



Law Society
of Scotland

Consultation Response

Coronavirus (COVID-19) recovery - justice system,
health and public services reform

November 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Public Policy committee welcomes the opportunity to consider and respond to the Scottish Government consultation: *Coronavirus (COVID-19) recovery - justice system, health and public services reform: consultation*.¹ We have the following comments to put forward for consideration.

General Comments

The Coronavirus legislative framework

We welcome the Scottish Government's commitment to reviewing the impact of Covid on the Scottish statute book. The Coronavirus legislation applicable in Scotland is contained in:

- (i) The relevant parts of the UK primary legislation in the Coronavirus Act 2020 (CA)². This Act contains 102 sections and 29 schedules and was considered at pace in Parliament.
- (ii) The Coronavirus (Scotland) Act 2020 (CSA)³ which was the principal Scottish legislation, contains many provisions of importance to life in Scotland, including law relating to children and vulnerable adults, justice matters, public bodies, and a number of other areas. That Act contains provisions requiring Scottish Ministers to report on the "necessity" of such legislation rather than, as in England and Wales, the "appropriateness" of the status of the legislation.
- (iii) The Coronavirus (Scotland) (No 2) Act 2020 (CSA2)⁴ ensured public services operated during the coronavirus pandemic and supported businesses and individuals. The Act included provisions to ensure business and public services can operate, change public service duties, provide protections for student tenants and support for carers, and made changes to criminal procedure. It also allowed Scottish notaries public to execute notarial documents by video technology ensuring that clients could transact business without exposure to the virus.

¹ <https://www.gov.scot/publications/covid-recovery-consultation-public-services-justice-system-reforms/>

² <https://www.legislation.gov.uk/ukpga/2020/7/contents/enacted>

³ <https://www.legislation.gov.uk/asp/2020/7/contents>

⁴ <https://www.legislation.gov.uk/asp/2020/10/contents/enacted>

These pieces of legislation contain a number of safeguards. Scottish Ministers have reviewed and reported on the measures every 2 months.⁵ Scottish Ministers must also review all coronavirus related Scottish Statutory Instruments under section 14 of the (No 2) Act.

The Coronavirus (Extension and Expiry) (Scotland) Act 2021, passed in June 2021, extended provisions of the CSA and CSA2 to 31 March 2022, with the potential for further extension by regulations to 30 September 2022.

Our four broad themes

We considered a number of broad themes which set the context for our comments on Coronavirus legislation applicable in Scotland and the wider UK. They are Parliamentary scrutiny and the rule of law, respect for human rights, devolution, and other public health legislation.

A. Parliamentary Scrutiny and Rule of Law

Common provisions of Coronavirus legislation fall within two broad categories:

- (i) Broad regulation making powers to suspend, modify or grant indemnity from existing statutory laws or common law and powers to suspend or revive other provisions of the legislation including to amend provisions of the Acts themselves (e.g. section 88 in the CA, section 11 in the CSA and section 14 in the CSA2.
- (ii) Those which confer new powers in order to deal with the coronavirus pandemic.

Parliamentary scrutiny of the Coronavirus Act 2020 was limited. It had all its stages – Second Reading, Committee, and Third Reading – in the House of Commons on 23 March 2020, all its stages in the House of Lords over 24 and 25 March and became law on 25 March 2020. Similarly, the CSA passed all its stages in the Scottish Parliament on 1 April 2020. The CSA2 was introduced on 11 May 2020 and became law on 26 May and accordingly received more scrutiny than the earlier legislation.

The Coronavirus (Extension and Expiry) (Scotland) Bill was published on 18 June 2021, debated in the Scottish Parliament over the period 22-24 June 2021, and passed on 24 June 2021. Although short in terms of parliamentary time the provisions were relatively straightforward.

In other circumstances when legislation has passed through the Parliament, we have highlighted the need to scrutinise the legislation carefully and not to sacrifice that scrutiny for speed. However, the nature of Covid-19 and the serious and imminent threat it posed to the community at large proved to be so devastating that it was right that the Parliament's response matched the level of threat.

As circumstances have changed it will be important that where future law is contemplated, there will be adequate pre-legislative consultation which takes into account case law such as *Reverend Dr William JU Philip and others v Scottish Ministers* [2021] CSOH 32, where the Lord Ordinary in the Court of Session held that regulations closing churches for worship were beyond the devolved competence of Scottish Ministers, proper Parliamentary scrutiny, and effective post-legislative review. It is also essential that any

⁵ <https://www.gov.scot/publications/coronavirus-acts-two-monthly-report-scottish-parliament/>

future legislation and subsequent guidance is explained to the public in clear, unambiguous terms so as to avoid confusion about their effect. This objective reflects the approach taken in The Coronavirus: Action Plan (AP) which was published on 3 March 2020 by the UK Department of Health and Social Care, the Scottish Government, the Department of Health for Northern Ireland and the Welsh Government. The AP recognised the respective roles and responsibilities of the UK Government and Devolved Administrations and set out information about the disease, actions taken so far by the Administrations, what was being planned and the role of the public in supporting the response to the virus. Revisiting the AP may assist in further controlling the virus, helping people to comply with the law and assisting in the work of recovery.

B. Respect for Human Rights

We welcomed the publication along with the UK Coronavirus Bill of the Human Rights Memorandum from the Department for Health and Social Care which dealt comprehensively with European Convention on Human Rights (ECHR) compliance. Similar respect for human rights was shown in the Explanatory Memorandums which accompanied the Scottish Bills. Where the legislation engages the ECHR, the rights engaged were qualified, not absolute and their exercise needed to be balanced with the wider interests of public safety and the protection of individual and community health.

The Human Rights Act 1998 applies to the acts of public authorities under the Acts and we encourage public authorities which undertake coronavirus functions to ensure compliance with Convention rights. We expect that human rights and the rule of law will be fully respected when applying the provisions of the Coronavirus legislation (see the reference to *Reverend Dr William JU Philip and others v Scottish Ministers* above). We have highlighted throughout this process those provisions which we have considered may have breached human rights. It is crucially important, especially in times of pandemic emergency which impact on the rights and freedoms of all citizens, that the law is applied equally and that the human rights of all are respected.

C. Devolution

The Coronavirus Act 2020 respected the devolution arrangements and the Legislative Consent convention, recognised in the Scotland Act 1998 Section 28(8), that the UK Parliament will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament without the consent of the latter. Many of the matters to which the Coronavirus Act 2020 relates are within the legislative competence of the Scottish Parliament or affect the executive competence of the Scottish Ministers. The Scottish Parliament agreed the Legislative Consent Motion on Tuesday, 24 March 2020.

D. Public Health legislation

We recommend a review of the law relating to health emergencies. Legislation already exists to deal with circumstances related to pandemic disease:

- (i) The Civil Contingencies Act 2004 can apply to emergencies and creates a framework for civil protection in the UK. The Act provides for local arrangements for civil protection and the employment of emergency powers under Orders in Council. The emergency powers in the Act allow for temporary regulations to deal with serious emergencies. Emergency powers under the Act are subject to rigorous safeguards and can only be used in exceptional circumstances.

- (ii) The Public Health (Control of Disease) Act 1984 (amended by the Health and Social Care Act 2008) as respects England and Wales and the Public Health (Scotland) Act 2008 include quarantine, detention and medical examination, and other powers, for local authorities and Health Boards.

The preference of Government to employ either the Coronavirus specific legislation or Public Health Acts rather than Civil Contingencies legislation raises questions about the legislative framework which applies across the UK and its fitness to deal with future public health crises. Once there is sufficient scope for a parliamentary inquiry into the fitness of the legislative (and policy) framework, we can envisage this being a priority for all the Administrations and Legislatures across the UK.

In this connection, we suggested that the Four Governments consider collaboration on the creation of a Standing Advisory Committee on Pandemics which, under an independent Chair would comprise medical, scientific, educational, research, and other experts drawn from the Four Nations and Ministerial Members from the Four Governments. This body would keep under review developments in virology and epidemiology, oversee preparation for viral events including supply chains, stockpiling of medicines, development of vaccines, medical equipment and PPE, training of medical and nursing staff and preparation of educational tools to inform the public and general preparedness for future pandemics.

We also suggested a quadripartite parliamentary group, bringing together all the UK legislatures to share experience, best practice and knowledge about legislating in the pandemic, using as a model the Inter-Parliamentary Group formed to consider Brexit.

Subordinate legislation concerning Coronavirus

There is a considerable amount of Coronavirus subordinate legislation across the UK: 403 UK statutory instruments (regulations), 208 Scottish Statutory Instruments, 265 Northern Irish Statutory Rules and 176 Welsh Statutory Instruments at the time of writing. With so much subordinate legislation (and the potential for more) covering so many areas of the law, it is difficult for legislators, advisers, and those subject to the regulations to be clear about the law which applies. It would be helpful if the regulations could be consolidated on a regular basis.

We would add, finally, that it remains unclear what the public health situation will be at the end of March 2022. We have suggested in response to several questions in this consultation paper that measures should continue beyond that stage, but not be made permanent. Equally, if there were to be a significant reduction in the risk to public health, it may be proportionate to discontinue those measures at that stage.

Consultation Questions

Chapter 2: Public health resilience

Question 1: Education: powers to make directions to close educational establishments, and to ensure continuity of education

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

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

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

We have no comments.

Question 2: Power to make public health protection regulations

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

- I think the provisions for Topic H2 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic H2 should be extended beyond March 2022, but not made permanent

- I do not think the provisions for Topic H2 should be extended or made permanent
- Unsure
- I have no view

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

These provisions have the potential to result in very significant restrictions on liberty being imposed by Regulation, with reduced opportunities for parliamentary oversight and scrutiny. This in turn creates a risk of misuse, or of powers being used in error. There must be sufficient safeguards to maintain checks and balances on executive powers, and to ensure appropriate parliamentary oversight.

Given that the devolved administrations are now adopting diverse policies on, for example, vaccine certification schemes, these powers create the potential for people in Scotland to be subject to more substantial restrictions on their liberty by way of Regulations as compared to those in the rest of the UK.

During the COVID-19 pandemic, both primary and secondary legislation was used to ensure that appropriate public health protection measures were in place, and this could be used as a model for future decision-making.

We have previously recommended a review of the law relating to health emergencies.⁶ See our general comments, above.

Question 3: Vaccinations and immunisations

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

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

⁶ The Law Society of Scotland submission to the House of Lords Constitution Committee Inquiry into the Constitutional Implications of Covid-19, July 2020, available at: <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/constitutional-law/>

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

We have no comments.

Question 4: Virtual public meetings under the Schools (Consultation) (Scotland) Act 2010

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

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

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

We have no comments.

Chapter 3: Public services & justice system

Question 5: Alcohol licensing remote hearings

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

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

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

We have previously commented on these provisions, and believe that there should be the ability for remote hearings to be retained in this context. Though in-person hearings should be the default, there may be benefits in retaining a residual power to hold remote hearings, for instance, during winter months where travel may be impractical.

Question 6: Bankruptcy: debt level that enables creditors to pursue the bankruptcy of a debtor through the courts

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

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

- I think the provisions for Topic P2 should be extended beyond March 2022 with an amended creditor petition debt level of £5,000, but not made permanent
- I do not think the provisions for Topic P2 should be extended or made permanent
- Unsure
- I have no view

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

On balance, we support the provisions being extended beyond March 2022 and made permanent but with an amended creditor petition debt level of £5,000. Increasing the permanent level from £3,000 to £10,000 (as per the current temporary level) would be a considerable increase on a permanent basis. Moving to this higher level is likely to frustrate the ability of many smaller creditors to bring about sequestration proceedings on their own initiative. There may be negative consequences regarding creditor behaviour as a result. The 'original' £3,000 figure appears to now be on the low side, particularly given the significant debt problems that are likely to become more visible as we emerge from the pandemic. We consider that a debt level of £5,000 would give a better balance between the interests of debtors and creditors. If there is to be a significant increase to the debt level, we suggest that this should await the conclusion of the ongoing review of Scotland's debt solutions.

Question 7: Bankruptcy: electronic service of documents

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

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

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

We consider that the provisions to allow for electronic service of documents should be made permanent. These provisions better reflect modern forms of communication and behaviour and make the relevant acts and processes easier and more efficient. By making these changes permanent, the need for further legislation on these matters in an emergency context could be avoided.

Question 8:

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

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

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

We consider that permanent extension of the moratorium period on diligence (in Part 15 of the Bankruptcy (Scotland) Act 2016) from the 'normal' period of 6 weeks is reasonable. An extended period of 6 months for the moratorium is justifiable in the context of an emergency situation but we consider this would be too long to retain more generally. If a fair balance is to be struck between protecting the debtor and supporting the rights of creditors to enforce after a reasonable period of time, we consider that a period of 12

weeks would be appropriate. This could be extended to 6 months if there was a further emergency.

Question 9: Bankruptcy: virtual meetings of creditors

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

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

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

We consider that the provisions to allow for virtual meetings of creditors should be made permanent. These provisions better reflect modern forms of communication and behaviour and make the relevant acts and processes easier and more efficient. By making these changes permanent, the need for further legislation on these matters in an emergency context could be avoided.

Question 10: Care services: giving of notices by the Care Inspectorate

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

- I think the provisions for Topic P6 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P6 should be extended beyond March 2022, but not made permanent

- I do not think the provisions for Topic P6 should be extended or made permanent
- Unsure
- I have no view

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

We have no comments.

Question 11: Civic government licensing remote hearings

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

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

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

We have no comments.

Question 12: Courts: intimation, etc. of documents

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

- I think the provisions for Topic P8 should be extended beyond March 2022 and made permanent

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

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

These proposals seem entirely sensible and improve the pre-Covid position by ensuring intimation of documents that would have previously been posted on the walls of court reach a much wider audience. The proposal includes appropriate safeguards to redact sensitive information.

Question 13: Criminal justice: arrangements for the custody of persons detained at police stations

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

- I think the provisions for Topic P9 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P9 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P9 should be extended or made permanent
- Unsure
- I have no view

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

We do not believe that the provisions for Topic P9 should be extended or made permanent. The arrangement for the custody of persons detained at police station requires further scrutiny before any extension considered and, with a Bail and Release from Custody Bill announced in the recent Scottish Government programme for 2021-22, we believe that this would be the appropriate stage at which to consider whether these

fundamental reforms should be retained in the criminal justice system.

Virtual custody hearings were a necessary step during the pandemic to ensure the safety of participants in the criminal justice process. As the pilot for these progressed, persistent concerns were raised by criminal practitioners around the fairness of the process, particularly because of challenges faced in access to papers prior to a hearing, or access to a client consultation prior to the hearing, as our research in July 2021 showed: [2020-07-28-crim-report-on-virtual-custody-courts.pdf \(lawscot.org.uk\)](#) At that stage, 50% of prosecutors stated that their preference for attendance at a virtual custody court would be by videoconference, this being the most preferred option among them and, for defence agents, the preferred option was for personal appearance (76%).

Processes, technology and familiarity may have improved since this survey was conducted, though we believe that this is an area that should be considered in more detail. Other jurisdictions, particularly the United States of America, have significant experience of virtual bail proceedings pre-dating the challenges emerging through the pandemic. Evidence from these video proceedings has shown disparity in outcomes between in-person and virtual hearings. In Cook County, Illinois, for instance, comparing bail bond levels in the eight years prior to the introduction of video hearings (1991-1999) and the eight years following (1999-2007), it was found that the bond levels in video hearings increased by 51% compared to 13% for in-person hearings: [Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions \(northwestern.edu\)](#) Disparities in outcome have also been found in civil hearings, for instance, immigration bail hearings in the UK where research in 2013 found that 50% of bail applications were refused by video, though only 22% in person: [2nd-bop-report.pdf \(wordpress.com\)](#). Similar research in the United States of America showed that individuals were more likely to be deported where appearing by video than in person: [Remote Adjudication in Immigration \(northwestern.edu\)](#)

Safeguards were included within the rules for the pilot of virtual custodies, such as unrepresented parties appearing in person, and the ability for solicitors to make representations to the sheriff on the Police Scotland assessment of an individual's suitability for video hearing. However, video and in-person hearings remain very different, however much the former has sought to replicate the latter through the pandemic. It would be unsurprising for the outcomes from these two means to also be different and research is undoubtedly required if this technology is to continue in the criminal justice system in future.

Question 14: Freedom of Information: giving notice electronically

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

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

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

We have no comments.

Question 15: Legal aid

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

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

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

We supported the introduction of measures to facilitate interim payments for work-in-progress through the legal aid scheme during the pandemic period. Most cases had been delayed and many aid types were not eligible for interim payment until such stage as the

case concluded. We believe that these measures should be retained currently, potentially to be reconsidered at the stage of the introduction of a Legal Aid Reform Bill.

We would also highlight the limited utility of these in the wider challenge for legal aid. The reduction in expenditure from the Legal Aid Fund likely exceeds 22% between 2019-20 and 2020-21 and the number of firms receiving a payment from the Fund for the same period is likely around 10%. The number of criminal firms registered has declined by 25% in the decade to 2021, and the number of civil firms by 18%. The crisis in provision in the face of the demands of the Recover, Renew, Transform programme has been well documented and evidenced with urgent attention needed.

Question 16: Legal writings etc.

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

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

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

We believe that this is a provision which is of benefit to people in Scotland who require the services of a notary. We also consider that were this provision to be repealed that could have an adverse impact on those who need notarial services in terms of risk of exposure to Covid -19, anxiety, cost and delay. Therefore, we consider that the provision should be extended and made permanent.

Question 17: Mental health: named person nomination

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

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

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

Requiring a nominee to accept a nomination is a useful safeguard to ensure that they are willing to act as a named person, but requiring this to be witnessed by a prescribed person risks creating unnecessary bureaucracy.

We would, however, suggest that the suggested form for acceptance of a named person nomination should be updated to include a declaration by the proposed named person to the effect that they understand the role, rights and responsibilities of a named person. This may act as an additional safeguard, and prompt a nominee who is unsure about the role to seek guidance before accepting the nomination.

Question 18: Parole Board: delegation

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

- I think the provisions for Topic P14 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P14 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P14 should be extended or made permanent

- Unsure
- I have no view

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

We believe that these measures are proportionate during the pandemic period, where there is a risk that Parole Board functions may be impaired in the absence of a chair. Whether there are benefits to wider delegation beyond this period, such as the sharing of functions amongst Parole Board members, may be more appropriate to consider separate to this legislation.

Question 19: Parole Board: live link

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

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

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

The capacity to allow for proceedings by live link is an important element during the pandemic period and should be retained until such stage that in-person hearings can be safely resumed. Whether these measures should be retained following this period merits separate consideration. While there may be efficiency savings from reduced prisoner transportation, there may be benefits in returning to in-person hearings.

Question 20: Remote registration of deaths and still-births

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

- I think the provisions for Topic P16 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic P16 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic P16 should be extended or made permanent
- Unsure
- I have no view

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

We have no comments.

Question 21: Remote registration of live births

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

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

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

We have no comments.

Question 22: Tenancies: protection against eviction (discretionary grounds of eviction); and pre-action requirements for eviction proceedings on ground of rent arrears

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

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

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

We do not seek to select a particular option in relation to the continuance of these measures. In considering whether to make the measures permanent, it is appropriate to consider the balance between the interests of landlords and tenants. We suggest that empirical information should be considered in deciding the appropriate approach, for example, statistics on the number and duration of cases before the First Tier Tribunal during COVID-19 under the discretionary approach, as well as information on the capacity of the First Tier Tribunal to deal with this legislative change in the longer term.

Chapter 4: Responding to the impact of COVID-19 in the justice system

Question 23: Courts and tribunals: conduct of business by electronic means

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

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

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

There is no doubt that digital interaction between court users and the courts for procedural and administrative business has brought tangible benefits in terms of cost, time and efficiency savings. It may well be appropriate to ultimately make these provisions permanent in due course but it is premature to do so. The courts have not yet re-opened for business. The temporary measures should continue until a full review is undertaken in 12 months' time (see Answer 24 for more detail as to the proposal for a 12 month review).

One issue which does require to be urgently addressed is that some changes in working practice which have been introduced through conducting business by electronic means e.g. increased requirement to lodge written submissions, are not reflected in the tables of fees for solicitors' work in the Court of Session or Sheriff Court. There are similar challenges for publicly funded work, where the legal aid system has not been adapted to reflect these changes. These factors create difficulties for the solicitor being properly remunerated. There requires to be urgent consideration given to the lacuna in the tables of fees to ensure fees are prescribed for these new work practices.

We also have some concerns regarding how party litigants or unrepresented accused, particularly those without access to the technology required, are able to represent themselves under this system. Information provided for these users is currently poorly communicated, does not currently meet the Scottish Government's own service design principles and forms a barrier to access. Such users must be adequately supported in their engagement with the system, whether moving into the digital landscape or in traditional physical court settings. The current situation provides an opportunity for a

properly-designed pilot scheme covering all users including party litigants to fully assess the advantages and disadvantages of conducting business by digital means.

Question 24: Courts and tribunals: virtual attendance

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

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

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

Civil court business

This question requires to be broken down as different considerations apply to different types of court hearing. Some are entirely suitable for virtual attendance such as most forms of procedural business, others are not. It is recognised that in some cases it is more appropriate for these types of hearings to be heard in person. Flexibility is required within the legislation to allow for this.

This consultation comes at a time when Scotland is emerging from what is perceived to be the worst effects of the Covid crisis. Scottish Courts and Tribunal Service current policy is to keep court buildings closed for most civil business for safety reasons notwithstanding most shops and businesses are open to the public. Large scale events such as world conferences on climate change, concerts and sporting events, attracting thousands of delegates and spectators, are being held around Scotland due to relaxation in Government guidelines.

Scotland is, by and large, trying to return to a degree of normality. It would appear however that assumptions are being made by SCTS and / or the Scottish Civil Justice Council that it is not possible to safely manage the re-opening, or at least partial re-opening, of the courts on safety grounds at the current time.

We acknowledge and accept that one of the reasons for continuing civil restrictions is the prioritisation of criminal business and the need to reduce the criminal backlog. However, one of the main reasons cited for conducting civil business virtually, at least in relation to the Court of Session, is that the inevitable footfall creates an unacceptable level of risk. This fails to take account of how that risk will develop over the coming months. New court rules have been proposed and are being consulted upon which are intended to be a permanent feature of the Scottish Civil Court system. They need to be fit for purpose in the medium to long term, not simply based on a perceived level of risk today.

The changes which the legal profession have faced since March 2020 have been borne out of necessity. That does not mean that all the changes which have been forced upon court users should all remain.

The Law Society of Scotland, at its August working group meeting with SCTS, called for a pilot scheme to be introduced in courts across Scotland, including the Court of Session, so that a limited number of live proofs, evidential hearings and appeals could be held in the court buildings. This would be regardless of case type or duration, the aim being to analyse how live proofs could be safely accommodated and assess whether there were any practical or safety issues which required attention. The outcome of the pilot would inform SCJC in their current consultation exercise and avoid a set of rules being introduced with no evidence base to justify the proposals. Our suggestion to run a pilot scheme has not been implemented. We remain of the view that it would be appropriate for the courts to run the pilot for a 12-month period. Analysis of the experiences of all participants in cases which proceed in person and those which do not should be undertaken. Only when that data is available should a view be taken on the extent to which virtual hearings should become a permanent feature of the civil court system.

Further, SCJC proposals do not reflect the overwhelming opinions expressed in responses to the surveys undertaken in March 2021 by the Law Society (and the Faculty of Advocates) which formed the basis of submissions in briefing papers submitted to the conference held on 10th May 2021 on "Civil Business Post-Covid". Over 90% of Law Society member responses expressed the desire, on behalf of solicitors and the clients

they represent, to return to live proof hearings when it is safe to do so. Reasons cited by Law Society of Scotland members for returning to in-person hearings include:

- a. The perception that a judicial office holder will make a better assessment of credibility and reliability of a party or witness if the party or witness appears in person. Whilst we recognise there are differing opinions on whether that is true, the perception is overwhelming. We would argue that it matters not whether there is clear data on the accuracy of that perception. The overriding factor is that Justice needs to be seen to be done and, to do that, litigants and their agents/counsel have to have confidence in the judicial office holder's ability to perform the fundamental function of assessing credibility and reliability. Absent such confidence, the losing party in particular will feel aggrieved that the process has not been fair and transparent.
- b. Digital Poverty Issues – a significant number of the population either cannot access the necessary hardware or software to participate effectively in a virtual hearing, or they do not have reliable broadband due to an inability to afford it or do not have the technical know-how to engage with IT. Whilst it is recognised that efforts are being made to address the issue by Government and various users of the court system this problem will persist in the medium term.
- c. Poor internet connection even with the appropriate hardware and software – there remains a significant variation in the quality of broadband strength across Scotland with some agents working in areas where they cannot connect to Fibre.
- d. Advocacy is much more difficult in a virtual setting and leads to “virtual fatigue” – effective examination and cross examination of a witness is diminished in a virtual setting, coupled with the fact that it is extremely tiring to conduct lengthy hearings on a virtual platform.
- e. Communication difficulties – it is much harder and sometimes impossible to relay confidential messages/take instructions between agents, counsel and clients whilst using a virtual platform.
- f. Loss of Advocacy skills – an inability to appear in-person in a court room will inevitably lead to a loss of or inability to acquire advocacy skills.
- g. Gravitas of the proceedings is lost in a virtual setting
- h. The ability to achieve late resolution of the case is diminished – meeting face to face in the court building on the day of a proof often led to discussions which resulted in settlement being achieved even in those cases where settlement discussions had previously been exhausted.

- i. Social interaction with other court users and lawyers is a positive experience which many young lawyers have had no opportunity to participate in.

In addition, we understand that the issue of expense is virtually neutral in terms of SCTS running evidential hearings on a virtual platform compared to in-person. There can therefore be no justification for not holding in-person hearings on cost grounds. Indeed, agents consider it to be more expensive to conduct evidential business virtually due to the need for additional 1) IT investment and 2) personnel required to deal with various aspects of a virtual evidential hearing.

We do recognise that there will be occasions where it is appropriate to hold a “hybrid proof” where some witnesses attend in-person and some give their evidence virtually. Our position is that this is a matter which should be left to the parties to agree and only in the event of disagreement should the judge be asked to rule on the matter. The interlocutor assigning proof dates should clearly state which witnesses are allowed to give their evidence virtually.

We suggest the approach to take is to weigh up the pros and cons of live hearings and virtual hearings, listen to the legal profession and those whom they serve and take cognisance of the reasons, for and against, a return to live proofs, evidential hearings, debates and appeals. A concluded view, in our submission, can only be reached after the courts have re-opened to run a number of proofs etc as part of the aforementioned pilot. By the same token, it is fully recognised that virtual hearings have worked well for procedural business and should remain the default position moving forward.

During the SCJC consultation exercise on the draft court rules, SCTS guidance has changed. The fixing of in-person hearings until November 2021 was only allowed in “exceptional circumstances” but from 15th November 2021 the guidance is changing to allow in-person hearings “on cause shown”. This is welcomed but is simply indicative of the fluid nature of the current position and is all the more reason not to prematurely introduce permanent rules which create a default position for proofs etc to be conducted virtually.

In short, it is too early to make permanent change. We support an extension of the practice of holding virtual hearings for procedural business but consider it is essential to review matters as and when there has been an opportunity to hold live proofs etc as it

may well be the case that it is appropriate to adopt a default position of live attendances in court for those types of hearing.

Studies of the “workability” of live hearings and virtual hearings should be undertaken in order that a knowledge-base can be established to inform the most appropriate method of conducting civil court hearings. Without that, we fear that that SCJC and SCTS will not “take the vast majority of members of the profession with them” and more importantly the cornerstone principles of Access to Justice, Fairness and Transparency will not be met.

In both civil and criminal hearings, a physical court setting can provide a level of support for the client or accused by their lawyer. Digital hearings can leave those with limited experience of court processes feeling vulnerable and isolated. The impact of this should be taken into account in any equality impact assessment and proper attention be given to what further support may need to be provided, particularly to vulnerable court users. In this respect, we note the [HMCTS digital support service](#) recently announced, though this will only apply to reserved tribunals in Scotland.

Criminal court business

The conduct of criminal court business by remote hearings engages many of the same issues as for civil work. Through the pandemic period, there have been virtual custody hearings, virtual trials and remote juries operating, and procedural hearings also taking place remotely. The experience of these has been mixed, in part because of the technology deployed, the training and familiarity of the parties around these remote hearings, the lack of access to papers in advance of these hearings and the inability to consult with clients effectively. Our research on virtual custodies, referred to in the response to question 13, above, highlights a number of these challenges.

The European Court of Human Rights has held that video hearings do not necessarily violate the Article 6 right to a fair trial. For instance, in *Marcello Viola v. Italy* (Application no. 45106/04), the court stated, “Although the defendant's participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention.” The legitimate aim during a pandemic may not be the same as in the recovery period from that pandemic,

potentially from public health to resolving backlogs, though the articulation of this aim is needed to justify any continuation.

Respect must also be provided for due process. Accused persons must be able to participate effectively, and this undoubtedly more challenging to ensure in a virtual environment. Ultimately, there must be equivalence of outcome between virtual and in-person proceedings and we do not have research to demonstrate that this is the case. There are suggestions from other jurisdictions, including the recent evaluation of the virtual court pilot, that those appearing by video are less likely to receive a community-based sentence and more likely to receive a custodial sentence: [Virtual Court pilot outcome evaluation \(justice.gov.uk\)](https://www.justice.gov.uk/virtual-court-pilot-outcome-evaluation)

There also needs to be consideration of issues around vulnerable accused. Our recent report on these issues noted that there is no common understanding of what vulnerability is or what triggers a need for support for accused persons:

<https://www.lawscot.org.uk/media/362501/vulnerable-accused-persons-report-final.pdf>

Virtual hearings exacerbate these concerns, though there may be circumstances in which a vulnerable accused may want to participate by video, for instance, in the circumstances in the case in England and Wales, *R v Ukpabio* [2007] All ER (D) 474 (Jul), where the accused wished to provide video evidence and to participate by video from a secure psychiatric unit.

The introduction of video hearings to the criminal justice system is a fundamental change of paradigm, and we believe needs detailed, careful and evidence-based scrutiny. Such activity should be undertaken separately. The resourcing of video hearings would also require careful consideration. There needs to be adequate funding to ensure that technology is as robust as possible and that changes in practice emerging from the change are reflected in the payments available for cases available under legal aid – for instance, where these take longer, require additional written pleadings and the like. Capacity across the justice system will also need to be considered. Historically, this has been determined by the limitations of the court estate, though virtual hearings could allow for capacity in excess of that previous limit. This may require additional judiciary, court staff, prosecution and defence practitioners. As noted above, there are significant capacity challenges, particularly for criminal defence, largely relating to generational underfunding of legal aid and the challenges around recruitment and retention into the sector.

Question 25: Criminal justice: early release of prisoners

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

- I think the provisions for Topic J3 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J3 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J3 should be extended or made permanent
- Unsure
- I have no view

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

We believe that these provisions should be extended but not made permanent. Early release has been used on a limited basis through the pandemic period, and remains an important option for as long as a risk to public health is presented. We note the recent [annual report from HM Inspectorate of Prisons](#), which commended Scottish Prison Service on the response to Covid-19, though also recognising human rights issues around the treatment of prisoners, particularly through isolation.

The early release of prisoners requires significant provision of support as people make the move from a prison setting back into society. For the scheme to work prisoners need to receive support in for example registering with medical services and entering benefits claims. Any continuation of the existing provisions beyond March 2022 must consider the impact on those leaving prison settings and whether they are receiving adequate support.

Question 26: Criminal justice: expiry of undertaking

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

- I think the provisions for Topic J4 should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J4 should be extended beyond March 2022, but not made permanent
- I do not think the provisions for Topic J4 should be extended or

made permanent

Unsure

I have no view

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

We believe that these measures should be extended for as long as the public health conditions require but should not be made permanent. There will be an opportunity to consider issues around undertakings through the introduction of the Bail and Release from Custody Bill in the current parliamentary term.

There appears to be an assumption that the accused is legally represented and can make representations through their agents in these cases. Any further extension of these provisions should take into account how these provisions are to be suitably explained to those accused who are unrepresented.

Question 27: Criminal justice: fiscal fines

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

I think the provisions for Topic J5 should be extended beyond March 2022 and made permanent

I think the provisions for Topic J5 should be extended beyond March 2022, but not made permanent

I do not think the provisions for Topic J5 should be extended or made permanent

Unsure

I have no view

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

As the consultation paper suggests, changes to the level of fiscal fine are better considered through separate legislation.

Fiscal fines take no account of the ability to pay. There is some research on fiscal fines showing the majority were issued in deprived areas. The pandemic has also had a significant impact on personal income, with the Office for National Statistics reporting in

January 2021 that 30.4% of people in the highest income quintile had reported a reduction in income over the pandemic; and 43.8% in the lowest quintile.

Question 28: Criminal justice: national court for cases beginning with an appearance from custody

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

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

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

The measures around the national court have been deployed to address the public health concerns around the pandemic and should be discontinued at such stage that there is no longer a risk to public health.

Virtual custody appearances present considerable issues, with little account taken of for example the age, mental health, learning difficulties or language barriers of a person in custody when deciding whether they should appear remotely. Further work is required in this area to ensure decisions are made that reflect these potential barriers to access to and understanding of proceedings.

Question 29: Criminal justice: time limits - relating to the time limit on summary-only cases at section 136 of the Criminal Procedure (Scotland) Act 1995 (1995 Act)

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

- I think the provisions for Topic J7(i) should be extended beyond March 2022 and made

permanent

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

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

In considering any extension beyond March 2022 data should be considered on the number of prisoners remanded for more than 40 days in summary procedure and what the impact of the provisions to date has been.

The role of time limits in the criminal justice system is an important human rights safeguard. Article 6 of the Convention states that “everyone is entitled to a fair and public hearing within a reasonable time”. There exists the possibility to extend time limits on a case by case basis, though we appreciate that such applications may engage additional court time to resolve (though the consultation paper does not estimate the number of such applications that may be made). Ultimately, our courts and the justice system as a whole need to be resourced to levels that would allow for such applications to be met within existing court business.

The most recent criminal court data from SCTS shows that court business in September 2021 is approaching volumes pre-pandemic, including:

- 47 High Court evidence led trials commenced, which is 12% higher than the average pre-COVID level.
- 95 sheriff solemn evidence led trials commenced which is the same as the average pre-COVID level.
- 551 sheriff summary evidence led trials commenced, which is 95% of the average pre-COVID levels

We anticipate that there will be further improvement in court capacity by the stage that the current measures are scheduled to cease. On this basis, we do not support the extension of provisions regarding time limits, whether globally or on the differentiated basis suggested in the consultation paper and believe that this important safeguard should be restored as soon as possible.

Question 30: Criminal justice: time limits - remand time limits at section 65(4) and section 147(1) of the 1995 Act

It is proposed that the provisions for Topic J7(ii) (remand time limits at section 65(4) and section 147(1) of the 1995 Act (Criminal justice: time limits)) as described will be extended beyond March 2022. Which of the following best describes what you think about this?

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

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

We refer to our response to question 29 above. Additionally, we note that the current backlog in criminal cases has had severe impacts on many held on remand, with some held for up to two years. Further extending remand time limits is cause for concern and we would like to see reform of bail legislation and the use of electronic tagging for untried prisoners where practical to alleviate the impact on those held on remand due to capacity issues in our justice system.

Question 31: Criminal justice: time limits - extending time limits relating to the maximum time between first appearance on petition and the first diet/preliminary hearing and commencement of the trial at section 65(1) of the 1995 Act

It is proposed that the provisions for Topic J7(iii) (extending time limits relating to the maximum time between first appearance on petition and the first diet/preliminary hearing and commencement of the trial at section 65(1) of the 1995 Act (Criminal justice: time limits)) as described will be extended beyond March 2022. Which of the following best describes what you think about this?

- I think the provisions for Topic J7(iii) should be extended beyond March 2022 and made permanent
- I think the provisions for Topic J7(iii) should be extended beyond March 2022, but not made permanent

- I do not think the provisions for Topic J7(iii) should be extended or made permanent
- Unsure
- I have no view

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

As per our comments in response to question 29 and 30 above, proper attention needs to be given to the impact on those held on remand and other potential solutions.

Question 32: Criminal justice: time limits - removing time limits on the length of individual adjournments for inquiries

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

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

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

We refer to our response to question 29 above.

Question 33: Proceeds of crime

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

- I think the provisions for Topic J8 should be extended beyond March 2022 and made permanent

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

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

We supported the changes in paragraphs 7 and 8 in relation to the Proceeds of Crime Act 2002. The purpose of such changes was to ensure that certain provisions relating to the periods of confiscation orders and for payment are modified in favour of the person who is affected by such orders to allow for confiscation proceedings to be postponed where they have been affected by coronavirus so that in terms of section 99 (4) of the 2002 Act, exceptional circumstances will include the effect (whether direct or indirect) of coronavirus on the proceedings. It seems appropriate for these measures to continue for as long as there remains a risk to public health.

Chapter 5: Final questions

Question 34: Covid recovery

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

- Yes
- No
- Unsure
- I have no view

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

In addition to our comments above, we also suggest changes to the Requirements of Writing (Scotland) Act 1995 and the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 in connection with the execution of both traditional and electronic documents. Our full proposals are set out in full in the annex to this response.

The identified areas of difficulty in the law of execution create barriers to the uptake of electronic signatures/documents, cause practical issues for practitioners wishing to use them and can cause delays in transactions. We consider that legal clarity in this area would help to encourage the uptake of electronic signatures and documents, and also help to progress digital conveyancing and make Scotland a more digitally-enabled economy, where business can be conducted swiftly and easily.

The issues described in the annex have become particularly apparent as a result of Covid-19 restrictions and increased working from home practices, and we understand that these issues are commonly arising in practice. We therefore support changes to the law in this area.

Furthermore, there has been a considerable decline in the number of practitioners, (solicitors, advocates and solicitor advocates) undertaking legal aid work in the years preceding the pandemic, a situation which has been further exacerbated over the past 18 months. Some welcome steps have been taken to address this issue including funding to support trainees entering legal aid and covid relief funding for those firms affected by the reduction in business across the pandemic. Defence firms however still face significant challenges recruiting and retaining members of the profession, particularly in light of increased recruitment for Procurator Fiscals and Advocate Deputes which, posts which frequently provide better pay, conditions and work/life balance than can be offered by defence firms under the current legal aid regime. At the time of writing this has led to a withdrawal from the duty scheme by the vast majority of criminal defence practitioners over the period of COP26.

With an increase in court timetabling of cases to tackle the existing backlog, including antisocial scheduling of business across public holidays and weekends, we are reaching a crisis where there are not enough legal aid practitioners to appear in these courts. It is important also to acknowledge that, in addition to support for court schedules, defence practitioners have a key role in the investigative process at police stations, often at anti-social hours and without prior notice, which presents further capacity challenges for this sector. In order to support the “common goal” for justice which is referred to in this paper, urgent action must be taken to ensure the legal aid system is adequately funded and attracts sufficient members of the profession to represent the most vulnerable in society.

Questions 35 to 39: Do you have any comments on potential impacts of the proposals in Chapters 2 to 4 of this paper, not sufficiently covered by the previous impact assessments, on:

Question 35: Business and regulatory impact assessment

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

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

We have no comments.

Question 36: Child rights and wellbeing impact assessment

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

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

We have no comments.

Question 37: Equality impact assessment

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

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

It is noted that the Equality Impacts Assessments (“EIA”) for these Acts were prepared at speed and in reaction to a public emergency. In particular, the EIAs for the Coronavirus Act 2020 and the Coronavirus (Scotland) Act 2020 were completed at the beginning of the pandemic when little was known about the transmission of the virus and its impact on the UK population. As these provisions were intended to be time limited and in reaction to the emergency, for all provisions which are proposed to become permanent we suggest that a further EIA should be considered taking into account evidence available from the application of these provisions since they were first introduced. In particular for Topics H1, H2, H3, P2, P8, P18 where the EIAs conducted when the provisions were introduced identified possible impacts, we suggest that these possible impacts are reviewed to establish whether they occurred, and if so, any adjustments which mitigate any negative impacts are necessary.

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

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

I have no view

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

We have no comments.

Question 39: Human rights

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

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

We have no comments.

Question 40: Data protection impact assessment

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

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

If you have selected “Yes” please write your comments below. It would be helpful if you could

refer to topics of particular interest to you with their topic codes.

We have no comments.

Question 41: Island communities impact assessment

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

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

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

We have no comments.

Question 42: Strategic environmental assessment

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

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

If you have selected “Yes” please write your comments below. It would be helpful if you could

refer to topics of particular interest to you with their topic codes.

We have no comments.

Question 43: Financial Memorandum

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

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

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

We have no comments.

Annex

Proposed legislative changes to assist digital conveyancing and remote working

Why the changes are required

When our Electronic Signatures Working Party were drafting the [Guide to Electronic Signatures](#), it became clear that there are some “grey” areas in the law of execution which (i) create barriers to the uptake of electronic signatures/documents, (ii) cause practical issues for practitioners wishing to use them and (iii) can cause delays in transactions. Clarity would not only encourage the uptake of electronic signatures and documents, but it would also help to progress digital conveyancing and make Scotland a more digitally-enabled economy, where business can be conducted swiftly and easily.

Proposed changes

Proposed legislative changes are set out below. Some of the proposed changes apply to both electronic and traditional (i.e. paper) documents.

We understand officials are currently considering item 1 and that the Keeper of the Registers of Scotland is supportive of clarifying the law on annexations to electronic documents.

We consider item 2 to be urgent. Covid-19 restrictions have led to increased working from home. This has, in turn, led to many solicitors seeking to sign missives electronically, to avoid the impracticalities of having to print out, wet ink sign, scan and post hard copies of missives. However, the lack of an express statement in the legislation that mixed media contracts are permissible leads some solicitors to shy away from both signing missives electronically and accepting electronically signed missives.

With regard to item 4, Covid-19 restrictions have also led to increased use of counterpart signing and this increased use is likely to continue. The increase has highlighted the problems and transactional delays caused by the lack of clarity in the legislation and the resultant different interpretations of the legislation.

If items 1, 2 and 4 are to be dealt with, it would be a missed opportunity not to address item 3.

1) Regulation 4 of the Electronic Documents (Scotland) Regulations 2014 (2014 Regulations)

Change: To clarify the position re annexations to e-documents. Paragraph 6 of our [Guide to Electronic Signatures](#) explains the issue.

We understand officials are currently considering this item and that the Keeper of the Registers of Scotland is supportive of clarifying the law on annexations to electronic documents.

2) Section 9B (3) and section 2(2) of the Requirements of Writing (Scotland) Act 1995 (1995 Act)

Change: To clarify that a *traditional* (i.e. hard copy) offer can be accepted by means of an *electronic* acceptance (and vice versa). *It is our view that primary legislation would be required to make this change.*

Analysis: The 1995 Act does not expressly refer to a contract signed by a combination of traditional and electronic signatures. Section 2(2) only refers to traditional documents and section 9B only refers to electronic documents. While both of these sections may be regarded as permissive and a mixture of signing types is not expressly excluded in the 1995 Act, there is concern expressed by many in the legal profession that a lack of specific provision casts the competence of "mixed media" signing into doubt.

We consider that it is clear that it was the policy intention of Scottish Government to permit this. The Explanatory Notes to Part 10 of the Land Registration etc. (Scotland) Act 2012 (which introduced the sections dealing with electronic signatures) states: "Subsection (3) [of section 9B] allows a contract mentioned in section 1(2)(a) of the 1995 Act to be constituted by a mix of electronic and traditional documents." However since section 9B(3) makes no mention of traditional documents, the conservative approach is that section 2(2) only permits a contract to be constituted by one or more *traditional* documents and section 9B only permits a contract to be constituted by one or more *electronic* documents.

We consider that the wording in sections 2(2) and 9B respectively is causing this issue, each appearing to be self-contained provisions that do not cross refer to the other.

Support for the argument that mixed media contracts are permitted can be found in section 1(2)(a) of the 1995 Act which states "a written document which is a traditional document complying with section 2 or an electronic document complying with section 9B of this Act shall be required for the constitution of a contract ... for the creation, transfer, variation or extinction of a real right in land". The rules on interpretation of statutes contained in section 6(c) of the Interpretation Act 1978 and section 22(a) of the Interpretation and Legislative Reform (Scotland) Act 2010 both provide that in any Act words in the singular include the plural, meaning that section 1(2)(a) of the 1995 Act has to be read as if it says "a written document *or documents* which is *or are* a traditional document complying with section 2 or an electronic document complying with section 9B of this Act shall be required for the constitution of a contract ... for the creation, transfer, variation or extinction of a real right in land". Many contracts for the sale of land consist of more than one document (i.e. missives) and the application of the rules of statutory interpretation would therefore mean that section 1(2) does authorise mixed media contracts. However, the absence of an express statement in the words of the Act is causing reluctance to accept mixed media contracts.

3) Schedule 2, paras 3 and 3A of the 1995 Act

Change: To clarify that a document being executed by a corporate director or corporate secretary of a company (or by a corporate member of a LLP) will be presumed to have been subscribed by that company/LLP (i.e. will be self-proving) if the Valid/Probative approach referred to below is used. This issue arises where *a company or LLP is required to execute a document and the director or secretary of that*

company (or member of that LLP) is itself a corporate body. This change would apply only to traditional documents.

It is our view that secondary legislation would be required to amend Schedule 2, para 3A of the 1995 Act (subject to the affirmative procedure) - see the Limited Liability Partnerships Act 2000 (ss. 16 and 17(1) and (3)).⁷ We consider that it may be possible to amend Schedule 2, para 3 of the 1995 Act by primary legislation.

Analysis: For a traditional document granted by a company or LLP to be self-proving, there are two possible approaches:

- The company that is a director/the secretary/a member of the granter must execute so as to be a probative execution. Then the execution of the company (or LLP) that is the granter must also be self-proving (i.e. another witness is required) (the Probative/Probative approach); or
- The company that is a director/ the secretary/a member must execute validly, and then the execution of the company (or LLP) that is the granter must be self-proving e.g. by witnessing (the Valid/Probative approach).

For example:

- adopting the Probative/Probative approach, a director of Director Company Limited signs and his signature is witnessed. That is probative for Director Company Limited but, to be probative for Granter Company Limited, either a further witness is required, or one of the other directors or the secretary of Granter Company Limited has to sign too.
- adopting the Valid/Probative approach, a director of Director Company Limited signs - that is valid for Director Company Limited and therefore a valid execution by Granter Company Limited - and then a witness signs to render the document self-proving for Granter Company Limited.

Several years ago, the Property Professional Support Group asked Professor Kenneth Reid for his thoughts on this issue regarding companies (not LLPs). His reply is set out below:

“The probative/probative approach is obviously safe. I tend to think that the valid/probative approach is OK also. For in the version of s 3 of the 1995 Act which is applied to companies by sch 2 para 3(5), all that is required for probativity of the granter-company is that ‘a document bears to have been subscribed on behalf of a company by a director ..’ (plus a witness). So the director must sign at the end. Where the director is a company, how does it sign? Arguably the answer is given in sch 2 para 3(1) which provides that where a granter of a document is a company, the document is

⁷ The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 as read with section 19(3) of the Limited Liability Partnership Act 2000 (“the 2000 Act”) which deemed the 2000 Act to be a pre-commencement enactment within the meaning of the Scotland Act 1998.

signed by the company if it is signed on its behalf by a director, or by the secretary, of the company or by a person authorised to sign the document of its behalf.

But the reference in this provision to ‘granter’ gives pause for thought. (Compare s 3(1) where there is no such reference). Strictly, the company which is signing as a director is not the granter of the deed, and so strictly sch 2 para 3(1) does not apply – except by analogy, for there must be some rule as to how a non-granter company signs.

Of course, the whole difficulty is readily avoided by using an authorised person instead of the granter-company’s director or secretary.”

Ideally, Schedule 2, paras 3 and 3A of the 1995 would be amended to make it clear that the Valid/Probative approach is sufficient for the document to be self-proving.

The 2014 Regulations do not require to be amended in a similar vein because, for electronic documents, there is no need for a witness or for two signatories in order to achieve self-proving status:

- **Validity:** Regulation 5 states that where the granter is a company, an electronic signature on behalf of the company must be applied by the secretary/a director/ or an authorised person. It also states that where the granter is an LLP, an electronic signature on behalf of the LLP must be applied by a member of the LLP; and
- **Probativity:** Regulation 3 states that for an electronic document to be presumed authenticated by a granter the electronic signature incorporated into or logically associated with that document must be a qualified electronic signature.

The only way to achieve self- proving status therefore is for the electronic signature of a corporate director or corporate secretary of the granter - company (or of a corporate member of the granter - LLP) to be a qualified electronic signature.

4) Section 1 of Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 (2015 Act)

Change: To clarify that two or more signatories signing on behalf of one single entity (e.g. two directors signing on behalf of a company, or a director and secretary signing on behalf of a company; or two trustees signing for a trust) can each sign a separate counterpart (as opposed to both signatories needing to sign the same counterpart). *This change would apply to both traditional and electronic documents.*⁸

We consider that secondary legislation would be required to make this change (subject to the affirmative procedure) - see section 5(1) of the 2015 Act.

Analysis: Sections 1(1) - (3) inclusive of the 2015 Act provide:

⁸ By virtue of section 3 of the 2015 Act.

- “(1) A document may be executed in counterpart.
- (2) A document is executed in counterpart if –
- (a) it is executed in two or more duplicate, interchangeable, parts, and
 - (b) no part is subscribed by both or all parties.
- (3) On such execution, the counterparts are to be treated as a single document.”

Uncertainty stems from the fact that the word “parties” is not defined and so is open to different interpretations. Are the signatories “parties” or are they simply signatories of a single “party”? If they are the latter, does this prevent them from each signing separate counterparts?

Professors Gretton & Reid (in *Conveyancing* 5th ed, para 18-41) explore the latter interpretation as follows:

“Different parties can sign different counterparts. But can different signatories “within” the same party do likewise? The issue arises in the context of companies and other juristic persons. So if, for example, a document is to be signed on behalf of Counterpart (Scotland) Ltd by two of its directors, is it competent for each director to sign a different counterpart? The answer is unclear. On one view there is nothing in s.1(2) of the Act, the key provision, to prevent this practice from taking place. On another view, a potential difficulty is caused by the fact that s.1 turns on the distinction between different “parties” whereas the directors of a company belong to the same party. The safe course is for the directors to sign the same counterpart.

A cautious view would extend this practice even to trustees. Admittedly, the argument is less strong because a trust, unlike a company, is not a separate legal person, and the juridical act represented by the document is performed by the trustees and not by the trust. Nonetheless it is possible to argue that the trustees as a body constitute a single “party”, as demonstrated by the fact that a single trustee could be authorised by a majority to sign for all, and that accordingly all must sign the same counterpart.”

Footnote 58 to para 2.46 of the [SLC Report on Formation of Contract: Execution in Counterpart \(2013\)](#) (our emphasis below) shows that the Scottish Law Commission entertained the concept of split counterparts for directors of a company and for members of a LLP (and by extension, for trustees).

“Delivery – unilateral documents

2.46 Before leaving the topic of delivery, there is an aspect of the current law on delivery in relation to unilateral documents which needs a brief mention. At present, it is well-known that such documents, for instance bonds of caution, guarantees or dispositions, are only effective when delivered to the party who may rely on them.⁵⁶ A notorious example is in the *Stamfield's Creditors* case mentioned earlier.⁵⁷ Where there are two (or more) granters of a unilateral document we envisage that, if desired, it may be executed in counterpart.⁵⁸ However, we intend no departure from the current requirement that the unilateral document so executed cannot be effective until delivered to the party who is to be the creditor under it. (This is additional to the requirement already discussed that the counterparts of any document executed in counterpart must all be

delivered between each of the subscribing parties before the document can come into effect.) To make the position clear, a general statement should be included in the legislation to the effect that the document executed in counterpart and delivered between the various subscribers must also meet any other requirement of the law (such as delivery to its creditor) for such a document to become effective. We therefore recommend:

A document executed in counterpart must, in addition to the counterparts being delivered between the subscribing parties, meet any other requirement of the law before it can become effective. (Draft Bill, section 1(6)(b))”

Footnote 58:

“58 There is no need for a specific recommendation to this effect as recommendation 1 (in para 2.13) embraces all documents, whether unilateral or otherwise. We note that a floating charge of the type mentioned above at footnote 56 above will normally require only a single subscription (of a director, secretary or authorised person for a company, or a member in the case of an LLP) along with that of a witness, and hence cannot be executed in counterpart. However, probativity may also be conferred under the 1995 Act if the document is subscribed by two directors (or members) with no witness, and in this case counterparts may be used.”



For further information, please contact:

Policy Team
Law Society of Scotland
policy@lawscot.org.uk