

Proposed extension of the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No.2) Act 2020

Statement of Reasons

SG/2022/19

February 2022



Scottish Government
Riaghaltas na h-Alba
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Statement of Reasons

1. Introduction

- 1.1 The Scottish Government is committed to putting, and keeping, in place all necessary measures to continue to address the on-going Covid pandemic.
- 1.2 The Coronavirus (Scotland) Act 2020¹ (“the First Scottish Act”) and the Coronavirus (Scotland) (No.2) Act 2020² (“the Second Scottish Act”) (together – “the Acts”) introduced measures deemed to be essential at the outset of the Covid pandemic in Scotland in 2020. The Acts are required to respond to the set of specific circumstances resulting from the pandemic and are therefore time limited. Part 1 of each of the Acts are due to expire at the end of 31 March 2022.
- 1.3 In addition to being time limited, the Scottish Government has also made clear it will retain and use the provisions in the Acts only for as long as they are necessary. As a result, where it has been possible to do so, provisions in the Acts have been suspended or expired when they have either fulfilled their purpose or the Scottish Government has listened to compelling views supporting change³.
- 1.4 This Statement of Reasons sets out why the Scottish Government believes it is necessary and appropriate to extend Part 1 of each of the Acts beyond the end of 31 March to the end of 30 September 2022. While details on specific measures are contained in [section 6](#), a summary of all the Scottish Government’s recommendations is set out in [section 7](#).

2. Background to proposal

- 2.1 The First Scottish Act came into force on 7 April 2020 (except for one provision) and the Second Scottish Act came into force on 27 May 2020. The Acts have provided powers and measures which have helped to protect the public, maintain essential public services and support the economy in the face of the unprecedented and ongoing public health and economic challenges created by the pandemic. This included protections for individuals in areas such as housing, measures to support the ongoing operation of the justice system, and support for public bodies in their response to Covid such as adjustments to deadlines for reports.
- 2.2 As set out under section 12 of the First Scottish Act, and section 9 of the Second Scottish Act, Part 1 of each of the Acts were due to expire on 30 September 2020, with the potential to be extended for two further periods of six

¹ [Coronavirus \(Scotland\) Act 2020](#)

² [Coronavirus \(Scotland\) \(No.2\) Act 2020](#)

³ [Coronavirus Acts: eleventh report to Scottish Parliament \(February 2022\) - gov.scot \(www.gov.scot\)](#)

months to 30 September 2021, subject to the approval of the Scottish Parliament. On 29 September 2020 and 30 March 2021, regulations came into force extending the expiry date of Part 1 of each of the Acts to 31 March 2021 and 30 September 2021 respectively⁴. As highlighted above, provisions in the Acts have been suspended or expired where they were no longer necessary or appropriate.

- 2.3 The Coronavirus (Extension and Expiry) (Scotland) Act 2021⁵ (“the Extension and Expiry Act”) amended the Acts to extend Part 1 of each Act until the end of 31 March 2022, with the potential for further extension by secondary legislation to the end of 30 September 2022, subject to the approval of the Scottish Parliament. In addition to extending provisions, the Extension and Expiry Act also expired certain provisions within the Acts which were no longer necessary or appropriate.
- 2.4 The Extension and Expiry Act contained no provision to extend the Acts beyond the end of 30 September 2022.
- 2.5 The draft regulations which accompany this Statement of Reasons seek to extend the expiry date of Part 1 of each of the Acts from the end of 31 March 2022 to the end of 30 September 2022. As required by section 12(6) of the First Scottish Act and section 9(6) of the Second Scottish Act, this Statement of Reasons has been prepared by the Scottish Government to set out reasons why the draft Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2022 (“the extension regulations”) should be made. This Statement of Reasons is laid with the draft extension regulations as required by section 12(6) of the First Scottish Act and section 9(6) of the Second Scottish Act.
- 2.6 The emergence of the Omicron variant altered the epidemiology of Covid in Scotland with a rapid increase in cases observed from 29 November 2021, when Scotland confirmed its first cases of the Omicron variant, to December 2021. Since then the number of new Covid cases per day has decreased from an average of around 16,000 at the beginning of January 2022, to around 7,000 by mid-January 2022, and has since remained at around that level with a slight decrease in February 2022. This is a high plateau compared to previous phases of the pandemic in Scotland and it remains difficult to predict the future trajectory of cases due to the evolving nature of the virus itself, and possible changes to population immunity and behaviour.
- 2.7 Hospital occupancy has gradually reduced from a peak of around 1500 in mid-January 2022 to around 900 by mid-February 2022. This remains a high level and health services are stretched. Hospital occupancy may be expected to plateau somewhat hereafter, reflecting the plateau in case numbers. The proportion of Covid cases resulting in ICU occupancy and death is low compared to earlier phases in the pandemic, reflecting the reduced severity of

⁴ [The Coronavirus \(Scotland\) Acts \(Amendment of Expiry Dates\) Regulations 2020 \(legislation.gov.uk\)](#) and [The Coronavirus \(Scotland\) Acts \(Amendment of Expiry Dates\) Regulations 2021 \(legislation.gov.uk\)](#)

⁵ [Coronavirus \(Extension and Expiry\) \(Scotland\) Act 2021 \(legislation.gov.uk\)](#)

the Omicron variant, compared with the Delta variant, and increased levels of immunity in the Scottish population.

- 2.8 Covid cases could increase again with the emergence of future variants, which might be more severe or transmissible than the Omicron variant, or with the waning of immunity; such events are inherently unpredictable and reflect the need to be able to implement proportionate measures in the face of future threats from this virus.
- 2.9 It is in this context that Scottish Ministers have given consideration to the question of whether Part 1 of each of the Acts should be extended. In doing so, careful consideration has been given to the requirement to balance the needs of many stakeholders and partners who wish to see the provisions remain available, against the commitment given when the Acts were introduced, that the provisions would not remain in place unless necessary. The Scottish Ministers consider that it remains necessary and proportionate to have these provisions available during this time due to the ongoing nature of the pandemic, and the need to mitigate the impact of Covid, including the Omicron variant and any other new variant.
- 2.10 Part 1 of each of the Acts can only be extended in their entirety and not on a provision by provision basis. Any provisions that should not be extended therefore need to be expired through separate regulations.
- 2.11 The Scottish Government has been clear that the provisions contained within the Acts must only be in place for as long as it is necessary and therefore in the preparations for the potential extension of the Acts, consideration has been given to whether each individual provision continues to be needed beyond the end of 31 March 2022. It has been judged that four measures will no longer be needed and can be expired. Therefore, alongside the extension regulations, the Scottish Government is also laying a separate set of regulations, the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022 (“the early expiry regulations”).
- 2.12 The early expiry regulations will expire the four identified provisions on 30 March 2022 and so these provisions will not be covered by the extension of Part 1 of each of the Acts.
- 2.13 Information on the provisions to be expired, and the reasons for their inclusion in the early expiry regulations, is provided within the Policy Note for those regulations.
- 2.14 The reporting requirement under section 15 of the First Scottish Act and section 12 of the Second Scottish Act will continue to require reporting whilst provisions in Part 1 of each of the Acts are in force. It is also important to note that, throughout the proposed six month extension period, if provisions are deemed to be no longer necessary during that time, they can be suspended or expired early. A suspended provision could subsequently be revived if this was considered necessary. Therefore, proposing that Part 1 of each of the Acts be extended at this time does not mean that all provisions covered by the

extension will remain in place until the end of 30 September 2022. As it has done throughout the life of the Acts so far, the Scottish Government will keep the continued necessity of these provisions under review.

- 2.15 This Statement of Reasons provides further detail of the justification for extending the expiry date of Part 1 of each of the Acts.

3. Rights and equality considerations

- 3.1 The Scottish Government has acknowledged in its two-monthly reporting on the Acts that some provisions have more significant impacts on rights and equality than others.
- 3.2 The following Impact Assessments were undertaken for the First Scottish Act as part of the development of the Bill which was introduced to Parliament on 31 March 2020:
- Equality Impact Assessment
 - Fairer Scotland Duty Impact Assessment
 - Child Rights and Wellbeing Impact Assessment
 - Business and Regulatory Impact Assessment
- 3.3 The following Impact Assessments were undertaken for the Second Scottish Act as part of the development of the Bill which was introduced to Parliament on 11 May 2020:
- Equality Impact Assessment
 - Fairer Scotland Duty Impact Assessment
 - Child Rights and Wellbeing Impact Assessment
 - Business and Regulatory Impact Assessment
- 3.4 The following Impact Assessments were undertaken for the Extension and Expiry Act as part of the development of the Bill which was introduced to Parliament on 18 June 2021:
- Equality Impact Assessment
 - Fairer Scotland Duty Impact Assessment
 - Child Rights and Wellbeing Impact Assessment
 - Business and Regulatory Impact Assessment
- 3.5 Many of the provisions which are proposed for extension have corresponding provision, though in some cases with amendments, in the Coronavirus (Recovery and Reform) (Scotland) Bill⁶ (“the Recovery and Reform Bill”), which was introduced to the Scottish Parliament on 25 January 2022. The following new Impact Assessments were undertaken as part of the development of that Bill:
- Equality Impact Assessment
 - Fairer Scotland Duty Impact Assessment
 - Child Rights and Wellbeing Impact Assessment

⁶ [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](#)

- Business and Regulatory Impact Assessment
- Island Communities Impact Assessment

3.6 The Impact Assessments outlined above are linked to from [this webpage](#).

3.7 The human rights impacts were summarised in the Policy Memorandums for each of the Bills.

3.8 The Scottish Government’s justification for why each individual provision in the extension regulations continues to be needed beyond the end of 31 March 2022 is set out in this Statement of Reasons. The Scottish Government has assessed the potential impacts of extension and, in many cases, previous findings remain valid and no additional impacts are expected in the proposed extension of the provisions. Further information has been provided, where relevant and/or helpful, later in this Statement of Reasons.

3.9 In setting out the proposals for the extension of the provisions under each of the Acts which are covered in this Statement of Reasons, consideration was given to continued compliance with the European Convention on Human Rights (“ECHR”) and other relevant rights.

4. Consultation

4.1 A formal public consultation exercise on the proposal for the extension regulations has not been undertaken. However, as part of the ongoing review of the continued necessity of the provisions and the formal process required under the Acts to report to Parliament every two months on the operation and status of provisions, there has been ongoing stakeholder engagement and consultation on whether the provisions continue to be necessary. The reporting regime will continue should the extension regulations be approved.

4.2 Furthermore, as highlighted above, many of the provisions have corresponding provision, though in some cases with amendments, in the Recovery and Reform Bill. The Scottish Government held a full 12-week public consultation on the Bill between 17 August and 9 November 2021. The consultation paper, entitled “Covid Recovery: a consultation on public health, public services and justice system reforms”⁷, was publicised widely and a dedicated webpage was established with supporting information⁸. The questions in the consultation paper invited respondents to provide their views on whether the provisions for each topic should be extended beyond March 2022. A total of 2,905 valid consultation responses⁹ were received, of which 2,775 were from individuals

⁷ [Covid recovery: a consultation on public health, public services and justice system reforms - Scottish Government - Citizen Space](#)

⁸ [Coronavirus \(Covid\) legislation - gov.scot \(www.gov.scot\)](#)

⁹ A total of 2978 responses were received, but 73 were identified as duplicates (submitted by duplicate email addresses) and removed during data cleaning. The most recent version of each response was kept.

and 130 were from organisations¹⁰. The Scottish Government has published a full consultation analysis report¹¹.

- 4.3 There are also provisions in respect of which detailed stakeholder engagement has been undertaken to arrive at the proposals for extension and this is set out later in the Statement of Reasons.

5. Proportionality

- 5.1 As part of the assessment of continued necessity that was undertaken, the Scottish Government considered if there were alternative options to extension for the provisions under Part 1 of each of the Acts. In all cases, for those provisions which are covered in this note, extension of the provisions was deemed to be necessary, proportionate and appropriate.

6. Provisions proposed for extension

6.1 **First Scottish Act: section 2 and schedule 1, paragraphs 1, 3 and 5 – Eviction from dwelling-houses (Discretionary grounds of eviction), and Second Scottish Act: section 2 and schedule 1, Part 2 – Tenancies: pre-action requirements for order for possession or eviction order on ground of rent arrears**

- 6.1.1 The effect of Covid has led to a reduction in income for many households in Scotland. Some tenants in both the private and social rented sectors are finding themselves in financial difficulty due to the pandemic.
- 6.1.2 Due to the provisions in the Acts, tenants have benefitted from additional legal protections. The Housing and Property Chamber of the First Tier Tribunal for Scotland (“the Tribunal”) now has greater discretion to consider all relevant factors in eviction cases. And the introduction of “pre-action requirements”, which make clear that private landlords should support tenants who are struggling with rent arrears and are at risk of being evicted on that ground, provides greater protections for those in the private rented sector, reflecting what is already in place in the social sector.
- 6.1.3 The extension of the pre-action requirements provisions and Tribunal discretion will continue to encourage sustainment of tenancies during the Covid pandemic by ensuring that:
- prior to seeking repossession of a property on the grounds of rent arrears, landlords make reasonable efforts to work with tenants to manage arrears; and
 - that the Tribunal is able to take all matters into consideration when deciding whether an eviction order should be granted or not (including whether a landlord has complied with the pre-action requirements).

¹⁰ Five organisations submitted a total of 11 responses. These were all included in the analysis as they were considered to represent different views across the organisations.

¹¹ The consultation analysis report is linked to from this webpage - [Coronavirus \(Covid\) legislation - gov.scot \(www.gov.scot\)](https://www.gov.scot/Coronavirus-Covid-legislation)

- 6.1.4 The Scottish Government considered the implications of not extending these provisions, however, extension is necessary to help support the sustainment of tenancies during the pandemic, where rent arrears continue to be an issue. They are an important measure in supporting tenants in the private rented sector, who are in rent arrears for a reason related to the pandemic, to sustain their tenancies, reducing the likelihood of eviction and subsequent homelessness.
- 6.1.5 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at pages 31-32 of the [consultation analysis report](#)).
- 6.1.6 The Scottish Government considers that the measures support the right to adequate housing under the International Covenant on Economic, Social and Cultural Rights by ensuring appropriate safeguards are in place to prevent unnecessary eviction.
- 6.1.7 The Scottish Government has assessed the potential impact of extending the measures on human rights. Consideration has been given to the impact of the pre-action requirements and discretionary grounds of eviction on a landlord's property rights under A1P1 to the ECHR. Both of these provisions could be argued to constitute a control of a landlord's use of their property for the purposes of A1P1. The Scottish Government considers that both of these provisions strike an appropriate balance between the landlord's rights in the property and the protection of the tenant from unnecessary eviction. Accordingly, these provisions are both considered to be proportionate.
- 6.1.8 In relation to the pre-action requirements, the Scottish Government considers that a fair balance has been struck between the rights of landlords and tenants by encouraging landlords to engage with tenants in cases of rent arrears and, if the tenancy cannot be saved, landlords would be in a better position to demonstrate that eviction is reasonable in the circumstances. A landlord is not prevented from obtaining an eviction as compliance with the pre-action requirements is simply something the Tribunal must take into account when determining whether eviction is reasonable. The pre-action requirements currently specified in Regulations made under the powers in the Second Scottish Act are all actions which are within the gift of the landlord to deliver.
- 6.1.9 In relation to discretionary grounds of eviction, the Scottish Government considers that a fair balance has been struck between the rights of landlords and tenants by enabling the Tribunal to consider all of the circumstances of a case before making a decision on eviction. The Tribunal can consider the ECHR rights of landlords and tenants and arrive at a decision which ensures appropriate respect for both. The removal of mandatory grounds of eviction does not in itself prevent eviction; it merely ensures that eviction should be granted only where it is reasonable to do so.
- 6.2 First Scottish Act: section 3 and schedule 2 – Temporary extension of moratoriums on diligence, and
Second Scottish Act: section 2 and schedule 1, Part 5 – Bankruptcy**

- 6.2.1 A moratorium on diligence is a period of debt relief during which creditors cannot take enforcement action against a debtor. The temporary extension of the moratorium from six weeks to six months provides enhanced protection to individuals who have financial difficulties for an extended period by affording them more time to find advice on how best to deal with their debts and, in current circumstances, also to recover from time-limited income shocks without having to take serious steps like applying for bankruptcy.
- 6.2.2 Corresponding provisions were included in the consultation for the Recovery and Reform Bill (see the outcome at pages 17-18 of the [consultation analysis report](#)). It should be noted that the corresponding provisions did not feature in the Bill as introduced. As a wide range of views were received, further targeted consultation will be undertaken to ensure the option chosen achieves the right balance between the interests of creditors and debtors and, insofar as possible is supported by a wide range of stakeholders. Subject to the outcome of that targeted consultation, it is anticipated that a provision on the moratorium period will be brought forward at Stage 2.
- 6.2.3 Given the broad agreement of stakeholders that the period of the moratorium should not revert to six weeks, recognising the need to maintain enhanced protections for those in financial distress, and numbers of individuals seeking a moratorium since the extension was introduced, there is a strong rationale for extending the provision beyond the end of 31 March 2022. At this stage of the pandemic, 6 months moratorium protection continues to be a proportionate period.
- 6.2.4 The measures in the Second Scottish Act are largely aimed at protecting those with unsustainable debt and streamlining and modernising the bankruptcy process, ensuring that it is flexible enough to function whilst there are restrictions on in-person contact. They do this by increasing the minimum amount someone must owe before a creditor can take action to petition for bankruptcy of a debtor and allowing more electronic and virtual administration (for example, enabling documents to be served electronically where post or in person service is not possible and conducting meetings virtually without participants requiring to be physically present in the same location).
- 6.2.5 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at pages 15-17 and 18-19 of the [consultation analysis report](#)).
- 6.2.6 Scottish Ministers have engaged closely with stakeholders with an interest in debt and the solutions in Scotland through targeted consultation and the Scottish Government consultation on Covid recovery. Given the ongoing nature of the Covid pandemic and its effects on problem debt together with the broad agreement of stakeholders that the petition threshold should be permanently increased, albeit at a level below £10,000, there is a strong rationale for extending the provision beyond the end of 31 March 2022 and maintaining protections for those in financial distress whilst a permanent increase in the creditor petition level is pursued.

- 6.2.7 Given that there is broad consensus amongst stakeholders that electronic and virtual administration measures have been sensible modernising changes and should be made permanent, there is a strong rationale to extend these beyond the end of 31 March 2022.
- 6.2.8 The Scottish Government has assessed the potential impact of the provisions increasing the minimum debt level a creditor must be owed to petition the court for bankruptcy of a debtor from £3,000 to £10,000 and extending the period of moratorium protection from 6 weeks to 6 months on human rights. Creditors' rights to recover their debts can be possessions protected by ECHR, in particular, A1P1 which protects property rights.
- 6.2.9 The Scottish Government considers that both of these provisions are proportionate and strike a fair balance between the general interest and the rights of creditors. Generally, the ECHR recognises privileging the property rights of one individual over another can be a legitimate means for promoting the public interest. Sequestration is a serious undertaking with significant long-term consequences for the debtor. As highlighted, the Scottish Government has considered the views of stakeholders which in general do not support reverting to the 6 week moratorium period or the petition threshold of £3,000 while permanent provisions are determined. While it is recognised that stakeholders do not favour the 6 month moratorium period and £10,000 petition threshold as permanent measures, the ongoing nature of the Covid pandemic and its effects on problem debt provide a strong rationale for extending these provisions beyond 31 March 2022 on a temporary basis. Importantly, these measures do not extinguish the creditors' claims. In terms of the measure extending the moratorium period to 6 months, this merely defers the claims. The Scottish Government is accordingly satisfied that the provisions are compatible with the ECHR.

6.3 First Scottish Act: section 5 and schedule 4, Part 1 – Courts and tribunals: conduct of business by electronic means, and Second Scottish Act: section 3 and schedule 2, Part 3 – Intimation, etc. of documents

- 6.3.1 The Scottish Government continues to support Justice Agencies to take action to address the backlog caused by the Covid pandemic and to minimise the impact on all court users. The provisions continue to enable the introduction and rollout of new and innovative ways of working in an urgent, effective and collaborative manner.
- 6.3.2 Much of the decision making undertaken by justice partners continues to be predicated on the existing powers being retained to support the initiatives being adopted within the parameters of public health guidance; and to be retained so long as the evidence supports their need. This has been a key component of the Recover, Renew, Transform ("RRT"¹²) programme.

¹² [Justice - vision and priorities: report - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/consultation-papers/collections/documents/Justice-vision-and-priorities-report-2020.pdf)

- 6.3.3 Without these provisions enabling business to be conducted by electronic means, the ability of the justice system to continue would otherwise have been adversely affected, primarily through the requirement for physical processes and the need to maintain public safety around court buildings.
- 6.3.4 The provisions enable business to be conducted in a way which minimises unnecessary travel and congregation of people in accordance with public health guidance and allows justice partners to focus on urgent and priority business as necessary in the physical court estate.
- 6.3.5 The safety and wellbeing of everyone coming to court – whether jurors, victims, accused, court staff, third sector, or legal professionals – remains paramount. This is an operational matter for the Scottish Courts and Tribunals Service (“SCTS”) who have very clear guidance for staff and court users which is regularly updated, most recently on 20 December 2021, with a reminder published on 11 January, to reflect public health advice.
- 6.3.6 All court and tribunal buildings are open. The range of business that will be dealt with on SCTS premises may vary during the pandemic – based on the public health advice in place at the time. To ensure that SCTS maintain a safe environment for all those using their buildings, access is currently restricted to those with a direct involvement in proceedings and journalists. Public counters are closed.
- 6.3.7 The provisions relating to intimation of documents on the SCTS website have ensured that documents can continue to be made publically available, as required or permitted by statute. As this situation presently continues, there remains uncertainty regarding future restrictions to court buildings’ access and also when full public access to court buildings may be achievable. The provisions have been utilised to progress a substantive volume of civil business that otherwise would have been unable to proceed, predominantly in relation to commissary business.
- 6.3.8 As part of the budget announcement, the Scottish Government has outlined significant funding increases for the justice portfolio - funding that is required to deal with the backlog and to support community justice services in recovering from the pandemic. The Scottish Government has established a justice recovery fund for the next financial year of £53.2m to be allocated to recovery, renewal and transformation activity across the justice system, including the ability to maintain enhanced court capacity and remote jury centres. This builds on the additional £50m this financial year which, by way of a tangible example, helped deliver the setting up of 16 additional solemn and summary courts from September 2021. It is also being used in a variety of ways to increase capacity across the justice system, including:
- recruitment of additional staff;
 - greater use of digital tools and;
 - improved support for victims and witnesses.

- 6.3.9 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at pages 21 and 33-36 of the [consultation analysis report](#)).
- 6.3.10 The Scottish Government has assessed the potential impact of extending the measures on human rights and considers an extension would be ECHR compliant including complying with Article 6 ECHR. The courts are obliged to make decisions about remote proceedings in an ECHR compliant manner, and to ensure that due process is being followed during proceedings.
- 6.3.11 Personal data, when documents are published online under these provisions, may arguably be more readily available to a wider audience given that there is the potential for web pages to be more easily searched and accessed. As a result there is a risk of interference with Article 8 ECHR rights for those who have personal data included in the documents published. The Scottish Government considers that such a risk is mitigated as this provision is subject to the power of the Lord President or the Lord Justice General to issue a direction to exclude publication of a type of document, or to redact sensitive information from documents before publication. In addition, existing powers for judicial office holders continue to be preserved to direct how specific documents are to be made available on a case by case basis. Whilst the provisions have been in force, the Lord President has used the direction-making powers to restrict the information that is published on the SCTS website to address data protection concerns. This has required less data to be made publicly available than was the case before the measure was introduced (for example in the sheriff court, a full copy of a document/application to which the notice related was placed on the walls of court. On the website, this is restricted to only the names and addresses of parties).
- 6.3.12 In addition SCTS continue to have legal duties under the data protection legislation which provides further reassurance that these provisions will be used in a manner that is compatible with the Convention. Guidance is currently in place for the courts, and efforts will be increased to widen awareness.

6.4 First Scottish Act: section 5 and schedule 4, Part 2 – Fiscal fines

- 6.4.1 Providing for the extension of provisions which increased the maximum level of fiscal fine (or ‘conditional offer of a fixed penalty’) available to prosecutors from £300 to £500 as a non-court disposal will continue to be helpful in minimising the significant and ongoing impact of Covid on the criminal courts system. This is because it will enable a wider range of summary cases to continue to be dealt with by way of fiscal fine as an alternative to prosecution in court than was the case prior to the introduction of the higher maximum level. The provisions will continue to be required to help the backlog of cases that has built up in the summary courts system as a result of the Covid pandemic by freeing up prosecutors and courts to deal with more serious offending behaviour.
- 6.4.2 The measure may indirectly benefit victims of crime by enabling the Crown Office and Procurator Fiscal Service (“COPFS”) to respond proportionately and

swiftly to offending behaviour in a wider range of cases, for which such a measure is appropriate.

- 6.4.3 With the Recovery Programme in place SCTS estimate that the summary court backlog will take until 2024 to be cleared. These provisions therefore continue to form an important part of the wider approach to enabling the justice system to recover from the impact of Covid while still ensuring justice is done in individual cases.
- 6.4.4 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at page 39 of the [consultation analysis report](#)).
- 6.4.5 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise. Fiscal fines have been an integral part of the Scottish criminal justice system for more than 20 years and although legal challenges do occur from time to time, the Scottish Government is not aware of any specific ECHR issues in relation to increasing the amount of such fines. Any specific ECHR issues would in any case relate to the previously existing system of fiscal fines rather than to the change in the maximum level of a fiscal fine. Moreover, fiscal fines are not mandatory penalties. They allow a person offered one to refuse the conditional offer by giving notice to the court to that effect. In such an event, the refusal is treated as a request by the person to be tried for the offence in which case the procurator fiscal will then decide whether to prosecute. Any resulting criminal proceedings would be compliant with the person's Article 6 rights. Whether or not a fiscal fine is deemed appropriate in any given case depends on an assessment of the individual facts and circumstances by prosecutors and the overall public interest.

6.5 First Scottish Act: section 5 and schedule 4, Part 3 – Cases beginning with an appearance from custody

- 6.5.1 Providing for the continuation of Scotland-wide jurisdiction for sheriffs dealing with appearances from police custody forms a part of the wider approach to enabling the justice system to recover from the impact of Covid by helping SCTS efficiently manage scarce court resources in response to the substantial backlog while ensuring the continued safe operation of custody courts while Covid remains a threat to public health and safety and while public health measures remain in place. For as long as court business is affected by Covid (both in terms of continued necessary public health measures and restrictions, and the lingering impact of backlogs caused by Covid expected to last for a number of years), the provisions will aid recovery of the court system.
- 6.5.2 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at page 40 of the [consultation analysis report](#)).
- 6.5.3 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.

**6.6 First Scottish Act: section 5 and schedule 4, Part 4 – Extension of time limits and,
Second Scottish Act: section 3 and schedule 2, Part 1, paragraph 1 – Criminal proceedings: extension of time limits**

- 6.6.1 There remains a significant backlog of cases, which it is anticipated will last for a number of years, and is evidenced by the increase in the number of people being held on remand in Scottish prisons. An exercise undertaken by COPFS at the end of last year found that in November 2021, 786 of sheriff and jury cases would already be past the pre-pandemic time limits and a further 653 cases would be approaching that limit, and that there were 530 High Court cases which were already older than the pre-pandemic time limits.
- 6.6.2 Provisions relating to time limits ensure that the courts' capacity to address the backlog of cases will not be impacted by very large numbers of individual hearings to extend time limits on a case-by-case basis, which would divert court, prosecution and defence resource away from addressing the backlog of cases that has built up, and will also ensure that in cases where the time limits cannot be extended on a case-by-case basis (certain offences that can only be tried summarily, including drink and drug driving offences) justice can still be progressed by avoiding proceedings being declared unlawful.
- 6.6.3 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at pages 41-43 of the [consultation analysis report](#)).
- 6.6.4 The Scottish Government has assessed the potential impact of extending the measures on human rights and has determined it may have an impact on the rights guaranteed by Articles 5(3) and 6(1) of the ECHR. However, the Scottish Government does not consider that the measures are incompatible with the right guaranteed by Articles 5(3) and 6(1) to a trial within a reasonable time. The increases are necessary to address the disruption to the justice system that is being caused by the Covid pandemic.
- 6.6.5 The impact of extended time limits in criminal cases is greatest where an accused person is being held on remand prior to trial. In any individual case, where an accused is brought before the court for a custody hearing, in determining whether to grant bail, the court requires to consider the accused's Article 5 and 6 rights in deciding whether it is appropriate to grant bail. Furthermore, an accused person can, at any time, apply to the court for a bail review under section 30 of the Criminal Procedure (Scotland) Act 1995, to enable the court to determine whether their continued detention is justified. The courts remain subject to the requirement to ensure that there is a fair and public hearing within a reasonable time. These safeguards are relevant to ensuring that these provisions are proportionate. The extensions to time limits for new cases coming into the system remain the same as before, and once these extensions have expired, any further extension will require to be dealt with through an individual application to the court.

6.7 First Scottish Act: section 5 and schedule 4, Part 6 – Community orders

- 6.7.1 Powers relating to community orders remain essential to ensure timescales for orders remain extended and powers are available to ensure the community justice system can operate effectively.
- 6.7.2 Capacity issues arising from the impact of Covid continue to impact on delivery of unpaid work, and while investment is being made to increase capacity, the extended time limit for unpaid work (paragraph 13 of schedule 4) is still required in order to ensure sufficient time to complete orders. The Omicron variant has further lowered capacity to deliver unpaid work in early 2022 and uncertainty remains about the likely impacts over the coming months on individuals on orders, staff and delivery capability (which can be linked to use of arrangements for people working in groups, including transport arrangements). In addition, uncertainty remains about the impact of the backlog of court business arising during the pandemic which adds to the need for extended timescales for delivery and potential need for flexibility if the justice system became overwhelmed.
- 6.7.3 The provisions in paragraph 15 allow for regulations to be made by the Scottish Ministers to vary or revoke requirements imposed in Community Payback Orders (“CPOs”). Ministers may do so only if it is required due to a likely failure to comply with the requirements due to Covid, or in response to the effects of Covid on local authorities or the courts. Regulations made by Ministers under this power came into force at 5pm on Monday 15 March 2021 and varied the unpaid work or other activity requirements imposed in existing CPOs (except those imposed for domestic abuse, sexual offences, or stalking), reducing these by 35%.
- 6.7.4 While there are no plans to use these powers again, there is continued uncertainty around the impact of the Omicron variant (and any other new variant) on individuals and staffing, as well as operational capacity, combined with the existing backlog in court business over the pandemic. While, as above, action has been taken to increase capacity, a risk remains that the justice system could become overwhelmed if the pandemic were to become more severe again. A cautious approach is considered prudent and so the extension of this power – rather than suspension – is recommended in order to ensure the ability to respond relatively quickly if there was a pressing need to introduce regulations. Any such regulations would be subject to Parliamentary scrutiny and approval.
- 6.7.5 Informal views have been invited from Social Work Scotland, Community Justice Scotland and the Convention of Scottish Local Authorities (“COSLA”). The consensus view was that a cautious approach should be taken and powers relating to community orders should be retained as significant uncertainty remains relating to the impact of Covid on delivery of CPOs. This is related in part to the impact of the Omicron variant and continued uncertainty relating to this and court backlogs. The extended timescales for delivery of unpaid work are still necessary and although the power to vary CPOs is not expected to be used, given uncertainty about impacts on staffing and the backlog of court

orders relating to the pandemic, informal stakeholder views were that the powers need to either be extended or potentially suspended if sufficient flexibility is retained to reintroduce powers if required.

- 6.7.6 In summary, the policy objective of this extension in relation to paragraph 13 is to ensure sufficient time to complete unpaid work requirements in CPOs, taking into consideration ongoing capacity issues. In relation to paragraph 15, the policy objective is to enable action to be taken to mitigate the effects of Covid should this appear necessary to ensure the continued effective operation of the community justice system. The threshold for such action will be high. Paragraph 16 contains definitions required for the effective operation of paragraphs 13 and 15.
- 6.7.7 The Scottish Government has assessed the potential impact of extending the measure on human rights. Article 7 ECHR (no punishment without law) precludes the retrospective application of a criminal offence and the retrospective application of a heavier criminal penalty than would have been available at the time of the offence. The extension of the time period in which unpaid work or other activity requirements can be completed does not increase the penalty imposed on the individual, it only alters the rules on the execution of that penalty – the penalty being the amount of hours of unpaid work or other activity which must be completed. The power to vary community orders is qualified so that it could not be used to make the penalty imposed more onerous. As a result the Scottish Ministers consider that these provisions do not breach, and could not be used to breach, the Article 7 rights of individuals who are serving community orders.
- 6.7.8 Article 6 ECHR provides a right to a fair and public hearing by an independent and impartial tribunal. The enabling power to provide for a possible variation of the requirements of CPOs under these provisions does not expressly provide for the offender to have a right to make representations or challenge the changes to their sentence. However, this right is already conferred elsewhere in the Criminal Procedure (Scotland) Act 1995. An offender can apply to vary or revoke their CPO under section 227Y of that Act. Accordingly, the Scottish Ministers consider that these provisions do not breach the Article 6 rights of those sentenced to a CPO.

6.8 First Scottish Act: section 5 and schedule 4, Part 7 – Parole Board

- 6.8.1 There is currently no scheme of delegation expressly allowed for in legislation to enable the Parole Board for Scotland (“the Board”) Chairperson to delegate his functions to another member of the Board. Further there are no provisions to allow another member of the Board to automatically assume the functions of the Chair should he become incapacitated by the virus or unable to carry out those functions due to self-isolating.
- 6.8.2 The ability to delegate the Chairperson’s functions to other members of the Parole Board has ensured it could continue to operate should the Chairperson be affected by Covid or the post was vacant for any other reason. As the

pandemic is not yet over, the Scottish Government believes these provisions continue to be required.

- 6.8.3 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at page 27 of the [consultation analysis report](#)).
- 6.8.4 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise. The provisions relate to organisation and allocation of the Parole Board Chairpersons' duties and as such will not change the procedure applied to any individual case considered by the Board.
- 6.8.5 Temporary provisions in the First Scottish Act, which provided for the Parole Board to conduct the entire proceedings of a parole hearing by live link, will be expired by the Coronavirus (Scotland) Act 2020 (Early Expiry of Provisions) Regulations 2022¹³ which were laid in the Scottish Parliament on the 20 January 2022. At the same time the Parole Board (Scotland) Amendment Rules 2022¹⁴ will amend the Parole Board (Scotland) Rules 2001 with the same effect as the modifications made by the temporary provisions. The amended rules are due to come into force on 10 March 2022 at the same time as the temporary provisions expire.

6.9 First Scottish Act: section 5 and schedule 4, Part 8 – Release of prisoners

- 6.9.1 Covid has continued to have significant impact on the operation of the prison system, whether in response to any cases of infection amongst prisoners or prison workers, changes necessary to the operation of the prison estate to mitigate and prevent the effects of potential spread of infection, and the changing effects of public health instructions on the overall operation of the prison estate.
- 6.9.2 Whilst the SPS continues to make strenuous efforts to control, mitigate and reduce the threat to the health of prison staff and prisoners, there remains a real concern that future Covid developments could still create circumstances that would require Ministers to instruct the use of an early release of prisoners as an emergency action to reduce the strain on prison operations (in the absence of other powers to give effect to release in this way).
- 6.9.3 The scale and scope of any future application of the power would have to be planned in response to the circumstances at that time – but always within the principles set up in the original powers that the measures should be necessary and proportionate to the circumstances faced, with action being taken to maintain the effective operation of the prison system, and to protect the health and wellbeing of prisoners and prison staff.

¹³ [The Coronavirus \(Scotland\) Act 2020 \(Early Expiry of Provisions\) Regulations 2022 \(legislation.gov.uk\)](#)

¹⁴ [The Parole Board \(Scotland\) Amendment Rules 2022 \(legislation.gov.uk\)](#)

- 6.9.4 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at page 37 of the [consultation analysis report](#)).
- 6.9.5 The Scottish Government has assessed the potential impact of extending the measure on human rights and has determined that, depending on how it is manifest, the impact of Covid in prisons (both on prison staff and prisoners) could create a risk of a breach of the Articles 2, 3 and 8 ECHR rights of prisoners and prison staff. Therefore the release of prisoners, by way of regulations under this provision, may be required as a means of safeguarding their ECHR rights.
- 6.9.6 As certain prisoners are not eligible for release, there is a risk of contravening the Article 14 rights of those prisoners who are not released. Any difference in treatment which arose would need to be objectively justified as it would seek to protect the public from the risks that would be posed by the release of prisoners serving sentences for more serious offences and those who pose a flight risk from ongoing proceedings. The release of prisoners also creates a risk of contravening the ECHR rights of a member of the public who is harmed by a released prisoner. To safeguard against this, the provisions enable Governors to prevent the early release of prisoners who pose an immediate risk of harm to an identified individual.

6.10 First Scottish Act: section 5 and schedule 4, Part 9 – Legal aid

- 6.10.1 Scotland's justice system, like jurisdictions around the world, continues to be significantly impacted by the global pandemic. The situation remains challenging, in particular in light of the Omicron variant and its transmission. Disruption across the justice system has adversely affected cash flow to legal aid service providers.
- 6.10.2 The provisions allow for increased availability of interim payments to solicitors, with corresponding powers of recovery in the event of overpayments resulting from interim payments, and removal of conditions for counsel to be able to apply for interim payment.
- 6.10.3 Many providers of legal aid services will continue to experience disruption to cash flow due to the ongoing nature of the pandemic, and provisions to allow for provisional payment prior to a case concluding will provide a significant support for businesses. With the ongoing backlog in the courts and impact on businesses further to the impacts of the pandemic, it is appropriate that these provisions remain in force, to meet the policy objective of ensuring that a robust legal aid system is in place as the country recovers.
- 6.10.4 The current temporary system has operated effectively since its introduction, and is considered to have been an improvement to the legal aid system. Many providers of legal aid services continue to experience disruption to cash flow and the provisions will support access to payment prior to a case concluding.

- 6.10.5 It is therefore the opinion of the Scottish Government that these provisions should remain in place to reduce any potential adverse financial impact on legal aid providers. The continued use of these provisions is necessary to support the current operation of the criminal justice system during this period, to ensure the viability of the RRT programme and to enable the increased capacity across the justice system.
- 6.10.6 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at page 24 of the [consultation analysis report](#)).
- 6.10.7 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.

6.11 First Scottish Act: section 6 and schedule 5 – Alcohol licensing, and First Scottish Act: section 7 and schedule 6, Part 1 – Licensing other than alcohol licensing

- 6.11.1 Whilst the vaccine take up is encouraging, Covid continues to pose a threat to public health in Scotland. The latest variant proved to be highly infectious and resulted in significant numbers of persons having to self-isolate which has impacted on the administration of the alcohol and civic licensing systems.
- 6.11.2 The flexibility and discretion provided by extending these licensing provisions beyond the end of 31 March 2022 will assist both licensing boards/licensing authorities to be able to continue to administer the alcohol and licensing under the Civic Government (Scotland) Act 1982 systems in as effective and practical a manner as is reasonably possible. This will also enable inroads to be made into the backlog of licensing casework due to licensing staff being required to work from home thus lessening the time applicants have to wait for specific case to be actioned.
- 6.11.3 A number of these provisions have corresponding provision in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at pages 14 and 20-21 of the [consultation analysis report](#)).
- 6.11.4 Informal consultation has taken place, and further engagement will take place as part of the Scottish Government's routine stakeholder engagement, with a number of key licensing stakeholders including representatives of SOLAR's (Scottish Local Authority Lawyers and Administrators) licensing sub-committee, the Law Society of Scotland's licensing sub-committee and legal experts in licensing law as well as Licensed Trade representative bodies. This informal consultation on these specific provisions has been reported on as part of the statutory two monthly reporting to the Parliament and has informed decisions on the continued necessity and appropriateness of these measures.
- 6.11.5 The Scottish Government has assessed the potential impact of extending the measures on human rights. With regard to how hearings may be held under alcohol and civic government licensing, to the extent that decision making by, and proceedings before licensing boards, licensing authorities and local

authorities engage the protections of Article 6 (right to fair determination of civil rights and obligations) the Scottish Government is of the view that no issues arise as a result of the provisions. Where a hearing cannot be held in person for reasons related to Covid, the provisions require licensing boards, licensing authorities and local authorities to provide an opportunity to persons to be heard by telephone, videoconference or written representations (including electronic communications). It also remains possible for decisions of those bodies to be appealed and for judicial review proceedings to be taken.

**6.12 First Scottish Act: section 7 and schedule 6, Part 2 – Freedom of information, and
Second Scottish Act: section 5 and schedule 4, Part 8 – Freedom of information**

First Scottish Act: section 7 and schedule 6, Part 2

- 6.12.1 At the current time, the measure remains necessary to allow the Scottish Information Commissioner to continue to allow staff to work remotely.
- 6.12.2 This is a technical measure expressly allowing the Commissioner and other authorities to issue formal notices electronically. This provision has been significant during the Covid outbreak in enabling the Commissioner and other authorities to discharge their statutory duties under the Freedom Of Information (Scotland) Act 2002 (FOISA) whilst staff are working remotely. The Commissioner has indicated that had the provision not been in force, it would have been necessary to re-open his office or delay the issue of decisions whilst staff were being required to work from home wherever possible.
- 6.12.3 Furthermore, this measure had previously been advocated by the Commissioner, as a useful adjustment to the statutory regime, in his evidence to the former Public Audit and Post-legislative Scrutiny Committee in 2019. The Committee's report on post-legislative scrutiny of FOISA recommended that the Scottish Government should consult on such a change. The Scottish Government fulfilled that commitment in the consultation for the Recovery and Reform Bill.
- 6.12.4 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at page 23 of the [consultation analysis report](#)).
- 6.12.5 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise. Extending the provision will have a small positive impact on local government, as local authorities are subject to FOISA and so will be able to rely on the provision in discharging their duties under that Act.

Second Scottish Act: schedule 4, Part 8

- 6.12.6 This provision – requiring the Scottish Ministers to report to the Parliament on a bi-monthly basis on their handling of requests under FOISA – is proposed for

extension so that it remains in place until such time as all emergency changes to FOISA made by the Acts have expired. This measure was inserted into the Second Scottish Act to ensure that there would be additional scrutiny of the Scottish Government's handling of requests under FOISA whilst emergency changes to the legislation were in effect.

- 6.12.7 The Scottish Government has not undertaken any specific consultation in relation to the extension of this measure, since it only imposes duties on the Scottish Ministers and is being extended in order to respect the will of the Parliament in requiring this additional scrutiny whilst other emergency changes to FOISA remain in effect.
- 6.12.8 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise. This provision in the Second Scottish Act only imposes duties on the Scottish Ministers and does not affect any other person.

6.13 First Scottish Act: section 7 and schedule 6, Part 3 – Duties in respect of reports and other documents

- 6.13.1 There are provisions in a wide range of primary and secondary legislation that require public bodies to make certain reports on their activities at particular times. There are also many provisions that require them to publish certain documents in a particular way or make them available for physical inspection, for example in council offices or libraries or by placing them at the site to which the document relates.
- 6.13.2 These provisions in the First Act allow for statutory reports to be delayed where publishing them would impede the organisation's ability to take action against Covid. If an authority decides to postpone the publication of a report, they must publish a statement to that effect, and comply with the duty as soon as is reasonably practicable or publish a statement setting out the reasons for not doing so. The provisions also allow for documents to be made available online where making them physically available risks spreading the virus or is ineffective due to restrictions in place.
- 6.13.3 These provisions were introduced because it was clear that some important work by public bodies would have had to stop or be excessively delayed by their inability to meet statutory requirements while responding to Covid or due to restrictions on movement and requirements for physical distancing.
- 6.13.4 The Scottish Government's intention in extending these provisions is to ensure that public authorities are able to continue to carry out their business and meet their statutory duties, while also taking action to respond to the pandemic.
- 6.13.5 Since they require public authorities to make a judgement to justify each individual use of the powers, it is considered reasonable to keep the provisions in place while restrictions are kept under review to ensure that they remain proportionate and necessary to support the ongoing public health response.

- 6.13.6 The Scottish Government continues to informally consult with COSLA and public bodies on these measures given the potential impact on offices, libraries and other public bodies of being required to make documents publicly available. However, given the aim of reducing undue burdens, it is the Scottish Government's view that it would be disproportionate to request authorities to report on the individual uses of these powers. These provisions are wide-reaching across the public sector; they exist for all public authorities to allow an option to continue to meet statutory requirements during the pandemic, for publishing reports and for making information available online or at a later date (or not at all if appropriate) rather than in hard copy at physical locations. The Royal Town Planning Institute in Scotland has noted that it is too early to be confident of a firm date when these flexibilities can be brought to an end without putting the continuing functioning of the planning system at risk. Heads of Planning Scotland support continuing online publication and recognise that, where there are risks of digital exclusion, exceptional provision can be made by authorities.
- 6.13.7 The Scottish Government has assessed the potential impact of extending the measure on human rights. It is considered that the measures are proportionate and meet a fair balance between the potential impact on the ability of individuals to participate in decision-making which may affect them, and the wider public interest. The exercise of the powers is a matter for the consideration of the authority in the circumstances. It is considered that the provisions are compatible with the ECHR.

6.14 First Scottish Act: section 8 and schedule 7, paragraphs 8 to 10 – Duration of planning permission, and Second Scottish Act: section 5 and schedule 4, Part 2 – Listed buildings and conservation areas: consents

- 6.14.1 Planning permissions are time-limited: they lapse if development does not commence within a specified period (typically three years from the date that permission was granted).
- 6.14.2 The effect of these provisions is to extend the duration of planning permissions (and other consents) that are due to lapse imminently because the associated development has not yet been commenced. In doing so, the provisions give developers more time to implement previously-consented developments, thereby avoiding the need to re-apply for planning permission (and for authorities to re-consider such applications).
- 6.14.3 The provisions recognise that during the pandemic, a range of factors have disrupted development programmes and affected developers' ability to start on site. By providing greater flexibility as to the implementation of previously-consented developments, they are intended to help support economic recovery from the pandemic.
- 6.14.4 The Scottish Government has sought feedback from stakeholders on the effects of these provisions in order to determine whether they continue to be needed. Given the aim of reducing burdens, the Scottish Government has

maintained that it would be disproportionate to request authorities to report on the individual uses of these powers.

- 6.14.5 Both Homes for Scotland and the Scottish Property Federation maintain their previous position that the provisions are still required for the reasons which they have previously set out.
- 6.14.6 The Royal Town Planning Institute and Heads of Planning Scotland did not agree with extending the provisions, querying whether they are still needed. Heads of Planning Scotland indicated that there are some administrative costs associated with planning authorities needing to update some of their internal records where the expiry date of permissions is recorded. This impact was not quantified.
- 6.14.7 On balance, the Scottish Government considers that the benefits of extending the provisions outweigh any negative effects such as the requirement to update systems with new expiry dates.
- 6.14.8 The Scottish Government has assessed the potential impact of extending the measures on human rights and considers that ECHR issues do not arise.

6.15 First Scottish Act: section 8 and schedule 7, paragraphs 11 to 14 – Electronic delivery of copy of deed to Registers of Scotland, and Second Scottish Act: section 5 and schedule 4, Part 3 – Registers kept by the Keeper of the Registers of Scotland

First Scottish Act: section 8 and schedule 7, paragraphs 11 to 14

- 6.15.1 It is not clear that the Keeper of the Registers of Scotland can reopen the Registers of Scotland to physical mail and function safely at scale whilst adhering to public health guidance in the next six months.
- 6.15.2 The provisions have been well received, and solicitors and Registers of Scotland have invested in technology and business change to implement the provisions. Accordingly, the provisions would be put on a permanent footing on a similar basis in the Recovery and Reform Bill. In addition, Parliament has already approved the Registers of Scotland (Digital Registration, etc.) Regulations 2022¹⁵ which will, if those provisions in the Bill are enacted, make digital submission the default route of submission to Registers of Scotland.
- 6.15.3 Until such time as the offices of the Keeper are fully reopened, remote electronic submission provisions will remain necessary as no practical alternative means of conveyancing deeds being registered exists, and in any event, there is no appetite amongst the conveyancing profession to return to paper-based processes.

Second Scottish Act: section 5 and schedule 4, Part 3

¹⁵ [The Registers of Scotland \(Digital Registration, etc.\) Regulations 2022 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukdsi/2022/0001/engandscot)

- 6.15.4 These provisions are necessary to enable the full range of registrations in the Register of Inhibitions (“RoI”) and the Register of Judgements (“RoJ”) while the Keeper's offices remain closed and she is unable to process paper registrations.
- 6.15.5 If the RoI provisions are not extended, creditors will not be able to use this means of safeguarding their position, leaving debtors free to transact with heritable property. Equally, debtors will be unable to discharge existing restrictions.
- 6.15.6 If the RoJ provisions are not extended beyond the end of 31 March 2022, parties will be unable to register and then enforce certain court judgments from other jurisdictions.
- 6.15.7 The Keeper continues to review the use of the powers in the First and Second Scottish Acts and engages directly with the Parliament via the Economy and Fair Work Committee on operational matters routinely, and this would be expected to continue. The Keeper has maintained a dialogue with key stakeholders including the Law Society of Scotland. Users of the portal have expressed a desire for ongoing use of the remote submission facility with close to unanimous support for their retention as evidenced by responses to the public consultation¹⁶ carried out by the Keeper on behalf of Ministers.
- 6.15.8 Corresponding provisions to those in the Acts relating to registration in the property registers and the ROI are contained in the Recovery and Reform Bill but did not form part of the main consultation on the Bill. As mentioned in the main consultation paper, the reasoning behind this was that Registers of Scotland, on behalf of Scottish Ministers, ran a public consultation on digital submission between 22nd December 2020 and 1st February 2021,¹⁷ prior to the main consultation. This consultation has been reported on as part of the statutory two-monthly reporting cycle to Parliament during the period the emergency Acts have been in force.
- 6.15.9 The consultation received 223 responses from key stakeholders, and provided clear evidence of the popularity and continuing need for digital submission; some 93% of responses to the consultation as a whole were positive, with 97% of respondents exhibiting a view that the emergency provisions should be retained.
- 6.15.10 In addition to the requisite bi-monthly reporting duties arising from these temporary measures and previous Impact Assessments conducted by the Scottish Government, RoS have recently carried out a number of Impact Assessments¹⁸ as part of the ongoing work to place these measures on a permanent statutory footing. Consideration has been given to a wide range of areas including: equal opportunities, human rights and island communities.

¹⁶ [Digital submissions 2020 - Registers of Scotland \(ros.gov.uk\)](https://www.ros.gov.uk/about/publications/consultations-and-surveys/2020/digital-submissions-2020)

¹⁷ <https://www.ros.gov.uk/about/publications/consultations-and-surveys/2020/digital-submissions-2020>

¹⁸ [Registers of Scotland \(Digital Registration etc.\) Regulations 2022 laid in Parliament - Registers of Scotland \(ros.gov.uk\)](https://www.ros.gov.uk/about/publications/regulations-2022-laid-in-parliament-registers-of-scotland)

There remains no significant implications for human rights with no groups disadvantaged by the operation or extension of the provisions.

6.16 Second Scottish Act: section 2 and schedule 1, Part 1 – Student residential tenancy: termination by tenant

- 6.16.1 As of early February 2022 the situation with regard to the pandemic, although improving, remains unpredictable in particular in light of the Omicron variant and its sub-lineages, their transmission and the potential for new variants. The Scottish Government will continue to monitor the situation and review measures to tackle the spread of the virus. At this stage, it is therefore considered to be prudent that the rights afforded to students in halls and Purpose Built Student Accommodation (“PBSA”) in terms of the notice to leave period, be extended beyond 31 March 2022.
- 6.16.2 Not to extend the provisions in relation to notice to leave periods, given the position with the Omicron variant, would introduce uncertainty for student tenants in halls of residence and PBSA. An extension of these provisions would provide clarity for students and landlords alike.
- 6.16.3 The Scottish Government consulted with stakeholders through the Student Accommodation Group. This highlighted a range of views and underpins the cautious approach to extend the provisions beyond March 2022. Discussions have also taken place at Covid Leads meetings with representatives from the university and college sectors. The Scottish Government will continue to consult with the Student Accommodation Group on the operation of the extension.
- 6.16.4 The Scottish Government has assessed the potential impact of extending the measures on human rights. The student tenancy provisions in the First Scottish Act constitute a control of the use of a landlord’s property for the purposes of A1P1. Accordingly that control of use must be legally clear, for a proper purpose and proportionate. The provisions are designed to protect the social, health and economic interests of tenants during the pandemic and the Scottish Government believes that the provisions are a proportionate means of doing so.
- 6.16.5 The continuation of these measures beyond 31 March 2022 is necessary due to the ongoing uncertainty surrounding the virus. It avoids the changing of the terms of student tenancies midway through the academic year which could cause uncertainty and confusion for landlords and tenants. The vast majority of student tenancies for the current academic year were entered into in the knowledge that the 28 day notice period was in place and the terms of the tenancy will have been set accordingly. The interests of accommodation providers are safeguarded by the Scottish Ministers’ powers to bring forward the expiry or suspension of these measures should they be considered no longer necessary.
- 6.16.6 For these reasons, the Scottish Government considers that the continuation of the student tenancy provisions strikes an appropriate balance between the

rights of landlords and the rights of tenants and those provisions remain a proportionate control of the use of property for the purposes of A1P1.

- 6.16.7 The Scottish Government will continue to review the measures into the spring of 2022, in light of clinical and operational data and ongoing discussions with stakeholders.

6.17 Second Scottish Act: section 2 and schedule 1, Part 4 – Social care staff support fund

- 6.17.1 Due to the ongoing nature of the Covid pandemic and the highly transmissible Omicron variant of the virus, it remains a very real possibility that social care workers will be required to self-isolate on multiple occasions. It is therefore the Scottish Government's view that these provisions should be extended since they support infection prevention and control in care homes and in the community. The provisions also support the Scottish Government's overall commitment to fair work in the social care sector.
- 6.17.2 Without the provisions of the Social Care Staff Support Fund ("the Fund"), many social care workers may experience financial hardship if they were absent from work due to having a confirmed case of Covid, or self-isolating in line with public health guidance. This is because their employment terms and conditions are such that they would receive Statutory Sick Pay or another amount which is less than their expected income.
- 6.17.3 The Fund goes some way to ensuring those with less favourable terms and conditions do not experience financial hardship due to not being able to work due to Covid. It will also help to ensure workers do not feel pressure to attend shifts when ill with Covid or self-isolating, by making their normal pay available to them in those circumstances.
- 6.17.4 Social Care provider representative organisations, COSLA and Scotland Excel have been consulted around the proposal to extend these provisions. All were in agreement that the Fund should continue due to the ongoing pandemic.
- 6.17.5 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise. Given that the measure provides financial support from the state to members of the general public, the Scottish Government does not consider that human rights are likely to be infringed by extending the provision and enabling the continuation of the Fund.

6.18 Second Scottish Act: section 2 and schedule 1, Part 6 – Mental health: named person nomination

- 6.18.1 Mental health legislation in Scotland provides for rigorous safeguards in respect of individuals' human rights. Scotland's mental health legislation promotes patients' rights and provides safeguards which include that any function should be carried out for the maximum benefit of the patient, with the minimum necessary restriction on the freedom of the patient.

- 6.18.2 Stakeholders are very clear that the provision requiring a nominated person's signature to be witnessed by a prescribed person adds no safeguard for patients. Instead it has added a layer to the overall nomination process however this proposal removes the last step of having the nominee's signature witnessed by a prescribed person.
- 6.18.3 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at page 26 of the [consultation analysis report](#)).
- 6.18.4 The Scottish Government has assessed the potential impact of extending the measure on human rights. The patient's human rights will not be impacted by the extension of this provision, as the patient will continue to be able to nominate a named person, and the patient's signature will continue to require to be witnessed, ensuring there has been no coercion and that the patient understands the consequences of their nomination. Neither will the nominated person's human rights be impacted. The nominated person will continue to be able to accept or reject the nomination and the only change will be the removal of the requirement for the nominated person's acceptance signature to be witnessed should they accept the nomination.
- 6.18.5 The provision will continue to ensure that the patient still has the ability to choose their own representation. It also provides for a named person to act for the patient, and will help reduce any delays in having the patient involved in their care and treatment decisions. This approach continues to respect the patient's rights and allows services to be delivered effectively.
- 6.18.6 The extension of this provision continues to be compliant with human rights obligations as the patient is able to have a named person, should they choose to do so.

6.19 Second Scottish Act: section 2 and schedule 1, Part 7 – Care homes

- 6.19.1 These powers for emergency directions and emergency intervention orders have been put in place to allow Health Boards and Scottish Ministers to make the swift interventions in care homes when it is considered the tests for intervention set down in section 63A and B and 65A of the Public Services Reform (Scotland) Act 2010 ('the 2010 Act') have been met (these provisions were inserted by the Second Scottish Act). The circumstances in which the Scottish Government would expect the powers in both section 63A and B and section 65A of the 2010 Act to be used, however, are rare. The standard and quality of care in care homes in Scotland is predominately high and the circumstances which these powers relate to are where there is, for a reason relating to Covid, a serious and imminent risk to life or health, or a serious risk to life, health or wellbeing (in relation to the powers in section 65A of the 2010 Act regarding immediate emergency intervention and general emergency intervention orders respectively) or a material risk to health of people in a care home (in relation to the powers at sections 63A and B of the 2010 Act).

- 6.19.2 The virus is still present, with a peak in case numbers recently seen in Scotland in January 2022 due to the Omicron variant.
- 6.19.3 This variant, which is now the dominant strain within Scotland and the rest of the UK, is more transmissible and has contributed significantly to the recent surge of infections across Scotland. The surge in community transmission of Covid is reflected in care homes, and while reduced from the peak in January 2022, significant outbreaks in care homes are continuing to be seen.
- 6.19.4 While early evidence suggests that the Omicron variant appears to cause less severe disease compared to the Delta variant, especially if a 3rd dose of the vaccine has been received, the care home population is still vulnerable due to their advanced age, or in the case of younger adults in care homes, underlying conditions. It is not only the nature of the residents that makes them susceptible to Covid, but also the fact that they all live together in close proximity with shared staff. There is a greater risk of the virus spreading in care homes. Whilst good progress is being made in vaccinating care home residents and staff, with the majority now vaccinated with three doses, the effect of vaccination is not permanent.
- 6.19.5 It is therefore the opinion of the Scottish Government that these powers should remain in place as they provide important assurance to those who depend on care services, their families, and the staff that deliver care, that swift action and additional oversight and support is available in the rare circumstances that it may be required. Retention of the voluntary purchase powers means that residents, many of whom are frail, would not need to be moved to another care home during a pandemic, thereby ensuring continuity of care and avoiding exposure of those most vulnerable to the virus which could happen if they are moved to other premises
- 6.19.6 The proposal to extend the powers was considered and supported by stakeholders at the Scottish Government's GOLD social care group. It has representation from across local government, Integration Authorities, NHS Boards, and wider delivery partners.
- 6.19.7 Extending these provisions for a further six months will result in no direct costs or savings to other bodies, individuals or businesses. However, there may be costs for private care home providers in the circumstances that a care home is directed to undertake an action via the Emergency Directions, depending on what the action is, although it is likely that the costs would have been incurred by a provider anyway had they run the service as expected i.e. so as not to require a Health Board direction. In the exceptional instance that a care home provider does not take the necessary steps in response to a direction, section 63B of the 2010 Act allows the Health Board to carry out the steps themselves. To allow the Health Board to do this, they may enter the care home if necessary and recover the costs incurred of carrying out the actions from the provider. The Health Board must apply to the sheriff for a warrant to enter the accommodation and take the specified steps.

- 6.19.8 In the event that an Emergency Intervention Order is granted by the Sheriff Court or Court of Session, regulation 4 of the Care Homes (Emergency Intervention) (Coronavirus) (Scotland) Regulations 2020 (“the 2020 Regulations”) provides that any expenditure incurred by a nominated officer or the Scottish Ministers in relation to intervention under section 65A of the 2010 Act may be recovered from the affected provider.
- 6.19.9 If there is a concern about provider financial sustainability, this can be raised locally with the commissioning authority or with Scottish Government.
- 6.19.10 The Scottish Government has assessed the potential impact of extending the measure on human rights. It is not anticipated that the extension of these provisions will have any significant adverse impact on human rights.
- 6.19.11 If Scottish Ministers decide to take emergency intervention action, they require to make an application to the court seeking permission to intervene in a care home, upon which application a court will give further consideration to the impact of any intervention on human rights and the balance of those rights. This includes consideration of how intervention seeks to safeguard and protect the human rights of residents and staff during this pandemic, particularly in relation to health and life, as well as other rights and protections. Where Scottish Ministers decide it is essential for a reason relating to Covid and in order to prevent an imminent and serious risk to the life or health of persons at a care home, the court application is to be made within 24 hours of emergency intervention. This allows immediate and proportionate safeguard of life and health at the care home on an urgent but limited basis, pending urgent consideration from the court and its ultimate decision.
- 6.19.12 A Health Board is under a similar obligation in relation to the use of its power of direction under section 63A of the 2010 Act. Directions must also be drafted with regard to any guidance issued by Scottish Ministers in relation to the exercise of this power. Entry by Health Boards to enforce directions issued under section 63A will only be taken where permitted by a care home provider or where a court grants a warrant to enter the premises and take the necessary steps. The court will consider the impact of human rights when granting any warrant.

6.20 Second Scottish Act: section 2 and schedule 1, Part 8 – Powers to purchase care home services and care at home providers

- 6.20.1 Part 8 builds on established powers and ensures, provided there is agreement, that action can be taken to acquire a care home or a care at home service which seeks to ensure the continuity of care is not jeopardised. The provisions in Part 8 create powers in relation to the acquiring of care homes and care at home services. These types of transactions require detailed due diligence exercises to be carried out as well as practical discussions around matters such as budget, transition, employment considerations and property legalities. These matters require time. If action is required, the extension of these emergency provisions would also provide much clarity and benefit.

- 6.20.2 These powers enable a Local Authority or a relevant health body to act to acquire a care home service or Local Authority to acquire a care at home service in circumstances relating to Covid where the provider is in serious financial difficulty; the Local Authority or health body is satisfied there is a threat to the life, health or wellbeing of people receiving the service; or where a provider has recently stopped providing the services.
- 6.20.3 These powers enable a Local Authority or relevant health body to act to safeguard the interests of the residents of a care home. Equally, and where there is agreement in relation to acquisition of the service, these powers seek to ensure a Local Authority can quickly put in place continuity of care for those who receive a care at home service.
- 6.20.4 As highlighted above, significant outbreaks in care homes are continuing to be seen. It's not only the nature of the residents that makes them susceptible to Covid, but also the fact that they all live together in close proximity with shared staff. There is a greater risk of the virus spreading in care homes. Where care homes have had outbreaks these have been significant often requiring mutual support from local partners. Whilst good progress is being made in vaccinating care home residents and staff, with the majority now vaccinated with 3 doses, the effect of vaccination is not permanent.
- 6.20.5 The proposal to extend the powers was considered and supported by stakeholders at the Scottish Government's GOLD social care group. It has representation from across local government, Integration Authorities, NHS Boards, and wider delivery partners.
- 6.20.6 Extending these provisions will result in no direct costs or savings to the Scottish Administration, Local Authorities or businesses as specific circumstances must be met before they can be relied upon. All purchases made under these provisions are voluntary, therefore any costs to private providers will be voluntary.
- 6.20.7 However, in the event that a relevant Health Body purchases a care home on behalf of Scottish Ministers, agreement between the Scottish Government and the relevant body may be needed regarding any financial support necessary to make this purchase. The amount of such cost is variable depending on the agreed price of the care home or care at home service and related costs.
- 6.20.8 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise. Given the voluntary nature of the powers and that both parties involved in any transaction are to reach agreement about the acquisition of any property, it does not envisage any adverse impact on these matters.

6.21 Second Scottish Act: section 2 and schedule 1, Part 9 – Care homes: further provision

- 6.21.1 These provisions were suspended by section 3 of the Extension and Expiry Act and the Scottish Government believes they should remain suspended.

- 6.21.2 The Scottish Government recommends it would be prudent to continue to suspend paragraph 23 of schedule 1 (Reporting on coronavirus deaths), which inserts section 79A of the 2010 Act, for another six months or until such earlier time as the threat from Covid has been substantially reduced.
- 6.21.3 As regards reporting powers under paragraph 22 of schedule 1 (Inspections of care homes), these should also be suspended for another 6 months or until such time as the threat from Covid has substantially reduced. There has been a return to a near normal pre-Covid process where full inspection reports are published usually within 10 days of the inspection. The result of this is that, in many cases, full reports are being published around the same time as the associated and less detailed parliamentary report. There is therefore unnecessary duplication of effort.
- 6.21.4 The weekly reporting of deaths is heavily reliant on accurate reporting by care homes, which has not always been achievable. Furthermore, the official statistics published by National Records of Scotland (NRS) are now well established.
- 6.21.5 The Scottish Government has consulted with Social Care and Social Work Improvement Scotland (“the Care Inspectorate”) and it is of the opinion that suspension is appropriate, due to the points about duplication outlined above. The Care Inspectorate further welcomes the suspension on the practical basis that it has reduced the added administrative burden placed on it during the pandemic to report to Scottish Ministers and parliament.
- 6.21.6 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.
- 6.21.7 Existing mechanisms to report on inspections and deaths are currently in place and are, at the moment, better able to provide accuracy and detail in relation to inspection reports and reporting of deaths in care homes.
- 6.21.8 However, in the event of a surge in Covid infections and pressure on existing mechanisms, the Scottish Government will consider whether a return to increased monitoring and reporting on individual care homes is justified and proportionate.
- 6.21.9 The Scottish Government will continue to work with its partners, providers of services and their representative bodies on ways in which to ease the burden on the sector and ensure human rights and equality issues are at the forefront of the response to the pandemic.

6.22 Second Scottish Act: section 3 and schedule 2, Part 1, paragraphs 2 to 5 – Arrangements for the custody of persons detained at police stations

- 6.22.1 The Scottish Government continues to support its justice partners to take action to address the backlog caused by the Covid pandemic and to minimise the impact on all court users. The provisions continue to enable the introduction

and rollout of new and innovative ways of working in an urgent, effective and collaborative manner.

- 6.22.2 Much of the decision making undertaken by the Scottish Government's partners continues to be predicated on the existing powers being retained to support the initiatives being adopted within the parameters of public health guidance; and to be retained so long as the evidence supports their need. This has been a key component of the RRT programme.
- 6.22.3 Without these provisions to support the administration of virtual custody courts, the ability of the justice system to continue would otherwise have been adversely affected, primarily through the requirement for the physical transfer of prisoners and the need to maintain public safety around court buildings.
- 6.22.4 The provisions continue to enable business to be conducted in a way which minimises unnecessary travel and congregation of people in accordance with public health guidance and allows justice partners to focus on urgent and priority business as necessary in the physical court estate.
- 6.22.5 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at page 22 of the [consultation analysis report](#)).
- 6.22.6 The Scottish Government has assessed the potential impact of extending the measure on human rights. Detention in a police station following arrest engages a person's right to liberty under Article 5 ECHR. The fundamental principle around access to justice has been applied when considering the extension of these provisions and the impact on all court users of delays in proceedings if remote custody courts are not supported by PCOs. Whether police officers, police custody and security officers or prisoner custody officers have charge of individuals appearing before virtual custody courts in police stations does not impact on the human rights of those individuals.

6.23 Second Scottish Act: section 3 and schedule 2, Part 1, paragraph 6 – Expiry of undertaking under section 25(2)(a) of the Criminal Justice (Scotland) Act 2016

- 6.23.1 During the Covid pandemic people have been unable to attend court in accordance with their undertaking due to public health guidance or infection. Without action, in this situation there was a risk that protective conditions attached to undertakings would expire in cases, raising safety concerns and an increased risk for the public, with particular risks associated with domestic abuse cases.
- 6.23.2 This measure addresses this risk by enabling the court to prevent the expiry of an undertaking given under section 25(2)(a) of the Criminal Justice (Scotland) Act 2016 and any protective conditions attached to the undertaking by changing the time at which the person who gave it is to appear at court when certain conditions are met. The need to self-isolate because of possible infection with Covid (or the continued existence of other Covid related reasons

which prevent people from attending court) are likely to continue for some time to come. It is considered prudent and necessary for this provision to remain in force while infection and/or public health measures remain in place to ensure the court has the powers to prevent the expiry of an undertaking and any conditions attached to it if a person fails to appear at court as required by the terms of their undertaking, where the court considers that the failure to appear is attributable to a reason relating to Covid and it is not appropriate to grant a warrant for the person's arrest. This enables the preservation of protective conditions of undertaking that may otherwise be lost where a person fails to attend court due to Covid and remains a key measure to preserve public and victim safety during the Covid pandemic, particularly in sensitive cases of domestic abuse.

- 6.23.3 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at page 38 of the [consultation analysis report](#)).
- 6.23.4 The Scottish Government has assessed the potential impact of extending the measure on human rights. In relation to Article 8 ECHR, which the Scottish Government acknowledges is engaged by these provisions, even where an undertaking continues longer than might have initially been anticipated, the conditions are the same as those that the person initially agreed to when entering into the undertaking. Where a person is subject to any further conditions of undertaking, the person retains the right to apply to the court to have a condition/(s) reviewed. If the court is not satisfied that the further condition is necessary and proportionate for the purpose for which it was imposed, the sheriff may modify the terms of the undertaking by removing the condition or imposing an alternative condition. The penalty for breaching the undertaking also remains unchanged. The Scottish Government therefore considers that any increased interference with Article 8 rights is in accordance with the law and can be justified as proportionate to achieving the legitimate aim of public safety.
- 6.23.5 In addition, the Scottish Government notes that the power to extend an undertaking and any conditions attached to it is limited to circumstances where the court considers that the accused person has not attended court for a reason relating to Covid, and as such, it could not be used by the court as a general alternative to issuing a warrant for the person's arrest in instances where, unrelated to Covid, the person has not appeared in court and the undertaking has lapsed. In any event, the power given to the court is exercisable by the court in a manner that is compatible with the ECHR.

6.24 Second Scottish Act: section 3 and schedule 2, Part 2 – Proceeds of crime

- 6.24.1 Paragraph 8 of schedule 2 of the Second Scottish Act has the effect of putting beyond any doubt that reasons directly or indirectly related to Covid may be regarded as "exceptional circumstances" for the purposes of extending the period of postponement of confiscation proceedings.

- 6.24.2 Following a conviction in relevant criminal cases, prosecutors can make an application to the court, under section 92 of the Proceeds of Crime Act 2002 (“the 2002 Act”), for a criminal confiscation order. These proceedings can be postponed under section 99 on an application by the prosecutor, the accused or by the court of its own motion. The permitted period for any postponement is two years from the date of conviction, unless (among other things) “exceptional circumstances” can be demonstrated, as per section 99(4) of the 2002 Act. If the court is satisfied that there are exceptional circumstances it can postpone the process for more than two years.
- 6.24.3 Critically, if proceedings are not commenced within the permitted period then no confiscation order can be made in that case. Extending the period of postponement ensures that the COPFS retain the option to apply for a confiscation order and this option does not fall due to the ending of the permitted period.
- 6.24.4 There is potential that, without this provision, convicted offenders who have profited from their criminality may be able to retain their ill-gotten criminal gains and use illicit monies to further their criminal activities.
- 6.24.5 COPFS has advised that there are currently five cases where the permitted period is likely to expire by the end of March 2022, with a further 10 cases where the permitted period could expire before September 2022. There have been 31 occasions where an extension of the permitted period has been sought, 23 of these being in the last six months.
- 6.24.6 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at page 44 of the [consultation analysis report](#)).
- 6.24.7 Extending the provisions is supported by several main stakeholders, including the Senators of the Court of Justice and Law Society of Scotland.
- 6.24.8 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise. Extending the provision is equitable to both prosecution and defence parties and, as the court retains the power to determine not to grant an extension and can therefore refuse such a request, a person’s Article 6 right will always be capable of being safeguarded. The extension of the provision would not create any new offences and no heavier penalty will be imposed than would otherwise have been the case.
- 6.24.9 With regard to paragraph 9 of schedule 2 of the Second Scottish Act, the Scottish Government considers that extending the additional time to pay provisions until the end of September 2022 is appropriate in the context of the impacts of the Omicron variant and potential future variants. It considers that there remains potential for difficulties in making payment if Covid reasons are genuinely hindering that payment, for example through difficulty realising assets or the availability of legal or financial advice. The Court would need to be satisfied that Covid was the reason for non-payment before an extension would

be granted and the prosecutor will have the opportunity to make representations.

- 6.24.10 The Scottish Government believes there is merit in extending these provisions until the end of September 2022.
- 6.24.11 The Scottish Government further believes that this approach is proportionate to the continued threat posed by the pandemic and allows sufficient time to cover any difficulties that might be experienced related to the Omicron, or other future variants.
- 6.24.12 Corresponding provision was included in the consultation for the Recovery and Reform Bill (see the outcome at page 44 of the [consultation analysis report](#)), but did not feature in the Bill as introduced. The Scottish Ministers consider that many of the barriers to fulfilment of a confiscation order caused by the pandemic (e.g. the stagnation of the housing market) have been significantly reduced and that after September 2022 it will be appropriate to revert to the pre-pandemic legislation. This will still allow an individual to apply for a maximum of 12 months to pay, however after which time, if payment has not been made, the individual will be called back before the court for further consideration of the case.
- 6.24.13 The Scottish Government has sought the views of the COPFS (as the main operational stakeholder) and given the current situation, they consider that March may be too soon to expire these provisions if Covid had genuinely prevented or hindered payment in some way (e.g. property sales, loss of income). Extending the provisions to the end of September 2022 is proportionate and provides sufficient notice to allow those subject to a confiscation order to rectify any issues in advance of that date.
- 6.24.14 Other stakeholders, such as the Law Society of Scotland, the Faculty of Advocates and COSLA, have suggested that the provisions should be extended beyond March 2022 but not made permanent. The Senators of the Court of Justice and the Sheriff Principals of Scotland, have noted that the issue of the extension of these provisions is a matter of policy and in that context have made no further comment.
- 6.24.15 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise. In particular, any impact that extending the provision may have on a person's rights under article 6 ECHR to have their case determined in a reasonable time does not apply because any request to extend the time within which the accused must realise his/her assets is made on the application of the accused and the purpose of extension is to protect against the accused's position being inadvertently prejudiced by the continuing effect of Covid.

6.25 Second Scottish Act: section 5 and schedule 4, Part 4 – Care services: giving of notices by the Care Inspectorate

- 6.25.1 This provision temporarily changes the law on giving notice by "personal service" in relation to corporate bodies, and on giving notice electronically by temporarily modifying section 101 of the Public Services Reform (Scotland) Act 2010. It enables the Care Inspectorate, when delivering a notice personally to a body corporate to serve it on a wider range of people, including a care home manager or a director, secretary or other similar officer of the body. It also enables the Care Inspectorate to send formal notices to registered care service providers, and those seeking to provide a care service, by electronic means for the duration of the emergency period.
- 6.25.2 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at pages 19-20 of the [consultation analysis report](#)).
- 6.25.3 The Scottish Government has consulted with the Care Inspectorate who have confirmed that they have found the emergency provision to be extremely useful. Since the commencement of the emergency provisions, it has used the power to issue electronic notices in relation to more than 4,000 matters. The Care Inspectorate have therefore indicated a preference to continue to serve notices electronically on a permanent basis and on the wider list of persons provided through the provisions.
- 6.25.4 Without the power to issue notices by electronic means, the ability of the Care Inspectorate to continue giving notices in the safest, quickest and most secure way is greatly affected. If physical notices were to once again become the only option for delivery, delays to enforcement action will likely increase. Should a service not be quickly and reliably informed of the necessary requirements to make to improve its quality of care, the health, safety and wellbeing of service users may ultimately be put at risk. Where the challenges of the pandemic continue or any similar future situation arises, the ability to issue electronic notices will also ensure continuity of service where physical delivery is problematic.
- 6.25.5 The view of the Scottish Government is that the provisions need to be extended beyond the end of 31 March 2022 given business practices are not yet operating as they normally do due to the pandemic. Furthermore, this provision allows notices to continue to be issued quickly and safely via electronic means to those providing and seeking to provide a care service. It also continues to permit physical notices being issued at the earliest opportunity to care home managers and a wider group of representatives of that care service provider where there is an immediate need to do so.
- 6.25.6 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise. These provisions will still enable physical notices to be issued, with electronic notices only being issued where a willingness to receive them in this way is indicated.

6.26 Second Scottish Act: section 5 and schedule 4, Part 7 – Execution of documents, etc.

- 6.26.1 This provision is to allow Scottish notaries public, solicitors or advocates to provide specific legal services such as the taking or administering of oaths, affirmations or declarations, and the execution of certain documents, without being in the physical presence of those seeking such legal services.
- 6.26.2 This a departure from the position prior to the Second Scottish Act where such legal services, guided by professional bodies, did require to be carried out by those legal professionals in the physical presence of those requiring them.
- 6.26.3 This provision creates the opportunity for Scottish notaries public, solicitors and advocates to adopt alternative appropriate means of executing documents and taking oaths etc., for example notaries may now execute certain documents remotely, for example by way of such as live video connection.
- 6.26.4 The virus is still present, with a peak in case numbers recently seen in Scotland in January 2022 due to the Omicron variant. Current guidance is that businesses must take reasonable measures to minimise the risk of the incidence and spread of Covid, and support hybrid working for employees where possible.
- 6.26.5 It is therefore the opinion of the Scottish Government that these provisions should remain in place so as to reduce any adverse impact on those who need notarial and other legal services, in terms of risk of exposure to Covid, as well as in relation to anxiety, cost and delay which may occur.
- 6.26.6 Corresponding provisions are contained in the Recovery and Reform Bill and were included in the consultation for the Bill (see the outcome at page 25 of the [consultation analysis report](#)).
- 6.26.7 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.

6.27 Second Scottish Act: section 5 and schedule 4, Part 12 – Restriction on giving grant to businesses connected to tax havens

- 6.27.1 Covid-related grants may be required by businesses in Scotland for some time to come. This measure is intended to ensure that businesses in Scotland contribute a fair share of tax.
- 6.27.2 Therefore, in order to continue to ensure that the intention of Parliament in respect of those grants is met, this restriction needs to remain in operation.
- 6.27.3 The Scottish Government believes that it is essential that everyone pays a fair share of tax to fund the vital services and infrastructure on which Scotland rely, now more than ever. Those who have chosen not to contribute their fair share should not expect to receive financial assistance and support.
- 6.27.4 This measure therefore continues to be necessary.

- 6.27.5 Stakeholders involved in Scottish Government grant-making (e.g. enterprise agencies, local authority representatives and UK Government specialist counterparts) were consulted in the early stages of this measure to ensure that it was designed and implemented in as practicable a way as possible. There is ongoing communication with affected grant-making entities on the implementation of the measure and no concerns have been raised.
- 6.27.6 The Scottish Government has assessed the potential impact of extending the measure on human rights and considers that ECHR issues do not arise.
- 6.27.7 There is a risk that some businesses which provide essential services to vulnerable people (e.g. care homes) could be denied grant funding as a consequence of the provision. Scottish Government officials are continuing to monitor this risk so that practical solutions can be devised if needed. Officials are not currently aware of any examples of essential services being obstructed by this measure.

7. Summary of recommendations made in relation to extending or expiring provisions in the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No. 2) Act 2020

Coronavirus (Scotland) Act 2020				
Provision	Subject	Action	Relevant section of Statement of Reasons	Further information
Schedule 1, paragraphs 1, 3 and 5	Eviction from dwelling-houses (Discretionary grounds of eviction)	Extension	See section 6.1	
Schedule 1, paragraphs 2, 4 and 6 to 10	Eviction from dwelling-houses (Extended notice periods)	Expiry	No reference	See the Policy Note accompanying the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022
Schedule 2	Temporary extension of moratoriums on diligence	Extension	See section 6.2	
Schedule 4, Part 1	Courts and tribunals: conduct of business by electronic means	Extension	See section 6.3	
Schedule 4, Part 2	Fiscal fines	Extension	See section 6.4	
Schedule 4, Part 3	Cases beginning with an appearance from custody	Extension	See section 6.5	
Schedule 4, Part 4	Extension of time limits	Extension	See section 6.6	
Schedule 4, Part 6	Community orders	Extension	See section 6.7	
Schedule 4, Part 7	Parole Board	Extension	See section 6.8	Paragraph 18(1) and (3) of Part 7, will be expired by the Coronavirus (Scotland) Act 2020 (Early Expiry of Provisions) Regulations 2022 which were laid in the Scottish Parliament on the 20 January

				2022. At the same time the Parole Board (Scotland) Amendment Rules 2022 will amend the Parole Board (Scotland) Rules 2001 with the same effect as the modifications made by the temporary provisions. The amended rules are due to come into force on 10 March 2022 at the same time as the temporary provisions expire.
Schedule 4, Part 8	Release of prisoners	Extension	See section 6.9	
Schedule 4, Part 9	Legal aid	Extension	See section 6.10	
Schedule 5	Alcohol licensing	Extension	See section 6.11	
Schedule 6, Part 1	Licensing other than alcohol licensing	Extension	See section 6.11	
Schedule 6, Part 2	Freedom of information	Extension	See section 6.12	
Schedule 6, Part 3	Duties in respect of reports and other documents	Extension	See section 6.13	
Schedule 6, paragraphs 11, 12 and 14	Local authority meetings	Expiry	No reference	See the Policy Note accompanying the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022
Schedule 7, paragraphs 6 and 7	Irritancy clauses in commercial leases: non-payment of rent or other sums due	Expiry	No reference	See the Policy Note accompanying the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022

Schedule 7, paragraphs 8 to 10	Duration of planning permission	Extension	See section 6.14	
Schedule 7, paragraphs 11 to 14	Electronic delivery of copy of deed to Registers of Scotland	Extension	See section 6.15	
Coronavirus (Scotland) (No. 2) Act 2020				
Provision	Subject	Recommendation	Relevant section of Statement of Reasons	Further information
Schedule 1, Part 1	Student residential tenancy: termination by tenant	Extension	See section 6.16	
Schedule 1, Part 2	Tenancies: pre-action requirements for order for possession or eviction order on ground of rent arrears	Extension	See section 6.1	
Schedule 1, Part 4	Social care staff support fund	Extension	See section 6.17	
Schedule 1, Part 5	Bankruptcy	Extension	See section 6.2	
Schedule 1, Part 6	Mental health: named person nomination	Extension	See section 6.18	
Schedule 1, Part 7	Care Homes	Extension	See section 6.19	
Schedule 1, Part 8	Powers to purchase care home services and care at home providers	Extension	See section 6.20	
Schedule 1, Part 9	Care homes: further provision	Extension	See section 6.21	
Schedule 2, paragraph 1	Criminal proceedings: extension of time limits	Extension	See section 6.6	
Schedule 2, paragraphs 2 to 5	Arrangements for the custody of persons detained at police stations	Extension	See section 6.22	

Schedule 2, paragraph 6	Expiry of undertaking under section 25(2)(a) of the Criminal Justice (Scotland) Act 2016	Extension	See section 6.23	
Schedule 2, Part 2	Proceeds of crime	Extension	See section 6.24	
Schedule 2, Part 3	Intimation, etc. of documents	Extension	See section 6.3	
Schedule 4, Part 2	Listed buildings and conservation areas: consents	Extension	See section 6.14	
Schedule 4, Part 3	Registers kept by the Keeper of the Registers of Scotland	Extension	See section 6.15	
Schedule 4, Part 4	Care services: giving of notices by the Care Inspectorate	Extension	See section 6.25	
Schedule 4, Part 7	Execution of documents, etc.	Extension	See section 6.26	
Schedule 4, Part 8	Freedom of information	Extension	See section 6.12	
Schedule 4, paragraph 14	Council tax: exempt dwellings	Expiry	No reference	See the Policy Note accompanying the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022
Schedule 4, Part 12	Restriction on giving grant to businesses connected to tax havens	Extension	See section 6.27	



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St Andrew's House
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ISBN: 978-1-80435-068-3 (web only)

Published by The Scottish Government, February 2022

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1024078 (02/22)

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