



Law Society
of Scotland

Consultation Response

Scottish Government Coronavirus (No 2) Bill

1 May 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee and also our Trusts and Succession committee have considered the proposals for the Coronavirus (No. 2) (Scotland) Bill and has the following comments to put forward for consideration. With this Bill, as with legislation more generally, provisions must be compliant with Convention rights. Specifically they should be lawful, necessary, proportionate and time limited and be subject to review and scrutiny.

The Scotland Act 1998 (regarding legislative and executive competence) applies to the Parliament and to the Scottish Government and the Human Rights Act 1998 applies to the acts of public authorities under the bill. We encourage public authorities which undertake functions under this legislation to ensure that compliance with Convention rights continues and that human rights and the law are respected when applying the provisions of this and other Coronavirus legislation.

Question 1: Statutory time limits relating to criminal proceedings under the Criminal Procedure (Scotland) Act 1995

Proposal

Time limits additional to those legislated for in the first emergency Coronavirus Bill have been suggested by the Scottish Courts and Tribunals Service and relate to the adjournment of summary trials at first calling, the power to remand following conviction for inquiry into the physical or mental condition of an offender and a power to adjourn a hearing and remand in custody a person accused of breach of certain court orders.

This is needed because the outbreak will significantly affect the ability of the courts to progress criminal cases in accordance with statutory time limits, resulting in large numbers of additional hearings to seek to extend these time limits on an individual basis.

SCTS have identified these additional statutory time limits as being likely to result in significant numbers of additional court hearings to extend the time limits on a case-by-case basis if no provision is made. This will further add to demands on the court system at a time its capacity to progress court business is already impacted by the coronavirus outbreak.

Further to the changes to certain statutory time limits in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) contained in paragraph 10 of Schedule 4 to the Coronavirus (Scotland) Act 2020 (“the 2020 Act”), we wish to extend further statutory time limits contained in the 1995 Act.

Our response

The proposed changes detailed below relate to extensions to certain time limits which are similar to the extensions provided for in paragraph 10(6) of Schedule 4 of the Coronavirus (S) Act 2020 (2020 Act). These changes, though not stated as the policy justification, may well be provisions that were not included within the 2020 Act due to time constraints. Such changes may well be justified on a similar emergency basis to the extensions to the time limits which have already been brought into effect. These changes include:

1. Continuation without Pleas (Cwps)
2. Inquiries into physical or mental condition
3. Breach of certain orders: adjourning hearing and remanding in custody etc

1. Continuation without Pleas

Section 145 (Adjournment for inquiry at first calling) of the Criminal Procedure (Scotland) Act 1995 (1995 Act) states:

“Where the accused is present at the first calling of a case in a summary prosecution the court may, in order to allow time for inquiry into the case or for any other cause which it considers reasonable, adjourn the case under this section, for such period as it considers appropriate, without calling on the accused to plead to any charge against him but remanding him in custody or on bail or ordaining him to appear at the diet thus fixed; and, subject to subsections (2) and (3) below, the court may from time to time so adjourn the case.

(2) Where the accused is remanded in custody, the total period for which he is so remanded under this section shall not exceed 21 days and no one period of adjournment shall, except on special cause shown, exceed 7 days.

(3) Where the accused is remanded on bail or ordained to appear, no one period of adjournment shall exceed 28 days.”

Section 145A states:

Section 145A (Adjournment at first calling to allow accused to appear etc.)

“(1) Without prejudice to section [150] of this Act, where the accused is not present at the first calling of the case in a summary prosecution, the court may (whether or not the prosecutor is able to provide evidence that the accused has been duly cited) adjourn the case under this section for such period as it considers appropriate; and subject to subsections (2) and (3) below, the court may from time to time so adjourn the case.

(2) An adjournment under this section shall be—

(a) for the purposes of allowing—

(i) the accused to appear in answer to the complaint; or

(ii) time for inquiry into the case; or

(b) for any other cause the court considers reasonable.

(3) No one period of adjournment under this section shall exceed 28 days.

[(4) The clerk of court may perform the functions of the court under subsection (1) above without the court being properly constituted.]”

Their intention is to remove the 28-day limit in circumstances where the accused has been released on bail, as set out at section 145(3) and 145A(3) and provide that the court may adjourn the case for such a period as it considers appropriate. The approach being adopted is similar to the extension to the time limits at section 201 of the 1995 Act as amended by Schedule 4 of paragraph 10(6) of the Coronavirus (Scotland) Act 2020 (Section 201 (power of court to adjourn case before sentence) has effect as if for subsection (3) there were substituted that “(3) The court may adjourn the hearing of a case as mentioned in subsection (1) for such period as it considers appropriate.”

2. Inquiries into physical or mental condition

Section 200(1) of the 1995 Act provides the court with a power to remand an offender for inquiry into physical or mental condition. This deals with cases where the court finds that an accused has committed an offence punishable with imprisonment and it appears to the court that, before the method of dealing with him is determined, an inquiry ought to be made into his physical or mental condition.

Section 200(2) of the 1995 Act provides that the court may remand the offender in custody or on bail (or in hospital where the court believes the offender appears to be suffering from a mental disorder) pending sentencing to allow an inquiry into the offender’s physical or mental condition. It also provides that the court may adjourn the case “for such period or periods, no single period exceeding three weeks, as the court thinks necessary to enable a medical examination and report to be made.”

Section 200(3) provides the same in relation to an extension of a period of remand in hospital, but subject to the condition that the court continues to be satisfied on the written or oral evidence of a medical practitioner, that the person appears to be suffering from a mental disorder.

The intention is to remove the time limits specified at sections 200(2) and 200(3) and provide as undertaken in paragraph 10(6) of Schedule 4 to the 2020 Act that the court may adjourn a case for such a period as it considers appropriate.

3. Breach of certain orders: adjourning hearing and remanding in custody etc

Section 245J (1) of the 1995 Act provides that, where an offender appears before the court in respect of their apparent failure to comply with a requirement of a community payback order, drug treatment and testing order or restriction of liberty order, the court may adjourn the hearing, for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the offender. Section 245J (2) of the 1995 Act provides that the court may remand or bail the offender or ordain them to appear at the adjourned hearing.

Section 245J (3) of the 1995 Act provides that the court shall not so adjourn a hearing for any single period exceeding four weeks or, on cause shown, eight weeks.

The intention is to remove the time limits specified at sections 245J (3) provide similar to paragraph 10(6) of Schedule 4 to the 2020 Act, that the court may adjourn a case for such a period as it considers appropriate.

Question 2: Undertakings

The issue being considered is to make provision which enables the continuation of undertakings given under section 25(2)(a) of the Criminal Justice (Scotland) Act 2016 (including preservation of the undertaking conditions) to the end of any adjourned hearing where an accused fails to appear to answer the undertaking at first instance and the information provided at that hearing is the reason for the accused's failure to appear is related to COVID – 19.

Where the police release an accused person on an undertaking to appear at a specified court at a specified time, they may also impose conditions to the terms of the undertaking. These can include conditions regarding non-interference with witnesses which may be used, for example, to prohibit them from contacting witnesses, including the complainer.

In terms of section 29 of the 2016 Act, undertaking conditions expire at the end of the day on which the person who gave the undertaking is required by its terms to appear at a court, or, if they fail to appear on the undertaking and a warrant is granted, at the end of the day on which the person is brought before a court having been arrested under the warrant.

However, an issue has been identified with cases where the accused fails to appear at the specified time for the undertaking hearing but information is provided at the hearing by the accused's solicitor, or

otherwise, that the reason for the accused's failure to appear is related to COVID – 19, for example they are infected, displaying symptoms or otherwise having to self-isolate in accordance with Government and health advice.

In these circumstances, COPFS have encountered difficulties in obtaining warrants for the accused's failure to appear on the undertaking (whereupon the undertaking conditions would be preserved until the accused is brought before on the warrant), with the result being that the protective conditions attached to the undertaking are lost.

While the Procurator Fiscal may by notice modify the terms of an undertaking under section 27 of the 2016 Act by changing the time specified at which the person is due to appear at court, this is not always possible when timely notice of the accused's non-appearance is not given.

If no action is taken, protective conditions attached to an accused's undertaking will expire, raising risk and safety considerations for the public, especially victims of domestic abuse.

To address this in the short term, COPFS have agreed with the police to lengthen the period of undertaking, with dates being fixed within 90 days. This has been agreed with the hope of reducing the number of undertakings being due to call during the anticipated highest impact period of the virus, while ensuring that protective conditions for public safety can be maintained.

However, this is far from desirable from a victim perspective, especially for victims of domestic abuse, including having regard to priority timescales adopted in domestic abuse cases and Scottish Government targets in this regard.

COPFS would like to be able to consider reviewing and reducing these extended timescales but cannot do so until the associated victim safety issues are resolved. While arrangements are developing for remote attendance these are not in place and will not necessarily enable accused to call in from their house and therefore it does not resolve the issue. In these circumstances it is considered a legislative solution is required.

The underlying policy behind the proposed measure is to preserve public and victim safety, particularly in cases of domestic abuse, during the Coronavirus outbreak and lockdown period. Increased risk to domestic abuse victims and the need for support for victims of domestic violence during the Coronavirus outbreak is live political issue which has attracted significant media attention and measures which seek to ensure existing protections for victims are maintained during the Coronavirus outbreak are likely to gain widespread support.

Our response

This relates to police undertakings. The relevant section appears to be section 29 of the Criminal Justice (Scotland) Act 2016 (2016 Act). It states:

“Expiry of undertaking

- (1) An undertaking given under section 25(2)(a) expires—
- (a) at the end of the day on which the person who gave it is required by its terms to appear at a court, or
 - (b) if subsection (2) applies, at the end of the day on which the person who gave it is brought before a court having been arrested under the warrant mentioned in that subsection.
- (2) This subsection applies where—
- (a) a person fails to appear at court as required by the terms of an undertaking given under section 25(2)(a), and
 - (b) on account of that failure, a warrant for the person's arrest is granted.
- (3) The references in subsections (1)(a) and (2)(a) to the terms of the undertaking are to the terms of the undertaking subject to any modification by notice under section 27(1)."

While the change may be reasonable in so far as providing that a warrant should not be taken where the accused has been in touch with a solicitor or the court indicating that they cannot for reasons related to COVID-19 appear in person in response to the undertaking, there is presumably a need to ensure that the court on its own violation (or indeed if proposed by a solicitor) to consider and vary any conditions that may have been imposed by the police in issuing an undertaking.

We would also suggest that the Crown share the papers with solicitors in advance for an undertaking, in the same way as it would do for a custody. This would allow the solicitor to take a client's instructions and either enter a not guilty or guilty plea and, in those cases,, bail could then be granted (otherwise the case could be continued without plea and bail conditions set, clearly with instructions having been obtained to do so.)

Question 3: Prisoner Custody Officers (PCOs) to provide custody services within Police Custody Units (PCUs)

Proposal

This is needed to deal with the coronavirus outbreak, and to deal with the disruption caused by the coronavirus outbreak, because there is no statutory basis for PCOs to work within custody hubs managed by Police Scotland. As part of the operational response to the outbreak, Police Scotland have worked with the Scottish Courts and Tribunals Service (SCTS) and other justice partners to manage first appearances from custody by way of video links between PCUs in police stations and courts. Whilst the law allows for

remote hearings to take place, it is not possible for Prisoner Custody Officer (PCOs) to execute their duties within Police Custody Units (PCUs).

This policy is necessary to allow for the safe and continued administration of criminal justice. This is urgent to minimise the need to transport detained persons between police custody and courts. If this change is not effected then Police Officers would need to carry out all of the duties required to operate the video-linked custody court with PCUs to minimise the movement of persons; this would be an additional draw on police resources at a time when they are required for front line duties.

Alternatively, detained persons would still be required to transfer between police stations and courts to allow for the safe and lawful detention of those in custody prior to their hearing.

This policy is likely to attract support in expedited legislation because it has been called for by Police Scotland and the Scottish Courts and Tribunal Service.

Our response:

We understand that the legislative change involves section 102 of the Criminal Justice and Public Order Act 1994 (1994 Act). Under Section 102(2) of the 1994 Act, the functions of the Policy Custody Officers are described as:

- “1) the transfer of prisoners between relevant premises (including between courts, prisons and police stations);
- 2) the custody of prisoners held on court premises (whether or not they would otherwise be in the custody of the court) and their production before the court;
- 3) the custody of prisoners temporarily held in a prison during transfer from one prison to another; and
- 4) the custody of prisoners who are outside of the prison temporarily.”

The 1994 Act allows Prisoner Custody Officers to transfer persons in custody between relevant places. This does not extend to allow them to facilitate and perform the custody and administration services in Police Custody Units. There is a view that the definition of ‘court premises’ does not include the cells or other areas from which video conferencing is to take place within Police Scotland’s premises.

There seems sense in making this change as it must be in the interests of the Scottish Government public health advice and safety issued to all involved to minimise the requirements for detained persons to appear in court. This would always be subject to the need to include facilitated access to their solicitor and advice by appropriate means including the need to secure confidential advice.

We had one further observation which relates to the time period relating to when undertakings may call which can be up to 90 days. While understandable and reasonable in the circumstances of COVID-19,

these may be very long periods of time, especially where the conditions imposed on the police undertaking, as will be common, relate to domestic abuse cases. Please could consideration be given to how will the courts deal with applications to vary bail conditions which would proceed otherwise the calling of the case? If the courts do agree to fix a hearing, following presumably an application by a solicitor or a client direct, should the case not also be called then? If so, there might be an issue to have accused seeking to lodge applications to vary bail, just to have their case dealt with sooner rather than later.

As there are legislative changes being proposed to deal with undertakings with which subject to the above comments we agree, we would favour an approach that considers all the ramification and that undertakings within the lengthier timescales could be dealt with sooner using the audio/video technology available. There would need to be a system for agents to be instructed too.

Question 4: Remove antiquated requirements that call for paper documents and notice to be displayed in court buildings.

Proposal

This is needed because the requirement is impossible to comply with in the context of closed court buildings and is causing practical difficulties in relation to commissary procedure where primary legislation (Confirmation of Executors (Scotland) Act 1858) requires physical display of documents.

This is necessary because commissary business is difficult to progress without more modern means of publicity. Whilst this was acceptable for a short period this is beginning to have real impact on bereaved families as the shutdown continues. The provision would instead allow documents relating to Sheriff Court business to be displayed on the SCTS website.

This policy is likely to attract support in expedited legislation because it is uncontroversial and accords with generally supported direction toward more modern court processes.

Our response

In relation to the planned removal of antiquated requirements that call for paper documents and notice to be displayed in court buildings, we are strongly supportive of this legislative change in the current circumstances. We recognise the practical benefits that such a measure will achieve, particularly to allow commissary business to continue to function while some Sheriff Courts are closed.

While perhaps considered antiquated, we consider it important to note the reasons why papers traditionally hung on the walls of court in commissary matters. It is important that the documents displayed digitally on

the SCTS website are done so with sufficient prominence so as to be clearly visible and capable of being easily located by members of the public. We consider that there would also be merit in updating other relevant guidance, such as the ‘What to do after a death in Scotland’ publication, to reflect the changes and draw these to the attention of the public.

More generally, we would welcome a review of the law of commissary practice as a whole, including consideration of opportunities for greater use of electronic documents. We recognise that this is a longer-term piece of work which would require detailed consideration and consultation with stakeholders and the public.

Similarly, we believe that there may be an opportunity to expand on Part 1 of Schedule 4 to allow for greater use of electronic signatures. Much as the Society of Solicitor Advocates has stated, we believe that provisions could be extended to ensure that all documents to be lodged at court, such as special defences, notices and written submissions in appeals, could be done by electronic means. This would facilitate business through the current crisis, avoid unnecessary travel to court, for instance, to lodge against strict time limits, and to protect the health and safety of solicitors and court staff.

Additional comments

In addition to the areas proposed for legislative change through the proposed Coronavirus (No. 2) (Scotland) Bill, we have highlighted other areas where we believe that there could be changes introduced to assist through the current crisis.

Police station interviews

Relevant to the above proposals, we believe that amendment to the Criminal Justice (Scotland) Act 2016 would facilitate solicitor access at the police station, ensuring social distancing or the use of technology. Section 32 of the 2016 Act states:

“Right to have solicitor present

(1) Subsections (2) and (3) apply to a person who—

(a) is in police custody, or

(b) is attending at a police station or other place voluntarily for the purpose of being interviewed by a constable.

(2) The person has the right to have a solicitor *present* while being interviewed by a constable about an offence which the constable has reasonable grounds to suspect the person of committing.”

We believe that an amendment to the term 'present' in section 32(2) is important, to facilitate remote access to persons at a police station.

The 2016 Act is designed to secure Article 6 rights under the Convention, and these may be satisfied via participation by videoconference (e.g. *Marcello Viola v. Italy* (no. 2), no. 77633/16, 13 June 2019 concerning an accused person's participation in proceedings this way, albeit not a police interview).

Presence could include a solicitor giving advice by remote link, provided that there is the facility for the solicitor and suspect to speak confidentially and securely.

However, we believe that it would provide surety to all parties involved in the police station interview process.

Similarly, we believe that clarification around the use of 'appearance' elsewhere in legislation would be helpful, so that this can include attendance and/or representation by virtual or remote or written means/communication (leaving it open, as always, for the court to specifically order personal appearance if thought appropriate, or what type of presence or communication it thinks would not be appropriate).

We believe that such clarification would be welcomed by prosecution and defence and would be in the interests of justice to retain such clarification following the current crisis.

Adults with Incapacity

We have highlighted a number of suggested changes to the Adults with Incapacity (Scotland) Act 2000, which could be taken forward to:

- provide maximum support to the health and care sectors in response to priorities articulated by those sectors
- enable people to anticipate urgent medical and personal decisions that may become necessary, and to plan for them
- enable families of people with dementia, learning disability and other conditions to support and protect their loved ones at a time of crisis
- and meet the expectations and demands of public, professionals and providers, including expectations that have been actively encouraged, for instance, around powers of attorney.

Our Mental Health and Disability committee has suggested several legislative reforms that could meet these aims, including:

- General principles – we have suggested amending section 1 of the Adults with Incapacity (Scotland) Act 2000 to ensure that these safeguards are maintained
- Powers of attorney – as the current regime requires registration, and with the timescales involved with this, we have suggested proposals to expedite this

- Advance statements – we believe that facilitating advance care planning would also be helped by statutory provision giving greater clarity and certainty to advance statements, including both persuasive statements and binding advance directives
- Guardianship and intervention orders - we have suggested amendments to help to deal promptly with applications for interim orders, and in particular for interim guardianship orders and to facilitate faster preparation of applications in a form that can be warranted upon presentation to court

We have suggested amendments to the Adults with Incapacity (Scotland) Act 2000 to bring these changes into effect.

Limitation and prescription

Our Civil Justice and Obligations committees have proposed the disapplication of the limitation and prescription periods for the duration of the current situation. We believe that this would have a number of benefits:

- To debtors and consumers, removing a situation in which either court action would be needed to preserve a position, or otherwise to lose a claim during a period during which so many are facing unprecedented economic hardship
- To creditors, particularly because of the impetus from regulators such as the Financial Conduct Authority around forbearance to debtors
- To the court system, at a stage at which urgent cases are being prioritised at a stage of limited resource.
- To the profession and to officers of court, as there may also be limited resource available to raise claims, to enable service or to conduct enforcement

For personal injury cases, we note that some parties to proceedings have endorsed a voluntary protocol around such issues, though we believe that legislative change to disapply these periods during the current crisis, and for the period immediately following as courts return to capacity and start to deal with postponed business, is important for access to justice.

We hope that these views are helpful in finalising arrangements for the Coronavirus (No. 2) (Scotland) Bill. Please do contact us if we can assist further in this work.



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