

# **Scottish Government Consultation on Permanence of Coronavirus Recovery and Reform Act measures**

**Analysis of responses**

**July 2024**

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# Summary

This summary sets out key findings from analysis of responses to the recent Scottish Government consultation on proposals to make permanent certain measures from the Coronavirus Recovery and Reform (Scotland) Act 2022.

The consultation opened on 6 November 2023 and closed on 12 February 2024, and asked 22 questions (see Annex 2). In total, 30 consultation responses were received, of which 22 were from groups or organisations and eight from individual members of the public.

The views of a small number of those with lived experience of the justice system were also gathered using a shorter question set specifically relating to provisions allowing attendance at criminal court by electronic means. Further information on the methodology and background of this process is available at Annex 3.

## **Cross-cutting themes**

This summary and the main body of the report consider views on each of the 22 consultation questions in turn. However, several cross-cutting themes also emerged across consultation responses, that appear to have influenced views on proposals. For example, responses to some proposals appeared to reflect underlying views on the relative value of digital and physical evidence, and between remote communication and in-person testimony. It was notable that few of those opposed to or raising concerns around proposals expressed less confidence in the suitability of digital technologies and digital evidence for criminal court.

Other common themes emerged across views on potential for proposals to positively or negatively impact the justice system. The opportunity for efficiencies in time and resources was highlighted across proposals for conduct of business by electronic means, virtual attendance and digital productions. Efficiencies were seen as a significant positive in the context of the current backlogs in court cases and potential for efficiencies to enable cases to be handled more quickly, benefiting all parties including vulnerable people with complex needs. The needs of vulnerable people were a factor in comments around potential for proposals to enable more trauma-informed justice processes, particularly for views on use of virtual attendance and conduct of business by electronic means. Vulnerable people, and in particular their capacity to engage with justice processes via digital means, were also a common theme for opposition to some proposals. This included concerns that vulnerable parties may require additional support to ensure greater use of digital technologies does not limit their access to justice.

## **Conduct of business by electronic means**

The majority of respondents agreed that provisions for conduct of business by electronic means should be made permanent. Those expressing support suggested that measures such as electronic signing and transmission of documents, granting of search warrants remotely, and remote citation of witnesses had become an

“essential” element of justice processes. This included a view that these provisions are necessary for a modern, efficient and person-centred justice system.

Some suggested exceptions to conduct of business by electronic means, including reference to the issue of digital exclusion for those involved in the criminal justice system. Respondents also raised other points for consideration around how proposed innovations are implemented across the justice system, in terms of resourcing and infrastructure requirements, technical capacity and skills, and compliance with data protection requirements.

### **Virtual attendance**

Most respondents agreed that virtual attendance provisions for criminal courts should be made permanent. Efficiency benefits were highlighted, with virtual attendance seen as having helped to reduce travel costs and mitigate the impact of what was described as poor performance by the current Prisoner Escort and Custody contractor. Other perceived benefits included a view that virtual attendance can be particularly positive for vulnerable individuals and those who may find in-person attendance frightening, emotionally taxing or (re)traumatising.

A small number objected to the principle of the proposal, suggesting that virtual attendance cannot replace in-person communication. Others raised points for consideration around how provisions are used, including a view that virtual attendance may not work well in all cases. Experience was cited of digital platforms creating barriers to participation and/or diminishing the significance of proceedings for some – seen as a particular risk for vulnerable individuals with complex needs and those facing language barriers. Respondents also suggested that quality and reliability issues around digital technologies can impact the quality of evidence seen by juries and individuals’ access to justice. Digital poverty was noted as a risk factor, and issues were highlighted around infrastructure and resourcing.

Amendments or additions to current provisions were suggested to ensure that the future approach is effective. These included calls for virtual attendance to be the default for professional witness such as police, medical and scientific witnesses. Others wished to ensure that mode of attendance should be determined on a case-by-case basis, particularly with reference to individual needs and circumstances.

### **National jurisdiction for callings from custody**

The majority of respondents felt that the provision for national jurisdiction for callings from custody should be made permanent. Those who supported permanency saw national jurisdiction as enabling a more flexible and efficient approach to management of custody business, noting that provisions have often helped to minimise the need for transport of prisoners and streamlined the handling of custody cases. Respondents suggested that this provision has the potential to reduce the current backlog of cases, benefiting both victims and the accused. It was also suggested that national jurisdiction can support a more trauma-responsive approach to custody.

Some of those who objected to or raised issues for proposals raised concerns that national jurisdiction could limit local access to justice. However, most of those raising concerns referred to practical considerations such as potential for custody hearings held outwith the jurisdiction of the offence to be less accessible to victims, witnesses and members of the public. It was suggested that provisions should ensure virtual attendance is available for those unable to attend in-person, and some proposed local hybrid custody courts as a preferable alternative.

## **Fiscal fines**

Most respondents agreed that provisions for fiscal fines should be made permanent. This support included a view that provisions could reduce use of court prosecution, helping to address backlogs and prioritising court time for more serious cases. It was suggested that temporary provisions have been working effectively in this regard.

Opposition to the permanency of fiscal fine provisions included concern that greater use of alternatives to prosecution could limit the ability of criminal justice partners to deliver their public protection function. Respondents also raised issues around how fiscal fines should be applied. The most common concern was that fines must be proportionate to the severity of the offence, and take into account capacity to pay and the potential impact of any financial hardship on families. Some saw a need for additional guidance to ensure appropriate use of fiscal fines as an alternative to prosecution.

## **Digital productions**

The majority of respondents agreed that digital evidence should be used in criminal cases rather than having to produce the original item in court. A range of anticipated advantages were noted, most commonly the potential to deliver efficiencies in relation to early disclosure and presentation in court. Several points for consideration were raised around how digital productions are used, most commonly that provisions should ensure that the court can require physical evidence to be produced and that the prosecution or defence can request physical productions. There were also calls for clarity around quality standards to ensure that digital productions can be trusted.

Most respondents agreed that, where an image is produced, it can be treated as if it was the item itself that was being produced – including a view that this is necessary if use of digital productions is to achieve the anticipated benefits. Respondents also saw other practical advantages such as potential to reduce the resources required for storage and transport of physical evidence. Opposition to the proposal appeared to be linked to a view that physical productions are usually more suitable than digital productions for criminal cases, including concerns around how the integrity and accuracy of images could be assured.

Around half of respondents agreed that the current procedural framework would allow the defence to request physical production in light of concerns that its absence would prejudice a fair trial. Comments on the approach to handling

requests for physical productions included a perceived need for judicial oversight of requests, and for issues to be raised at an early stage to enable judicial determination. It was also suggested that physical production should be allowed where there is disagreement between prosecution and defence, unless a request is considered unjustified. There was also concern around how these issues can be dealt with prior to trial for summary cases, as the defence would not be made aware in advance of intended productions.

### **Modernisation of the law on copy documents**

Around half of respondents agreed that the transfer of digital files to a reliable digital evidence system should remove the requirement of certification, and that any such file should be accepted as a true copy. Support reflected confidence in the capacity of the Digital Evidence Sharing Capability (DESC) system to ensure the integrity of digital evidence, and potential for significant efficiencies if the requirement for certification is removed in these cases. Several points for consideration were raised around whether and how the provenance of digital evidence can be assured on the basis of information retained in the DESC audit system. There were concerns around potential manipulation of data and images, and how any manipulation before a file was transferred to DESC can be identified. It was also suggested that assuring the provenance of digital files may require DESC to capture additional information such as locus, the person responsible for evidence, and the information captured.

Most respondents agreed that any issue relating to the admissibility of the copy held in DESC could be raised through the existing pre-trial hearing system. Potential issues were raised around how admissibility disputes should be managed, including that a certification defect may only become clear after a procedural hearing, potentially requiring a trial to be halted. Around half of respondents agreed that the court should have discretion to allow a document, if satisfied it is a copy, despite any defect in certification, and most agreed that the court should be able to hear evidence to make such a determination. Respondents expressed confidence that judicial determination would ensure copy documents are not allowed into evidence inappropriately, although it was suggested that the specific formulation of the power will be important such as the basis on which a court would be able to make such a determination.

### **Impact assessments**

Around half of respondents commented on the potential impacts of consultation proposals, including a view that effective monitoring will be important to ensure that any emerging issues affecting access to justice are understood and addressed.

Comments on **human rights impacts** included reference to potential positive impact for proposals to make justice processes more efficient and accessible. However, respondents also saw a risk of adverse impacts on human rights, including potential for use of virtual attendance and digital productions to impact the right to a fair trial (Article 6) and right to respect for private and family life (Article 8).

In terms of potential impact on **equalities and the protected characteristics**, it was suggested that wider use of digital technologies is likely to support access to justice for some with protected characteristics. Potential negative impacts included concern that proposals could limit access for those who may struggle to engage with justice processes via digital means, such as people with disabilities or visual impairment, and other needs such as those with addiction or mental health needs, or neurodivergence. Concern that those affected by digital exclusion could also be disadvantaged were raised for children and families, and children in care.

Comments around the impact for **children and young people** focused on the perceived risk of negative impacts. This included potential for fiscal fines to disproportionately affect children and younger people, and concern that some may have difficulty engaging meaningfully with justice processes via digital means. Scotland's Bairns Hoose Standards were suggested as a reference point for work around implementation of proposals for virtual attendance to mitigate negative impacts. There were also calls for proposals to be extended to the children's hearing system, as the means by which many children who offend are dealt with.

Regarding **socio-economic equality**, comments primarily related to fiscal fines and use of digital technologies. Respondents identified ability to pay fiscal fines as a key issue for socio-economic equality, with proposals seen as having potential to disproportionately affect those who are socio-economically disadvantaged. There was also concern that greater use of digital technologies could limit access to justice for the socio-economic inequality, due to the higher incidence of digital exclusion amongst this group.

Discussion of impacts for **island communities** included reference to potential for virtual attendance proposals to improve the accessibility of court for these communities, particularly for those where no court is available locally and travel to the mainland can be costly and unreliable. Potential negative impacts included concern that proposals could contribute to the closure of sheriff courts for island communities. This was also linked to wider concern that any centralising of justice could disproportionately affect island communities and their access to local justice.

Respondents cited several areas where proposals could have a negative impact on **data protection and privacy**, primarily around use of digital technologies and digital evidence. It was suggested that greater use of digital evidence would increase the risk of data protection breaches, and specific issues were raised around assuring the right to privacy for witnesses and victims, and the need for suitable protocols to ensure compliance with data protection legislation.

Consideration of **business and third sector** impacts included potential for efficiencies due to conduct of business by electronic means and digital productions to improve prosecution of financial crime. There were also concerns around potential for any closure of court buildings to have an adverse impact on local businesses, and that proposals could result in additional financial burden for organisations required to upgrade digital technologies and security systems.

Commentary around **environment impacts** identified positives associated with greater use of digital technologies. In particular, respondents noted that proposals for virtual attendance and use of digital productions are likely to reduce environmental impacts associated with travel to and from court due to reduced transport of evidence and people.



# 1. Introduction

## Background

This report summarises responses to the recent Scottish Government consultation on the permanence of certain measures from the Coronavirus Recovery and Reform (Scotland) Act 2022.

## The consultation

This consultation is a key part of a far-reaching programme of work that aims to make fundamental change to the operation of Scotland's justice services, ensuring that its processes and laws meet the needs of people. The consultation takes forward Scottish Government's Programme for Government 2022-23 commitment to modernise justice processes through greater use of digital processes. It also delivers on the Scottish Government's priorities for justice as outlined in Equality, opportunity, community: New leadership - A fresh start.<sup>1</sup>

The consultation sought views on proposals to make permanent several specific aspects of the 2022 Act, and other considerations around digitising elements of the criminal justice system. Consultation topics included conduct of business by electronic means, virtual attendance at criminal court, national jurisdiction for callings from custody, fiscal fines, digital productions, modernisation of the law on copy documents, and other modernisation of procedures through greater use of digital processes.

The consultation opened on 6 November 2023 and closed on 12 February 2024. It asked 22 questions, of which 20 had both 'closed' and 'open' elements with the remaining two questions being entirely open. [The consultation paper is available on the Scottish Government's website.](#)

## Profile of responses

In total, 30 consultation responses were received, of which 22 were from groups or organisations and eight from individual members of the public. Where consent has been given to publish the response, it may be found at [Citizen Space](#).

A breakdown of the number of responses received by respondent type is set out in Table 1, and a full list of group respondents is appended to this report at Annex 1.

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<sup>1</sup> [Scottish Government: Equality, opportunity, community: New leadership - A fresh start](#)

**Table 1 – Respondents by type**

Type of respondent	Number
Organisations:	
Judiciary	3
Legal profession representatives	5
Police	2
Community justice	2
Health and social care	3
Public body	3
Advocacy organisation	2
Third sector organisation	2
Organisations	22
Individuals	8
<b>All respondents</b>	<b>30</b>

The consultation exercise also gathered responses from a small number of those with lived experience of the justice system, based on a shorter question set specifically relating to provisions allowing attendance at criminal court by electronic means. The background and methodology to this process has been provided at Annex 3. The views of these individuals have been integrated with other consultation responses at questions 2 and 3.

### **Analysis and reporting**

The report presents a question-by-question analysis of answers to the closed questions and further comments at open questions. Both the proportion of respondents answering closed questions and the number providing written comment varied from question to question, and this is noted in the body of the report. Non-response has been excluded from the analysis of closed questions.

As with any public consultation exercise, it should be noted that those responding generally have a particular interest in the subject area. Therefore, the views they express cannot necessarily be seen as representative of wider public opinion.

## 2. Conduct of business by electronic means in criminal cases

It is proposed that current temporary provisions enabling electronic signing and sending of documents in criminal courts are made permanent.

The consultation paper notes that digital transmission of documents and use of electronic signatures have been heavily used by courts, including all High Court indictments being received electronically and search warrants being granted remotely. It indicates that these provisions have enabled courts to operate more efficiently, thus contributing to a more streamlined, modern and sustainable justice system. It also notes that making these provisions permanent would be consistent with modernisation already undertaken in other public services such as registration of births and deaths.

**Question 1: It is proposed that the provisions for Chapter 1 (Conduct of business by electronic means in criminal cases: documents) will be made permanent. Which of the following best describes your view?**

Responses to Question 1 by respondent type are set out in Table 2.

**Table 2**

Provisions should be...	Permanent	Permanent with exceptions	Not permanent	Unsure	No view	Total
Organisations:						
Judiciary	3	0	0	0	0	3
Legal profession representatives	4	0	1	0	0	5
Police	0	1	0	0	1	2
Community justice	2	0	0	0	0	2
Health/social care	3	0	0	0	0	3
Public body	1	0	0	0	2	3
Advocacy organisation	1	0	0	0	0	1
Third sector	1	1	0	0	0	2
<b>Total organisations</b>	<b>15</b>	<b>2</b>	<b>1</b>	<b>0</b>	<b>3</b>	<b>21</b>
Individuals	6	2	0	0	0	8
<b>All respondents</b>	<b>21</b>	<b>4</b>	<b>1</b>	<b>0</b>	<b>3</b>	<b>29</b>

1 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

The majority of those who answered the question (25 of 29) felt that the provisions for Chapter 1 in relation to conduct of business by electronic means should be made permanent, including four who felt that provisions should be made permanent with exceptions. One legal profession respondent felt that the provisions should not be made permanent.

**If you have any comments on the proposal for permanency of these provisions, please provide them below.**

Twenty-one respondents provided written comment at Question 1.

### **Reasons for supporting the permanency of provisions**

Those expressing support for the permanency of Chapter 1 provisions noted that measures supporting conduct of business by electronic means were important in enabling court and tribunal business to continue during the COVID-19 pandemic. This included specific reference to electronic signing and transmission of documents, granting of search warrants remotely, and citation of witnesses. These measures were described by some as having become an “essential” element of justice processes, including legal profession and advocacy respondents suggesting that electronic conduct of business is necessary for a modern, progressive and person-centred justice system. It was also noted that planned virtual custody and virtual summary court models will require fully electronic proceedings.

Respondents referred to a range of specific positive impacts for justice processes associated with this provision. The most commonly cited was improving the efficiency of justice processes; efficiencies and associated reduction in resource requirements were noted by a range of respondents including judiciary, legal profession representatives and police. A police respondent noted that efficiencies have been achieved with limited initial outlay of capital or other resources, and that making the provisions permanent would retain these benefits with relatively little resource implications. Respondents also noted that provisions had helped to speed up administrative processes such as in relation to Benefit Deduction Orders and Arrestment of Fund Orders, and had improved access to justice.

Provisions were described by some as having potential to reduce trauma as part of a person-centred system. Several health/social care and community justice respondents noted that greater use of digital technologies can reduce the need for people to repeat their information and experiences through their custodial journey.

A legal profession respondent also saw provisions as contributing to a more sustainable justice system that supports delivery of wider carbon reduction policy priorities. It was noted that conduct of business by electronic means reduces use of hard copy papers and travel associated with lodging hard copy documents, and can support more home and hybrid working (thus helping to improve the wellbeing of staff and justice system users). Provisions were also described as contributing to the creation of a more resilient justice system to ensure business continuity in the event of any future disruption.

## **Reasons for not supporting permanency**

Reflecting the balance of views shown at Table 2, one respondent expressed objection to the permanency of temporary provisions. The legal profession respondent was of the view that physical productions are more consistent with the seriousness of criminal proceedings, and that this is a key difference between criminal cases and applications to Registers of Scotland (where digital productions are used). It was suggested that physical documents are likely to be treated with more gravity by accused persons.

## **Other points for consideration**

Respondents also raised several issues requiring further consideration, including some from those expressing support for making chapter 1 provisions permanent.

- It was suggested that digital exclusion is an issue for some of those involved in the criminal justice system, and several respondents saw a need for provisions to recognise the potential impact of digital exclusion on access to justice. This included calls for additional support and/or hard copy options for those unable to use digital technologies.
- Concerns were raised around the proposal that documents can be sent to a person's solicitor rather than to a party in a case, including reference to examples of individuals struggling to engage with their solicitor.
- A number of respondents highlighted the need to consider how proposed innovations – such as those around electronic signatures and service by electronic means – are implemented. This included reference to:
  - Funding and infrastructure requirements.
  - Ensuring that all organisations have the necessary technical capacity and skills to securely store and transmit documents, and to confirm that documents have been received and read.
  - Concern that conduct of business by electronic means must be consistent with data protection requirements across all organisations.
- Some judiciary respondents wished to retain the power for the Lord Justice to direct that there should be exceptions to these provisions, such that physical signing and transmission should be used in some cases. However, there was also concern that any exceptions should not be based only on document type, but also on individuals' needs and ensuring person-centred justice processes.

### 3. Virtual attendance – criminal courts

It is proposed that current temporary provisions allowing attendance at criminal court by electronic means should be made permanent, retaining the Lord Justice General's power to make virtual attendance the default for certain types of cases or in certain circumstances. The Lord Justice General cannot issue a determination that trials should be held virtually by default. However, a court can direct a person to attend a trial virtually, on a case-by-case basis.

The consultation paper notes that courts can overturn the 'default' of physical attendance on a case-by-case basis to direct a person to attend virtually. It also notes that the prosecution or defence can request virtual attendance if the default is physical attendance, or vice versa can request that someone attends in-person if the default is virtual attendance.

Current temporary provisions have enabled the justice system to respond to a range of challenges, including physical distancing rules related to the COVID-19 pandemic. Engagement with stakeholders around extending virtual attendance measures has also identified benefits for people affected by crime who can be traumatised by attending court, and in supporting more person-centred and resource-efficient approaches to justice. However, the consultation paper also notes that legal professionals had mixed views of virtual hearings.

In this context, it is proposed that allowing for wider use of virtual attendance could make justice processes more efficient and accessible, and improve people's experience of these processes.

**Question 2: It is proposed that the provisions in Chapter 2 (Virtual attendance – criminal courts) will be made permanent. Which of the following best describes your view?**

Responses to Question 2 by respondent type are set out in Table 3.

**Table 3**

Provisions should be...	Permanent	Permanent with exceptions	Not permanent	Unsure	No view	Total
Organisations:						
Judiciary	3	0	0	0	0	3
Legal profession representatives	2	2	1	0	0	5
Police	1	0	0	0	1	2
Community justice	0	2	0	0	0	2
Health/social care	2	0	1	0	0	3
Public body	1	0	0	0	2	3
Advocacy organisation	2	0	0	0	0	2
Third sector	1	0	0	1	0	2
<b>Total organisations</b>	<b>12</b>	<b>4</b>	<b>2</b>	<b>1</b>	<b>3</b>	<b>22</b>
Individuals	4	2	2	0	0	8
<b>All respondents</b>	<b>16</b>	<b>6</b>	<b>4</b>	<b>1</b>	<b>3</b>	<b>30</b>

Most respondents (22 of 30) felt that the provisions for Chapter 2 in relation to virtual attendance should be made permanent, with six of these wanting exceptions. Four respondents – a legal profession, health/social care and two individual respondents - felt that the provisions should not be made permanent.

**If you have any comments on the proposal for permanency of this provision, please provide them below.**

Twenty-four respondents provided further comment at Question 2.

### **Reasons for supporting the permanency of the provision**

Similar to comments noted earlier at Question 1, those who supported the permanency of proposals highlighted efficiency benefits as a result of the additional flexibility provided by virtual attendance. This included comments from judiciary, legal profession, advocacy and third sector respondents.

Virtual attendance for procedural hearings, preliminary hearings in the High Court, bail appeals in Sheriff Appeal Court and remote balloting of jurors were highlighted as examples of processes where virtual attendance has enabled significant efficiencies. Provisions were described as having helped to maximise case and estate capacity, reduced the financial and environmental cost associated with travel, and helped to mitigate the impact of what was described as poor performance by the current Prisoner Escort and Custody contractor.

A legal profession respondent suggested that use of virtual attendance has enabled these efficiencies while preserving access to justice, fairness and transparency. Several judiciary and third sector respondents also suggested that efficiencies have potential to help clear the current backlog of cases and enable more timely justice.

Virtual attendance was also described by several legal profession, advocacy and third sector respondents as having potential to enable more person-centred and trauma-informed justice processes. For example, respondents noted the potential for virtual attendance to better support individuals who may find in-person attendance frightening, emotionally taxing or (re)traumatising. An advocacy organisation respondent reported having received positive feedback from vulnerable witnesses who have used virtual attendance provisions. The potential psychological and emotional impact of court attendance was also highlighted as a particular concern by a respondent with lived experience as a witness in the criminal justice system. This respondent noted that the trauma of in-person attendance can undermine the ability of individuals to fully participate as a witness.

Reducing the need for travel to court was also identified as particularly relevant by a respondent with lived experience as a witness in ensuring a trauma-informed approach. It was noted that the distress that individuals experience can make it impossible to use public transport, or to drive themselves home after attending court. It was also noted that reducing footfall in court buildings, and in particular reducing congestion in witness waiting rooms, can enable a more trauma-informed environment for those witnesses who require to attend in person.

Other comments around the positives associated with virtual attendance provisions included:

- A legal profession respondent noted practical and security benefits for terror-related offences, where virtual attendance avoids the need for secure transportation and for armed police officers within the court building.
- A health/social care respondent highlighted potentially significant cost savings for individuals if virtual attendance enables them to avoid travel and accommodation costs associated with attending court.
- Virtual attendance was highlighted as crucial in supporting future innovations, such as development of virtual domestic abuse courts and virtual custodies as key steps in the creation of a trauma-informed process.
- There was some concern that virtual attendance and other special measures are not currently being used consistently enough for vulnerable people, including for children and their families. These comments were linked to a view that additional infrastructure and resourcing is required to ensure access to suitable facilities for virtual attendance by vulnerable people. Respondents cited current facilities such as the Bairns Hoose in North Strathclyde as offering relevant learning to inform future development.
- A police respondent noted that these benefits can only be secured where virtual attendance forms part of an agreed, carefully implemented and appropriately resourced approach.
- It was suggested that continued use of virtual attendance will be required for preliminary hearings in High Court cases due to insufficient availability of Advocates to support the previous in-person system. There was concern that a return to in-person preliminary High Court hearings would negatively impact hearings.



While some suggested that virtual attendance can have benefits for all parties, respondents also saw provisions as being particularly positive for vulnerable individuals and others who may face barriers to in-person attendance. A number of specific groups were referenced including those living in remote and island communities who can face significant costs associated with attending court on the mainland, vulnerable individuals such as those with health conditions or disabilities, and children and young people. Some also cited the effectiveness of virtual attendance for certain parties such as police, medical and other professional witnesses. This included reference to benefits of virtual attendance in allowing them to return more quickly to vital front-line roles.

### **Reasons for not supporting permanency and other issues or concerns**

The four respondents who were opposed to proposals included some objecting to the principle of virtual attendance. It was suggested that virtual attendance cannot replace in-person communication, for example in terms of gauging body language and personal interactions; a legal profession respondent wished to ensure that the accused is always required to attend proceedings in-person. Another legal profession respondent repeated the view noted at Question 1, that requiring in-person attendance would ensure all parties recognise the seriousness of criminal proceedings.

#### **Vulnerable individuals**

A concern raised by respondents opposed to and those in favour of permanency, was that virtual attendance may not work as well for individuals with multiple, complex needs. Health/social care and third sector respondents suggested that the lack of physical immediacy can diminish the significance of proceedings for some, and cited experience of virtual attendance contributing to the accused becoming “disengaged”. Concerns were also raised around experience of digital platforms creating barriers for individuals, for example where systems are deactivated following sentencing before services can ensure the individual has understood what has happened. It was suggested that these factors could inhibit the right of individuals to meaningfully participate in criminal proceedings.

The above issues were seen as having the potential to disproportionately disadvantage vulnerable individuals and those with complex needs. Respondents highlighted a number of specific groups such as those with disabilities, and those with additional support needs including neurodiversity. Those facing language barriers were noted as facing particular barriers given the crucial importance of clear communication with an interpreter. Respondents also saw potential for virtual attendance to specifically impact the ability of services to support individuals and assess possible interventions. For example, it was suggested that being unable to interview individuals with vulnerabilities face-to-face could limit the effectiveness of assessments, which may lead to risks escalating or make it challenging to protect them from harm.

Some of those highlighting potential issues for specific groups appeared to be opposed to any continuation of virtual attendance. However, others referred to the importance of ensuring the court can make exceptions to ensure the mode of

attendance suits individuals' circumstances. This included a view that physical attendance should be the default, and that the court should only overturn this where it is satisfied that virtual attendance would not be contrary to the interests of justice. These respondents also wished to limit the Lord Justice's power to make virtual attendance the default for certain types of hearings or cases; it was suggested that mode of attendance should always be determined on a case-by-case basis, with reference to individual needs and circumstances.

### Standard of digital technologies

Some cited experience of issues around the quality and reliability of digital technologies, including varying video and audio quality, and slow or unreliable internet connections. There was concern that these issues can be significant enough to impact the quality of evidence seen by juries and individuals' access to justice. Respondents cited multiple examples of technical issues and failures in virtual and telephone hearings, including cases where individuals do not have support to bring technical problems to the court's attention such that it was assumed that they had chosen not to participate. It was noted that these can result in distressing experiences for participants. Lost court time associated with establishing and re-establishing remote links was also noted.

### Digital infrastructure and resourcing

Digital poverty was also highlighted as a risk factor, and it was noted that individuals may not have access to the necessary equipment and/or connectivity to make proper use of virtual attendance. This was seen as a particular issue in more rural and island settings. Some wished to ensure that all individuals would be able to choose whether to engage with the justice system via virtual or in-person attendance.

A number of issues were highlighted around the resourcing requirements and likely feasibility of increased use of virtual attendance. For example, the current model for virtual attendance from police custody was described as no longer suitable or sustainable, as the number of custodies has returned to pre-pandemic levels. Other issues included the performance of the current provider of the Prisoner Escort and Custody contract, a lack of suitable facilities and infrastructure (including reliable digital equipment and connectivity) in some locations, provisions to ensure the security and confidentiality of virtual attendance, and existing pressures on budgets and resources across justice system partners. It was suggested that significant capital investment would be required to upgrade facilities and infrastructure, and that a dedicated "virtual team" would be required for each criminal justice partner. There was also reference to the need for appropriate support to ensure individuals can effectively engage with the justice system digitally. It was suggested that third sector organisations do not have the capacity or resources to provide the scale of support required.

## Proposed amendments and additions to provisions

Some of those who wished to see virtual attendance made permanent suggested amendments or additions to current provisions to ensure that the future approach is effective.

Several respondents referred to the need for exceptions and scope for flexibility in use of virtual attendance, to enable the court to respond to the specific circumstances of each case, and the needs of individuals involved. This was both in terms of requiring in-person attendance for some groups or specific cases, but also in ensuring that individuals are not compelled to attend in-person where this may cause further trauma. Respondents also proposed the following to refine the approach to virtual attendance.

- There was objection to the requirement for courts to make a direction in every case before virtual attendance is allowed, and a view that this has proven cumbersome in practice. Changes in the default mode of attendance for certain types of witness were proposed as a means of ensuring a “more agile” approach. Specific proposals included making virtual attendance the default for professional witnesses such as police, medical and scientific witnesses. It was also suggested that in-person attendance should remain the default for other categories of witness, although there was support for the Lord Justice to have the power to specify certain types of witnesses where the requirement for physical attendance would be disapplied. It was also proposed that provisions to allow deviation from the default in appropriate cases should be retained.
- Some of those raising concerns around the use of digital platforms to assess needs and provide support proposed an alternative “hybrid” approach whereby a mix of digital and/or in-person approaches are used dependent on specific needs and circumstances.
- It was suggested that the remote jury centre currently used to support the High Court should be retained and secured in legislation, to provide capacity to address future needs and as a contingency for any future disruption.
- There was a perceived need for further discussion with stakeholders to agree a timetable and programme for implementation of a permanent virtual attendance model.
- There was concern that other innovations such as virtual summary domestic abuse courts and virtual custody courts require separate evaluation to ensure they are fully resourced and can operate in practice.

**If you have any views on whether there are any specific factors the court should have to take into account when deciding whether it’s appropriate for people to participate in proceedings by electronic means, please provide them below.<sup>2</sup>**

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<sup>2</sup> This question was erroneously marked as question number 3 in the [consultation paper](#). This discrepancy may be seen in the responses submitted via email.

Twenty-one respondents provided their views.

In comments around the specific factors that the court should consider when deciding whether to use virtual or in-person attendance, some made the general point that the interests of justice and fairness must always be an overarching consideration.

Respondents also identified a range of other considerations seen as relevant to determinations in relation to virtual attendance. This included a view that procedures should recognise that each case and individual have specific needs and circumstances. There were calls for legislation and guidance to make clear that the needs of the individual should be central in the court's decisions regarding use of virtual or in-person attendance. It was also suggested that current provisions for the Lord Justice to disapply or use virtual attendance, and separate discretionary powers provided to the court, should be retained. These were seen as important in providing flexibility to respond to individual circumstances and needs.

Discussion of factors that the court should take into account included similar points noted at Question 2 on the types of witness where virtual attendance was seen as most appropriate. These were most commonly police and other professional witnesses.

Respondents also identified a range of circumstances and factors where virtual attendance could be helpful. These are summarised below.

- Situations where vulnerability and attendance at court can risk (re)traumatising individuals or otherwise have a significant adverse emotional or psychological impact. A number of respondents referred to potential for virtual attendance to particularly benefit vulnerable individuals, such as those with addiction, mental health and disability or health-related needs. An advocacy respondent was of the view that children should not be required to attend in-person unless unavoidably necessary, and expressed concern that this is not reflected in current practice. There was reference to the availability of technologies enabling live links and/or gathering of quality pre-recorded evidence from children without the need for in-person attendance at court.
- When lengthy journeys are required to attend court resulting in significant cost and environmental impact or due to practical considerations such as access to childcare or availability of public transport.
- Circumstances where individuals are unable to make the required journey, due to the potential impact of travel on their health and wellbeing. This may include those with disabilities or medical conditions and/or those who may suffer potentially adverse emotional and psychological impacts due to in-person attendance.
- Situations where attendance at court can impact on witnesses' work – especially those in public service - and the extent to which virtual attendance can mitigate this.
- Virtual attendance was seen as more suitable for preliminary hearings, and for those on remand in prison.

Respondents also identified circumstances where it was suggested that virtual attendance may not be appropriate. These are summarised below.

- When the vulnerability of participants can negatively impact the ability of those with mental health needs, addiction issues, cognitive impairment or neurodiverse condition to fully engage with and understand proceedings; this was highlighted by some community justice and health/social care respondents
- When people do not have access to other electronic devices, and secure facilities with suitable provisions that guarantee confidentiality, including specifically between solicitors and their clients. For some, these comments were linked to particular concern that the court must be satisfied that remote attendees are not under any undue influence.
- For hearings where individuals may be released from custody suites a significant distance from their home with no means of making this journey.

It was notable that responses to this question appeared to reflect in part respondents' wider view on the preferred balance between in-person and virtual attendance at court. For example, some suggested that in-person attendance should remain the default where there is a trial, tending to focus on use of virtual attendance for more vulnerable witnesses.

Other respondents wished to see virtual attendance made as widely available possible, and were concerned that individuals should not have to meet certain standards of vulnerability to access these provisions. This appeared to be linked to concern that there may not be sufficient flexibility to accommodate individual needs, and that attendance at court can still be traumatising for individuals who may not consider themselves vulnerable. It was also suggested that arrangements should be in place for members of the public to view virtual hearings if they wish to do so.

## 4. National Jurisdiction for Callings from Custody etc.

It is proposed that temporary provisions to enable all sheriffs to hear custody cases - irrespective of where the accused is held, where the sheriff normally has jurisdiction, and where the alleged offence took place - are made permanent.

The consultation paper notes that these temporary measures extend a sheriff's jurisdiction throughout Scotland to deal with first appearances from police custody, and any continuation until tendering of a not guilty plea, or to full committal in solemn proceedings. It is proposed that making such provisions permanent would enable more flexible and efficient management of custody business, and support increased use of virtual custody courts. The consultation paper also makes reference to stakeholder agencies having expressed support for the permanency of these measures.

**Question 3: It is proposed that the provisions for Chapter 3 (National Jurisdiction for Callings from Custody etc.) will be made permanent. Which of the following best describes your view?**

Responses to Question 3 by respondent type are set out in Table 4.

**Table 4**

Provisions should be...	Permanent	Permanent with exceptions	Not permanent	Unsure	No view	Total
Organisations:						
Judiciary	2	0	1	0	0	3
Legal profession representatives	1	0	2	1	1	5
Police	1	0	0	0	1	2
Community justice	0	2	0	0	0	2
Health/social care	1	1	0	0	1	3
Public body	1	0	0	0	2	3
Advocacy organisation	0	1	0	0	1	2
Third sector	1	0	0	0	0	1
<b>Total organisations</b>	<b>7</b>	<b>4</b>	<b>3</b>	<b>1</b>	<b>6</b>	<b>21</b>
Individuals	6	1	0	1	0	8
<b>All respondents</b>	<b>13</b>	<b>5</b>	<b>3</b>	<b>2</b>	<b>6</b>	<b>29</b>

1 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

Most of those answering the question (18 of 29) felt that the provisions for Chapter 3 in relation to national jurisdiction for callings from custody should be made permanent, with five of these wishing to see provisions made permanent with exceptions. Three respondents – two legal profession and a judiciary respondent -

felt that the provisions should not be made permanent. Eight respondents were unsure or had no view.

**If you have any comments on the proposal for permanency of these provisions, please provide them below.**

Eighteen respondents provided further comment at Question 3.

### **Reasons for supporting the permanency of provisions**

Several of those who supported permanency noted the potential for provisions to enable a more flexible and efficient approach to management of custody business, reducing the current backlog of cases and easing pressure on police custody units.

It was noted that national jurisdiction has often helped to minimise the need for lengthy transportation of prisoners (with associated carbon reduction benefits), and to ensure those appearing from custody can be processed without delay. Comments in support of national jurisdiction noted benefits such as enabling the operation of 'hub' virtual custody courts with the power to deal with cases throughout Scotland, providing access to modern facilities which ensure custody cases can be dealt with promptly. It was also suggested that national jurisdiction can support a more trauma-responsive approach to custody, and that provisions are essential in enabling the virtual trauma-informed and domestic abuse aware summary court model.

Any reduction in backlog of cases and the length of time that individuals spend in custody was seen as having benefits for both victims and the accused. This included particular reference to benefits for vulnerable individuals and those with certain protected characteristics for whom delayed access to justice can have a significant negative impact. Respondents cited feedback indicating that national jurisdiction has had a positive impact on the wellbeing of accused persons, and that minimising the time that the accused spends in custody before being seen in court can safeguard their Article 5 Rights under the European Convention on Human Rights (ECHR). It was also noted that reducing case backlogs would have a positive impact on the wellbeing of court staff, and that national jurisdiction has helped to address current challenges associated with staffing shortages at the custody contractor.

National jurisdiction provisions were seen as particularly relevant where an accused is arrested on warrants from multiple courts, by enabling all outstanding matters to be dealt with more efficiently in a single court with minimal travel. Respondents also referred to benefits where there are barriers to travel such as transport disruption, severe weather or other unexpected events, and on public holidays.

### **Reasons for not supporting permanency**

Some of those who objected to or raised concerns around this proposal felt that justice should be dealt with locally. In addition to commenting on the importance of the relationship between the court and the people it represents, respondents cited specific positives associated with local justice including sheriffs and court officers

being able to draw on their local knowledge of the accused and circumstances around cases, better access to local social work and support services to input to sentencing, and ensuring local residents can witness justice being administered. There was also concern that proposals could result in the closure of court buildings to save money, and would thus be detrimental to local justice.

### **Other points for consideration**

Most of those raising concerns around national jurisdiction referred to practical considerations, including a view that proposals raise significant difficulties that are yet to be resolved. There was concern that custody hearings held outwith the jurisdiction of the offence may be less accessible to victims, witnesses and members of the public. It was suggested that any permanent use of national jurisdiction should ensure that parties unable to attend in-person have the option of virtual attendance, to ensure that victims and witnesses are not adversely affected. Local hybrid custody courts were proposed as a preferable alternative in the context of these issues noted above, and there were calls for work to develop this model further.

Several respondents reiterated concerns discussed previously at Question 2 and the supplementary question about specific factors which relate to virtual appearance at custody hearings, potentially indicating lack of clarity around the distinction between the principle of national jurisdiction, and virtual attendance at court.

These respondents suggested that use of virtual attendance as part of national jurisdiction could limit the ability of more vulnerable individuals to fully participate in proceedings, and it was suggested that consideration should be given to how individuals can access support prior to leaving custody. There was also concern that use of virtual attendance could prevent effective input from local social work services with potential for this to lead to an increased number of individuals being remanded in custody, contrary to the wider policy direction.

Respondents also perceived pilots of virtual custody courts as having failed to deliver anticipated benefits, and there was a view that pilots have been less efficient than in-person custody courts. This was primarily attributed to administrative and technical issues that have not been overcome to date. Some felt that there is scope for stakeholders to continue to work together to improve efficiencies, but others suggested that technical barriers are currently too great to allow effective virtual custody courts. There were calls for an evidence-based evaluation of virtual custody court pilots before further change is considered.



## 5. Fiscal fines

It is proposed that several temporary changes to fiscal fines and financial penalties set out in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 should be made permanent. Specifically, this would apply to the increase in the maximum level of fiscal fine from £300 to £500, and the new nine-point scale of fixed penalties.

The consultation paper notes that these measures have together enabled alternative action to prosecution to be taken in a wider range of cases, in line with revised policy guidance issued by the Lord Advocate in April 2020. It is also noted that the measures allow for proportionate penalties for lower-level offences, while providing a higher maximum penalty where appropriate.

**Question 4: It is proposed that the provisions for Chapter 4 (Fiscal fines) will be made permanent. Which of the following best describes your view?**

Responses to Question 4 by respondent type are set out in Table 5.

**Table 5**

Provisions should be...	Permanent	Permanent with exceptions	Not permanent	Unsure	No view	Total
Organisations:						
Judiciary	0	0	0	0	3	3
Legal profession representatives	3	0	1	0	1	5
Police	1	0	0	0	1	2
Community justice	0	2	0	0	0	2
Health/social care	1	1	1	0	0	3
Public body	1	0	0	0	2	3
Advocacy organisation	1	0	0	0	1	2
Third sector	1	0	0	0	0	1
<b>Total organisations</b>	<b>8</b>	<b>3</b>	<b>2</b>	<b>0</b>	<b>8</b>	<b>21</b>
Individuals	7	0	0	1	0	8
<b>All respondents</b>	<b>15</b>	<b>3</b>	<b>2</b>	<b>1</b>	<b>8</b>	<b>29</b>

1 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

Over half of those answering the question (18 of 29) felt that the provisions for Chapter 4 in relation to fiscal fines should be made permanent, including three who felt that there should be exceptions. Two respondents – a legal profession and health/social care respondent - felt that the provisions should not be made permanent.

**If you have any comments on the proposal for permanency of this provision, please provide them below.**

Twelve respondents provided further comment at Question 4.

### **Reasons for supporting the permanency of the provision**

Reflecting the overall balance of views reported at Table 5, most of those providing further comment expressed general support for provisions to enable wider use of fiscal fines. This included a mix of legal profession, community justice, health/social care, advocacy and third sector respondents.

For some, this support was linked to the potential for provisions to reduce use of court prosecution, helping to reduce backlogs and prioritising court time for more serious cases. It was suggested that temporary provisions have been working effectively in this regard. This included reference to evidence on the use of revised fiscal fines and penalties to date, and a view that there is no indication that higher maximum fines were being used excessively or inappropriately. There was also specific support for higher maximum fines, including comments that this has in effect enabled fines to take account of inflation.

### **Reasons for not supporting permanency**

Opposition to the permanency of fiscal fine provisions included comments from legal profession and health/social care respondents that increased use of alternatives to prosecution will negatively affect the ability of the criminal justice system to deliver its public protection function. A health/social care respondent suggested that alternatives to prosecution were being used during the COVID pandemic for offences that could be considered serious. It was also noted that individuals do not have to declare spent alternatives to prosecution in circumstances where they would have to declare a criminal conviction. This was seen as potentially limiting the ability of regulators and other bodies to carry out their public protection function.

### **Other points for consideration**

Respondents also raised a number of considerations for the permanency of fiscal fines, including proposals for how fines should be applied. The most common was a view that provisions must take into account the individual's capacity to pay and any potential impact of financial hardship on their family. This was raised as a concern by several community justice and health/social care respondents, including reference to ongoing cost of living pressures. The criteria and approach to assessing capacity to pay were also highlighted as a key consideration.

Other issues raised by respondents are summarised below.

- Any fiscal fines are proportionate to the severity of the offence.
- Fiscal fines should not be used for those aged under 18.

- An individual respondent suggested that the scale of fiscal fines is too low, noting that a £500 fine may have little impact on an individual with higher income.
- It was proposed that clear guidance will be required to ensure appropriate use of fiscal fines as an alternative to prosecution.

A specific concern was raised around the interaction between use of pre-conviction and diversionary processes and the current disclosure systems. The respondent recommended that provisions should include a requirement for the Procurator to be clear on how use of fiscal fines is disclosed within the terms of the Management of Offenders (2019) and Disclosure Scotland (2020) Act.

## 6. Digital productions

It is proposed that images of physical productions should be admissible in evidence in the same way as if the item itself had been produced in court.

The consultation paper notes that secure storage, tracking and transportation of physical evidence is resource intensive for a number of organisations including Police Scotland, Crown Office and Procurator Fiscal Service and Scottish Courts and Tribunal Service (SCTS). The potential impact on a case if specific pieces of physical evidence cannot be produced in court also means that the police and the Crown may consider it necessary to retain many productions as a safeguard.

It is proposed that use of digital productions will support greater efficiency across the criminal justice system, enable virtual trials, and potentially improve the court experience. The consultation paper notes that the Digital Evidence Sharing Capability (DESC) currently supports secure storage, sharing, accessing and presentation of digital evidence.

### The principal of digital evidence

**Question 5: Do you agree or disagree with the proposal that digital evidence should be used to produce evidence in courts in criminal cases rather than having to produce the original item in court?**

Responses to Question 5 by respondent type are set out in Table 6.

**Table 6**

	Agree	Disagree	Unsure	No view	Total
Organisations:					
Judiciary	3	0	0	0	3
Legal profession representatives	4	0	1	0	5
Police	0	0	1	1	2
Community justice	1	0	0	0	1
Health/social care	0	0	2	0	2
Public body	1	0	1	0	2
Advocacy organisation	1	0	0	0	1
Third sector	1	0	0	0	1
<b>Total organisations</b>	<b>11</b>	<b>0</b>	<b>5</b>	<b>1</b>	<b>17</b>
Individuals	7	0	1	0	8
<b>All respondents</b>	<b>18</b>	<b>0</b>	<b>6</b>	<b>1</b>	<b>25</b>

5 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

The majority of those answering the question (18 of 25) agreed that digital evidence should be used in courts in criminal cases rather than having to produce the original item in court. Six respondents were unsure.

**Please elaborate on your answer, setting out any advantages or disadvantages of the proposal as you see them.**

Sixteen respondents provided further comment at Question 5.

### **Advantages of the proposal**

Consistent with the overall balance of views, the majority of those providing further comment agreed with the proposal.

These respondents cited a range of anticipated advantages associated with use of digital productions, most commonly the potential to deliver efficiencies and reduce pressure on court and justice partner resources. It was noted that DESC enables all parties – police officers, prosecutors, defence agents and the judiciary – to access evidence in an efficient and secure way. Judiciary and community justice respondents referred to positive feedback from pilots of digital productions, including delivery of efficiencies in relation to early disclosure and presentation in court.

It was also suggested that efficiencies and quicker resolution of cases, potentially including fewer trials, could bring significant benefits for victims, witnesses and the accused.

Other specific benefits mentioned in relation to digital productions include reduced resourcing requirements and carbon emissions associated with storage and transport of physical evidence (including reducing the need for long-term storage of physical productions if digital evidence can be treated as “best evidence”), reduced risk of loss or tampering of evidence, and minimising risk to staff from any toxic substances.

A judicial respondent felt that in most cases (particularly in summary) digital evidence should be used in court rather than having to produce the original.

A legal profession respondent commented that the above benefits could help to reduce “churn”<sup>3</sup> in court business and enable trials to run more smoothly. It was also suggested that such positive outcomes have the potential to improve public confidence in the justice system.

### **Points for consideration**

While none of those providing comment at Question 5 objected to proposals for digital evidence to be used in courts in criminal cases, respondents did raise a number of potential issues around how digital productions are used.

These were most commonly linked to a view that there will be circumstances where it will be necessary for physical evidence to be produced in court. Several judiciary and legal profession respondents cited potential situations where the defence

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<sup>3</sup> The respondent’s reference to “churn” may be describing situations where cases do not proceed as planned, with repeated court hearings taking place before moving on to the next stage due to various reasons such as the unavailability of witnesses, the preparedness of the case etc.

and/or witnesses need to physically examine an item. It was also noted that the need for production of an original item may not be apparent to prosecution and/or defence until later in proceedings, for example following full production of the prosecution case or if additional evidence emerges. While acknowledging that such instances are likely to be rare, some respondents perceived the need for provisions to enable the court to require and for the prosecution or defence to request physical productions.

There were calls for clarity around the quality standards that will be in place to ensure that digital productions can be trusted to capture the forensically significant aspects of original items. This included reference to image quality, standards of display to ensure accurate reproduction of evidence, the provenance trail and the producer of digital evidence. A legal profession respondent also raised specific concerns around use of digital productions in the presentation of forensic evidence in court, including the risk of limiting opportunities for the defence to test evidence and potential privacy issues. There were calls for guidance on the digital reproduction of forensic evidence.

Other issues noted by respondents in relation to use of digital productions are summarised below.

- An individual respondent suggested that digital productions may lack the impact of physical evidence, such that provisions should require all parties to agree before digital productions are used.
- It was suggested that modernisation in relation to use of digital productions should also be made available to children's hearings court proceedings, noting that this may require additional legislation or regulatory change.
- Judiciary and advocacy respondents indicated that experience to date has highlighted potential issues around data storage compliance, and suggested that these will need to be resolved.
- A legal profession respondent saw a need for a clear and shared understanding that the object and the image are two different things.

A small number of respondents saw a need for further work to agree a suitable approach and timescale for implementation of proposals. A police respondent suggested that further discussions between Scottish Government and affected agencies could be valuable in agreeing how current operational barriers might be overcome. The resourcing implications were also highlighted, including concern that these are not accounted for in current budgeting. For example it was noted that updates would be required to police, COPFS and partner guidance, operating procedures and IT systems relating to the storage and destruction of productions, and that associated training would be required.

## **Procedural and practical considerations**

The consultation paper highlights a number of procedural and practical considerations around the use of digital productions. For example, it notes that some items will still require to be securely stored for the purpose of examination, even if transportation to court would not be necessary. Prosecutors or defence

agents may still choose to produce physical evidence in court; there is also potential for the defence agent to require an item to be produced in court even if the prosecutor is satisfied with a digital production. It is noted that different approaches to resolving this disagreement would be required for solemn and summary cases due to the different procedures which already apply.

It is also assumed that digital images would be led in evidence in the same way as a physical production, and that images would require supplementary information such as the weight and size of productions. The consultation paper notes that the accuracy and quality of images would be of vital importance, and that there must be assurance of the integrity of the image – for example via the DESC audit function.

**Question 6: Do you agree or disagree with the proposal that where an image is produced that it can be treated as if it was the item itself that was being produced?**

Responses to Question 6 by respondent type are set out in Table 7.

**Table 7**

	Agree	Disagree	Unsure	No view	Total
Organisations:					
Judiciary	3	0	0	0	3
Legal profession representatives	3	0	2	0	5
Police	0	1	0	1	2
Community justice	1	0	0	0	1
Health/social care	0	0	2	0	2
Public body	1	0	1	0	2
Advocacy organisation	1	0	0	0	1
Third sector	1	0	0	0	1
<b>Total organisations</b>	<b>10</b>	<b>1</b>	<b>5</b>	<b>1</b>	<b>17</b>
Individuals	6	2	0	0	8
<b>All respondents</b>	<b>16</b>	<b>3</b>	<b>5</b>	<b>1</b>	<b>25</b>

5 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

The majority of those answering the question (16 of 25) agreed that, where an image is produced, it can be treated as if it was the item itself that was being produced. Three respondents – a police respondent and two individuals – disagreed with the proposal and five were unsure.

**Please elaborate on your answer, setting out any advantages or disadvantages of the proposal as you see them.**

Fourteen respondents provided further comment at Question 6.

### **Advantages of the proposal**

Most of those providing further comment agreed with the proposal, reflecting the overall balance of views.

Some of these respondents commented on the principle of treating an image as if the item itself is being produced, including a view that this is necessary for the use of digital productions to achieve the anticipated benefits. For example, a legal profession respondent noted that if the image is not treated as the item, then subsequent production of the physical item may result in adjournments and delays.

Those commenting in support of the proposal also noted potential practical advantages. A legal profession respondent identified potential to reduce the cost and resource implications around storage and transport of physical evidence. There was also specific reference to potential for an image to be used as “best evidence”, noting that this would enable some productions to be returned to owners sooner.

Other discussion of practical considerations included a judiciary respondent noting the importance of DESC provisions to preserve original digital files to assure the integrity of digital productions. Several individual respondents also noted the need to ensure that images include and/or are accompanied by the information needed for proper interpretation – for example to confirm accurate representation of scale and context.

### **Disadvantages of the proposal**

Comments from some of those who disagreed with the proposal suggested that physical productions are usually more suitable than digital productions for criminal cases. They highlighted concerns around how the integrity and accuracy of images could be assured. Some individual respondents referred to the impact of perspective, lighting and other factors on how objects may be presented in an image. It was also suggested that jury members’ wider view of the trustworthiness of images may have been diminished by the recent rise in AI with the ability to produce realistic images, and that provisions to ensure the integrity of images as outlined in the consultation document may be too technical to be properly understood by juries.

### **Other points for consideration**

Several judiciary and legal profession respondents, including some of those who agreed with proposals, highlighted the importance of ensuring that the defence still has a reasonable opportunity to examine physical evidence, and where necessary require physical production in court. This included a legal profession respondent expressing reservations around an image being treated as best evidence in all cases, and noting that some items may have certain physical characteristics which are less well represented in an image. It was also suggested that a requirement to inspect physical evidence, such as by an expert witness, can only become apparent in the course of court proceedings, and that the retention of physical evidence will be required to respond to these circumstances.

A police respondent wished to see further discussions between Scottish Government, criminal justice partners and representatives of affected stakeholders to consider what the proposal might mean and how it should be implemented from



a practical standpoint. It was also suggested that the proposal should be applied to children’s hearing court proceedings.

**Question 7: Do you agree or disagree that the current procedural framework as outlined in chapter 5 would allow the defence to seek for the physical production to be brought to court if its absence would prejudice a fair trial?**

Responses to Question 7 by respondent type are set out in Table 8.

**Table 8**

	Agree	Disagree	Unsure	No view	Total
Organisations:					
Judiciary	3	0	0	0	3
Legal profession representatives	2	0	2	1	5
Police	1	0	0	1	2
Community justice	1	0	0	0	1
Health/social care	0	0	2	0	2
Public body	0	0	2	0	2
Advocacy organisation	0	0	1	0	1
Third sector	1	0	0	0	1
Total organisations	8	0	7	2	17
Individuals	5	2	1	0	8
<b>All respondents</b>	<b>13</b>	<b>2</b>	<b>8</b>	<b>2</b>	<b>25</b>

5 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

Around half of those answering the question (13 of 25) agreed that the current procedural framework would allow the defence to seek for the physical production to be brought to court if its absence would prejudice a fair trial. Two individual respondents disagreed with the proposal, and eight respondents were unsure.

**Please elaborate on your answer, setting out any advantages or disadvantages of the proposal as you see them.**

Eleven respondents provided further comment at Question 7. These were primarily focused on considerations around how the proposed approach would operate in practice.

As noted at Questions 5 and 6, several respondents wished to ensure that the approach to digital productions retained opportunity for prosecution and defence to inspect physical evidence, and to require physical production in court where this was seen as necessary. This was seen by a judiciary respondent as an essential safeguard to ensure use of digital productions does not prejudice a fair trial.

Comments from judiciary, legal profession and police respondents saw a need for judicial oversight to determine whether the absence of the original evidence could prejudice a trial. It was suggested that these issues should be raised at an early stage to ensure they can be judicially determined. This was seen as important in protecting the interests of justice and to ensure this provision is only used where necessary.

Also in relation to how requests should be determined, a legal profession respondent suggested that a defence request should be allowed unless it is considered unjustified. A community justice respondent suggested that physical production should be assumed where there is disagreement between prosecution and defence around a specific item.

Respondents also noted the differing procedures in solemn and summary cases for the defence to identify objects they wish to be produced in court.

In relation to solemn cases, a judiciary respondent suggested that it would not be appropriate for the defence to raise issues around physical production as a preliminary plea, but that this could be raised as a general issue under sections 72 or 79 of the Criminal Procedure (Scotland) Act 1995 - for example on basis of an objection to evidence. It was proposed that sections 72 and 79 could be amended to make digital/physical production an additional preliminary issue.

In relation to summary cases, concern was expressed around how the issue can be dealt with prior to trial, as the defence would not be made aware in advance of the productions that the prosecution expects to use. It was suggested that there may be a need to ensure the defence is informed of productions early in proceedings and/or allow the defence to object during the trial, and thus potentially pause the trial until a physical production can be made. A legal profession respondent suggested the use of Statement Of Uncontroversial Evidence (SOUE) procedures by the prosecution to allow the defence to consider the digital images to be used, and to raise any challenge in summary cases.

A legal profession respondent noted potential for the defence to require attendance of the accused to physically examine an item, in order to identify where physical production may be required. There was concern that requiring transportation of the accused from custody to examine items may not be feasible given existing pressures on custody services.

## 7. Modernisation of the law on copy documents

It is proposed that legislation relating to the use of copy documents in criminal cases should be updated to maximise use of existing and potential future digital technologies, and to give courts more discretion in relation to proof of copy physical documents.

Currently, the law and court rules allow authenticated copy documents to be admitted in evidence through use of physical signed certificates. The consultation paper refers to the range of Court Rules that currently govern how copy documents should be authenticated, and by whom. It notes that these rules must accommodate the wide definition of 'document' (which can include media or devices on which sound or other data are recorded) and allow for necessary editing or redacting of copy documents through recertification.

The development of Digital Evidence Sharing Capability (DESC) has significantly changed the way in which digital evidence can be stored, edited, transmitted, and presented in court. DESC is currently being piloted to allow the collection of digital material from mobile devices; it is also anticipated that DESC will be used to collect footage once Body Worn Video is rolled out by Police Scotland. DESC incorporates multiple authentication and auditing measures to ensure the accuracy and integrity of digital documents, including where documents must be edited or redacted. As such, it is considered that separate certification should not be required for authentication.

### Authentication of digital copy documents

**Question 8: It is proposed that the transfer of digital files to any reliable digital evidence system such as DESC (which has a robust audit system) should remove the requirement of certification as outlined in the scheme under the 1995 Act. Which of the following best describes your view on this proposal?**

Responses to Question 8 by respondent type are set out in Table 9.

**Table 9**

	Agree	Disagree	Unsure	No view	Total
Organisations:					
Judiciary	3	0	0	0	3
Legal profession representatives	2	0	1	2	5
Police	1	0	0	1	2
Community justice	1	0	0	0	1
Health/social care	0	0	1	1	2
Public body	0	0	1	1	2
Advocacy organisation	0	0	0	1	1
Third sector	1	0	0	0	1
Total organisations	8	0	3	6	17
Individuals	6	1	1	0	8
<b>All respondents</b>	<b>14</b>	<b>1</b>	<b>4</b>	<b>6</b>	<b>25</b>

5 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

More than half of those answering the question (14 of 25) agreed that the transfer of digital files to any reliable digital evidence system should remove the requirement of certification. One individual respondent disagreed with the proposal, and four respondents were unsure.

**If you have any comments on this proposal, please write them below.**

Ten respondents provided further comment at Question 8. This included a number of shorter responses that repeated points noted earlier in relation to digital productions.

### **Reasons for supporting the proposal**

Some of those providing comment noted that the proposal to remove the requirement of certification for files transferred to a robust digital evidence system could deliver significant efficiencies in the management of evidence. This included specific reference to potential reduction in the resources required to certify digital evidence. A legal profession respondent also suggested that a digital evidence system with a robust audit system is more secure and reliable than the scheme operating under the 1995 Act.

### **Points for consideration**

Some respondents raised concerns around whether it is possible to agree the provenance of evidence in digital files transferred to DESC on the basis of information retained in the DESC audit system. Other respondents repeated concerns noted earlier in relation to digital productions around the potential for AI to manipulate data and images, and the negative impact that this capability has had on confidence in the integrity of digital images. It was suggested that retaining use

of certification could help to prevent any challenge to the authenticity of digital productions.

Specific issues raised around assuring the provenance and integrity of digital files included current provisions for certification which require data such as locus, the person responsible for evidence, and details of the information captured. While it was acknowledged that the DESC audit system guards against any suggestion that a file has been tampered with or altered after being transferred to DESC, there was concern that this does not capture the information required to identify the provenance of the evidence and assure that files have not been altered prior to transfer to DESC.

An individual respondent suggested that an independent review of DESC is required to validate the system. A police respondent also proposed that further discussion is required between Scottish Government and criminal justice partners to “road test” proposals and consider whether existing systems could be modified to replace the current authentication scheme.

**Question 9: It is proposed that any type of document uploaded to DESC should be accepted as a true copy without the need for separate certification. Which of the following best describes your view on this proposal?**

Responses to Question 9 by respondent type are set out in Table 10.

**Table 10**

	Agree	Disagree	Unsure	No view	Total
Organisations:					
Judiciary	3	0	0	0	3
Legal profession representatives	2	1	1	1	5
Police	0	1	0	1	2
Community justice	1	0	0	0	1
Health/social care	0	0	1	1	2
Public body	0	0	1	1	2
Advocacy organisation	0	0	0	1	1
Third sector	0	0	0	0	0
<b>Total organisations</b>	<b>6</b>	<b>2</b>	<b>3</b>	<b>5</b>	<b>16</b>
Individuals	6	1	1	0	8
<b>All respondents</b>	<b>12</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>24</b>

6 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

Half of those answering the question (12 of 24) agreed that any type of document uploaded to DESC should be accepted as a true copy without the need for separate certification. Three respondents – a legal profession, police and individual respondent - disagreed with the proposal, and four respondents were unsure.

**If you have any comments on this proposal, please write them below.**

Nine respondents provided further comment at Question 9. A number of these respondents provided relatively brief comments reiterating points noted earlier at Question 8.

### **Reasons for supporting the proposal**

Those expressing support for the proposal noted that their view was based on having confidence in the robustness of the DESC system, and its capacity to ensure the integrity of digital evidence. However, some of those expressing support also noted that this was contingent on there being sufficient provision for physical productions to be made where necessary. This included reference to comments noted earlier at Questions 6 and 7 in relation to items where physical production may be required. A legal profession respondent also suggested that the original item or document is likely to be required in certain types of case, such as fraud.

### **Points for consideration**

Other respondents raised potential issues for proposals. Legal profession and police respondents noted challenges around agreeing whether a digital document is a true copy of the source, and in particular how to determine whether there has been any manipulation before a file was transferred to DESC. Respondents also repeated concerns noted at Question 8 around limitations in the metadata collected by DESC to authenticate the provenance of documents. The need to ensure that parties have the opportunity to question the status of documents uploaded to DESC was highlighted, with reference to comments at Question 7. An individual respondent referenced the potential negative impact of the rise of AI on confidence in the integrity of digital images.

A legal profession respondent suggested that further discussion with experts in digital imaging and cybercrime could help to refine the approach to assuring the accuracy and integrity of digital documents.

### **Resolving issues in the admissibility of DESC copy documents**

**Question 10: It is proposed that any issue in relation to the admissibility of the copy held in DESC could be raised through the pre-trial hearing system already in place. Which of the following best describes your view on this proposal?**

Responses to Question 10 by respondent type are set out in Table 11.

**Table 11**

	Agree	Disagree	Unsure	No view	Total
Organisations:					
Judiciary	3	0	0	0	3
Legal profession representatives	2	0	2	1	5
Police	1	0	0	1	2
Community justice	1	0	0	0	1
Health/social care	0	0	1	1	2
Public body	0	0	1	1	2
Advocacy organisation	0	0	0	1	1
Third sector	1	0	0	0	1
Total organisations	8	0	4	5	17
Individuals	7	1	0	0	8
<b>All respondents</b>	<b>15</b>	<b>1</b>	<b>4</b>	<b>5</b>	<b>25</b>

5 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

The majority of those answering the question (15 of 25) agreed that any issue relating to the admissibility of the copy held in DESC could be raised through the existing pre-trial hearing system. One individual disagreed with the proposal, and four respondents were unsure.

**If you have any comments on this proposal, please write them below.**

Seven respondents provided further comment at Question 10.

### **Reasons for supporting the proposal**

Several judiciary and legal profession respondents expressed general support for issues around admissibility being raised through the existing pre-trial hearing process. The ongoing pilot of a summary case management model was referenced; it was noted that under this model any issues around admissibility would be dealt with at a case management hearing, as opposed to the current model of issues being dealt with at the intermediate diet.

### **Points for consideration**

Other respondents raised potential issues relating to the nature of disputes around admissibility, and how these should be managed.

An advocacy respondent noted that an issue or defect in certification of evidence may only become clear after a procedural hearing, before or during the trial, potentially requiring the trial to be halted while the matter is resolved. Concern was expressed that resolution of such issues can involve significant time (e.g. if the document is to be re-certified) or for the copy document to be excluded from evidence (e.g. if the original is not available), with the risk that the issue can result in the failure of a case. It was suggested that the court should be given more

discretion to allow a copy document to be admitted even where there is a defect in certification, if the court is satisfied that it is a true copy. Views on this issue are discussed further at Question 11.

A legal profession respondent noted that documents certified as a true copy under existing rules are rarely challenged, and that any concerns around admissibility are more likely to be related to the provenance of the original document. For example, it was suggested that a challenge is more likely to focus on what may have happened to a document before it was seized as evidence.

A legal profession respondent suggested that resolving issues around the admissibility of DESC copies could be an additional burden on defence firms, and wished to ensure that this additional resourcing requirement should be met fully by legal aid.

## Discretion for courts in proof of copy documents

**Question 11: It is proposed that the court therefore be given a discretion to allow a document to be led in evidence if satisfied it is a copy document despite any defect in certification. Which of the following best describes your view on this proposal?**

Responses to Question 11 by respondent type are set out in Table 12.

**Table 12**

	Agree	Disagree	Unsure	No view	Total
Organisations:					
Judiciary	3	0	0	0	3
Legal profession representatives	2	0	2	1	5
Police	1	0	0	1	2
Community justice	1	0	0	0	1
Health/social care	0	0	1	1	2
Public body	0	0	1	1	2
Advocacy organisation	0	0	1	0	1
Third sector	1	0	0	0	1
<b>Total organisations</b>	<b>8</b>	<b>0</b>	<b>5</b>	<b>4</b>	<b>17</b>
Individuals	6	1	1	0	8
<b>All respondents</b>	<b>14</b>	<b>1</b>	<b>6</b>	<b>4</b>	<b>25</b>

5 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

More than half of those answering the question (14 of 25) agreed that the court should be given discretion to allow a document to be led in evidence if satisfied that it is a copy document despite any defect in certification. One individual disagreed with the proposal, and six respondents were unsure.



**If you have any comments on this proposal, please write them below.**

Nine respondents provided further comment at Question 11.

Some expressed general support for the court having discretion to allow a document as a true copy despite any defect in certification. Respondents noted that any dispute around admissibility would be resolved by a judicial determination, and expressed confidence that this would ensure copy documents are not allowed into evidence inappropriately. An advocacy respondent supported proposals in the context of minimising the risk of trials being halted or cases failing as a result of dispute over copy documents.

Some of those providing comment suggested that the specific formulation of the power, and how it will be used by the court, will be important. There was interest from stakeholders in commenting on the draft text. Clarity was also sought specifically around the basis on which a court would be able to determine that it is satisfied with the authenticity of the document, including a view that there should be a compelling reason to accept a copy document where there is a defect in certification. Respondents also wished to see further detail on the practicalities of when a determination would be made during proceedings.

**Question 12: It is proposed that the court should be able to hear evidence from witnesses, to allow it to be satisfied that the document can be deemed a true copy and treated for evidential purposes as if it were the document or material part of the document. Which of the following describes your view on this proposal?**

Responses to Question 12 by respondent type are set out in Table 13.

**Table 13**

	Agree	Disagree	Unsure	No view	Total
Organisations:					
Judiciary	3	0	0	0	3
Legal profession representatives	3	0	1	1	5
Police	1	0	0	1	2
Community justice	1	0	0	0	1
Health/social care	0	0	1	1	2
Public body	1	0	1	0	2
Advocacy organisation	1	0	0	0	1
Third sector	1	0	0	0	1
<b>Total organisations</b>	<b>11</b>	<b>0</b>	<b>3</b>	<b>3</b>	<b>17</b>
Individuals	7	0	1	0	8
<b>All respondents</b>	<b>18</b>	<b>0</b>	<b>4</b>	<b>3</b>	<b>25</b>

5 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

The majority of those answering the question (18 of 25) agreed that the court should be able to hear evidence to allow it to be satisfied that the document can be deemed a true copy and treated as if it were the document or material part of the document. Four respondents were unsure.

**If you have any comments on this proposal, please write them below.**

Six respondents provided further comment at Question 12.

This included judiciary and legal profession respondents who agreed that oral evidence is an acceptable basis for the court to be satisfied that a document can be treated as a true copy, in the absence of certification. This appeared to reflect a view that the court is capable of making such a determination on the basis of the available evidence.

In terms of how the provision should be implemented, a legal profession respondent noted that existing legislation allows a witness already listed on an indictment to be called to speak to a document being a true copy. It was proposed that legislation should be amended to allow a witness not listed to be called for these purposes.

An advocacy respondent also suggested that the court should be allowed to take account of the risk that being called to provide such evidence would not cause further trauma to the witness. This included reference to potential for the court to make adjustments to better suit the witness' needs.

A judiciary respondent suggested that the court should continue to encourage matters to be resolved by way of joint minute between the prosecution and defence.

## 8. Further Views

The final part of the main body of the consultation paper notes that the overall aim of proposals set out in the consultation is to modernise justice processes by enabling greater use of digital technologies. Views are sought on whether further legislative changes are required to modernise justice processes, and to support the future resilience, effectiveness and efficiency of the criminal justice sector.

**Question 13: Out with the proposals outlined in chapters 1-6, do you think any further legislative changes are needed to support the modernisation of criminal justice procedures through greater use of digital processes in order to achieve our ambitions of an efficient and resilient criminal justice system?**

Responses to Question 13 by respondent type are set out in Table 14.

**Table 14**

	Yes	No	Don't know	Total
Organisations:				
Judiciary	1	1	0	2
Legal profession representatives	1	3	1	5
Police	1	1	0	2
Community justice	0	1	0	1
Health/social care	0	0	2	2
Public body	0	0	2	2
Advocacy organisation	1	0	0	1
Third sector	1	0	0	1
<b>Total organisations</b>	<b>5</b>	<b>6</b>	<b>5</b>	<b>16</b>
Individuals	3	0	5	8
<b>All respondents</b>	<b>8</b>	<b>6</b>	<b>10</b>	<b>24</b>

6 of the 30 consultation respondents did not answer this question and are not included in the results presented above.

Around a third of those answering the question (8 of 24) felt that further legislative changes are needed to support the modernisation of criminal justice procedures through greater use of digital processes. Six respondents disagreed and 10 were unsure.

**If you answered yes, please provide details of what those legislative changes might be.**

Twelve respondents provided further comment at Question 13.

Respondents suggested a number of further legislative changes, primarily around conduct of court business by electronic means and digital productions, but also proposed other changes to regulation and practice. These are summarised below.

In relation to conduct by electronic means, the following suggestions were made.

- Remove the current requirement to have warrants “backed” as set out in the Summary Jurisdiction (Process) Act 1981, such that an electronic warrant issued by a recognised magistrate or clerk of court in England, Wales, the Channel Islands or the Isle of Man will be accepted in Scotland.
- Consider use of website forms for general court documents to reduce the risk of human error, and achieve time and resource savings.
- Retain use of hard copies for service of formal documents such as complaints, indictments etc. or in relation to court appearances.
- Allow SCTS to print a hard copy from documents received electronically and for it to be treated as an original document.

In relation to digital productions, it was proposed that the current authentication scheme and associated court rules are updated to take account of expected use of body worn cameras to produce evidence in criminal cases. Specific reference was made to sections 279 and 283 of the Criminal Procedure (Scotland) Act 1995.

Respondents also made the following suggestions.

- An advocacy respondent referred to what was seen as an “implementation gap” between current legislation, and the provisions taken forward and implemented in practice. This was described as a significant barrier to modernisation of criminal justice processes. It was also suggested that ensuring current legislation is fully implemented would enable a better understanding of any further legislative changes that may be required.
- Explore options around virtual court visits to help children and young people become familiar with the court room and processes.
- Use ongoing monitoring to ensure that justice processes are equally accessible to all parties, including the digitally excluded.
- Reinforce provisions to ensure data protection is not compromised by greater use of digital technologies.

## 9. Impact Assessments

The consultation paper invited views on the potential impacts of consultation proposals, to inform ongoing impact assessments. Overall, 17 respondents provided comment regarding one or more of the areas identified in the consultation document, with some of these comments being relatively brief.

This included a police respondent making the general point that effective monitoring will be required to ensure that any emerging issues affecting access to justice as a result of proposals can be understood and addressed. Comments in relation to each of the specific areas noted in the consultation document are summarised below.

### Human rights

Eleven respondents commented on the potential impacts of consultation proposals on human rights. These comments included reference to the potential positive impact of proposals for human rights (for example by making justice processes more efficient and accessible) as well as potential adverse impact on human rights.

A legal profession respondent referred specifically to potential impacts associated with use of virtual attendance and digital productions on articles 6 (right to a fair trial) and 8 (right to respect for private and family life, home and correspondence) of the ECHR. In relation to Article 6, concerns regarding virtual attendance focused on the conditions in which individuals present evidence remotely and how to ensure they are not subject to undue influence, and guaranteeing that accused persons have confidential communication with their defence solicitor. There was also concern that proposed use of digital productions could have an impact on the right to present physical evidence in cases where it is appropriate. In relation to Article 8, it was suggested that proposals on the use of digital evidence could have implications for the right to privacy.

Concerns were also raised around the potential for proposals to specifically affect individuals with protected characteristics or other needs. This included reference to vulnerable people such as those with addiction, mental health, neurodiversity and special needs, and those with visual impairment. Some community justice and health/social care respondents suggested that proposals could affect individuals' ability to fully understand and participate in proceedings, and that use of digital communication can be a barrier to identifying individuals where this is a risk. A third sector respondent saw a need for enhanced support to ensure that vulnerable people are not adversely affected by the proposals.

Digital exclusion was also identified as a potential issue in terms of the potential impact of proposals on equality of access to justice and rights to freedom of expression. Respondents suggested that proposals could particularly affect those without access to the equipment, connectivity, skills and/or confidence necessary to make effective use of digital technologies. This included specific concern that proposals could lead to a "digital by default" approach which disadvantages the digital excluded unless enhanced support is made available. A third sector respondent identified specific groups as being more likely to face digital exclusion

including rural and island communities, those affected by financial insecurity and/or in areas of high socio-economic deprivation, those with disability or health needs, and those facing language or literacy barriers. It was also noted that prisoners, including those on pre-trial and pre-sentencing remand, also lack access to digital technologies.

### **Equalities and protected characteristics**

Eleven respondents commented on the potential impacts of consultation proposals on equalities and the protected characteristics.

Some legal profession and third sector respondents suggested that wider use of digital technologies is likely to support rather than hinder access to justice for those with protected characteristics. For example, virtual attendance was seen as making court more accessible for people with physical disabilities.

Reference to potential negative impacts included concerns noted previously in relation to human rights around adverse impacts on specific groups. It was suggested that proposals could limit access for vulnerable people who may struggle to meaningfully engage with and understand justice processes via digital means, and could make it more difficult for defence agents and others to support clients through these processes. This included reference to some specific protected characteristics such as people with disabilities or visual impairment, and other needs such as those with addiction or mental health needs, or neurodivergence. It was also noted that “offenders” as a group are often stigmatised.

The potential for proposals to limit access for those affected by digital exclusion was also a concern, including for some public bodies. People without access to the equipment, connectivity and skills required to make effective use of digital platforms were seen as being potentially disadvantaged by proposals, for example compared with professional prosecutors likely to have better access to and understanding of technology. There was reference to digital exclusion being a more significant issue for specific groups such as children and families, and children in care.

Reflecting the concerns noted above, it was suggested that care is required to ensure that the focus on maximising use of technology does not prevent access to other processes and procedures that are more appropriate for certain groups.

A public body respondent noted that the Scottish Government should ensure that there are no gaps in the evidence base for the equality impact assessment (EQIA) of proposals, and suggested that further consultation with protected characteristic groups may be necessary. It was also noted that SCTS is required to carry out an EQIA in the development of any strategies or policies related to implementation of proposals.

## **Children and young people**

Eight respondents commented on the potential impact of consultation proposals on children and young people as set out in the UN Convention on the Rights of the Child (UNCRC).

These comments focused on areas where proposals were seen as having potential to negatively impact children and young people. For example, it was suggested that proposals in relation to fiscal fines could disproportionately affect children and younger people given they typically have limited or no income. A legal profession respondent proposed that additional sentencing guidelines would be helpful in mitigating this impact.

Points noted earlier in relation to human rights and equalities around varying capacity to use digital platforms were also highlighted specifically in relation to children. While it was noted that use of digital technologies could be suitable for some children, several community justice and health/social care respondents expressed concern that others may have difficulty engaging meaningfully with justice processes in this way. Wider policies intended to improve outcomes and wellbeing for children and young people were highlighted as relevant here.

Scotland's Bairns Hoose Standards, based on the Barnahus model underpinned by the UNCRC, were highlighted as relevant to the potential impact of proposals on children and young people. It was suggested that the Standards should be a reference point for work around implementation of proposals for virtual attendance. For example, Article 12 of UNCRC (the right for children to be listened to and taken seriously) was cited in suggestions that children's views should be brought into decisions about virtual or physical attendance at court. There was also reference to Article 13 giving children the right to receive information, and concern that directions given by court should be child friendly and accompanied by appropriate relationship-based and trauma-informed support.

It was noted that children who offend are more likely to be dealt with by the children's hearing system, and wished to ensure that this system can also benefit from proposals intended to improve experience of justice processes.

## **Socio-economic equality**

Twelve respondents commented on the potential impacts of consultation proposals on socio-economic equality and the Fairer Scotland Duty.

These comments primarily focused on proposals relating to fiscal fines and use of digital technologies. The ability to pay fiscal fines was identified as a key issue for socio-economic equality, with proposals seen as having potential to disproportionately affect those with lower incomes and/or in socio-economically deprived areas. This included concern around the potential financial impact on the individuals' family. It was suggested that imposition of fines must not result in households falling below a liveable income, and sentencing guidelines were seen as having a role in mitigating any negative impact.

Digital exclusion was also seen as an important factor for the impact of proposals on socio-economic equality. Respondents noted that those affected by socio-economic inequality, including in areas of deprivation, are more likely to lack access to the equipment, connectivity and skills/education necessary to properly engage with digital platforms. It was suggested that proposals could therefore limit access to justice for those experiencing socio-economic inequality.

### **Island communities**

Eleven respondents commented on the potential impacts of consultation proposals on communities on the Scottish islands.

This included reference to virtual attendance proposals as having potential to improve the accessibility of court for island communities. This was identified as a particular issue for communities where no court is available locally, and where travel to and from the mainland can be costly and unreliable. It was also noted that justice social work teams are typically smaller on Scotland's islands, and that these teams could benefit from greater use of digital technologies and remote communication.

Discussion of potential negative impacts included concern that proposals could contribute to the closure of sheriff courts for island communities. More widely, it was suggested that any centralising of justice could disproportionately affect island communities and their access to local justice. There was also concern that local justice is particularly important for islands given the distinctive character of island communities. Concerns noted earlier in relation to digital exclusion were repeated, with respondents noting that many island communities have more limited access to reliable digital connectivity than other parts of Scotland.

### **Data protection and privacy**

Seven respondents commented on the potential impacts of consultation proposals on data protection and privacy.

These respondents cited several areas where proposals could have a negative impact on data protection and privacy. Use of digital technologies and production of digital evidence were identified as having potential for a significant negative impact, including concerns about the risk of data protection breaches, particularly where technical capacity and knowledge varies across justice partners. Specific issues were also raised around assuring the right to privacy for witnesses and victims, and the need for suitable protocols to ensure that handling of data collected in the production of digital evidence complies with data protection legislation. There was specific reference to the need to ensure secure storage and transmission of data, that data is only used for necessary purposes, and that files are deleted appropriately after use.



## **Businesses and the third sector**

Five respondents commented on the potential impacts of consultation proposals on businesses and the third sector.

Reference to potential positive impacts included a suggestion that proposals may benefit the prosecution of financial crime, for example through efficiencies resulting from conduct of business by electronic means and digital productions. It was also suggested that greater use of digital technologies could enable third sector community organisations to better support individuals to engage with justice processes.

Concerns raised by respondents included the potential for any closure of court buildings to have an adverse impact on businesses in the local area. It was also noted that proposals could result in additional financial burden for organisations required to upgrade digital technologies and security systems. This was seen as a particular challenge for third sector organisations.

## **Environment**

Seven respondents commented on the potential impacts of consultation proposals on the environment.

These respondents identified positive impacts associated with greater use of digital technologies. In particular, some judiciary, community justice and health/social care respondents noted that proposals for virtual attendance and use of digital productions are likely to reduce environmental impacts associated with travel to and from court due to reduced transport of evidence and people.

# Annex 1: Organisations responding to the consultation

## **Judiciary**

Senators of the College of Justice  
Sheriffs Principal  
The Sheriffs and Summary Sheriffs Association

## **Legal profession representatives**

Faculty of Advocates  
Law Society of Scotland  
Scottish Courts & Tribunals Service  
Society of Solicitor Advocates  
The Scottish Law Agents' Society

## **Police**

British Transport Police  
Police Service of Scotland

## **Community justice**

Community Justice Ayrshire Partnership  
Community Justice Scotland

## **Health and social care**

Aberdeen City Health & Social Care Partnership  
Social Work Scotland  
The Scottish Social Services Council

## **Public body**

Equality and Human Rights Commission  
Scottish Children's Reporter Administration (SCRA)  
West Lothian Council

## **Advocacy organisations**

Children 1st  
Victim Support Scotland

## **Third sector organisations**

Braveheart Industries  
Citizen Advice Scotland

## Annex 2: Questions from the consultation

1. It is proposed that the provisions for Chapter 1 (conduct of business by electronic means in criminal cases : documents) will be made permanent. Which of the following best describes your view?
2. It is proposed that the provisions for Chapter 2 (virtual attendance - criminal courts) will be made permanent. Which of the following best describes your view?
3. It is proposed that the provisions for Chapter 3 (national jurisdiction for callings from custody etc.) will be made permanent. Which of the following best describes your view?
4. It is proposed that the provisions for Chapter 4 (fiscal fines) will be made permanent. Which of the following best describes your view?
5. Do you agree or disagree with the proposal that digital evidence should be used to produce evidence in courts in criminal cases rather than having to produce the original item in court?
6. Do you agree or disagree with the proposal that where an image is produced that it can be treated as if it was the item itself that was being produced?
7. Do you agree or disagree that the current procedural framework, as outlined in chapter 5, would allow the defence to seek for the physical production to be brought to court if its absence would prejudice a fair trial?
8. It is proposed that the transfer of digital files to any reliable digital evidence system such as DESC (which has a robust audit system) should remove the requirement of certification as outlined in the scheme under the 1995 Act. Which of the following best describes your view on this proposal?
9. It is proposed that any type of document uploaded to DESC should be accepted as a true copy without the need for separate certification. Which of the following best describes your view on this proposal?
10. It is proposed that any issue in relation to the admissibility of the copy held in DESC could be raised through the pre-trial hearing system already in place. Which of the following best describes your view on this proposal?
11. It is proposed that the court is given a discretion to allow a document to be led in evidence if satisfied it is a copy document despite any defect in certification. Which of the following best describes your view on this proposal?
12. It is proposed that the court should be able to hear evidence from witnesses, to allow it to be satisfied that the document can be deemed a true copy and treated for evidential purposes as if it were the document or material part of the document. Which of the following describes your view on this proposal?
13. Out with the proposals outlined in chapters 1-6, do you think any further legislative changes are needed to support the modernisation of criminal justice procedures through greater use of digital processes in order to achieve our ambitions of an efficient and resilient criminal justice system?

# **Annex 3: Views on Chapter 2 provisions from lived experience group**

## **Rationale**

The proposal in Chapter 2 relates to making permanent provisions allowing people to attend a criminal court by electronic means (for example, by live video link). Justice agencies and victim support organisations have expressed strong support for maintaining these provisions. When consulted on extending this current temporary measure for a further year, victim support organisations highlighted that attending court physically can be traumatising for people affected by crime - particularly if they face the prospect of meeting the person who has caused them harm, or that person's family or supporters – and suggested that returning to more limited scope for virtual attendance by victims and witnesses would be regressive.

Although our consultation was shared with a wide group of stakeholders including advocacy groups we were keen to gather views directly from victims themselves.

## **Methodology**

The questions were shared as Microsoft Form with the victims through Victim Support Scotland who distributed the link on our behalf. We had no direct engagement with the respondents themselves. For data privacy reasons, the distribution list was not shared with us and we are unable to comment on the size and makeup of the sample size which is a limitation of this survey

## **Questions**

1. Name (optional)
2. Email address (optional)
3. What is your view on these changes?
4. If you have any comments on the proposal for permanency of this provision, please provide them below.
5. What should the court think about when deciding if people can attend court electronically?



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Any enquiries regarding this publication should be sent to us at

The Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

ISBN: 978-1-83601-202-3 (web only)

Published by The Scottish Government, July 2024

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS1450378 (07/24)

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