



The Scottish Parliament
Pàrlamaid na h-Alba

Published 13 November 2023
SP Paper 469
15th Report, 2023 (Session 6)

Criminal Justice Committee

Report on the International Organisations Immunities draft Order and the Coronavirus Recovery and Reform Scotland Act 2022 draft Regulations 2023



Published in Scotland by the Scottish Parliamentary Corporate Body.

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Criminal Justice Committee

To consider and report on matters relating to criminal justice falling within the responsibility of the Cabinet Secretary for Justice and Home Affairs, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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Introduction

1. At its meeting on Wednesday 8 November 2023, the Criminal Justice Committee considered the following affirmative instruments-
 - [The International Organisations \(Immunities and Privileges\) \(Scotland\) Amendment \(No. 2\) Order 2023 \[draft\]](#), and
 - [The Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022 \(Extension and Expiry of Temporary Justice Measures\) Regulations 2023 \[draft\]](#).
2. This report sets out the Committee's consideration of these instruments.

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

Background

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

Policy objective

6. The UK regularly hosts International Atomic Energy Agency (IAEA) convened events and accepts as the host nation to provide the privileges and immunities set out in the Agreement on the Privileges and Immunities of the International Atomic Energy Agency 1959 (signed by the UK in 1961).
7. Where the 1959 Treaty grants privileges and immunities to representatives of Members attending UK hosted, IAEA convened international symposiums, seminars, or panels, the International Atomic Energy Agency (Immunities and Privileges) Order 1974 only grants privileges and immunities to representatives of Members attending a limited range of UK hosted IAEA convened meetings.
8. The provisions of the 1974 Order therefore need to be amended to enable the United Kingdom to fulfil its obligations to provide privileges and immunities to international delegates attending applicable IAEA convened events hosted in the UK. The International Atomic Energy Agency (Immunities and Privileges) (Amendment) Order (S.I. 2023/845) amended the 1974 Order to correct this discrepancy between the provisions of that Order and the Agreement to the extent the provisions relate to reserved matters as regards Scotland and with the other UK jurisdictions.
9. That amendment also disapplies the provisions of the 1974 Order insofar as they would be within the legislative competence of the Scottish Parliament. This Order therefore restates the provisions of the 1974 Order, as amended to correct the discrepancy, insofar as they would, if included in an Act of the Scottish Parliament, be within the legislative competence of that Parliament. In addition, this Order sets out the meaning of 'representatives of Members' as defined in the 1959 Treaty.

Other issues

Scotland Act

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

EU Alignment Consideration

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

Consultation

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

Impact Assessments

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

Financial effect

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

Consideration by the Delegated Powers and Law Reform Committee

16. The Delegated Powers and Law Reform Committee considered this instrument at

its meeting on 26 September 2023.

17. **The DPLR Committee agreed that it did not need to draw them to the attention of the Parliament on any grounds within its remit.**

Consideration by the Criminal Justice Committee

18. **Motion S6M-10537** was lodged proposing that the Criminal Justice Committee recommends that the International Organisations (Immunities and Privileges) (Scotland) Amendment (No. 2) Order 2023 be approved.
19. At its [meeting on Wednesday 8 November 2023](#), the Committee took oral evidence from the Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP ("the Cabinet Secretary"), Susan Black, Senior Policy Officer, Civil Law and Legal System Division and Emma Thomson, Solicitor, Legal Directorate, Scottish Government.
20. **Motion S6M-10537 was agreed to without debate or dissent.**

21. **The Criminal Justice Committee recommends to the Scottish Parliament that it approve the International Organisations (Immunities and Privileges) (Scotland) Amendment (No. 2) Order 2023 [draft].**

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

Background

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

Policy objectives

29. The 2022 Act includes a range of temporary justice measures that were originally introduced in response to Covid-19 to support the operation of Scotland’s justice system as it responded to the impact of the pandemic and associated restrictions it led to. These temporary measures are currently due to expire on 30 November 2023.
30. This instrument’s objectives are to-
 - extend the availability of those temporary measures that are continuing to play a valuable role in helping Scotland’s justice system to process business more effectively and efficiently in the wake of the Covid-19 pandemic and support the system’s recovery from the effects of the pandemic; and

- expire those temporary provisions that are no longer necessary or proportionate. Further detail is provided in the Statement of Reasons produced to accompany the instrument (SG/2023/180).

Scottish Government - table of changes as a result of the 2023 regulations.

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

Other issues

Statement of Reasons

31. The Scottish Government submitted a detailed Statement of Reasons accompanying the draft Instrument setting out more details of the instrument. The table above summarises the changes made by the Instrument to the 2022 Act.

EU Alignment Consideration

32. The Scottish Government stated that this instrument is not relevant to the Scottish Government's policy of maintaining alignment with the EU.

Consultation

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

Impact Assessments

34. The provisions extended by this instrument all form part of the 2022 Act. The following impact assessments were carried out for the 2022 Act. They have been reviewed and, where necessary, updated to reflect the contents of this instrument:
- Coronavirus (Recovery and Reform) (Scotland) Bill: child rights and wellbeing impact assessmentⁱ
 - Coronavirus (Recovery and Reform) (Scotland) Bill: equalities impact assessmentⁱⁱ
 - Coronavirus (Recovery and Reform) (Scotland) Bill: fairer Scotland duty impact assessmentⁱⁱⁱ
 - Coronavirus (Recovery and Reform) (Scotland) Bill: island communities impact Assessment^{iv}

Financial Effects

35. The provisions extended by this instrument all form part of the 2022 Act. A Business and Regulatory Impact Assessment was carried out for the Act, and can be found here:
- Coronavirus (Recovery and Reform) (Scotland) Bill: business and regulatory impact assessment^v

i [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill: child rights and wellbeing impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/bills/2022/1/paras/100/html/#:~:text=Coronavirus%20(Recovery%20and%20Reform)%20(Scotland)%20Bill%3A%20child%20rights%20and%20wellbeing%20impact%20assessment,https://www.gov.scot/publications/bills/2022/1/paras/100/html/#:~:text=Coronavirus%20(Recovery%20and%20Reform)%20(Scotland)%20Bill%3A%20child%20rights%20and%20wellbeing%20impact%20assessment)

ii [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill: child rights and wellbeing impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/bills/2022/1/paras/101/html/#:~:text=Coronavirus%20(Recovery%20and%20Reform)%20(Scotland)%20Bill%3A%20child%20rights%20and%20wellbeing%20impact%20assessment,https://www.gov.scot/publications/bills/2022/1/paras/101/html/#:~:text=Coronavirus%20(Recovery%20and%20Reform)%20(Scotland)%20Bill%3A%20child%20rights%20and%20wellbeing%20impact%20assessment)

iii [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill: fairer Scotland duty impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/bills/2022/1/paras/102/html/#:~:text=Coronavirus%20(Recovery%20and%20Reform)%20(Scotland)%20Bill%3A%20fairer%20Scotland%20duty%20impact%20assessment,https://www.gov.scot/publications/bills/2022/1/paras/102/html/#:~:text=Coronavirus%20(Recovery%20and%20Reform)%20(Scotland)%20Bill%3A%20fairer%20Scotland%20duty%20impact%20assessment)

iv [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill: island communities impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/bills/2022/1/paras/103/html/#:~:text=Coronavirus%20(Recovery%20and%20Reform)%20(Scotland)%20Bill%3A%20island%20communities%20impact%20assessment,https://www.gov.scot/publications/bills/2022/1/paras/103/html/#:~:text=Coronavirus%20(Recovery%20and%20Reform)%20(Scotland)%20Bill%3A%20island%20communities%20impact%20assessment)

v [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill: business and regulatory impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/bills/2022/1/paras/104/html/#:~:text=Coronavirus%20(Recovery%20and%20Reform)%20(Scotland)%20Bill%3A%20business%20and%20regulatory%20impact%20assessment,https://www.gov.scot/publications/bills/2022/1/paras/104/html/#:~:text=Coronavirus%20(Recovery%20and%20Reform)%20(Scotland)%20Bill%3A%20business%20and%20regulatory%20impact%20assessment)

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

Parliamentary Procedure

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

Consideration by the Delegated Powers and Law Reform Committee

38. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 26 September 2023.
39. **The DPLR Committee agreed that it did not need to draw them to the attention of the Parliament on any grounds within its remit.**

Consideration by the Criminal Justice Committee

40. **Motion S6M-10547** was lodged proposing that the Criminal Justice Committee recommends that the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension and Expiry of Temporary Justice Measures) Regulations 2023 [draft] be approved.
41. At its [meeting on Wednesday 8 November 2023](#), the Committee took oral evidence from the Cabinet Secretary, Heather Tully, Justice Reform Unit, Patrick Down, Criminal Law Practice and Licensing Unit, and Nicola Guild, Solicitor, Legal Directorate, Scottish Government.
42. At the meeting Members put various questions to the Cabinet Secretary on the provisions to be extended under the instrument. These were mainly around the proposed continued extension of powers relating to three criminal procedure time limits and, specifically, those relating to how long a person can be kept on remand before service of indictment/preliminary hearing/first diet/trial in solemn cases.
43. Prior to the pandemic, for solemn cases, time limits were as follows:
- the time between the accused being remanded and indictment was 80 days;
 - the time between the accused being remanded and preliminary hearing or first diet was 110 days; and,
 - the time between the accused being remanded and trial was 140 days.
44. If passed, these will be kept at 260, 290 and 320 days respectively and this will remain the case until the end of November 2024, with the potential for a further

extension through a similar process to November 2025.

45. Members also asked about the proposals relating to the use of virtual trials (i.e. a disapplication of the requirements to attend physically for certain proceedings) and also the applicability of what was being proposed to custody matters. Paragraphs 23 to 33 of the [Statement of Reasons](#) set out what is being proposed and the Scottish Government's justification for these (the text of these paragraphs is set out in [Annex A](#)).
46. In relation to custody hearings, the Scottish Government told the Committee that custody courts were not included and so the default is currently that accused people appear at custody courts in person.
47. Finally, members asked about the proposal to extend the provisions relating to fiscal fines and specifically to increase the maximum level of a fiscal fine to £500 and adjust the scale of fines. Members also asked for clarification that no other types of offence would now be covered by the possibility of a fiscal fine than had been the case prior to the pandemic.
48. The Scottish Government told the Committee in its [Statement of Reasons](#) that the increase in the maximum level of fiscal fine is intended to enable alternative action to prosecution to be taken in a wider range of cases, but not to increase the fine amount in individual cases that would previously have been dealt with by way of fiscal fine. It said that this allows prosecutors to issue proportionate penalties for lower level offences, while also providing a higher maximum penalty that can be used for appropriate cases which would otherwise have proceeded in the Justice of the Peace court.
49. Following debate, Motion S6M-10547 was agreed by division (For 4; Against 4; Abstentions: 0)^{vi}.

The Motion was agreed on the casting vote of the Convener.

50. **The Criminal Justice Committee recommends to the Scottish Parliament that it approve the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension and Expiry of Temporary Justice Measures) Regulations 2023 [draft].**

Annex A

Extract from the Statement of Reasons for the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension and Expiry of Temporary Justice Measures) Regulations 2023 [draft]

These provisions enable participants in court or tribunal proceedings (including judges, clerks, legal representatives, parties to proceedings, accused people, convicted people, appellants, jury members and witnesses) to take part in some proceedings by way of live visual (television) or audio (telephone) link, from any location.

^{vi} For: Audrey Nicoll, Rona Mackay, Fulton MacGregor and John Swinney. Against: Katy Clark, Pauline McNeill, Russell Findley and Sharon Dowey. Using her casting vote. Audrey Nicoll (Convener) voted for the motion.

Before the Covid pandemic, some legislation required people to physically attend court or tribunal proceedings. Paragraph 6 of the schedule removes those requirements for certain proceedings, so that virtual attendance is the default position. The proceedings this applies to are:

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

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

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

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

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

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

All determinations that are in force are published on SCTS's website. Currently, all active determinations are set out in [The Criminal Courts Determination 2022](#), which was published on 30 September 2022 and took effect from 1 October 2022. The 2022 Determination disapplies the requirement for physical attendance for a range of procedural hearings (such as preliminary hearings in the High Court and, where a person is detained, full committal hearings in the Sheriff courts) and bail appeal hearings in the Sheriff Appeal Court, so that the default mode of attendance for these hearing types is now virtual. This is largely in line with the types of hearing that were already being held virtually under the First Scottish Act and the [Extension Act](#).

The 2022 Determination also provides that people who are suspected of having Covid or have been advised to self-isolate should attend hearings virtually. Again, this continues previous practice.

During the passage of the 2022 Act, some MSPs expressed concerns about virtual

appearances from police custody. It should be noted that custody courts are not included in the 2022 Determination, and so the default is currently that accused people appear at custody courts in person^{vii}.

As noted above, these provisions only apply to limited civil proceedings. Following a public consultation, the Scottish Civil Justice Council developed new, permanent court rules on mode of attendance at most civil hearings, which came into force on 3 July 2023. These provisions were therefore expired in relation to the civil business covered by the new court rules. SCTS and the Scottish Government jointly funded independent research into the impact of remote hearings on the civil justice system during the pandemic, which was published in August 2023. This research provides an evidence base which can be used to consider the mode of attendance at civil hearings in the longer term.

^{vii} Although note that there is long standing provision for a court to direct that a detained person should take part in a hearing by live video link, under s.288H of the Criminal Procedure (Scotland) Act 1995.

