



Law Society
of Scotland

Written evidence

Coronavirus (Recovery and Reform) (Scotland) Bill

February 2022



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, and its subcommittees, welcomes the opportunity to consider and respond to the Scottish Parliament's Covid-19 Recovery committee call for views on the Coronavirus (Recovery and Reform) (Scotland) Bill. The committee has the following comments to put forward for consideration.

Public Health Resilience

Modifications of the Public Health Etc. (Scotland) Act 2008 (Part 1, Chapter 1)

Do you support these provisions?

Don't know

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. Further, use of these provisions is not restricted to Covid, or to public health emergencies of equivalent scale to Covid, and they could accordingly be used in a wide range of circumstances to impose a wide range of restrictions, including creating offences and modifying existing legislation. There must therefore be sufficient safeguards to maintain checks and balances on executive powers, and to ensure appropriate parliamentary oversight.

We welcome the recognition in the Policy Memorandum that the response to a public health threat must be "proportionate; subject to Parliamentary scrutiny; and offer as much notice as practicable to those affected on their potential implications." (Policy Memorandum, para 53). We welcome the provision for review of regulations which contain any restrictions which make provision imposing (directly or indirectly) restriction or requirements on people, things or premises every 21 days. We note that these provisions would allow the use of the made affirmative procedure to make regulations in circumstances where the Scottish Ministers consider that because of the urgency it is necessary to depart from the affirmative procedure.

Bankruptcy

Bankruptcy (Part 3, Clauses 15-17)

Do you support these provisions?

Yes

We support the proposed changes relating to bankruptcy and they also align with our earlier response to the Covid recovery consultation that closed in November.

We note that section 17(2) would replace the existing paragraph 13 of Schedule 6 of the Bankruptcy (Scotland) Act 2016 with a new paragraph 13 and a new paragraph 14. However, there is already a paragraph 14 in the legislation so we would expect that either the new paragraph 14 will need to be renumbered, e.g. as 13A, or the later paragraphs, from the old paragraph 14 onwards, will need to be renumbered.

Public Services and Justice System Reform

Civic licensing (Part 3, Clauses 21-22)

Do you support these provisions?

Yes

We welcome the provisions at Clause 21 which will amend the Civic Government (Scotland) Act 1982 in relation to Civic Licensing and establish a more accessible and flexible mechanism for Civic Licensing hearings. We have previously expressed our support for the proposed implementation of remote hearings which were introduced as a result of the Covid-19 pandemic.

We also welcome the provisions at Clause 22 which will implement the publication of electronic notices subject to appropriate safeguards to redact sensitive information.

Alcohol licensing (Part 3, Clause 23)

Do you support these provisions?

Yes.

We welcome the provisions at Clause 23 which will amend the Licensing (Scotland) Act 2005 in relation to Alcohol Licensing and establish a more accessible and flexible mechanism for Licensing hearings. We have previously supported the implementation of remote hearings which were introduced as a response to the Covid-19 Pandemic.

Land registration (Part 3, Clauses 24-25)

Do you support these provisions?

Yes.

We welcome the provisions which make provision for registration in the Land Register and recording in the Register of Sasines to proceed on a copy of a deed submitted to the Keeper of the Registers by electronic means (section 24) and make provision for registration or recording in the Register of Inhibitions to proceed on the basis of electronic submission of documents and copies of documents to the Keeper of the Registers (section 25). We have previously supported these measures being placed on a permanent footing. While these measures were introduced as a response to Covid-19 when it was not possible for paper applications to be processed in line with UK and Scottish Government guidance and restrictions, the operation of the Registers of Scotland's digital submission services and the ability to submit applications to the Register of Inhibitions in electronic form has not only created efficiencies for Registers of Scotland but also for our members.

Legal aid and advice (Part 3, Clause 26)

Do you support these provisions?

Yes

The use of interim payments has been an important element of the response to court delays during the pandemic. We believe that these provisions provide greater flexibility, and should be made permanent.

Mental health (Part 3, Clause 28)

Do you support these provisions?

Yes

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 and potential unnecessary delays within the Tribunal system.

In the context of any future public health emergency, these proposed changes may improve resilience within the Tribunal system by reducing the need for face to face meetings with prescribed persons whilst ensuring that those who wish to nominate a named person continue to be able to do so.

We would, however, suggest that alongside the proposed changes to legislation, 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.

Custody at police stations (Part 3, Clause 31)

Do you support these provisions?

No

We have previously raised concerns about the proposals for custody of persons whilst detained at police stations. We remain firmly of the view that that these proposals require further scrutiny given that they propose retaining and extending these fundamental reforms. We note that the Bail and Release from Custody Arrangements (Scotland) Bill did not include any consideration these matters. We had previously stated our view that this would have been an appropriate stage at which to do so.

Whilst virtual custody hearings have been incorporated into the criminal justice system as a necessary step during the pandemic, we have noted concerns from our criminal practitioner members who have expressed apprehension relating to the fairness of the proceedings, particularly in relation to access to papers and client consultations. These concerns have not yet been alleviated and whilst safeguards have been incorporated as the pandemic has progressed, issues remain. Our research from July 2021¹ clearly showed that defence agents had concerns that virtual custodies diminished the accused's sense of participation and of being properly heard and represented. The research also highlighted concerns that virtual arrangements had affected defence agents ability to assess whether their client was fit to appear, had any particular vulnerabilities and could competently instruct. Given that issues relating to poor audio/video quality, and inconsistencies across jurisdictions continue to cause difficulties, we remain of the view that further research is required if this measure is to continue as part of the criminal justice system.

Parole Board for Scotland (Part 3, Clause 32)

Do you support these provisions?

Don't know

We have previously expressed our view that the measures are proportionate during the pandemic. We are of the view that concerns relating to wider delegation requires further consideration.

The impact of COVID on the Justice system

Temporary provisions (Part 5, Clauses 38-42)

Do you support these provisions?

Yes

¹ <https://www.lawscot.org.uk/media/369189/2020-07-28-crim-report-on-virtual-custody-courts.pdf>

We support the proposals which have led to efficiencies in the justice system such as electronic service of documents and virtual attendance at court. We are of the view that consideration should be given to placing these provisions on a permanent statutory footing which will encourage necessary scrutiny and debate.

Supporting provisions (Part 5, Clauses 43-44)

Do you support these provisions?

No

We do not support these provisions. We are of the firm view that time limits in the criminal justice system should revert to those as set out prior to the pandemic. We noted that swift action was necessarily required to alleviate concerns relating to time limits in the criminal justice sector during the early days of the pandemic, however we are unable to comprehend the justification for extending time limits in the current climate. We remain of the view that time limits in the criminal justice system are in place as a safeguard in order to protect the rights of an accused who is protected by the presumption of innocence. Accused persons are also protected by Article 6 of the European Convention which entitles them to a fair and public hearing within a reasonable time.

We are of the view that extending time limits should be taken on a case-by-case basis and should not be used as a blanket approach. We have raised grave concerns about the impact of the pandemic on those awaiting trial and those currently on remand within the prison estate. We have suggested the use of electronic tagging of untried prisoners where practical, to alleviate the strains upon the system. We take the view that coupled with a considerable existing backlog of cases within the court system in Scotland, (which is not expected to be cleared before 2025²), we cannot support the global proposals to extend time limits and would encourage proper consultation and debate on this issue.

Schedule: Temporary Justice Measures (Schedule)

Do you support these provisions?

Yes

We are of the view that these measures should be extended whilst public health conditions require.

In relation to undertakings - we do note that this matter was not considered as part of the Bail and Release from Custody Scotland Bill as anticipated. As a result, there remains an opportunity to consider issues relating to undertakings in further detail. We previously highlighted the assumption that the accused is legally represented in these circumstances and that it is also assumed that they will be able to make representations via their agent. This is not always the case in practice, we would therefore reiterate our

² [Reducing the Criminal Trials Backlog \(scotcourts.gov.uk\)](https://www.scotcourts.gov.uk/reducing-the-criminal-trials-backlog)

previous comments that provision will have to be made to ensure that these measures are communicated to those who are not represented.

In respect of fiscal fines – we are of the view that these changes are more appropriately considered through separate legislation as opposed to being dealt with by way of emergency legislation relating to the pandemic. We note that fiscal fines are specifically intended for use as an alternative to prosecution, and recognise that there are questions relating to the fairness of the scheme given the incentivised nature of the offer as it extinguishes the risk of conviction and the fact that decisions to accept fiscal fines are commonly uninformed³. Additionally we note that there is no means testing assessment or affordability mechanism in place.

In respect of a national jurisdiction for callings from custody – we are of the view that these measures should be discontinued at a stage where this no longer considered to be a risk to public health. We would reiterate our comments set out above at part 3 – clause 21.

In respect of extension and adjournment periods, we would reiterate our comments as set out at part 5 clauses 43-44 above.

In relation to proceeds of crime – we have previously supported changes to the Proceeds of Crime Act 2002 where changes allowed for proceedings to be postponed where the person is affected by coronavirus. We consider it appropriate for these measures to continue for as long as public health is at risk.

In relation to prisons and young offenders institutions – we have previously stated that we support the extension of the provisions but remain of the view that they should not be made permanent. We note that early release has been implemented in a limited capacity throughout the pandemic. We note that there have been concerns relating to public health and the treatment of prisoners. We have previously stated our support for the implementation of throughcare and support for prisoners being released back into society. We believe this will be fundamental to aid reintegration and access to benefits, accommodation, and medical services.

³ I Callander, 'The pursuit of efficiency in the reform of the Scottish fiscal fine: should we opt out of the conditional offer?' 2013 SLT (News) 37-43 (Part 1) and 47-53 (Part 2).



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