

# Criminal Justice Committee

**29th Meeting, 2023 (Session 6), Wednesday, 8 November 2023**

## Subordinate legislation

### Note by the clerk

### Purpose of the paper

1. This paper invites the Committee to consider the following affirmative instruments:
  - [The International Organisations \(Immunities and Privileges\) \(Scotland\) Amendment \(No. 2\) Order 2023 \[draft\]](#)
  - [The Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022 \(Extension and Expiry of Temporary Justice Measures\) Regulations 2023 \[draft\]](#)

## **The International Organisations (Immunities and Privileges) (Scotland) Amendment (No. 2) Order 2023 [draft]**

2. The above instrument is proposed to be made in exercise of the powers conferred by sections 1 of the International Organisations Act 1968.
3. The purpose of the instrument is to amend the International Organisations (Immunities and Privileges) (Scotland) Order 2009 to correct a discrepancy between the provisions of the Agreement on the Privileges and Immunities of the International Atomic Energy Agency 1959 (signed by the UK in 1961) and the International Atomic Energy Agency (Immunities and Privileges) Order 1974, which implemented the Treaty obligations into UK domestic law.
4. This Order will correct that discrepancy for those matters which are within the legislative competence of the Scottish Parliament.
5. Further details on the purpose of the instrument can be found in the policy note attached in **Annex A**.

## **The Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension and Expiry of Temporary Justice Measures) Regulations 2023 [draft]**

6. The above instrument is proposed to be made in exercise of the powers conferred by sections 52(3), 53 and 58(1) of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (“the 2022 Act”).
7. The 2022 Act includes a range of temporary justice measures that were originally introduced in response to Covid-19 to support the operation of the justice system as it responded to the impact of the pandemic and associated restrictions it led to. These temporary measures are currently due to expire on 30 November 2023.
8. These Regulations expire the temporary justice measures in the 2022 Act that are no longer required.
9. They also modify the expiry date for the remaining temporary justice measures, with the effect that those measures remain in force until 30 November 2024.
7. Further detail is provided in the Policy Note and Statement of Reasons produced by the Scottish Government to accompany the instrument (see **Annexes B and C**).
8. The Criminal Justice Committee considered the justice provisions in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 when it considered the Bill at Stage 1.
9. The [Committee's Stage 1 report](#) discussed each of the proposed temporary justice measures in turn.

## **Delegated Powers and Law Reform Committee Consideration**

7. The Delegated Powers and Law Reform Committee considered both of the instruments at its meeting on 26 September 2023.
8. The DPLR Committee agreed that it did not need to draw them to the attention of the Parliament on any grounds within its remit.

## **Criminal Justice Committee Consideration**

- 9. The Committee is required to report to the Parliament by 13 November 2023 for the first instrument and 14 November 2023 for the second of the instruments.**
10. Motions S6M-10537 and S6M-10547 have been lodged proposing that the Committee recommends approval of the instruments. The Cabinet Secretary for Justice and Home Affairs is due to attend the meeting on 8 November to answer any questions on the instruments and to move the motions for approval.
- 11. It is for the Committee to decide whether to agree to the motions, and then to report to the Parliament. Thereafter, the Parliament will be invited to approve the instruments based on the Committee's recommendation.**
- 12. The Committee is asked to delegate to the Convener authority to approve the report on the instruments for publication.**

Clerks to the Committee  
November 2023

# Annex A

## Policy Note

### The International Organisations (Immunities and Privileges) (Scotland) Amendment (No.2) Order 2023

#### SSI 2022/XXX

The above instrument was made in exercise of the powers conferred by section 1 of the International Organisations Act 1968 (“the 1968 Act”) and all other powers enabling His Majesty to do so. The instrument is subject to affirmative – order in council procedure.

#### Summary Box

The purpose of this instrument is to amend the International Organisations (Immunities and Privileges) (Scotland) Order 2009 to correct a discrepancy between the provisions of the Agreement on the Privileges and Immunities of the International Atomic Energy Agency 1959 (signed by the UK in 1961) and the International Atomic Energy Agency (Immunities and Privileges) Order 1974, which implemented the Treaty obligations into UK domestic law. This Order corrects that discrepancy for those matters which are within the legislative competence of the Scottish Parliament.

#### Policy Objectives

1. The UK regularly hosts International Atomic Energy Agency (IAEA) convened events and accepts as the host nation to provide the privileges and immunities set out in the Agreement on the Privileges and Immunities of the International Atomic Energy Agency 1959 (signed by the UK in 1961)
2. Where the 1959 Treaty grants privileges and immunities to representatives of Members attending UK hosted, IAEA convened international symposiums, seminars, or panels, the International Atomic Energy Agency (Immunities and Privileges) Order 1974 only grants privileges and immunities to representatives of Members attending a limited range of UK hosted IAEA convened meetings.
3. The provisions of the 1974 Order therefore need to be amended to enable the United Kingdom to fulfil its obligations to provide privileges and immunities to international delegates attending applicable IAEA convened events hosted in the UK. The International Atomic Energy Agency (Immunities and Privileges) (Amendment) Order (S.I. 2023/845) amended the 1974 Order to correct this

discrepancy between the provisions of that Order and the Agreement to the extent the provisions relate to reserved matters as regards Scotland and with the other UK jurisdictions. That amendment also disapplies the provisions of the 1974 Order insofar as they would be within the legislative competence of the Scottish Parliament. This Order therefore restates the provisions of the 1974 Order, as amended to correct the discrepancy, insofar as they would, if included in an Act of the Scottish Parliament, be within the legislative competence of that Parliament. In addition, this Order sets out the meaning of ‘representatives of Members’ as defined in the 1959 Treaty.

## **Scotland Act**

4. Under the Scotland Act 1998, international relations (including relations with international organisations) is reserved to the UK Parliament. However, to the extent that the UK’s obligations in respect of international organisations fall within devolved competence – for instance, conferral of immunity from criminal and civil proceedings, and relief from local and devolved taxes – the making of orders under section 1 of the 1968 Act to meet those obligations is subject to procedure in the Scottish Parliament, given the terms of paragraph 7(2) of Part I of schedule 5 of the Scotland Act 1998, under which the observance and implementation of international obligations is a devolved matter.
5. The effect of section 118(4) of the Scotland Act 1998 is that a power to make an Order in Council in a pre-commencement enactment (i.e. an Act preceding the Scotland Act 1998) which is exercisable within devolved competence must be approved by a resolution of the Scottish Parliament rather than the UK Parliament. Consequently, Orders in Council made by His Majesty under section 1 of the 1968 Act, so far as they are within devolved competence, are subject to approval by the Scottish Parliament.

## **EU Alignment Consideration**

6. This instrument is not relevant to the Scottish Government’s policy to maintain alignment with the EU.

## **Consultation**

7. The instrument has been prepared in consultation with the Foreign, Commonwealth and Development Office, the Department for Energy Security & Net Zero and other relevant United Kingdom Government Departments. No external consultation was undertaken as this Order implements provisions of an international agreement to which the United Kingdom is obliged to give effect as a matter of international law. This is consistent with the general practice on Orders made under the 1968 Act.

## **Impact Assessments**

8. No impact assessment has been completed as there is no effect on people other than those to whom the UK Government has afforded privileges and immunities.

## **Financial Effects**

9. The Cabinet Secretary for Justice and Home Affairs confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government  
Justice Directorate  
September 2023

## **Annex B**

### **Policy Note**

# **The Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension and Expiry of Temporary Justice Measures) Regulations 2023**

## **SSI 2023/XXX**

The above instrument was made in exercise of the powers conferred by sections 52(3), 53 and 58(1) of the Coronavirus (Recovery and Reform) (Scotland) Act 2022. The instrument is subject to affirmative procedure.\*

### **Summary Box**

These Regulations expire the temporary justice measures in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (“the 2022 Act”) that are no longer required. They also modify the expiry date for the remaining temporary justice measures, with the effect that those measures remain in force until 30 November 2024.

### **Policy Objectives**

The 2022 Act includes a range of temporary justice measures that were originally introduced in response to Covid-19 to support the operation of Scotland’s justice system as it responded to the impact of the pandemic and associated restrictions it led to. These temporary measures are currently due to expire on 30 November 2023. This instrument’s objectives are to (i) extend the availability of those temporary measures that are continuing to play a valuable role in helping Scotland’s justice system to process business more effectively and efficiently in the wake of the Covid-19 pandemic and support the system’s recovery from the effects of the pandemic; and (ii) expire those temporary provisions that are no longer necessary or proportionate. Further detail is provided in the Statement of Reasons produced to accompany the instrument (SG/2023/180).

### **EU Alignment Consideration**

This instrument is not relevant to the Scottish Government’s policy to maintain alignment with the EU.

## Consultation

To comply with the requirements of section 52(6) of the 2022 Act, the Scottish Ministers have consulted a range of stakeholders to inform the contents of this instrument. Further detail is provided in the Statement of Reasons produced to accompany the instrument.

## Impact Assessments

The provisions extended by this instrument all form part of the 2022 Act. The following impact assessments were carried out for the 2022 Act. They have been reviewed and, where necessary, updated to reflect the contents of this instrument:

- Coronavirus (Recovery and Reform) (Scotland) Bill: child rights and wellbeing impact assessment<sup>1</sup>
- Coronavirus (Recovery and Reform) (Scotland) Bill: equalities impact assessment<sup>2</sup>
- Coronavirus (Recovery and Reform) (Scotland) Bill: fairer Scotland duty impact assessment<sup>3</sup>
- Coronavirus (Recovery and Reform) (Scotland) Bill: island communities impact Assessment<sup>4</sup>

## Financial Effects

The provisions extended by this instrument all form part of the 2022 Act. A Business and Regulatory Impact Assessment was carried out for the Act, and can be found here:

- Coronavirus (Recovery and Reform) (Scotland) Bill: business and regulatory impact assessment<sup>5</sup>

The Scottish Government has reviewed the Business and Regulatory Impact Assessment and is satisfied that it reflects the impact of the instrument.

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<sup>1</sup> <https://www.gov.scot/publications/coronavirus-recovery-reform-scotland-bill-child-rights-wellbeing-impactassessment-crwia/>

<sup>2</sup> <https://www.gov.scot/publications/coronavirus-recovery-reform-scotland-bill-equalities-impact-assessmentegia/>

<sup>3</sup> <https://www.gov.scot/publications/coronavirus-recovery-reform-scotland-bill-fairer-scotland-duty-impactassessment-fsdia/>

<sup>4</sup> <https://www.gov.scot/publications/coronavirus-recovery-reform-scotland-bill-island-communities-impactassessment-icia/>

<sup>5</sup> <https://www.gov.scot/publications/coronavirus-recovery-reform-scotland-bill-business-regulatory-impactassessment-bria/>



**\* Note on Parliamentary Procedure**

Under the terms of the 2022 Act, regulation 3 in this instrument is subject to the affirmative procedure, while the remaining regulations are subject to the negative procedure. The regulations have been combined in a single, affirmative, instrument because of their interrelated nature: regulation 2 only has meaningful effect if regulation 3 is passed by the Parliament.

Scottish Government  
Justice Directorate  
*September 2023*

## Annex C

# Proposed extension of temporary justice provisions in the Coronavirus (Recovery and Reform) (Scotland) Act 2022

## Statement of Reasons

### Overview

1. The [Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022](#) ('the 2022 Act') includes a range of temporary justice measures that are due to expire on 30 November 2023. Any of these temporary provisions may be extended for one year (that is, until 30 November 2024), by regulations subject to the affirmative procedure.
2. To inform a decision on whether each provision should be extended, Ministers must review its operation, and consult such persons as they consider appropriate.
3. Having carried out a review and consultation exercise, Ministers have now laid regulations before the Parliament to expire the provisions that the Scottish Government believes are no longer required, and to modify the expiry date that applies to the remaining provisions, with the effect that they be extended until 30 November 2024. **Table 1** provides an overview of which measures the regulations expire and which they extend.
4. The temporary measures were originally introduced in 2020<sup>6</sup>, in order to give Scotland's justice system the resilience and flexibility needed to respond to the challenges presented by the Covid pandemic. There are three key reasons that the Scottish Government is proposing that some of these measures now be extended until November 2024:
  - The pandemic significantly increased criminal court backlogs, which continue to impact the justice system. Considerable progress has already been made in reducing the backlog – the total number of outstanding scheduled trials fell by over a third between January 2022 and July 2023 – but it remains high, and modelling by the Scottish Courts and Tribunals Service (SCTS) predicts that solemn backlogs will persist above pre-pandemic levels until 2026. Without the mitigating effect of the temporary measures that help ensure court resources are used efficiently, this timescale would be longer, and there would be a risk that some cases could not proceed at all.

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<sup>6</sup> In the Coronavirus (Scotland) Act 2020 'the First Scottish Act') and the Coronavirus (Scotland) (No.2) Act 2020 ('the Second Scottish Act'). Note that some of the measures were modified slightly when incorporated into the 2022 Act.

- Other measures (notably those in Part 7) remain important tools to directly respond to the public health threat posed by Covid, in circumstances where – although the likelihood of such a threat arising might be low – the harm caused by not having the measures available could be severe.
  - Although the pandemic was the catalyst for temporary legislative change, some of the measures have demonstrated that they have a valuable role to play in helping to make Scotland’s justice processes more modern and efficient, delivering better outcomes and experiences for the people using them. Whilst recognising that permanent reform will require further primary legislation, it is appropriate to seek to extend the use of some of these valuable measures not only to promote the continued recovery of the justice system, but to ensure that welcome modernisations of the system can continue to be developed and assessed, pending any permanent reform.
5. This Statement of Reasons sets out why the Scottish Government believes it is necessary and appropriate to extend each of the provisions indicated in Table 1. It summarises the review that has been undertaken of their operation, and the consultation that was carried out as part of that review.

**Table 1**

Temporary provisions in schedule of 2022 Act	Effect of the 2023 Regulations
<p><b>Part 1, Chapter 1: Courts and tribunals: conduct of business by electronic means etc: Documents</b> Allows for the electronic signing, sending and intimation of documents</p>	<p>Extended until end of 30 November 2024.</p>
<p><b>Part 1, Chapter 2: Courts and tribunals: conduct of business by electronic means etc: Attending a Court of Tribunal</b> Enables virtual attendance at a court or tribunal</p>	<p>Extended until end of 30 November 2024 for criminal business, and for civil business other than proceedings in the Court of Session and ordinary cause proceedings (for those proceedings, the provisions expired on 3 July 2023, and have been replaced by court rules).</p>
<p><b>Part 2: Fiscal fines</b> Increases the maximum level of fiscal fine to £500, and adjusts the scale of fines</p>	<p>Extended until end of 30 November 2024.</p>
<p><b>Part 3: Failure to appear before court following police liberation</b> Enables the courts to modify the date someone is required to attend court on an undertaking, if they fail to appear at court for a reason attributable to coronavirus</p>	<p>Expired from the end of 29 November 2023.</p>
<p><b>Part 4: National jurisdiction for callings from custody</b> Allows custody cases to be heard in any court in Scotland</p>	<p>Extended until end of 30 November 2024.</p>
<p><b>Part 5, Chapter 1: Criminal procedure time limits: Extension of periods</b> Extends the statutory limits on:</p>	
<ul style="list-style-type: none"> <li>• how long may elapse between first appearance and preliminary hearing/first diet/trial in solemn proceedings</li> </ul>	<p>Extended until end of 30 November 2024</p>
<ul style="list-style-type: none"> <li>• how long may elapse between the commission of an offence and the commencement of proceedings for statutory offences that are triable only summarily</li> </ul>	<p>Extended until end of 30 November 2024</p>
<ul style="list-style-type: none"> <li>• how long a person can be kept on remand before service of indictment/preliminary hearing/first diet/trial in solemn cases</li> </ul>	<p>Extended until end of 30 November 2024</p>
<ul style="list-style-type: none"> <li>• how long a person can be kept on remand before trial in summary cases</li> </ul>	<p>Expired from the end of 29 November 2023</p>
<ul style="list-style-type: none"> <li>• how long a person can be kept on remand pre-sentence pending inquiry into their physical or mental condition.</li> </ul>	<p>Expired from the end of 29 November 2023</p>
<p><b>Part 5, Chapter 2: Criminal procedure time limits: Adjournment periods</b> Removes the limit on how long a court can adjourn a summary case :</p>	
<ul style="list-style-type: none"> <li>• to allow for further inquiries</li> </ul>	<p>Expired from the end of 29 November 2023</p>
<ul style="list-style-type: none"> <li>• when the accused does not appear</li> </ul>	<p>Expired from the end of 29 November 2023</p>
<p><b>Part 6: Proceeds of Crime</b> Ensures that criminal confiscation order proceedings in proceeds of crime cases can be postponed if coronavirus is affecting proceedings</p>	<p><i>This measure expired on 3 July 2023.</i></p>
<p><b>Part 7: Prisons and Young Offenders Institutions</b> Enables the emergency early release of prisoners in response to the effects of coronavirus</p>	<p>Extended until end of 30 November 2024.</p>

## Legislative context

6. Section 52(1) of the 2022 Act provides that the temporary measures in the schedule will expire at the end of 30 November 2023. However, under section 52(3) the Scottish Ministers may extend the measures for one additional year at a time, by modifying the expiry date that is set out on the face of the Act.
7. If the expiry date is modified, that has the effect of extending all of the measures that are still in force on the date when the extension takes effect. This means that if Ministers do not wish certain measures to be extended, they must expire those measures before the extension takes effect.
8. To inform a decision on whether each provision should be extended, Ministers must review the operation of each provision. Section 52(6) requires that, as part of that review, they must consult “any person they consider appropriate”.
9. If Ministers decide that any of the provisions should be extended, section 52 requires that they must lay before the Parliament:
  - Regulations that would modify the expiry date of those provisions, so that they would expire at the end of 30 November 2024. These regulations are subject to the affirmative procedure.
  - A statement setting out the reasons for seeking the extension, the findings of the review, and the consultation undertaken.
10. On 20 September 2023, the Cabinet Secretary for Justice and Home Affairs laid the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension and Expiry of Temporary Justice Measures) Regulations 2023 (‘the 2023 Regulations’) before the Parliament. As set out in Table 1, they expire certain provisions with effect from the end of 29 November 2023, and modify the expiry date in section 52(1) of the Act so that the remaining provisions expire at the end of 30 November 2024.
11. If in the future Ministers decide that any of these provisions should be extended for a further year (until the end of 30 November 2025), this process would need to be repeated. Under the 2022 Act, it is not possible to extend the temporary measures beyond November 2025. If there were a desire to retain any of the temporary justice measures beyond that point, primary legislation would be necessary, which would be informed by a full public consultation.

## Consultation

12. As part of the review of the operation of the temporary measures since October 2022, the Scottish Government has engaged with justice agencies to understand how the provisions are being used, the effect they are having, and what the impact would be if they were not extended.
13. The legal profession, judiciary, local government, organisations supporting and representing victims and third sector organisations with a particular interest in the

provisions were also invited to share their views. This included those organisations who gave oral or written evidence on the provisions to the Criminal Justice Committee during its scrutiny of the 2022 Act. A full list of the bodies who were invited to take part in the consultation is at Appendix 1.

## Provisions proposed for extension

### Part 1, Chapter 1: conduct of court and tribunal business by electronic means

#### *What do the provisions do?*

14. These provisions enable documents produced by a court or tribunal, or connected with criminal or civil proceedings, to be signed and transmitted electronically (for example by email), and in certain circumstances be sent to a party's solicitor instead of to the party themselves in a case, removing the requirement for physical movement of documents. They also provide that documents that would normally have to be physically displayed (or otherwise made publicly available) in a court building can instead be published on the Scottish Courts and Tribunals Service website.

#### *Why does the Scottish Government believe these measures should be extended until 30 November 2024?*

15. The provisions have become firmly embedded in Scotland's justice system since they were first introduced in 2020, and have made many justice processes much more efficient. Returning to paper documents would be resource-intensive and create inefficiencies, which would run counter to efforts to use resources efficiently to support the courts' recovery from the pandemic.

16. Electronic submission is now the main method of sending documents to the civil courts. SCTS figures show that since March 2020, over 7,500 applications have been lodged in the Court of Session, all of which have been dealt with electronically. Between 1 October 2022 and 5 September 2023, 9,014 documents were lodged using the Civil Online portal.<sup>7</sup>

17. These provisions are also used extensively in the criminal courts. All High Court indictments are now received electronically, and High Court warrants are submitted electronically to the Scottish Prison Service. In the Sheriff Appeal Court the use of paper documents is now the exception, with most documents being in electronic form. Other documents often transmitted electronically include breach reports and Criminal Justice Social Work reports in the sheriff courts, as well as a range of orders sought by Fines Enforcement Officers. These arrangements help to speed up administrative processes, increasing the system's efficiency and flexibility.

18. Police officers regularly rely on these provisions to apply for search warrants, particularly out of hours. As the provisions remove the need to travel to and from the court, they significantly reduce the time that investigating officers spend obtaining warrants, making much more efficient use of police time. Similarly, the

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<sup>7</sup> This excludes simple procedure documents, as simple procedure claims do not rely on the temporary provisions. However, according to SCTS almost all simple procedure claims are registered using Civil Online, underlining how well established digital submission is in civil business.

provisions streamline the process for obtaining emergency child protection orders, which can now be obtained out of hours without requiring a physical meeting between the courts and social workers to be convened.

19. The temporary provisions also allow for court documents to be intimated on the SCTS website (rather than having to be physically displayed on court walls). Between 1 October 2022 and 5 September 2023, over 6,400 sheriff court notices were published on the website<sup>8</sup>.
20. The Scottish Government believes that these provisions are an integral part of a modern justice system, and that allowing them to expire would be a severely retrograde step, leading to lengthy delays and inefficiencies. The Scottish Civil Justice Council has already decided to develop permanent court rules on the electronic signature and transmission of documents, which, once in place, will supersede these temporary measures for civil proceedings. In the meantime, the temporary measures play a critical role in supporting both civil and criminal business.

### ***What views were expressed during the consultation?***

21. There was widespread support for the retention of these provisions, and none of the organisations that responded to the consultation expressed any objection to the principle of allowing court documents to be signed and lodged electronically.
22. However, Citizens Advice Scotland (CAS) highlighted some challenges with implementation. Some people need additional support to engage with the justice system digitally, and CAS reported that their in-court advisers were spending increasing amounts of time helping clients navigate the technology needed to lodge evidence and documents (which is not the intended function of CAS's in-court services). They also considered that court notices should continue to be displayed as physical documents, as well as online, to avoid digital exclusion. The Scottish Government has shared these concerns with SCTS. SCTS is developing a strategy for assisted digital services so that there is more support for those who have difficulty engaging electronically.

## **Part 1, Chapter 2: attending a court or tribunal by electronic means**

### ***What do the provisions do?***

23. These provisions enable participants in court or tribunal proceedings (including judges, clerks, legal representatives, parties to proceedings, accused people, convicted people, appellants, jury members and witnesses) to take part in some proceedings by way of live visual (television) or audio (telephone) link, from any location.
24. Before the Covid pandemic, some legislation required people to physically attend court or tribunal proceedings. Paragraph 6 of the schedule removes those

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<sup>8</sup> Excludes relating to simple procedure claims



requirements for certain proceedings, so that virtual attendance is the default position. The proceedings this applies to are:

- In the civil courts: summary cause proceedings, summary applications, simple procedure claims, small claims, and proceedings in the Scottish Land Court.
- In the criminal courts, proceedings where the only party is a public official. In practice, this means police officers seeking warrants or court orders.

25. For most criminal business, the default position is that people attend hearings physically. (Although see paragraph 30 below, on determinations.)

26. A court or tribunal can overturn any of the defaults described above, on a case-by-case basis.

27. The provisions set out the tests that a court or tribunal needs to apply if it is overturning the default positions on mode of attendance. When the default is virtual attendance, a court or tribunal may only require a person to attend physically if allowing them to attend by electronic means would prejudice the fairness of proceedings, or would otherwise be contrary to the interests of justice. When the default is physical attendance, the court or tribunal may only direct a person to attend virtually if it is satisfied that would not prejudice the fairness of proceedings, or otherwise be contrary to the interests of justice.

28. Whenever a court or tribunal overturns the default arrangements, all parties must have the opportunity to make representations requesting that the court reverts to the default mode of attendance. The decision is ultimately for the court or tribunal.

29. For criminal business, the provisions also give the Lord Justice General a power to issue determinations to change the default to virtual attendance for certain types of cases or in certain circumstances. There is an exception to this power: the Lord Justice General cannot issue a determination that trials should be held virtually by default. However, on a case by case basis, a court can direct a person to attend a trial virtually. Whenever a party is directed to attend criminal proceedings virtually (whether because that is the default under a determination, or because the court has specifically directed them to), they may make representations requesting that the court allows them to attend physically instead. As above, the decision is ultimately for the court.

30. All determinations that are in force are published on SCTS's website. Currently, all active determinations are set out in [The Criminal Courts Determination 2022<sup>9</sup>](https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/2022criminalcourts_determination_final_.pdf?sfvrsn=67edf183_4), which was published on 30 September 2022 and took effect from 1 October 2022. The 2022 Determination disapplies the requirement for physical attendance for a range of procedural hearings (such as preliminary hearings in the High Court and, where a person is detained, full committal hearings in the Sheriff courts) and bail appeal hearings in the Sheriff Appeal Court, so that the default mode of attendance for these hearing types is now virtual. This is largely in line with the types of hearing

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<sup>9</sup> [https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/2022criminalcourts\\_determination\\_final\\_.pdf?sfvrsn=67edf183\\_4](https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/2022criminalcourts_determination_final_.pdf?sfvrsn=67edf183_4)

that were already being held virtually under the First Scottish Act and the Extension Act<sup>10</sup>.

31. The 2022 Determination also provides that people who are suspected of having Covid or have been advised to self-isolate should attend hearings virtually. Again, this continues previous practice.
32. During the passage of the 2022 Act, some MSPs expressed concerns about virtual appearances from police custody. It should be noted that custody courts are not included in the 2022 Determination, and so the default is currently that accused people appear at custody courts in person.<sup>11</sup>
33. As noted above, these provisions only apply to limited civil proceedings. Following a public consultation, the Scottish Civil Justice Council developed new, permanent court rules on mode of attendance at most civil hearings, which came into force on 3 July 2023.<sup>12</sup> These provisions were therefore expired in relation to the civil business covered by the new court rules.<sup>13</sup> SCTS and the Scottish Government jointly funded independent research into the impact of remote hearings on the civil justice system during the pandemic<sup>14</sup>, which was published in August 2023. This research provides an evidence base which can be used to consider the mode of attendance at civil hearings in the longer term.

***Why does the Scottish Government believe these measures should be extended until 30 November 2024?***

34. As technologies improve, and people increasingly expect to be able to engage with public services digitally, allowing the flexibility for wider use of electronic participation has the potential to make justice processes more efficient and accessible.
35. In some cases, virtual attendance can help to ensure that the justice system's resources are used as efficiently as possible. For example, police officers are frequently cited to appear as professional witnesses at criminal trials. While these court appearances can play an important role in cases, travel to and from court – and waiting once at court – can take up a significant amount of officer time. The ability for police officers to give their evidence remotely can offer resource savings. As an illustration of this, between 17 January 2022 and 1 September 2023, 1899 police officers appeared as professional witnesses in the High Court, and 30% of these (575) gave their evidence remotely. Police Scotland have calculated that these remote appearances resulted in savings of £111,204 in travel costs and

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<sup>10</sup> The [Coronavirus \(Extension and Expiry\) \(Scotland\) Act 2021](#)

<sup>11</sup> Although note that there is longstanding provision for a court to direct that a detained person should take part in a hearing by live video link, under [s.288H of the Criminal Procedure \(Scotland\) Act 1995](#).

<sup>12</sup> Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Attendance at Hearings) 2023

<sup>13</sup> In the [The Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022 \(Early Expiry of Provisions\) Regulations 2023](#)

<sup>14</sup> "Impacts of remote hearings and other measures introduced or expanded during the Covid-19 pandemic on Scotland's civil justice system"

travel time. They also enabled officers to spend more time providing policing services in their local communities.

36. There is scope to scale up these benefits. The Scottish Government is supporting justice partners in working together on a programme aimed at making the system work better for everyone who experiences it, with a particular focus on reducing waiting times. One strand of this programme focuses specifically on increasing the percentage of police officers and other professional witnesses who give their evidence remotely. As well as reducing the time spent by professional witnesses in giving evidence (and the consequent disruption), this also aims to reduce churn, with fewer cases needing to be re-scheduled due to witnesses being unavailable.
37. These provisions also provide justice partners with the tools to be able to continue to innovate to improve people's experiences of justice processes. For example, following on from its original pilot of running virtual trials for summary domestic abuse cases, SCTS is currently developing a new, fully virtual model for these cases. The new model seeks to build on the benefits that remote attendance can offer in order to respond to domestic abuse cases in a more holistic and trauma-informed way, covering a case's full journey through the court (rather than simply the trial, as in the original model).

***What views were expressed during the consultation?***

38. Victim organisations welcomed the ability for victims and witnesses to attend trials virtually. They noted that attending court physically can be traumatising for people affected by crime, particularly if they face the prospect of meeting the person who has caused them harm, or that person's family or supporters. The idea of returning to more limited scope for virtual attendance by victims and witnesses was seen as regressive.
39. One organisation said that they have had "overwhelmingly positive" feedback on virtual trials from vulnerable witnesses, and the pilot of virtual trials for summary domestic abuse cases was seen to have highlighted the benefits of remote evidence. The continuation of provision allowing for virtual trials was seen as being consistent with a trauma-informed justice system.
40. Legal professionals' views on these provisions were mixed. On the one hand, the ability to participate remotely in certain proceedings was welcomed as a way of enabling cases to progress efficiently in the face of resource constraints. For example, preliminary High Court hearings are held in Glasgow, and defence advocates would face capacity issues if these were to return wholesale to in-person hearings. Having the flexibility to attend remotely was therefore seen as important to ensure that these hearings could be covered effectively.
41. However, concerns were expressed about the quality of the audio-visual links used for professional witnesses to give evidence remotely. It was felt that this could detract from the quality of the evidence heard by the court.
42. In relation to civil business, respondents from the legal profession generally considered that only procedural hearings were suitable for a "virtual by default" approach, and that substantive business should require in-person attendance by

default, with the courts able to require an individual hearing of any kind to be held in person. As noted in paragraph 33, since 3 July 2023 the rules on mode of attendance at most civil hearings has been governed by court rules, rather than by the temporary measures in the 2022 Act.

43. Citizens Advice Scotland noted that virtual hearings had benefited people where their health, location or physical access needs made attending court in person more difficult, or where individuals found remote hearings less frightening or distressing than attending court in person. However, they considered that digital access to justice services should supplement, not replace, physical access, and that the mode of attendance should be driven by participants' needs rather than by the type of procedure. They were particularly concerned that vulnerable parties could be disadvantaged by remote hearings – partly because important advice and advocacy services are often located in court buildings, and so people might not be signposted to them if they were participating remotely. (Again, it should be noted that the rules on mode of attendance at most civil hearings are now governed by court rules, rather than by the temporary measures in the 2022 Act.)
44. Social Work Scotland highlighted that the use of virtual custody courts could pose challenges both for the quality of service that justice social workers can provide, and for their resources. (It should be noted that virtual custody courts are not currently operating, and that the current by default is for custody hearings to be held in person. The Scottish Government understands that justice partners have been working to develop an improved model for virtual custody courts, and engaging with justice social workers on their role in supporting these hearings.)

## **Part 2: Fiscal fines**

### ***What do the provisions do?***

45. Paragraph 13(2) provides that the maximum fixed penalty that may be offered by the procurator fiscal under section 302 of the Criminal Procedure (Scotland) Act 1995 Act is £500. Before the temporary modifications made by the First Scottish Act, the maximum penalty was £300.
46. [The Criminal Procedure \(Scotland\) Act 1995 Fixed Penalty Order 2008](#) sets out the scale of fixed penalties. Paragraph 14(2) of the 2022 Act schedule temporarily replaces this with a new scale. The temporary scale has 9 levels instead of 7. The amounts in levels 1 to 7 are identical to the scale that operated before to the temporary modifications made by the First Scottish Act (i.e. £50 to £300). The two additional levels provide for the amounts of £400 and £500.

### ***Why does the Scottish Government believe these measures should be extended until 30 November 2024?***

47. The increase in the maximum level of fiscal fine is intended to enable alternative action to prosecution to be taken in a wider range of cases, but not to increase the fine amount in individual cases that would previously have been dealt with by way of fiscal fine. This allows prosecutors to issue proportionate penalties for lower level

offences, while also providing a higher maximum penalty that can be used for appropriate cases which would otherwise have proceeded in the Justice of the Peace court.

48. In accordance with policy guidance issued by the previous Lord Advocate, prosecutors are directed to first consider offering a direct measure, in particular a fiscal fine, in relation to appropriate cases.
49. Between the implementation of the revised scale on 7 April 2020 and March 2023, on average, 3% of individuals offered a fiscal fine and 0.4% of individuals offered a combined offer (a combination of both a fiscal fine and a compensation offer) were issued with a fine amount between £300 and £500.
50. Keeping the revised scale in place would enable COPFS to continue to use alternative action to prosecutions and help reduce the number of cases entering the criminal justice system, while also allowing the courts and prosecutors more time to deal with more serious cases. This supports efforts to make the most efficient, proportionate use of resources while the system continues to address case backlogs. Importantly, it also enables more cases to be resolved without the need for court procedure and associated appearance at court, which can have a detrimental impact on individuals.

***What views were expressed during the consultation?***

51. COPFS were strongly supportive of retaining this measure. Whilst they noted that only a small proportion of fines issued have been above the previous scale's maximum amount, they consider the change has been a useful modification, enabling the Crown to respond proportionately, efficiently and in a timely manner in appropriate cases. This is particularly valuable when summary criminal court resources remain under heightened pressures in the wake of the pandemic – a position that is expected to continue during the extension period now being sought. None of the organisations that responded to the consultation expressed any objection to extending this measure.

**Part 4: National jurisdiction for first callings from custody**

***What do the provisions do?***

52. Paragraph 16 of the schedule provides that, where a person appears in court for the first time from custody in criminal proceedings, that calling of the case may be taken in any sheriff court in Scotland, and may be dealt with in that court by a sheriff of any sheriffdom. Paragraph 16 also allows a sheriff court that has taken on the initial calling of a case to continue dealing with it up until a not guilty plea is tendered (or full committal in proceedings on petition or indictment).
53. Paragraph 18 goes on to ensure that when a court is dealing with a case for which it would not normally have territorial jurisdiction, the sheriff and the prosecutor have all the same powers to deal with it as they would if it were a case that fell within their normal territorial jurisdiction.

***Why does the Scottish Government believe these measures should be extended until 30 November 2024?***

54. The measure enables custody proceedings to be heard in any sheriff court in Scotland by a sheriff of any sheriffdom, no matter where the alleged offence took place. Having a national jurisdiction also allows the court which first heard the case to deal with guilty pleas and move them out of the court system, minimising the number of cases that have to be transferred to local court.
55. This helps give Police Scotland and SCTS the flexibility to manage custody court business efficiently. It also improves resilience, enabling an effective operational response to transport disruption, severe weather, large public events or unexpected public health threats that restrict either the capacity to move an accused person or to use court facilities in a particular area. Without this measure, the law would revert to the pre-pandemic position that criminal proceedings before a sheriff court must take place in a court in the sheriff court district where the offence was allegedly committed. Although there are existing powers to transfer cases between sheriffdoms, this requires a judicial order for each individual case, thus making it extremely onerous and not suitable in light of custody timescales, where cases have to be brought to court quickly.
56. The measure also forms a part of the wider approach to enabling the justice system to recover from the impact of coronavirus by helping SCTS efficiently manage court resources in response to the backlog. As such, extension of this measure until November 2024 will aid the ongoing recovery of the court system.

***What views were expressed during the consultation?***

57. Justice agencies supported the continued availability of a national custody jurisdiction. Police Scotland noted that the ability to hear all matters in one court prevents the accused having to be transported across the country to appear at different courts on a different day. They supported the resultant reduction in time spent in custody by accused persons arising from this measure, which is in keeping with a human rights based approach within the criminal justice system. Police Scotland also noted that the availability of a national jurisdiction supports and complements virtual custody appearances, when they are being used.
58. Similarly, SCTS expressed support for this measure and considered it beneficial to extend these provisions beyond 30 November 2023. They highlighted the measure provides a degree of flexibility in the management of cases in unexpected or emergency situations. SCTS noted the alternative is that courts would have to go through the process of transferring cases, or a direction would need to be sought from the Sheriff Principal for each diet of the court – both of which would create inefficiencies.
59. SCTS further observed powers of this nature would be of assistance to ensure that business can be effectively processed (and the timescale within which an individual is required to have their first hearing in court met). For example, in situations where circumstances such as transport disruption, severe weather or other public health

emergencies restrict either the capacity to move an accused person or to use court facilities within a particular area.

60. SCTS advised that they are working with justice partners to ascertain whether a more efficient process can be put in place for instances where an accused person appears in court for a new offence but has an outstanding warrant in another court, potentially in another sheriffdom. At present, the accused person would be held overnight to appear in the other court the next day. SCTS are seeking to ascertain whether the person could appear in one court for both cases, and the national jurisdiction may be a key component to this. If this is feasible it will result in valuable system-wide efficiencies.
61. A third sector organisation also noted the beneficial flexibility the provisions could bring to the sector, by allowing proceedings to be dealt with by a broader range of sheriffs and sheriff courts.

## **Part 5: Criminal procedure time limits**

### ***What do the provisions do?***

62. These provisions increase (or, in some cases, remove) the statutory time limits for certain criminal procedures. With one exception, longstanding legislation provides that all of these time-limits can be extended at the court's discretion, on a case by case basis. By contrast, the temporary extensions to time limits apply automatically.
63. The temporary, extended limits were originally introduced in 2020, in recognition of the fact that the pandemic would hinder the justice system's ability to progress cases. They were maintained in the 2022 Act on the basis that they were necessary to help the courts focus on responding to the backlog that has developed as a result of the pandemic and its impact. This is because without extensions to time limits operating as a matter of law, more court time would be diverted from hearing cases to considering large numbers of individual applications to extend the time limits to prevent cases from being time-barred.
64. The Scottish Government believes that the pre-pandemic time limits should be reinstated as soon as that can be done responsibly, without jeopardising the courts' capacity to focus on the throughput of trials or putting prosecutions at risk. As the table overleaf sets out, the regulations expire four of the extended time limits, and retain only the three that continue to be crucial to courts' recovery and the delivery of justice. The different time limits, and the proposed approach to each, are summarised in **Table 2** below.

**Table 2**

Type of time limit	Pre-pandemic limit	Current limit under 2022 Act	Approach in 2023 Regulations
* Solemn: (i) time between accused's first appearance on petition and preliminary hearing or first diet (ii) time between accused's first appearance on petition and trial	(i) 11 months  (ii) 12 months`	(i) 17 months  (ii) 18 months	Continue in operation until 30 November 2024 (see paras 65 – 72)
Summary: time between offence and commencement of proceedings	6 months	12 months	Continue in operation until 30 November 2024 (see paras 73 – 75)
Solemn: (i) time between accused being remanded and indictment (ii) time between accused being remanded and preliminary hearing or first diet (iii) time between accused being remanded and trial	(i) 80 days (ii) 110 days (iii) 140 days	(i) 260 days (ii) 290 days (iii) 320 days	Continue in operation until 30 November 2024 (see paras 65 – 72)
Summary: time between accused being remanded and commencement of trial	40 days	130 days	Expire (see para 103)
General: remand for inquiry into physical or mental condition	21 days	No limit	Expire (see para 104)
Summary: adjournment for further inquiries-maximum length of single period of adjournment	28 days	No limit	Expire (see para 105)
Summary: maximum length of a single period of adjournment where accused is not present at first calling	28 days	No limit	Expire (see para 105)

**Why does the Scottish Government believe these measures should be extended until 30 November 2024?**

*Solemn time limit extensions – section 65 – Criminal Procedure (Scotland) Act 1995*

65. Section 65(1) sets out time limits that apply where the accused appears on petition for trial on indictment. It provides that a preliminary hearing or first diet must commence within 17 months of the first appearance of the accused on petition in respect of the offence, and the trial must commence within 18 months of the first appearance of the accused on petition. As per the table above, the pre-pandemic time limits were 11 months and 12 months respectively.

66. Section 65(4) sets out the time limits that apply where the accused has been remanded in custody prior to trial. It provides that an indictment must be served within 260 days of the accused being remanded in custody, a preliminary hearing must be commenced within 290 days of that period, and the trial must be



commenced within 320 days. If these time limits are breached, the accused shall be entitled to be admitted to bail. As per the table above, the pre-pandemic time limits were 80 days, 110 days and 140 days respectively.

67. All jury trials were suspended at the onset of the coronavirus pandemic in March 2020. High Court trials recommenced later in 2020 and sheriff and jury trials recommenced in late 2020 and early 2021. In some parts of Scotland, there were no sheriff and jury trials for a period of 12 months. For a considerable period after this, there was reduced capacity within the court system to hear cases because of the need for social distancing measures to protect public health. While there has been considerable progress, with the backlog of cases having reduced by over a third since its peak in January 2022, the effect of this is that it will take a number of years for the court system to be able to address the number of outstanding cases.
68. In addition, and separate from the backlog, the situation has been impacted by an increase in the number of solemn cases going through the court system, with new petitions having risen from around 9,000 a year before the pandemic to around 11,000 a year in 2020/21, and stayed at that level.
69. The effect of this has been that the length of time it takes for cases tried on indictment to come to trial has increased considerably. In November 2019, where the accused was released on bail prior to trial, the average time between the case first calling on petition and the trial commencing was 16 months. This had increased to 30 months in May 2023. Similarly, in November 2019, the average time in High Court cases from full committal to the trial commencing was 43 weeks and in May 2023, this had increased to 85 weeks.
70. Without the continued extension to the two separate sets of time limits at section 65 of the 1995 Act, the only option would be for an application to be made to the courts to extend the time limit in each individual case under the discretion given to the courts by statute. This would have considerable resource implications for the Crown Office, the judiciary and Scottish Courts and Tribunals Service, which could better be utilised in dealing with the backlog of cases. There is also a risk that in individual cases, the court may not grant the application or no application may be made, with the result that an accused would be released on bail (where it relates to the remand time limit at section 65(4)) or the case would fall (where it relates to the time limit at section 65(1)).
71. The Scottish Ministers therefore consider that it is necessary that the extensions to the time limits at section 65 of the 1995 Act should remain in effect until 30 November 2024 to assist in the continued efforts of justice agencies in managing the backlog of cases being tried on indictment.
72. The Scottish Government does not want the extended time-limits to be in force any longer than is strictly necessary, and wants the pre-pandemic time-limits to apply as soon as they can be re-introduced without an undue impact on the progress of criminal cases through the courts. The Scottish Government will continue to discuss with justice agencies how time-limits can be reverted to those operating prior to the pandemic with minimal impact on the progress of recovery of the criminal courts.

*Summary time limit extension – section 136 – Criminal Procedure (Scotland) Act 1995*

73. This time limit applies to summary-only offences where no alternative time limit has been provided for in statute. Under the current extended time limit, prosecutions must be initiated within 12 months of an offence being committed. The pre-pandemic time limit was 6 months. There is no mechanism to allow this time limit to be extended on a case-by-case basis. That means that if the time limit is breached, the case will fall.
74. The pandemic has had a significant impact on all aspects of the criminal justice system. In particular, it has resulted in an increase in the time required by the police to investigate alleged crimes including scientific analysis by the Scottish Police Authority (SPA) forensic services (which are especially relevant to drug-driving cases which are prosecuted using summary only offences), and the availability of court resource to facilitate new business (especially since the decision was taken in April 2023 to remove the additional ten sheriff summary courts from operation and instead create two additional High Court courts and six additional Sheriff solemn courts, in light of the greater progress in reducing the backlog of summary cases than the backlog in cases tried before a jury).
75. Despite the significant progress that has been made in reducing the number of outstanding cases in the summary courts, there remains a backlog. Reverting to the pre-pandemic time limit that summary cases must commence within 6 months of the date of the alleged commission of the offence would mean that the Crown would not be able to raise criminal proceedings in some cases. Drug driving cases would be particularly affected, as there is a backlog of cases awaiting forensic reports from the SPA forensic services. If the time limit extension were not continued, resource would need to be reallocated to prosecute summary-only criminal offences in order to minimise the number of cases in which criminal proceedings could not be raised. This would impact on the resource available to other areas of the criminal justice system, including the investigation and prosecution of more serious crime prosecuted on indictment. While justice partners are continuing working towards the summary time limit reverting back to 6 months, it is apparent that consistently meeting that limit is not currently feasible. The Scottish Ministers therefore consider that it is necessary to continue the 6 month extension to 12 months to the summary-only time limit at section 136 of the Criminal Procedure (Scotland) Act 1995 until 30 November 2024.

***What views were expressed during the consultation?***

76. Justice agencies strongly supported retaining the extended time limits that the Scottish Government is proposing continuing for a further year. COPFS stated that if these extended limits were not retained beyond 30 November 2023 there was a serious risk of not being able to deliver justice. They noted that to mitigate the extent to which summary cases would ‘time out’ so that criminal proceedings could not be raised, it would be necessary to reallocate resources, which would have a negative impact on the resources available to other areas of the criminal justice system. They further noted that in view of the increase in solemn business the

withdrawal of the time limit extensions in relation to summary cases would lead to serious cases having to be discontinued.

77. The Scottish Courts and Tribunals Service noted that expiry of the time limits relating to cases tried on indictment would mean that the number of applications to extend time limits on a case-by-case basis would greatly increase, with significant resource implications for them and justice partners. They expressed the view that this resource can be better used dealing with the backlog of cases.
78. Specifically on the summary time limit, Police Scotland highlighted a particular issue with the prosecution of drug driving offences. At the time the offence was introduced in October 2019, despite benchmarking with England and Wales conducted during the development stage, Police Scotland indicated it was not possible to determine what the demand for drug driving sample testing might be. Once the service had been live for a few months in late 2019 and early 2020, it was clear that actual demand was well above what had been estimated. This position was then compounded by the pandemic, as the impact of lockdowns resulted in significant backlogs of sample testing.
79. In April 2020, the First Scottish Act extended the statutory time limit for summary-only offences, including drug driving, from 6 months to 12 months. Despite this, demand continued to exceed capacity and backlogs remained, resulting in around 477 drug driving cases not being able to be prosecuted because of the time bar. Analysis indicated that this was due primarily to delays in forensic testing, though some delays also occurred with sample submission to laboratories and reporting cases to COPFS for prosecution.
80. In 2022, His Majesty's Inspectorate of Constabulary Scotland (HMICS) conducted a review of the end-to-end process for drug driving and in April 2023 they made 25 recommendations and 17 areas for development. Work by all agencies is underway to deliver these improvements but some require significant changes to process which is under consideration. Further time is required to enable these changes to take effect and ensure that reversion to the 6 month pre-pandemic time limit does not run a significant risk of cases becoming time-barred. Due to the existing agreed restrictions in place around roadside testing and sample analysis, this will be a complex and resource-intensive task.
81. In the meantime, criminal justice agencies continue to work closely to monitor and improve drug driving processes. Whilst the situation is improving, significant challenges remain in meeting the current 12 month statutory time limit. Private laboratory outsourcing arrangements would currently exceed the 6 month time limit as competing demand for such services is high across the UK. A key aspect of delivering an improved service is the development of a Memorandum of Understanding between the Police, Scottish Police Authority (SPA) Forensic Services and COPFS around sample submission, testing and case reporting timescales, based upon a six month statutory time limit. The SPA state that they are undertaking development activities within the Criminal Toxicology team to increase capacity for drug driving casework, including significant method development and staff training. However, it is evident that further time and action is

required for all stakeholders, including Police Scotland and the SPA, to achieve compliance.

82. Police Scotland have noted that if the 12 month statutory time limit is not extended and reverts to 6 months on 30 November 2023, it is likely that a significant number of drug driving cases would be lost due to time bar. Whilst justice agencies seek to prioritise cases involving fatalities and repeat offenders, this could increase risks around road safety and undermine public trust and confidence in the justice process. Extension of the 12 month statutory time limit would mitigate an immediate risk of cases being lost due to time bar, whilst backlogs are cleared and improvements to current processes are developed.
83. Respondents representing both victim organisations and the legal profession supported the extension of the time limits, while acknowledging the negative impact on complainers, accused people and other witnesses of the delays in cases coming to court as a result of the pandemic. Victim organisations explained that their key concern is that without these provisions, cases will be dropped. While the backlog and numerous adjournments have a negative impact on people affected by crime, it is a greater priority that victims still have access to justice and the trial is not dropped due to matters outwith their control.
84. A legal organisation noted the particular negative impact on accused people of spending long periods on remand prior to trial and suggested that thought could be given to 'imaginative solutions' to avoid keeping untried people in prison for long periods of time. A third sector organisation also highlighted the negative impact on untried people of spending long periods on remand.

## **Part 7: Prisons and young offenders institutions: power to release early**

### ***What do the provisions do?***

85. Paragraph 25 of the schedule gives the Scottish Ministers a power to make regulations to release certain groups of people from prisons and young offenders institutions early, if Ministers are satisfied that is a necessary and proportionate response to the effects (or anticipated) effects of Covid on a prison or on prisons generally. The regulations must be for the purpose of protecting the security and order of the prison concerned or protecting the health, safety and welfare of those accommodated or working in the prison.
86. There are restrictions on which prisoners can be released under the regulations. A person may not be released under the regulations more than 180 days earlier than that person would otherwise be due for release. In addition, a person may not be released under the regulations if the governor of the prison considers that the person poses an immediate risk of harm to another identified person.
87. Prisoners are also ineligible for release under the regulations if they fall into any of these categories:

- people who are not serving determinate sentences (for example, a person sentenced to life imprisonment, or where no limit of time has been specified),
- people sentenced to an extended sentence for sexual, violent or terrorism offences,
- people who are subject to a supervised release order in order to protect the public from serious harm upon the person's release or who are subject to notification requirements under the Sexual Offences Act 2003,
- people sentenced for domestic abuse offences, and
- people who are in prison for reasons other than having been sentenced (for example, people who are on remand awaiting trial, or who are being detained before potentially being deported).

***Why does the Scottish Government believe these measures should be extended until 30 November 2024?***

88. A Covid-specific emergency release power was initially created in the First Scottish Act. It has been used once, in May 2020, when 348 individuals were released early, if they met the criteria set out in the emergency legislation and did not present as symptomatic for Covid-19. This supported the safe management of the prison environment and protected the health and safety of those living and working in the prison setting. Given the ongoing uncertainty with regards to further Covid variants, it is considered necessary to extend this power until 30 November 2024.
89. On 22 June 2023, the Scottish Parliament passed the Bail and Release from Custody (Scotland) Act (the 2023 Act), which includes a permanent emergency release power, similar to the long-held power of the UK Government. Once commenced, this will supersede the temporary, Covid-specific emergency release power. The permanent power can be used to respond to any emergency situation within prisons, or the impact of such situations, if Ministers are satisfied that releasing prisoners early is a necessary and proportionate response in such circumstances.
90. This permanent emergency release power is therefore much broader than the Covid-specific emergency release power in the 2022 Act. This means that, in the future, if an operational emergency arises within Scottish prisons which poses a threat to the security and good order of prisons, or to the health, safety and welfare of those living or working in prisons, Ministers will be able to respond to that as quickly as possible by making specific regulations, rather than needing to enact new primary legislation.
91. However, this new regulation-making power has not yet been commenced and it is unlikely that it will be in place before 30 November 2023. This is because the Scottish Government intends to undertake detailed implementation planning with stakeholders, prior to it being brought into force.
92. Covid had a particular impact on the prison setting due, in large part, to the number of people held in close proximity to one another. This made limiting the spread of infection during Covid a specific challenge and isolating those who tested positive was particularly problematic, as this requires individuals to be placed in single cells. Public health measures were enacted within prisons for extended periods, with

protective measures remaining in place longer than they did in the community, to limit and better manage any potential spread of infection within the custodial setting.

93. With this in mind, and until the wider, permanent emergency release power under the 2023 Act is brought into force, the Scottish Government considers it necessary to retain the temporary Covid-specific power, to ensure that Ministers could act promptly in the event that Covid threatened the security of prisons, or the health, safety and welfare of those living or working within the prison estate. There are no current plans to utilise the Covid specific emergency release power. However, in the absence of any other powers currently available to Ministers to order the early release of groups of prisoners, it remains prudent to maintain this Covid specific emergency release power.

***What views were expressed during the consultation?***

94. Generally, respondents were in agreement that the extension of the emergency release was reasonable at this stage, until the wider permanent emergency release power contained in the Bail and Release from Custody (Scotland) Act is in force.

95. Generally respondents indicated that if there was a need for an emergency release power, and no such power was available, there may be negative impacts experienced within a prison setting. Specifically, any potential future Covid-related outbreak within the prison estate could place the prison regime under significant pressure which would have negative consequences for prisoners and staff.

96. There was also an emphasis on the importance of preparations for any future release process, establishing a timely multi-agency communication structure, particularly between SPS and community services/resources, as well as including robust risk assessments with an emphasis on public/victim safety. A national victims organisation expressed concerns over the communication of plans for early release when this power was used in 2020. They noted that some individuals had been uncertain whether or not the process would apply to the specific prisoner in their case. As such, they did not support an extension. Victims who were registered with the Victim Notification Scheme (VNS) were notified of the release of the prisoner in their case under this power when it was used in 2020. However, it is recognised that this did not remove all uncertainty and that clear communication with victims is critical. Any future use of this power would include specific consideration of communication with victims, learning from the experience of the release process in 2020.

97. Respondents also indicated that consideration should also be given to any learning from the pandemic, which should inform the decision making and planning for any future consideration of the use of the Covid specific emergency release power. Some respondents referred to previous suggestions that the early release provisions should have been used more widely than was actually deployed by SG, to release more prisoners during Covid, and to make additional provision for elderly and/or vulnerable prisoners (as well as those on short sentences and close to their release date which were identified by SG).

98. Respondents indicated that they did not expect there to be a need to use the Covid specific emergency release power in the future, but it would be sensible to retain such power to safeguard against any future variants or outbreaks of Covid within the custodial setting. However, generally respondents indicated that consideration of using such emergency release powers should only be considered as a last resort following the introduction of other management processes.

## Provisions proposed for expiry

99. This section briefly summarises the provisions in the schedule that are being expired by the 2023 Regulations, and the reasons that the Scottish Government proposes expiring them.

100. Certain provisions have already been expired, under [The Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022 \(Early Expiry of Provisions\) Regulations 2023](#)<sup>15</sup> which came into force on 3 July 2023. These regulations expired the following provisions:

- Part 1, Chapter 2 in relation to attending civil proceedings in the Court of Session or raised under the Ordinary Cause Rules 1993. Mode of attendance for these civil proceedings is now covered by court rules.<sup>16</sup>
- Part 6, which ensured that criminal confiscation order proceedings in proceeds of crime cases could be postponed if Covid was affecting proceedings.

### Part 3: Failure to appear before court following police liberation

101. These provisions enable the courts to modify the date someone is required to attend court on an undertaking, if they fail to appear at court for a reason attributable to coronavirus.

102. This measure was a response to Covid as a major public health threat. In the current context (by the time extensions take force, there will have been no statutory Covid restrictions in Scotland for over 18 months), it is not considered proportionate to retain it beyond November 2023.

### Part 5, Chapter 1: Criminal procedure time limits – summary remand

103. Paragraph 22(3) extends the time that someone may be held on remand pending summary trial, from 40 days pre-pandemic to 130 days. Expiring this measure will mean that the time limit returns to 40 days. Justice agencies are content that this provision is no longer required as summary trials where the accused is in custody are now being assigned within the pre-pandemic time limit of days.

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<sup>15</sup> <https://www.legislation.gov.uk/ssi/2023/172/made>

<sup>16</sup> Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Attendance at Hearings) 2023

104. Paragraph 22(4) removes the limit on the period a court may adjourn for to allow for inquiry into an accused's physical or mental condition. The normal time limit of 28 days was removed because it was recognised that during the pandemic it might take longer to obtain any necessary medical reports. In the current context, it is not considered necessary or proportionate to retain this provision beyond November 2023.

## **Part 5, Chapter 2: Criminal procedure time limits – adjournment periods**

105. Paragraph 23 of the schedule removed the normal time limits on certain summary adjournment periods. This was in recognition of the fact that during the pandemic it might take longer for any necessary enquiries to be made. Justice agencies are content that, in the current context, these measures are no longer necessary and can be allowed to expire. The time limit for an individual adjournment would then return to 28 days.



## Appendix 1: Consultation

The following organisations were invited to provide feedback on the operation of the temporary justice measures, as part of the consultation under section 52(6) of the 2022 Act.<sup>17</sup> This included those who gave written or oral evidence to the Criminal Justice Delivery during its original consideration of the measures in the 2022 Act.

### ASSIST

Association of Local Authority Chief Housing Officers

Children's Hearings Scotland

Children and Young People's Centre for Justice

Children and Young People's Commissioner

Citizen's Advice Scotland

COSLA

Criminal Justice Voluntary Sector Forum

Crown Office and Procurator Fiscal Service

Faculty of Advocates

Howard League Scotland

Judicial Institute

Law Society of Scotland

Lord President's Office

National Prisoner Healthcare Network

Police Scotland

Rape Crisis Scotland

Scottish Children's Reporter Administration

Scottish Courts and Tribunals Service

Scottish Prison Service

Scottish Solicitors Bar Association

Scottish Women's Aid

Sheriffs and Summary Sheriffs Association

Social Work Scotland

Society of Solicitor Advocates

Victim Support Scotland

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<sup>17</sup> 21 of the 26 organisations listed here responded.