



Law Society  
of Scotland

# Consultation response

## Coronavirus Recovery and Reform (Scotland) Act 2022 – Criminal Justice Measures

January 2024



## Introduction

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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 Criminal Law Committee welcomes the opportunity to consider and respond to the Coronavirus Recovery and Reform (Scotland) Act 2022 – Criminal Justice Measures consultation. The committee has the following comments to put forward for consideration.

## General Comments

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In November 2023, the Scottish Government released a consultation on making permanent some criminal justice measures from the Coronavirus Recovery and Reform (Scotland) Act 2022 and implementing other proposals to modernise the criminal justice system.

The measures proposed in the consultation are mainly focused in digitalise some relevant practices in criminal processes. We are of the view that the inclusion and implementation of technology in the criminal justice system would have a positive impact on its users. Despite we have some reservations with few of the proposals, in general terms, we welcome most of the measures.

## Questions

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

- I think the provisions for Chapter 1 should be made permanent.
- I think the provisions for Chapter 1 should be made permanent, with exceptions (please outline exceptions below).
- I do not think the provisions for Chapter 1 should be made permanent.
- Unsure.
- I have no view.

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

**I think provisions for Chapter 1 should be made permanent.**

We consider that provisions for Chapter 1 should be made permanent. Most, of what is suggested, is already in force with remarkable practical results. Additionally, the provisions greatly improve access to justice, making it simpler for criminal court users to sign and send documents.

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

- I think the provisions for Chapter 2 should be made permanent.
- I think the provisions for Chapter 2 should be made permanent, with exceptions.
- I do not think the provisions for Chapter 2 should be made permanent.
- Unsure.
- I have no view.

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

**I think the provisions for Chapter 2 should be permanent, with exceptions.**

We agree to some degree with making permanent the provisions in Chapter 2 relating to virtual attendance in criminal courts.

As far as summary trials are concerned, we welcome that professional and police witnesses can provide evidence remotely by video link, making the process more efficient in some extent.

Additionally, we consider that the possibility for vulnerable witnesses to provide evidence remotely could improve their experience in court and reduce retraumatisation. It is better to have direct testimony, whether that is in person or by video link, than no testimony at all. However, it is crucial to assure that no interference is made with witnesses providing evidence from a remote location. Measures would require to be put in place to ensure witnesses, giving evidence by video link, are not susceptible to any undue influence.

We also consider essential that the effective participation of the accused is guaranteed with an appropriate connection network and electronic devices. Furthermore, the court should be able to guarantee confidential communication between solicitors and their clients.

At all times, the court is required to ensure that a fair trial is being conducted.

**Question 3: If you have any views on whether there are any specific factors the court should have to take into account when deciding whether it's appropriate for people to participate in proceedings by electronic means, please provide them below**

Please see our answer to question 2.

**Question 4: It is proposed that the provisions for Chapter 3 (National Jurisdiction for Callings from Custody etc.) will be made permanent. Which of the following best describes your view?**

- **I think the provisions for Chapter 3 should be made permanent**
- **I think the provisions for Chapter 3 should be made permanent, with exceptions**
- **I do not think the provisions for Chapter 3 should be made permanent**
- **Unsure**
- **I have no view**

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

**Unsure.**

While there may be arguments in favour of a National Jurisdiction for Callings from Custody, we maintain some reservations. We recognise that Chapter 3 provisions can be helpful in circumstances that restrict either the capacity to move an accused or to use court facilities within a particular area such as transport disruption, severe weather, and large public events.

However, we are of the view that maintaining custody courts at a local level is more advantageous. Firstly, most of the sheriffs will have a local knowledge of the accused, their family circumstances, and an understanding of the locus of the alleged offence or offences. In addition, local sheriffs will know, whether or not the accused is currently subject to orders or other community sentences. Local social workers will also have that knowledge and can input into the sentencing process. Previous reports can be readily obtained.

Experience of local hybrid custody courts can work better. We would suggest further developments of the local hybrid method.

In the end, whenever is possible, local justice is preferable.

**Question 5: It is proposed that the provisions for Chapter 4 (Fiscal fines) will be made permanent. Which of the following best describes your view?**

- **I think the provisions for Chapter 4 should be made permanent.**
- **I think the provisions for Chapter 4 should be made permanent, with exceptions.**
- **I do not think the provisions for Chapter 4 should be made permanent.**
- **Unsure.**
- **I have no view.**

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

**I think the provisions for Chapter 4 should be made permanent.**

We consider that Chapter 4 provisions should be permanent. The 7-point scale, which was been force between 2008 and 2020, was amended to increase the maximum fine from £300 to £500 in the Coronavirus (Scotland) Act 2020. The measures appear to be working effectively.

The Consultation paper reports that since the changes were implemented in April 2020, on average, 3% of fiscal fines issued each year have been between £300 and £500. Around 0.4% of combined fine and compensation offers were issued with a fine component of over £300. There is no evidence to suggest that higher level fiscal fines are being used excessively or inappropriately. Detailed information about the number of fines of over £300 issued each year is not routinely published by COPFS, or as part of the Scottish Government's Criminal Proceedings statistical bulletin. However, some information is available. A [COPFS response](#) to the Scottish Parliament Criminal Justice Committee in March 2022 provides a useful picture of the types of offence for which fiscal fines were issued between April 2018 and the end of February 2022, and a breakdown of cases in which an accused was issued with a fiscal fine of over £300 in 2020-21 and 2021-22. (See Annexes B and C). This response confirms information provided to the Convenor of the Criminal Justice Committee by the [Lord Advocate](#) in June 2021.

The original 7 points on the scale have not been revisited since they were introduced in 2008. According to the Bank of England Inflation Calculator, £300 in 2008 would be worth £467 today. Retaining the £400 and £500 points on the scale could also serve as an adjustment for inflation. Therefore, we agree that the measures should be made permanent.

**Question 6: Do you agree or disagree with the proposal that digital evidence should be used to produce evidence in courts in criminal cases rather than having to produce the original item in court?**

- **Agree**
- **Disagree**
- **Unsure**
- **I have no view**

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

**Agree.**

We agree with the proposal to some extent. We recognise that generally; the use of digital evidence does not represent a problem in the course of a trial. However, in very limited situations, physical original evidence is critical. To avoid any potential for a miscarriage of justice, we consider that preserving the right to keep the original evidence seems appropriate in the interests of a fair trial. There is almost no tradition in Scotland of excessively theatrical presentation of criminal cases. There is no reason to suspect that defence practitioners would abuse the right to request the physical productions.

We are of the view that, if in certain circumstances police will move to taking images in place of seizing property, then there needs to be a clear and shared understanding that the object and the image are two different things. We consider that it would be necessary to have in place standards designated to ensure that images produced capture the forensically significant essence of each such item of evidence.

We consider that the use of digital evidence will have a significant impact on the production of forensic evidence. It is required some guidance about the reproduction of forensic evidence digitally as the opportunities for the defence for testing the evidence may diminish.

We agree that the quality of the images is a fundamental aspect to be considered. Assuring that appropriate technology systems can reproduce all the properties of the evidence is the key in the implementation of the provision.

We note that the digitalisation of forensic evidence could result in privacy issues. For example, having a blood sample in an open bank could be considered by the owner of the sample as a breach of privacy. Further guidance about this issue should be considered.

**Question 7: Do you agree or disagree with the proposal that where an image is produced that it can be treated as if it was the item itself that was being produced?**

- Agree
- Disagree
- Unsure
- I have no view

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

**Agree.**

As above, we consider that images can have the same treatment that the item of evidence itself in most of the cases.

**Question 8: Do you agree or disagree that the current procedural framework as outlined in chapter 5 would allow the defence to seek for the physical production to be brought to court if its absence would prejudice a fair trial??**

- Agree
- Disagree
- Unsure
- I have no view

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

**Agree.**

We refer to our response at question 6 above. The defence should be able to maintain the right to retain the original evidence. We believe there should be appropriate judicial oversight on deciding whether the absence of original evidence could prejudice a fair trial.

**Question 9: It is proposed that the transfer of digital files to any reliable digital evidence system such as DESC (which has a robust audit system) should remove the requirement of certification as outlined in the scheme under the 1995 Act. Which of the following best describes your view on this proposal?**

- I agree
- I do not agree
- Unsure
- I have no view

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

**Agree.**

We agree with the proposed provision. We are of the view that a digital evidence system with a robust audit system, such as DESC, is more secure and reliable than the scheme under the 1995 Act.

**Question 10: Whilst the examples given have related to files from mobile devices, there are other types of documents which could be transmitted into DESC, especially as the term document is given a wide definition in schedule 8. This could include items such as photographs of evidence or paper copies of a traditional document which are scanned and uploaded to DESC.**

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

- I agree
- I do not agree
- Unsure
- I have no view.

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

**I agree.**

We agree with the proposal to some extent. In some circumstances, the original document is critical for the case, for example, in fraud cases. When that happens, the uploaded document to DESC should not be accepted.

**Question 11: If there were to be a challenge to the admissibility of the evidence held within DESC on the basis that the image is not a true copy, we do not consider that any new procedure need be introduced to allow this challenge. We consider that there are sufficient procedures currently in place to allow a challenge to the admissibility of such evidence through procedural pre-trial hearings in all courts.**

**It is proposed that any issue in relation to the admissibility of the copy held in DESC could be raised through the pre-trial hearing system already in place.**

**Which of the following best describes your view on this proposal?**

- I agree
- I do not agree
- Unsure
- I have no view

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

**I agree.**



We agree with the proposal as any issue with the admissibility of the evidence could be solved with the existing process.

**Question 12: Certification under schedule 8 will still be needed for copies of documents which are not uploaded to DESC. There are occasions where the certification of the document is incorrect or missing an essential piece of information. Where there is no valid certificate the copy document cannot generally be accepted into evidence in place of the original.**

Whilst we do not consider that there should be any separate procedure to challenge the admissibility of copy documents certified under schedule 8 due to defect in certification, as the issue should be raised at a procedural hearing, an issue may arise if such a defect is not detected until after a procedural hearing in the case, particularly if it is only discovered shortly before or at the trial.

If this happened at the trial, it could potentially result in a trial being halted for the matter to be resolved or a decision taken that the copy document could not be put in evidence. This could not just cause inconvenience to victims and witnesses but could also result in the failure of a case.

At present the ways to remedy the defect would include having the document re-certified, or to try and obtain the original document to put in evidence. This second course may not be possible as the original may no longer exist. Both of these routes to correct a defect would be time consuming.

We do not consider that this should be necessary. There may be sufficient information before the court to allow it to accept that the copy document is a true copy. We therefore consider that the law should be more flexible. The court could be given a discretion to allow the copy document to be admitted if satisfied it is a copy despite any defect in certification.

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

- I agree.
- I do not agree.
- I am unsure.
- I have no view.

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

I agree.

We agree with the proposed provision. We consider it to be perfectly reasonable that the court retains the option to decide whether a document to be led in evidence overrides, with the information available, any defect in certification.

**Question 13: One of the ways a court may be satisfied that a document is a copy document is to simply hear oral evidence of that fact. It is therefore also proposed that the court should be able to hear evidence from witnesses, to allow it to be satisfied that the document can be deemed a true copy and treated for evidential purposes as if it were the document or material part of the document.**

**Which of the following describes your view on this proposal?**

- I agree
- I do not agree
- I am unsure
- I have no view

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

**I agree.**

Please see our answer to question 12.

**Question 14: Out with the proposals outlined in chapters 1 -6, do you think any further legislative changes are needed to support the modernisation of criminal justice procedures through greater use of digital processes in order to achieve our ambitions of an efficient and resilient criminal justice system?**

- Yes
- No
- Don't know

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

**In your answer, please make reference to the particular procedure, how any additional legislation would support modernisation and what these legislative changes would achieve.**

**Yes.**

We consider that the use of website forms for general court documents could achieve time and resource savings. There is available software that allows the user to create pre-defined documents inserting in a form only the data required for the case. The implementation of such tools may reduce human error and allow court users to focus on other important aspects.

**Question 15: Do you have any views on potential impacts of the proposals in the chapters of this consultation on human rights?**

- **Yes**
- **No**
- **Unsure**

**Please provide details, making reference to the specific proposal or proposals to which your comments relate.**

**Yes.**

We consider that some provisions could have an impact in Articles 6 and 8 of the European Convention on Human Rights (ECHR).

We identify that the proposal of the chapter 2 related to the virtual attendance to court could have potential implications related to the right to a fair trial in terms of Article 6. As we mentioned in question 2, judicial oversight is critical to ensure that witnesses are not subject to undue influence when giving evidence. The conditions in which evidence is produced is a factor to determine whether a trial is fair in terms of the Article 6 (1) of ECHR. In addition, the guarantee that accused persons have confidential communication with their defence solicitor also impacts the minimum rights contained in Article 6 (3) (c) of ECHR.

We also consider that the proposal of the chapter 5 related to digital productions of evidence could have an impact on the right of a fair trial, particularly the opportunity to retain the right to present physical evidence in the cases when it is appropriate.

As mentioned in question 6, we are of the view that the proposal of the chapter 5 related to the production of digital evidence has also implications in the right of privacy contained in Article 8 of ECHR.

**Question 16: Do you have any views on potential impacts of the proposals in the chapters of this consultation on equalities and the protected characteristics set out above?**

- **Yes**
- **No**
- **Unsure**

**Please provide details, making reference to the specific proposal or proposals to which your comments relate.**

**No.**

**Question 17: Do you have any views on potential impacts of the proposals in the chapters of this consultation on children and young people as set out in the UN Convention on the Rights of the Child (UNCRC)?**

- Yes
- No
- Unsure

**Please provide details, making reference to the specific proposal or proposals to which your comments relate.**

**Yes.**

We consider that the proposal contained in chapter 4 related to fiscal fines could affect more to younger than older offenders as the former usually have limited income or no income at all. Some sentencing guidelines seem appropriate to mitigate the effect that the proposals about fiscal fines could have in young people.

**Question 18: Do you have any views on potential impacts of the proposals in the chapters of this consultation on socio-economic equality?**

- Yes
- No
- Unsure

**Please provide details, making reference to the specific proposal or proposals to which your comments relate.**

**Yes.**

Similarly with the argument in the former question, the proposals contained in chapter 4 related to fiscal fines may have a more negative impact on offenders from lower socio-economic backgrounds. Again, some sentencing guidelines that consider this factor would be appropriate.

**Question 19: Do you have any views on potential impacts of the proposals in the chapters of this consultation on communities on the Scottish islands?**

- Yes
- No
- Unsure.

**Please provide details, making reference to the specific proposal or proposals to which your comments relate.**

**Yes.**

We consider that provisions contained in chapter 2 related to virtual attendance could have a positive impact in rural communities, particularly in those located far from the court estate.

**Question 20: Do you have any views on potential impacts of the proposals in the chapters of this consultation on privacy and data protection?**

- Yes
- No
- Unsure

**Please provide details, making reference to the specific proposal or proposals to which your comments relate.**

**Yes.**

We are of the view the proposal contained in chapter 5 related to the production of digital evidence may have a serious negative impact on privacy and data protection.

Firstly, some considerations should be given in the assurance of the right of privacy of witnesses and victims as we mention above.

Secondly, we acknowledge that the data collected in the production of digital evidence should be processed according to the law only for the necessary purposes. In addition, an appropriate protocol to delete the information when it is no longer required is crucial.

**Question 21: Do you have any views on potential impacts of the proposals in the chapters of this consultation on businesses and the third sector?**

- Yes
- No
- Unsure

**Please provide details, making reference to the specific proposal or proposals to which your comments relate.**

**Yes.**

We consider that proposals of chapters 1 and 5 may have a positive impact in the prosecution of financial crime in which a modern and efficient system of digital evidence could result in savings.

**Question 22: Do you have any views on potential impacts of the proposals in the chapters of this consultation on the environment?**

- Yes
- No
- Unsure

**Please provide details, making reference to the specific proposal or proposals to which your comments relate.**

**Yes.**

We are of the view that the proposal of chapter 5 may have a positive impact on the environment as lower carbon emissions as a result of a reduced need to travel to and from court is anticipated.

**For further information, please contact:**  
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