic J7(iii)**). However, if this approach is taken, it may be helpful for case management purposes to retain the J7(ii) provisions until September 2022, which is the latest date that the provisions in the Coronavirus (Extension and Expiry) (Scotland) Act 2021 can continue to have effect. The benefit of this possible approach would ensure that specifically where an accused person is being held on remand, the pre-Covid position would re-emerge so as to require a judicial decision at an earlier point to extend the time limits beyond those prescribed in the 1995 Act prior to the amendments made by the Coronavirus (Scotland) Act 2020.

**Question 30:**

**It is proposed that the provisions for Topic J7(ii) (remand time limits at section 65(4) and section 147(1) (Criminal justice: time limits)) as described will be extended beyond March 2022. Which of the following best describes what you think about this?**

- I think the provisions for Topic J7(ii) should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J7(ii) should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J7(ii) should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic J7(ii), or the proposal for extension beyond March 2022, please write them below.

**Question 31:**

**It is proposed that the provisions for Topic J7(iii) (extending time limits relating to the maximum time between first appearance on petition and the first diet/preliminary hearing and commencement of the trial at section 65(1) (Criminal justice: time limits)) as described will be extended beyond March 2022. Which of the following best describes what you think about this?**

- I think the provisions for Topic J7(iii) should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J7(iii) should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J7(iii) should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic J7(iii), or the proposal for extension beyond March 2022, please write them below.

197. These provisions also disapply certain time limits on the length of individual adjournments contained in the 1995 Act so that the court can adjourn a case for such period as it considers appropriate.

198. These time limits are those at:

- 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).

199. Provisions removing the limit on the length of a single adjournment of a case to make enquiries are principally intended to maximise efficient use of court time where it is known that external agencies are going to be unable to respond to a request for information within the timescales prescribed by the 1995 Act for a single adjournment because of the impact that Covid has had on their ability to respond to such requests.
200. While there is a risk that future outbreaks of coronavirus could result in either court closures in particular areas or a significant reduction in the capacity of either courts or the police or criminal justice social work or medical experts to consider or respond to requests for further information, it is open to question how essential such provisions are when Covid has less of a severe impact on communities.
201. It is recognised that the limits on the length of an individual adjournment can be helpful in setting expectations as to when police, criminal justice social work and others will respond to requests for additional information. On the other hand, there is a risk that, without the continuation of these provisions, multiple hearings could be required to adjourn a single case, and as set out above, this risks impacting on the ability of the courts to reduce the backlog of cases that has built up in the system during the pandemic.
202. The continuation of extension of time limits relating to a number of solemn and summary court processes would continue to deliver a reduced need to allocate scarce and valuable court time that otherwise would be required for the court to individually consider applications for extension of time-bar in given cases, or to repeatedly adjourn a case for further inquiries. This enables the COPFS and the SCTS to prioritise cases so as to continue to make more efficient use of court time at this continuing challenging time for the criminal courts.
203. We would therefore welcome views on whether the provisions removing the time limits on the lengths of individual adjournments should continue in effect beyond March 2022 (referred to as **Topic J7(iv)**).

**Question 32:**

**It is proposed that the provisions for Topic J7(iv) (removing time limits on the length of individual adjournments for inquiries (Criminal justice: time limits)) as described will be extended beyond March 2022. Which of the following best describes what you think about this?**

- I think the provisions for Topic J7(iv) should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J7(iv) should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J7(iv) should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic J7(iv), or the proposal for extension beyond March 2022, please write them below.

**Topic J8 – Proceeds of crime**

Legislative reference: [Part 2 of schedule 2 of the Second Scottish Act \(legislation.gov.uk\)](https://www.legislation.gov.uk)

- 204. The proposal is to keep in operation for longer two adjustments to the Proceeds of Crime Act 2002 (“the 2002 Act”) made by the Second Scottish Act.
- 205. First, it is proposed that the law continues to state, for the purposes of section 99(4) of the 2002 Act, that the effects of Covid (whether direct or indirect) are to be treated as “exceptional circumstances”. A postponement or extension may be made on application by the accused, a prosecutor, or the court of its own motion.
- 206. Ensuring that the period to apply for a confiscation order can be extended will mean that the process for the confiscation of the proceeds of crime is not frustrated due to delays in court proceedings as a result of pandemic-related backlogs. Without these provisions, the Crown Office and Procurator Fiscal Service (“COPFS”) for example may be unable to proceed with confiscation



proceedings against convicted criminals which could allow serious organised criminals to continue to use the illegally obtained funds to further their criminal activities in communities and be a threat to public safety and public order. The provision allows both prosecutors and defence agents additional time to prepare the cases if needed due to the pandemic.

207. Second, it is proposed that accused persons continue to be allowed longer to pay confiscation orders where the effects of Covid (whether direct or indirect) have affected the person's ability to pay. This would mean that the courts would continue to be able to extend the time to pay beyond 12 months. And an accused would be able to make an application to the court for a further extension of the time to pay. If such an extension were granted, interest of the outstanding amount would not run as it otherwise would under section 117 of the 2002 Act.
208. Allowing more time for confiscation orders to be paid will ensure that individuals are not treated unfairly or disproportionately throughout this period if they have been unable to pay for reasons related, directly or indirectly, to Covid. The confiscation order will remain in force and no convicted person is being excused from paying their confiscation order, however if they are unable to extend the permitted time for payment (for Covid reasons) they might otherwise face a default custodial sentence. The Scottish Government considers that this would be disproportionate. If the sheriff court does not accept that payment has been delayed due to Covid the order will be required to be paid as previously ordered.

**Question 33:**

**It is proposed that the provisions for Topic J8 (Proceeds of crime) as described will be extended beyond March 2022. Which of the following best describes what you think about this?**

- I think the provisions for Topic J8 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J8 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J8 should be extended or made permanent
- Unsure
- I have no view

If you have any comments on either the provisions for Topic J8, or the proposal for extension beyond March 2022, please write them below.

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## Chapter 5: Final questions

209. Chapter 1 set out the Scottish Government’s ambitions for Covid recovery. The Government’s specific legislative proposals in Chapters 2 to 4 aim to support those ambitions but the Government is not complacent and wishes to establish if more might be done.
210. As mentioned in Chapter 1, as we emerge from the Covid pandemic we are committed to addressing the underlying inequalities that have been exacerbated by recent events. People have told us they want a Scotland that achieves financial security for all: through good quality work and sustainable employment; that supports health and well-being for young people in particular; that promotes equalities; and that strengthens people’s rights. This final Chapter does not seek views on specific legislative proposals but asks for views on the sort of legislative changes that you believe will help us to achieve the change we are seeking.
211. You may have comments on specific, existing regulation, you may want to suggest improvements to legislation or you may want to suggest new or different approaches to legislation.
212. To help shape the scope of where you focus your attention we have identified three themes highlighted through Stakeholder Roundtables<sup>(28)</sup> and where we are seeking views; they are **(i) sustainable, good and green jobs; (ii) financial security for low income households; and (iii) supporting children’s wellbeing and mental health.** In responding please also consider our commitment to a **person centred approach** to delivering change.
213. In this section of the consultation, where it makes sense to do so, please reflect “in the round” on your proposal - taking into account the needs of the individual, the private, public and third sectors and society as a whole. Acknowledging the tensions between the needs of different actors such as public service providers and businesses in addition to those of individuals and families will provide fuller background on which to base any future proposals.

### Question 34:

**To support the key three themes for Covid recovery as described, do you have any proposals for legislation which goes beyond or is different to the consultation proposals in Chapters 2 to 4?**

- Yes
- No

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(28) Details of these Roundtables are linked to in Chapter 1.

- Unsure  
 I have no view

If you have selected “Yes” please write your comments below. It would be helpful if you could refer to which of the three themes are of particular interest to you.

### Impact assessments

214. Four impact assessments were published in June 2021 to accompany the introduction of the Bill for the Extension and Expiry Act:

- Business and Regulatory Impact Assessment<sup>(29)</sup>
- Child Rights and Wellbeing Impact Assessment<sup>(30)</sup>
- Equality Impact Assessment<sup>(31)</sup>
- Fairer Scotland Duty Assessment<sup>(32)</sup>

215. A human rights impact assessment was contained in the Policy Memorandum for the Bill for the Extension and Expiry Act (see paragraphs 23 and 24).

216. The Scottish Government wishes to establish if there are any factors to be considered in the preparation of further impact assessment material for any Bill or Bills following on from this consultation, in terms of the proposals in Chapters 3 and 4 of this consultation that originate in the First or Second Scottish Act and therefore are directly within the impact assessments referred to above.

217. Some proposals in Chapters 2 and 3 of this consultation originate in the UK Act, or are new, and were not within the impact assessments for the Bill for the Extension and Expiry Act.

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(29) [Coronavirus \(Extension and Expiry\)\(Scotland\) Bill: business and regulatory impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/bills/2021/coronavirus-extension-and-expiry-scotland-bill-business-and-regulatory-impact-assessment)

(30) [Coronavirus \(Extension and Expiry\) \(Scotland\) Bill: child rights and wellbeing impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/bills/2021/coronavirus-extension-and-expiry-scotland-bill-child-rights-and-wellbeing-impact-assessment)

(31) [Coronavirus \(Extension and Expiry\) \(Scotland\) Bill: equality impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/bills/2021/coronavirus-extension-and-expiry-scotland-bill-equality-impact-assessment)

(32) [Coronavirus \(Extension and Expiry\) \(Scotland\) Bill: Fairer Scotland Duty Assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/bills/2021/coronavirus-extension-and-expiry-scotland-bill-fairer-scotland-duty-assessment)

**Questions 35 to 42: Do you have any comments on potential impacts of the proposals in Chapters 2 to 4 of this paper, not sufficiently covered by the previous impact assessments, on:**

**Question 35: Business and regulatory impact assessment**

- Yes I have comments on potential impacts
- No
- Unsure
- I have no view

If you have selected “Yes” please write your comments below. It would be helpful if you could refer to topics of particular interest to you with their topic codes.

**Question 36: Child rights and wellbeing impact assessment**

- Yes I have comments on potential impacts
- No
- Unsure
- I have no view

If you have selected “Yes” please write your comments below. It would be helpful if you could refer to topics of particular interest to you with their topic codes.

**Question 37: Equality impact assessment**

- Yes I have comments on potential impacts
- No
- Unsure

I have no view

If you have selected “Yes” please write your comments below. It would be helpful if you could refer to topics of particular interest to you with their topic codes.

**Question 38: Socio-economic equality impact assessment (the Fairer Scotland Duty)**

- Yes I have comments on potential impacts
- No
- Unsure
- I have no view

If you have selected “Yes” please write your comments below. It would be helpful if you could refer to topics of particular interest to you with their topic codes.

218. The Scottish Government is committed to respecting, protecting and fulfilling the rights set out in human rights treaties, including the UN Convention on the Rights of Persons with Disabilities, hearing from disabled people, and indeed everyone, who may be affected by the proposals in this paper.

**Question 39: Human rights**

- Yes I have comments on potential impacts
- No
- Unsure
- I have no view

If you have selected “Yes” please write your comments below. It would be helpful if you could refer to topics of particular interest to you with their topic codes.

219. The Scottish Government also has an open mind as to whether there is a case for preparing a Data Protection Impact Assessment, an Islands Communities Impact Assessment, or a Strategic Environmental Assessment for any Bill or Bills arising out of from this consultation.

**Question 40: Data protection impact assessment**

**Do you have any comments on potential impacts of the proposals in Chapters 2 to 4 of this paper on data protection and privacy (the handling of personal data)?**

- Yes I have comments on potential impacts
- No
- Unsure
- I have no view

If you have selected “Yes” please write your comments below. It would be helpful if you could refer to topics of particular interest to you with their topic codes.

**Question 41: Island communities impact assessment**

**Do you have any comments on potential impacts of the proposals in Chapters 2 to 4 of this paper on people in rural or island communities?**

- Yes I have comments on potential impacts
- No
- Unsure
- I have no view

If you have selected “Yes” please write your comments below. It would be helpful if you could refer to topics of particular interest to you with their topic codes.

#### **Question 42: Strategic environmental assessment**

**Do you have any comments on potential impacts of the proposals in Chapters 2 to 4 of this paper on the environment?**

- Yes I have comments on potential impacts
- No
- Unsure
- I have no view

If you have selected “Yes” please write your comments below. It would be helpful if you could refer to topics of particular interest to you with their topic codes.

#### **Financial implications**

220. When introducing primary legislation to the Scottish Parliament, the Scottish Government is required to make best estimates of the administrative, compliance and other costs to which the provisions of legislation would give rise; best estimates of the timescales over which such costs would be expected to arise; and an indication of the margins of uncertainty in such estimates. The Bill for the Extension and Expiry Act was accompanied by a June 2021 Financial Memorandum setting out this information for the measures in that Bill<sup>(33)</sup>. That Financial Memorandum considers costs on the Scottish Administration, costs on local authorities and costs on other bodies, individuals and businesses.

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(33) [Financial Memorandum \(parliament.scot\)](https://www.parliament.scot/Financial-Memorandum)



221. The Scottish Government wishes to establish if there are any factors requiring further consideration in the preparation of the Financial Memorandum for a further Bill or Bills arising out of this consultation. All of the First and Scottish Act measures in Chapter 5, and all but one of the measures in Chapter 4 of this consultation are measures within the Extension and Expiry Act and therefore within the Financial Memorandum referred to. Chapter 3 measures were not within the Financial Memorandum.

**Question 43:**

**Do you have any comments on the financial implications of the proposals in Chapters 2 to 4 of this consultation paper for public bodies, individuals and businesses, having regard to the Financial Memorandum for the Extension and Expiry Bill?**

- Yes I have comments on potential impacts
- No
- Unsure
- I have no view

If you have selected "Yes" please write your comments below. It would be helpful if you could refer to topics of particular interest to you with their topic codes.



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