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Coronavirus (Recovery and Reform) (Scotland) Bill: Criminal Justice, Courts and Legal Aid

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This briefing covers the provisions of the Bill being scrutinised by the Scottish Parliament's Criminal Justice Committee.



18 February 2022
SB 22-11

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Summary

The Scottish Government's Coronavirus (Recovery and Reform) (Scotland) Bill was introduced on 25 January 2022.

This briefing covers the provisions of the Bill which the Scottish Parliament's Criminal Justice Committee will be taking evidence on. These are:

- a range of justice measures relating to legal aid and the operation of courts and tribunals in both civil and criminal cases
- various other criminal justice issues.

The remaining provisions of the Bill are being scrutinised by several committees, including the COVID-19 Recovery Committee as lead committee.

Temporary provisions in the areas covered by this briefing are currently included in two Scottish Parliament statutes agreed in response to the COVID-19 pandemic – the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No. 2) Act 2020.

The Bill provides for some justice provisions which are 'permanent' – in the sense that their continuation is not limited to a specified period of time.

This reflects an assessment that those measures, although initially enacted in response to COVID-19, have proven to have benefits to the justice system which should be retained. Relevant provisions are included amongst those provided for in Part 3 of the Bill:

- legal aid and advice – providing more flexibility for interim legal aid payments
- requirements of writing – removing some requirements for a lawyer to be physically present (e.g. when witnessing someone signing a document)
- custody at police stations – allowing prisoner custody officers to facilitate virtual custody hearings within police stations
- Parole Board for Scotland – providing for the functions of the Chair to be delegated to another member of the Board.

The Bill also provides for some temporary justice measures which would expire on 30 November 2023. The expiry of all or some of those temporary measure could, through statutory instrument, be brought forward or delayed. However, expiry could not be delayed beyond 30 November 2025 using these powers. Temporary justice measures are provided for in Part 5 and the schedule of the Bill:

- courts and tribunals: conduct of business by electronic means – allowing more flexibility for people to attend by electronic means (e.g. live video link) along with provisions on documents
- fiscal fines – allowing prosecutors to use increased levels of fiscal fine
- failure to appear before court following police liberation – allowing the extension of undertakings to appear in court, including associated conditions

- national jurisdiction for callings from custody – providing greater flexibility on which courts can deal with the initial stages of a case where a suspect has been held in police custody
- criminal procedure time limits – extending a range of statutory time limits applying to criminal cases
- proceeds of crime – allowing for the extension of time limits relating to relevant court proceedings for confiscation
- prisons and young offenders institutions – power to release groups of prisoners earlier than would be the case under normal arrangements.

The time limit on the temporary measures reflects the fact that the justification put forward for them is, at least in large part, based on the continuing effects of the COVID-19 pandemic. The extent to which there is also support for making more permanent changes in these areas varies (e.g. there is ongoing work looking at possible approaches to remote attendance in court proceedings in the longer term).

Introduction

Parliamentary scrutiny

The Scottish Government's [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill](#) (the Bill) ¹ was introduced on 25 January 2022.

Documents published along with the Bill include [Explanatory Notes](#), ² a [Policy Memorandum](#) ³ and a [Financial Memorandum](#). ⁴ The Scottish Government has also published five impact assessments on the Bill (available on its [Coronavirus \(COVID-19\) legislation page](#)). ⁵

This briefing covers the provisions of the Bill which the Scottish Parliament's Criminal Justice Committee will be taking evidence on:

- criminal and civil justice issues relating to legal aid and the operation of courts and tribunals
- other criminal justice issues.

The remaining provisions of the Bill are being scrutinised by several committees, including the COVID-19 Recovery Committee as lead committee.

On 3 February 2022, the Scottish Parliament issued a [call for views on the Bill](#) ⁶ which closes on 25 February.

Current temporary provisions

Temporary provisions in the areas covered by this briefing are currently included in two Scottish Parliament statutes agreed in response to COVID-19 – the [Coronavirus \(Scotland\) Act 2020](#) and the [Coronavirus \(Scotland\) \(No. 2\) Act 2020](#). Parliamentary scrutiny at the time was truncated given the need to react quickly to problems arising from the COVID-19 pandemic.

Some of the provisions in the two statutes are no longer in force. However, the application of others was extended to 31 March 2022 by the [Coronavirus \(Extension and Expiry\) \(Scotland\) Act 2021](#), with the possibility of further extension by statutory instrument to 30 September 2022. It is anticipated that a relevant statutory instrument will be laid shortly.

Scottish Government consultation

In August 2021, the Scottish Government published a [COVID Recovery consultation paper](#) ⁷ seeking views on what should happen to the remaining temporary statutory provisions agreed in response to COVID-19.

In the foreword to the consultation, the Deputy First Minister, John Swinney MSP, stated

that the Scottish Government was:

“ committed to reviewing the impact of COVID on the Scottish statute book. We want to ensure we remove measures no longer needed in order to respond to the pandemic whilst keeping those where there is demonstrable benefit to the people of Scotland.”

An independent [analysis of responses to the consultation](#)⁸ was published in January 2022. The [responses to the consultation](#)⁹ were also published.

Commenting on responses to all the topics covered in the consultation, the analysis (page 50) notes that:

“ A large number of individuals and informed stakeholders with expert knowledge took part in the consultation. Together, these responses provided a useful evidence base of diverse perspectives for the Scottish Government to draw upon when developing the final Bill.”

And that:

“ While there was support for the proposals, a significant proportion of respondents, particularly individuals, opposed any extension of temporary powers. Consistent reasons for this were raised across consultation questions. Respondents raised concerns about an undemocratic overreach of government power which many felt breached human rights. Others believed the pandemic was not a justifiable reason for either introducing or prolonging emergency powers, with calls for Scotland to 'return to normal'.”

In relation to the topics covered by this briefing, the consultation analysis indicates that a substantial majority of responses from individuals were not in favour of continuing any of the current temporary provisions/powers.

Responses from organisations were more likely to be supportive, although there were differences in the level of support depending upon the topic. Levels of support also varied significantly in relation to whether provisions should be made permanent or just extended.

Further information from the consultation analysis is provided later in this briefing, when looking at individual topics covered by the Bill.

Outline of provisions in the Bill

The Bill provides for some justice provisions which are 'permanent' – in the sense that their continuation is not limited to a specified period of time. This reflects an assessment that those measures, although initially enacted in response to COVID-19, are desirable irrespective of COVID-19. Relevant provisions are included amongst those provided for in Part 3 of the Bill:

- legal aid and advice – providing more flexibility for interim legal aid payments
- requirements of writing – removing some requirements for a lawyer to be physically present (e.g. when witnessing someone signing a document)
- custody at police stations – allowing prisoner custody officers to facilitate virtual

custody hearings within police stations

- Parole Board for Scotland – providing for the functions of the Chair to be delegated to another member of the Board.

The Bill also provides for some temporary justice measures which would expire on 30 November 2023. The expiry of all or some of those temporary measure could, through statutory instrument, be brought forward or delayed. However, expiry could not be delayed beyond 30 November 2025 using these powers.

The time limit on the temporary measures reflects the fact that the justification put forward for them is (at least in large part) based on the continuing effects of the COVID-19 pandemic. The impact on the courts is of particular significance in this respect. The pandemic, including steps taken to limit the spread of the virus, has caused severe disruption to the courts. Despite new ways of working (e.g. conducting jury trials with jurors taking part via video link), there was a substantial increase in cases waiting to be dealt with. A [recent report of the Criminal Justice Committee](#)¹⁰ noted that (para 11):

“ Prior to the pandemic, the court system in Scotland already had a backlog of trials. The impact of COVID-19 led to that backlog in the court system increasing markedly. According to the Scottish Government, the current backlog of solemn trials (for the most serious crimes) is not expected to be cleared until 2025. The summary trial backlog is not expected to be cleared until 2024.”

The fact that the Bill does not allow for its temporary justice measure to be extended beyond November 2025 reflects the Scottish Government's estimate of when the backlog (resulting from the COVID-19 pandemic) will be cleared.

Temporary justice measures are provided for in Part 5 and the schedule of the Bill:

- courts and tribunals: conduct of business by electronic means – allowing more flexibility for people to attend by electronic means (e.g. live video link) along with provisions on documents
- fiscal fines – allowing prosecutors to use increased levels of fiscal fine
- failure to appear before court following police liberation – allowing the extension of undertakings to appear in court, including associated conditions
- national jurisdiction for callings from custody – providing greater flexibility on which courts can deal with the initial stages of a case where a suspect has been held in police custody
- criminal procedure time limits – extending a range of statutory time limits applying to criminal cases
- proceeds of crime – allowing for the extension of time limits relating to relevant court proceedings for confiscation
- prisons and young offenders institutions – power to release groups of prisoners earlier than would be the case under normal arrangements.

In general, those justice proposals which might be expected to give rise to most debate are included within the temporary measures.

The rest of this briefing covers all the provisions outlined above, whilst focusing on the most significant and/or controversial.

Legal aid and advice

The Bill would put on a permanent footing changes which allow legal aid payments to be made to solicitors at an earlier stage in a case.

These were introduced as a temporary measure during the pandemic to help with solicitors' cash flow in light of significant delays to court hearings. Backlogs in dealing with court cases are expected to continue until at least 2025.

The Bill would amend the Legal Aid (Scotland) Act 1986 to create permanent powers to make interim payments. It would also give the Scottish Legal Aid Board – the body which administers legal aid – the power to recover overpayments from solicitors and, where appropriate, their firms.

The Scottish Legal Aid Board conducted [research into the use of interim payments](#)¹¹ in 2021. It targeted solicitors who had made little use of the scheme in order to explore what the barriers might be.

All those interviewed had heard of the scheme, and it was generally welcomed. Reasons for not using it included lack of access to administrative or accountancy support, and a general need to be cautious in the management of both finances and future workloads to deal with the impacts of COVID-19.

Requirements of writing

The Bill would permanently remove the requirement for lawyers to be physically present to deliver certain legal services.

The provisions would apply to solicitors, advocates and notaries public. Notaries public have a specific role in the witnessing of documents and the taking of oaths. Most solicitors are also notaries public.

Any legal requirement for these professions to be physically present when carrying out the following services would be removed:

- signing documents
- taking oaths
- making affirmations or declarations.

The provisions would allow such services to be delivered remotely, such as by video conferencing. The Scottish Government states that it expects the affected professions still to be guided by their professional bodies in adopting alternative means of delivering these services (para 150 of the [Policy Memorandum](#)).³

The provisions do not extend to other professions routinely involved in certain legal work, such as doctors or accountants.

Custody at police stations

Background

In some cases, a suspect is held in police custody until their first appearance in court (e.g. where the police consider that release would present a significant risk to a complainer).

It has been normal for that first appearance to involve the accused being transferred to the court building for the hearing. However, it is now also possible for the court hearing to take place with the accused appearing by video link from the police station - sometimes referred to as a remote custody appearance or a virtual custody court.

Temporary COVID-19 related legislation agreed in 2020 does not affect the rules on whether the police should or should not keep a suspect in custody prior to a court appearance. It does, however, include provisions allowing:

- more flexibility for people to attend court by electronic means (e.g. video link)
- prisoner custody officers to facilitate remote custody appearances from police stations.

The first of the above issues is considered later in this briefing (see [Courts and tribunals - conduct of business by electronic means](#)).

This part of the briefing is concerned with the role of prisoner custody officers.

Under the current temporary COVID-19 related legislation, prisoner custody officers are able to carry out the functions they normally would carry out in court buildings within police stations. This includes, setting up solicitor consultations, moving prisoners between cells and virtual court rooms, and the release or transfer to prison of a person after the hearing.

Provisions of the Bill

The Bill seeks to continue the ability of prisoner custody officers to carry out their functions within police stations.

It seeks to do this on a permanent basis. This reflects the Scottish Government's intention that remote custody appearances should become a normal part of how the justice system operates. Its [COVID Recovery consultation paper](#)⁷ noted (para 95):

“ It is proposed that remote custody appearances be used beyond the period of the pandemic and become part of future working practice, freeing capacity within the physical court estate for evidence-led trials and priority procedural matters. As with all custody appearances, this could either result in the release of the person or remand to prison; in either case, transfer to the court estate is minimised.”

In relation to the role of prisoner custody officers, the [analysis of responses to the Scottish Government's consultation](#)⁸ (page 22) notes that:

“ Very few respondents provided specific or detailed comments on the proposal to allow prison custody officers to carry out their functions of transfer or custody of prisoners within police stations. Several responded to the question with comments about the wider justice system in Scotland, and others expressed concerns about virtual court appearances (which are discussed later in this report).”

Parole Board for Scotland

Temporary COVID-19 legislation provides that the functions of the Chair of the Parole Board of Scotland are delegated, to the next most senior member, where the Chair is unable to perform them for reasons related to COVID-19.

The Bill seeks to provide, on a permanent basis, for the delegation of those functions where the Chair is unable to perform them, or there is no Chair in place. This need not be linked to COVID-19 in any way. Rather than specifying who the powers should be delegated to, it requires the Chair to prepare a scheme setting out how delegation will work. The [Policy Memorandum](#)³ (paras 276 to 277) sets out why the Scottish Government believes this to be a better approach.

The temporary legislation also allows, but does not require, the Chair of the Board to make further arrangements authorising other members of the Board to carry out the Chair's functions. The Bill also allows the Chair to do this. Such arrangements could cover situations where the Chair is available to carry out a particular function but it is considered useful to also let another Board member do so.

Courts and tribunals - conduct of business by electronic means

Background

Traditionally, in-person hearings have been the norm in the civil and criminal justice systems. Although there were exceptions, court rules generally required lawyers, the accused, the parties in civil cases and witnesses to be physically present at certain points during court proceedings (e.g. when giving evidence).

In addition, even though the electronic submission of documents was possible in certain situations, procedural rules required many documents to be signed in pen and lodged with the court in person or by post, or physically served on people or businesses following set procedures. Where someone's address was unknown this could include the ability to serve documents on the 'walls of the court' (i.e. in the court building itself).

The Scottish Government has been working for some time on digitising this system. In 2014, it published its [Digital Strategy for Justice in Scotland](#)¹² with the aim of: increasing transparency (providing better information online); fully digitising justice systems over time; and improving data analysis to predict future patterns.

Some of the main developments which followed included:

- the introduction in October 2016 of an [integrated case management system](#)¹³ for processing civil cases in the sheriff courts
- the launch of the digital [Civil Online](#)¹⁴ service in 2019 for [simple procedure](#)¹⁵ cases (claims with a value of £5,000 or less). Since May 2021, solicitors can also use the system to submit documents in cases dealt with under [ordinary cause procedure](#)¹⁶
- provisions in the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 which seek to encourage greater use of pre-recorded evidence in criminal trials.

In 2018, the Scottish Courts and Tribunals Service outlined its future plans in its [Digital Strategy 2018-2023](#).¹⁷

Impact of COVID-19

The approach to digital developments was largely an incremental one with changes happening gradually. The COVID-19 pandemic, along with the social-distancing restrictions introduced in March 2020, significantly accelerated the rate of change.

By the end of March 2020, contingency plans had been put in place by the Scottish Courts and Tribunals Service (SCTS) which meant that the courts were only able to deal with urgent and essential business. An [SCTS news release](#) (March 2020)¹⁸ stated:

“ Courts have already ceased all jury trials, adjourned all but essential summary criminal trials, adjourned all civil hearings involving witnesses and tribunals will only proceed with essential hearings by audio conference. We have also backed this up with strong advice to the public not to attend our buildings.”

In addition, [virtual custody courts were established](#) ¹⁹ providing remote links from police custody centres to the courts.

The initial measures taken by the courts did not require changes to legislation. However, temporary COVID-19 related legislation agreed in spring 2020 provided for a new framework aimed at allowing the courts to operate safely during the pandemic. These included provisions:

- allowing for electronic signatures and the electronic transmission of court documents
- suspending requirements that certain documents be publicised on court walls and replacing this with a requirement to publicise on the SCTS website
- suspending legal requirements (in statute or otherwise) for a person, including jurors, to physically attend court. Instead, the relevant court could instruct the person appearing before it to do so by live visual and/or audio link.

The legislation did not contain detailed rules on virtual hearings. Instead, it provided that courts could issue directions on the type of hearing required (virtual or physical) based on two principles: the fairness of proceedings; and the interests of justice. Courts were also obliged to have regard to guidance issued by the Lord President.

In the civil courts, virtual court procedures using video links were gradually rolled out, starting with the [Court of Session in April 2020](#) ²⁰ and then [sheriff courts in November 2020](#). ²¹

In the criminal courts, online summary trials started on a pilot basis in Aberdeen and Inverness in June 2020.

Solemn criminal trials (more serious cases) had been unable to take place during the first lockdown. However, the [first remote jury centre in a cinema](#) ²² was introduced from September 2020 for High Court cases sitting in Edinburgh and Livingston. This was followed in the sheriff courts in December 2020. The aim was to ensure that jury members could physically distance while hearing evidence and taking part in deliberations about the case.

A summary of the impact on the courts and some of the initial measures taken can be found in the SCTS document [Respond, Recover, Renew](#) (August 2020). ²³

In the civil sphere, remote hearings using video links have now become the norm in almost all cases. This has allowed civil hearings to continue, whilst also seeking to free up physical court space to facilitate the reduction of criminal case backlogs resulting from the pandemic.

The Scottish Civil Justice Council (the body which drafts procedural rules for the civil courts and advises the Lord President) has recently [consulted on new civil court rules](#) ²⁴ which could apply if remote hearings become a more permanent part of the civil justice landscape. The draft rules work on the basis of:

- a list of types of cases where the default would be an in-person hearing (e.g. many family law cases, legal debates raising points of general public importance and evidential hearing where credibility is a significant issue)
- a list of types of cases where the default would be a remote hearing (e.g. procedural hearings, commercial actions, petitions for judicial review and hearings which do not involve the giving of evidence by a witness)
- rules which allow for the non-default option to be taken – to switch to the non-default option, the court has to be satisfied that this would not prejudice the fairness of proceedings, or otherwise be contrary to the interests of justice.

In the criminal sphere, the Virtual Trials National Project Board (which included representation from across the justice system) recently reported back on the pilot for virtual summary criminal trials in Aberdeen and Inverness sheriff courts. Its [report recommended the setting-up of specialist online courts in each sheriffdom to tackle domestic abuse cases](#).²⁵ The report argues that this would increase protection and reduce trauma for complainers as well as assisting in reducing the criminal case backlog. The Cabinet Secretary for Justice and Veterans, Keith Brown MSP, has written to the Lord President asking if he will consider issuing a Practice Note to enable implementation to commence at the earliest opportunity.

Provisions of the Bill

One of the main aims behind this part of the Bill is to extend the application of the temporary provisions which allow for electronic court business during the pandemic. This is proposed on a temporary basis. The key provisions in the temporary COVID-19 related legislation and the Bill are the same.

Relevant provisions apply to both courts and tribunals. These terms are defined widely. 'Court' means any of the Scottish courts as defined in section 2 of the Judiciary and Courts (Scotland) Act 2008. This covers the full range of Scottish courts (e.g. including custody courts). 'Tribunal' means the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland (which hears appeals) – in other words the devolved tribunals. References to 'courts' below should be read as including tribunals.

Electronic signatures and website intimation

The Bill provides that an electronic signature fulfils any requirement for the 'signing, initialling or signetting' of various documents including:

- 'an order, warrant, sentence, citation, minute or any other document produced by a court or tribunal' including extracts of these documents
- documents which are required by an enactment to: be given to a person in connection with proceedings or to initiate proceedings; or signed, initialled or signetted to be used in proceedings for any purpose, including for evidential purposes.

Any requirement that a document be given to a person is also fulfilled by transmitting it electronically to the person, or their solicitor. The [Policy Memorandum](#)³ argues that the new rules will allow courts to operate more efficiently (see para 328).

The Bill also extends the rule in the temporary legislation that requirements for documents to be put on the 'walls of the courts' are instead fulfilled by the documents being made publicly available through the SCTS website.

Virtual hearings

The Bill provides a general framework for attending courts electronically (i.e. virtual hearings) in relation to both criminal and civil cases.

The default rule is that any requirement that a person physically attend a court does not apply unless the court directs the person to attend physically. A court can only issue a direction requiring physical attendance if it considers that a virtual hearing would: (a) prejudice the fairness of the proceedings; or (b) otherwise be contrary to the interests of justice.

However, this default rule in favour of virtual hearings does not apply to "a hearing in which a person is to give evidence". This would, for example, cover criminal trials, but also evidential hearings (proofs) in the civil courts. Here the basic principle is that there should be a hearing in person, although the courts can also issue directions ordering virtual attendance instead. In this case the same principles apply as above. A court can only order virtual attendance for an evidential hearing if it is of the view that this would not: (a) prejudice the fairness of the proceedings; or (b) otherwise be contrary to the interests of justice.

Although there are general rules, the Bill therefore gives the courts a key role in the new system as they can issue directions on whether or not a physical or virtual hearing is appropriate (either on the motion of a party or of their own accord).

Fairness and the interests of justice will be the key criteria which the courts will have to follow when considering which type of hearing is appropriate. In addition, when considering whether to order a virtual or physical hearing, courts must give all parties the opportunity to make representations and must also have regard to any guidance issued by the Lord President.

Further rules on the scope of court directions include a requirement that a direction to attend virtually must enable the party to both see and hear all of the other participants in a hearing, including any witness who is giving evidence.

The Bill allows a court or tribunal to issue a general direction that applies to all proceedings of a specified type, provided that the only party to such proceedings is a public official (public official is further defined in the Bill). The [Explanatory Notes](#) (para 198)² indicate that:

“ This would allow a court, for example, to issue a direction as to how applications for search warrants should be made by the procurator fiscal.”

The [Policy Memorandum](#)³ makes the general argument that the provisions of the Bill in this area will be beneficial, noting that they (para 341) :

“ have enabled the justice sector to respond to the challenges of the pandemic and to deliver improvements which are seen as features of a modern criminal justice system. These provisions have been identified by those parties as a key measure to provide for the continued operation of courts and tribunals as a result of the COVID pandemic, to allow both civil and criminal proceedings to be conducted in a way which will minimise unnecessary travel and congregation of people, and which will save time for those involved in critical front line service delivery.”

However, it also stresses that "some elements of a virtual justice sector remain open to contention" and that further work, analysis and assessment would be necessary before considering the provisions on a permanent basis.

In addition, the Policy Memorandum refers to the Scottish Civil Justice Council (SCJC) consultation on proposed civil procedural rules for virtual court hearings, noting that (para 344):

“ In parallel with this Bill, the SCJC has conducted a consultation on proposals for new court rules (...). In their response to the consultation, SCTS were also clear that while they are of the view that the provisions should be retained permanently for both civil and criminal proceedings, they do not think that they should be retained in their current form. Instead, they believe that the provisions should be enabling, and subject to rules development by the SCJC and the Criminal Courts Rules Council. That position further strengthens the approach for longer extension at this juncture.”

Debate and views

Although the proposals in the Bill are time limited, they do raise some fundamental questions about the future of court hearings and processes, as well as the nature of the justice system in general.

Some concerns have been raised in relation to the proposals on electronic transmission of documents and intimation of documents on the SCTS website. There are, for example, questions on the security of the new system, as well as how the rules will work for people who do not have access to digital technology (for details see pages 9 and 33 of the [analysis of responses to the Scottish Government's consultation](#)).⁸ However, in general these developments appear to be seen as welcome changes to the justice system, and arguably ones which should have been introduced earlier.

At least some of the proposals on virtual hearings are more controversial. They are the focus of the following discussion.

Consultation analysis

The consultation analysis provides a summary of some issues in relation to virtual hearings and outlines potential benefits and concerns raised. It notes (page 34) that benefits highlighted in responses included:

- improving court processes and helping reduce the COVID-19 case backlog
- reducing time and travel costs for those attending court (for example, for the police or expert witnesses such as doctors)

- creating a less stressful or intimidating experience for some witnesses, victims of crime and vulnerable individuals
- less movement of individuals from police custody and prisons to courts, thereby reducing overcrowding in court custody units
- increasing the resilience of the court system (e.g. allowing it to better operate during severe weather or travel disruption).

Concerns included:

- the detrimental impact of virtual hearings on assessing the credibility of witnesses
- the potential for discrimination as regards people who do not have access to, or the skills to use, digital technology
- greater difficulties for some people to consult their legal representative or to get legal advice in a virtual setting
- fears that virtual attendance could diminish the justice system by not conveying the same seriousness of proceedings
- a lack of public access to the courts and the threat this poses to open justice
- a detriment to the training of new lawyers who need to observe court proceedings.

The consultation analysis states though that there was generally less opposition to remote procedural hearings. It also indicates that a variety of views were evident and suggests that "most desired a hybrid system with a range of options to create the flexibility to adapt to different circumstances and the seriousness of each case".

It also stresses that:

“ Most in the legal and justice sector called for default in-person attendance, particularly for civil proofs and jury trials, given the importance placed on these by all parties and the concerns noted above.”

Individual consultation responses

More detailed, and additional, views can be found in the individual [responses to the consultation](#).⁹ A brief snapshot is provided below.

Scottish Courts and Tribunals Service

The SCTS response outlines in detail why it thinks the virtual court system should be continued, noting generally that:

“ The addition of a virtual means by which the majority of court and tribunal business can be conducted greatly enhances resilience when present alongside the option of in-person hearings. The pandemic proved this – but there are other instances in which virtual hearings may prove indispensable for service continuity – including other resilience situations such as severe weather – and for the administration of justice, such as cases where one or more of the participants are physically unable to be present in the court but can participate effectively in proceedings via remote means.”

As mentioned though, the SCTS is of the view that the issue of virtual hearings should be dealt with by individual court rules rather than the framework approach which is proposed in the Bill.

Senators of the College of Justice

The consultation also includes a response from the Lord President on behalf of the Senators of the College of Justice (i.e. judges in the Supreme Courts). The response is broadly supportive of the extension of the provisions on the basis that they can be used flexibly to reduce the court backlogs which followed from the pandemic. However, it notes that, "the measures should not be continued for any longer than is strictly necessary for health and safety reasons".

In relation to criminal cases, the Lord President's response indicates that remote attendance of professional and police witnesses is both efficient and effective, but that it would be more appropriate to have default rules for certain cases rather than the court having to make a direction in every case. The response also argues that remote balloting of jurors is to be welcomed as it reduces repeat attendance at court.

As regards civil cases in the Court of Session, the response argues that the default position for substantive issues should be in person hearings. In the first place, it argues that virtual hearings on substantive matters, "simply cannot match the many advantages of a hearing that takes place with the main participants present together in a court room". In addition, it notes that:

“ the dignity and solemnity of the court room are missing in a video conference. There is an absence of the formality that should characterise a court hearing. The court as a physical place supports the public's acceptance of the legitimacy and authority of the court, and the law itself. In a video conference these essential features are lost.”

Similar arguments can be found in a response from the Forum of Insurance Lawyers (FOIL) which states that, "all hearings (and civil proofs and jury trials in particular) should take place in person unless the court otherwise directs".

Law Society of Scotland

In its response, the Law Society of Scotland makes the argument that the proposal to extend the existing emergency rules is overly based on short term goals and risk assessments in relation to COVID-19 which are likely to change in the coming months. It states:

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

The Law Society's response argues that decisions on what to do in the future should be based on better evidence and data and that there should be a pilot scheme involving a "limited number of live proofs, evidential hearings and appeals" in court buildings. According to the Law Society, this would allow evidence to be compared from remote and in-person hearings.

It is worth noting that in September 2021, the Scottish Government advertised a [tender for research into the impact of remote hearings within the civil justice system](#).²⁶ It is anticipated that the research should be completed towards the end of 2022.

The Law Society's response also argues that more analysis and consideration is needed before committing to virtual custody hearings in criminal cases. In July 2020, the Law Society published a [report raising concerns about the workings of the virtual custody court pilot](#)²⁷ – in particular as regards the client consultation process. In a connected point, the Bill's Policy Memorandum indicates that the Scottish Government will work with local government to better understand the impacts of providing remote social work provision in the context of virtual custody courts (see paras 159 and 173).

Equalities and Human Rights Commission

A response from the Equalities and Human Rights Commission deals with a concern that virtual courts could lead to discrimination. It refers to its [report on the experiences of disabled accused](#)²⁸ and concludes that:

“ the Scottish Government should ensure that it considers how disabled people can participate effectively in meetings or hearings held using video or remote technology. It should make clear on the face of the Bill that use of video or remote technology – by any public body, in any setting – must be accompanied by proactive efforts to understand individuals' needs, reasonable adjustments where these are required, and alternative means of conducting business where video or remote technology makes effective participation unlikely.”

The Scottish Government's [equalities impact assessment on the Bill](#)²⁹ accepts that digital exclusion is a significant issue which needs to be considered. However, it argues that courts will be able to make directions which take account of the specific circumstances of the parties, noting that (page 11):

“ This includes the power to direct that persons attend court where remote attendance would prejudice the fairness of proceedings or otherwise be contrary to the interests of justice. Courts must also ensure that proceedings are fair in terms of the Article 6 ECHR right to a fair hearing, which includes ensuring that parties, for example vulnerable accused, are able to participate effectively in their hearing.”

Future court rules and digital innovation

It is worth outlining certain things that the Bill does not do. As indicated, the Bill only provides a general framework for virtual hearings. It does not provide detailed procedural rules for particular types of cases or procedures or courts. It would appear that these rules will be drawn up by the Scottish Civil Justice Council and the Criminal Courts Rules Council, although the time-frame is currently not clear. In practice, the individual rules are likely to be at least as important as the general rules outlined in the Bill.

In addition, the provisions in the Bill are largely focused on the electronic transmission of legal documents and virtual hearings – traditional court procedures being carried out through the use of more modern technologies. They do not deal with potentially more radical and innovative uses of digital technologies in the court system (e.g. true online courts or new digital tools to resolve disputes).

This point was emphasised by Professor Richard Susskind during the Equalities, Human Rights and Civil Justice Committee's [evidence session on remote hearings and digital justice](#) (November 2021).³⁰ He argued that much of the debate around digital courts is focused on the automation of existing processes whereas instead the focus should be on the long-term potential for innovation – trialling and using digital technology to do things that previously were not possible.

In addition, he also argued that the debate is often portrayed in an unduly polarised and dogmatic way (i.e. traditionalists versus modernisers) whereas the core issue should be more about assessing, based on the evidence, how innovation can potentially improve current problems in the justice system which are faced by individual people.

Fiscal fines

Background

Where a criminal allegation is reported to the Crown Office & Procurator Fiscal Service, prosecutors have a range of actions they can take instead of prosecution through the criminal courts.

In appropriate cases, these alternatives to prosecution include offering the alleged offender the opportunity to pay a fixed penalty under section 302 of the Criminal Procedure (Scotland) Act 1995. This form of penalty is commonly referred to as a 'fiscal fine'. The offer does not have to be accepted, but the possibility of prosecution remains if it is not.

Under the provisions applying before the COVID-19 pandemic, a prosecutor could select from a scale of seven fixed penalties ranging from £50 to £300.

Temporary COVID-19 related legislation agreed in 2020 increased the levels of penalty so that they currently range from £50 to £500. The justification for doing so was to expand the use of fiscal fines - allowing more cases to be resolved without going to court. This was intended to give the courts more time to deal with serious cases and ease some of the burden on the courts resulting from the COVID-19 pandemic.

The Bill's [Policy Memorandum](#) (para 350)³ notes that 595 individuals were given a fiscal fine above the previous £300 maximum during the period 7 April 2020 to 31 October 2021. This accounted for a little under 3% of all those given a fiscal fine during that period.

Provisions of the Bill

The Bill seeks to continue the availability of higher levels of fiscal fine. As before, this is being done on a temporary basis, with the same maximum level of £500.

There are some differences from the current temporary provisions, with the Bill setting out a scale of nine fixed penalties (rather than the current seven). This allows for smaller increments between the lowest (£50) and highest (£500), with the first seven levels being the same as those prior to the current COVID-19 related changes. The slightly different approach in the Bill is intended to better reflect the policy justification for the temporary increase. This was (and still is) to widen the range of cases which can be dealt with by fiscal fine; not to increase the fine for those already dealt with in this way.

The [analysis of responses to the Scottish Government's consultation](#) (page 39)⁸ indicates that support for continuing higher levels of fiscal fines was mainly based on their usefulness in helping to clear the court backlog created by COVID-19. Objections and concerns included that:

- levels of fiscal fines offered can fail to take account of individual ability to pay
- people may accept a fiscal fine without taking legal advice
- fiscal fines should not be used for certain types of case (e.g. domestic abuse).

The question of whether a fiscal fine might be used in a case of domestic abuse was addressed in a 2020 [letter from the then Lord Advocate to the Justice Committee](#).³¹ In the letter (pages 3 to 4), he appeared to rule out the use of fiscal fines for domestic abuse.

Failure to appear before court following police liberation

Background

One of the options open to the police, following the arrest of a suspect, is to release the person subject to an undertaking to appear at court on a specified date (provided for in the Criminal Justice (Scotland) Act 2016). During this period, the person is subject to conditions which may include ones seeking to protect others (e.g. a prohibition on approaching the complainer in the case).

Where the person appears in court, as required by the undertaking, it is for the court to then decide what should happen next (e.g. whether the person should be given bail subject to conditions). If the person fails to appear, the court may grant a warrant for the person's arrest. However, the court may decide not to do so if there appears to be a good reason for non-attendance. Under normal rules, the latter leads to the expiry of the undertaking and associated conditions.

There was a concern that the COVID-19 pandemic could lead to situations where a person had a good reason for non-attendance (e.g. a need to self-isolate) but the loss of conditions attached to the undertaking would remove important safeguards (e.g. for the protection of the complainer).

Temporary COVID-19 related legislation agreed in 2020 sought to address this by allowing a court to extend an undertaking where a person fails to appear; and the court considers that this is attributable to a reason relating to COVID-19. This has the effect of preventing the undertaking conditions from expiring.

Provisions of the Bill

The Bill seeks to keep in place the same COVID-19 related power to extend an undertaking as was added to the normal rules in 2020. This is again proposed on a temporary basis.

The Bill's [Policy Memorandum](#) (para 369)³ argues that:

“ The need to self-isolate because of possible infection with COVID (or the continued existence of other COVID related reasons which prevent people from attending court) are likely to continue for some time to come. Given the uncertainty as to prevalence of COVID within communities, it is considered prudent and necessary for this provision to remain in force while infection and/or public health measures remain in place. This is in order to ensure that in any case where an accused is unable to attend court for a COVID-related reason, the court has a power to ensure that any conditions associated with the undertakings on which they were released can continue to have effect until they are able to appear in court.”

The [analysis of responses to the Scottish Government's consultation](#) (page 38)⁸ notes

that:

“ Only a limited number of open comments directly addressed the expiry of undertaking provisions. The most common theme, mentioned by a few of those in support, was agreement that the provision should be extended due to the ongoing pandemic and the need for individuals to self-isolate. This was cited by Sheriffs Principal of Scotland, Scottish Courts and Tribunals Service, Law Society of Scotland, The Faculty of Advocates, West Lothian Council and Angus Council, all of whom supported an extension.”

National jurisdiction for callings from custody

Background

In some cases, suspects are held in police custody until their first appearance in court (e.g. where the police consider that release would present a significant risk to a complainer).

Temporary COVID-19 related legislation agreed in 2020 does not affect the rules on whether the police should or should not keep a suspect in custody prior to a court appearance. It does, however, include provisions giving greater flexibility in relation to which sheriff courts can deal with a case when it first comes to court. Under normal pre-pandemic practice, the case would go to a court within the sheriffdom where an offence was allegedly committed. Scotland is split into six sheriffdoms.

The COVID-19 related changes allow any sheriff court in Scotland to deal with initial appearances from police custody, no matter where an offence is said to have taken place. This includes dealing with sentencing following an early guilty plea. The Crown Office & Procurator Fiscal Service is given the power to select which sheriff court should deal with the case at this stage. Normal rules on which sheriff courts can deal with a case generally apply after the initial stages (e.g. following an unaccepted not guilty plea).

The justification put forward for the change was that it would, during the pandemic, provide the necessary flexibility to allow for a smaller number of centralised police custody suites, and for custody courts to work in a way that complies with physical distancing requirements and minimises unnecessary travel.

Provisions of the Bill

The Bill seeks to put in place similar provisions continuing the current flexibility (with some relatively minor changes) in relation to which sheriff courts can deal with a case when an accused person appears from police custody. This is again proposed on a temporary basis.

The Bill's [Policy Memorandum](#) (para 372)³ argues that:

“ retention of these provisions through the Bill will continue to enable more efficient prioritisation of court resources and assist SCTS [Scottish Courts and Tribunals Service] in managing the significant backlog of court business arising from the COVID pandemic, which will be an important contribution to the justice system's overall recovery from the lingering impacts caused by COVID, expected to last for a number of years.”

The [analysis of responses to the Scottish Government's consultation](#) (page 40)⁸ notes that:

“ Flexibility and efficiency, allowing cases to be heard promptly and help clear any backlogs were the most common reasons for supporting the continuation of this measure. Organisations supporting permanence elaborated on this theme. HMIPS [HM Inspectorate of Prisons for Scotland], Howard League Scotland and Police Scotland noted efficiency savings from minimising unnecessary travel and reducing time in custody. Scottish Courts and Tribunals Service and the Senators of the College of Justice felt this would add flexibility in times of severe weather, transport disruption or public health emergencies.”

And that:

“ A small numbers of respondents shared their reasons for opposing the provision. Most common was that justice should remain local; a few elaborated that sheriffs were best placed to understand their areas.”

Criminal procedure time limits

Background

Criminal proceedings are subject to a range of time limits intended to prevent unnecessary delays in taking forward cases. Such delays can have a serious impact on those involved – including complainers and accused.

Given the disruption caused to the normal working of the justice system during the COVID-19 pandemic, the Scottish Parliament passed legislation in 2020 relaxing a range of statutory time limits. This was done on a temporary basis.

Relevant provisions of the Bill seek to continue the relaxation of the same statutory time limits. This would still be on a temporary basis. The degree to which those time limits would be relaxed would be the same as, or very similar to, that provided by the current temporary provisions.

Some of the more significant time limits affected are outlined below. This is followed by consideration of debate on the issue.

Information on other relevant changes to time limits is set out in the Bill's [explanatory notes](#) (paras 228 to 234)². These deal with the removing of upper limits on the length of certain criminal court adjournments.

Commencement of trials and pre-trial hearings in solemn cases

Solemn procedure is used for more serious cases and can lead to a trial before a jury in either the High Court or a sheriff court.

Section 65 of the Criminal Procedure (Scotland) Act 1995 sets out time limits applying to the period up to trial in solemn cases. It includes limits on the time between the first appearance of an accused on petition (an early stage of court proceedings in solemn cases) and the start of both the pre-trial hearing (preliminary hearing or first diet) and the trial itself.

A failure to comply with these time limits brings an end to the prosecution (at least under solemn procedure). Normal rules, not linked to the COVID-19 pandemic, allow application to the court to extend the time limits where justified in the specific case.

Temporary legislative changes agreed in 2020 extended the time limits by six months. This extension was automatic, not requiring an application to the court. It is still possible to seek a further extension from the court under normal rules.

The Bill proposes automatic extensions which effectively replicate those made by the current temporary provisions.

The normal time limits (before COVID-19 changes) and extensions provided for in the Bill are:

- time from appearance on petition to pre-trial hearing – 11 months extended to 17 months
- time from appearance on petition to trial – 12 months extended to 18 months.

Section 65 of the Criminal Procedure (Scotland) Act 1995 also sets out a range of shorter time limits covering the length of time an accused can be held on remand prior to trial in solemn cases. These are additional to the limits already outlined and are dealt with below under the heading of [Pre-trial remand in solemn cases](#).

Commencement of summary cases

Summary procedure is used for less serious cases and can lead to a trial without a jury in a sheriff or justice of the peace court.

Section 136 of the Criminal Procedure (Scotland) Act 1995 sets a time limit on commencing proceedings for certain statutory offences. It applies to offences which can be prosecuted under summary procedure only (i.e. where there is no option of prosecuting the offence under solemn procedure). In addition, the time limit is subject to any different period specified in the statute setting out the offence.

Under normal rules (not linked to COVID-19) section 136 provided that the proceedings must commence within six months of the alleged commission of the offence. Temporary COVID-19 related changes agreed in 2020 increased this to 12 months. The Bill also proposes a 12-month time limit on a temporary basis

It is worth noting that, in contrast with the other criminal procedure time limits discussed, it is not possible to apply to court for an extension of this time limit in specific cases.

Pre-trial remand in solemn cases

In relation to solemn cases, section 65 of the Criminal Procedure (Scotland) Act 1995 sets out limits on the length of time an accused can be held on remand awaiting trial. A failure to comply with these limits does not end the prosecution but leads to the release of the accused on bail pending trial. Normal rules allow an application to be made to the court to extend the time limits where justified in the specific case.

Temporary changes agreed in 2020 added an automatic extension of six months to these time limits. The Bill proposes automatic extensions which are very similar in effect – providing for an extension of 180 days rather than six months.

The normal time limits (before COVID-19 changes) and extensions provided for in the Bill are:

- time on remand until service of indictment (document confirming the charges faced) on accused – 80 days extended to 260 days
- time on remand until pre-trial hearing – 110 days extended to 290 days
- time on remand until trial – 140 days extended to 320 days.

Pre-trial remand in summary cases

For summary cases, section 147 of the Criminal Procedure (Scotland) Act 1995 limits the length of time an accused can be held on remand awaiting trial. A failure to comply with this limit brings an end to the prosecution.

Normal rules (not linked to COVID-19) provide for a maximum of 40 days on remand before the trial is started. They do, however, allow an application to be made to the court to extend this time limit where justified in the specific case.

Temporary changes agreed in 2020 added an automatic extension of three months to the above limit. The Bill proposes an automatic extension which is very similar in effect – providing for an extension of 90 days to increase the time limit to 130 days.

Debate and views

In seeking to justify provisions in the Bill continuing the extension of relevant time limits, the Scottish Government highlights the delays caused by the COVID-19 pandemic and the resulting substantial increase in the backlog of cases.

The Bill's [Policy Memorandum](#) (para 388) ³ states:

“ The purpose of the provisions is to ensure delivery of justice is not further adversely affected by prosecutors, the defence and the courts requiring to spend scarce resource and time on preparing for and conducting large numbers of individual hearings on applications to extend time limits or renew adjournments on a case-by-case basis.”

And that (para 389):

“ Such a requirement would impact on prosecutors, the defence and the courts' capacity to undertake other business and, where there is no power to extend the time limits, as is the case for the time limit on the commencement of trials for certain summary-only offences, justice would not be able to be progressed without proceedings being declared unlawful.”

The Policy Memorandum goes on to highlight steps being taken to reduce the backlog (e.g. additional funding to establish more criminal courts) whilst also noting that "there will continue to be a very significant backlog of cases for the foreseeable future" (para 406).

The [analysis of responses to the Scottish Government's consultation](#) (pages 41 to 43) ⁸ notes that there was, amongst key organisations in the legal and justice sector, mixed support for continuing the existing temporary changes – with different views on the various time limits. And that, there was no support amongst those organisations for making the changes permanent.

Looking at all relevant responses, the consultation analysis states that:

- reasons for supporting the continued extension of time limits included improving flexibility and efficiency within the court system whilst clearing the COVID-19 related backlog

- reasons for not supporting continued extension included concerns that it would delay the resolution of cases, undermine trust in the justice system and have a negative impact on victims.

Some responses also questioned when there would be a return to normal time limits (e.g. arguing that it should be as soon as possible and that there is less justification for longer time limits as normal business resumes).

The extended time limits on remanding people in custody was an area of particular concern for some of those responding to the consultation. Issues highlighted in the analysis include:

- the fact that such prisoners may go on to be found not guilty or, if found guilty, receive a non-custodial sentence
- the negative impact of increased periods of remand for the families of those held in custody
- the negative impact which increased numbers of remand prisoners has on the functioning of whole prison system.

The Bill's Policy Memorandum acknowledges concerns about remand arising from the impact of the pandemic on the throughput of criminal cases, whilst arguing that a failure to continue the current extended time limits would significantly hamper the prosecution of serious cases. It also points to safeguards for accused persons:

- a requirement on the courts to have particular regard to the length of time a person is likely to remain on remand during the current situation, when deciding whether to grant bail or remand in custody
- the power to seek a review of a court's decision to refuse bail where circumstances change.

Proceeds of crime

Background

The Proceeds of Crime Act 2002 provides for the confiscation or civil recovery of the financial benefit derived from unlawful conduct. There are four main routes for recovery through the legislation:

- post-conviction confiscation via the criminal courts (criminal confiscation)
- civil recovery (used where no conviction has been secured)
- cash seizure/forfeiture
- taxation.

Confiscation orders can be sought by the prosecution in criminal proceedings where a person is convicted of an offence. The Civil Recovery Unit undertakes civil recovery proceedings in the civil courts (e.g. where a person is found to have a large sum of money with no obvious explanation for its origin).

Temporary legislation agreed in 2020 made provision on time limits relating to criminal confiscation proceedings only.

Regarding criminal confiscation, section 99 of the Proceeds of Crime Act 2002 generally allows the court to postpone relevant proceedings for up to two years after the date of conviction. The normal (pre-pandemic) rules state this two-year limit does not apply if there are exceptional circumstances. The temporary changes agreed in 2020 expressly provided that 'exceptional circumstances' may include the impact of COVID-19 on the proceedings.

Provisions of the Bill

The Bill seeks to make the same COVID-19 related addition, as described above, in relation to exceptional circumstances. As before, this would be on a temporary basis. The [Policy Memorandum](#) (para 409) ³ says that:

“ The Scottish Government has no plans to make this provision permanent, but intend to keep it in place until such time as it is no longer required due to progress with the court backlog.”

The [analysis of responses to the Scottish Government's consultation](#) (page 44) ⁸ notes that most comments did not directly address the proposals, but that rationales put forward by those supporting an extension included the view that it is an appropriate step to take while COVID-19 remains an issue.

It is worth noting that the Bill does not seek to extend current temporary provisions relating to the the time a person has to pay a confiscation order. The Policy Memorandum (para 410) notes that the changes made in 2020:

“ were intended to acknowledge the effect of restrictions put in place at the time of COVID lockdown, such as those affecting the housing market or difficulties encountered in obtaining legal and financial advice. The amendments were designed to ensure that no individual subject to a confiscation order was unfairly disadvantaged if they could not pay a confiscation order on time for reasons relating directly, or indirectly, to COVID.”

It goes on to say (para 411) that:

“ The Scottish Ministers consider that many of the barriers to fulfilment of a confiscation order caused by the pandemic (e.g. the stagnation of the housing market) have been significantly reduced and that after expiry of the Scottish Acts [i.e. the current temporary legislation] it will be appropriate to revert to the pre-pandemic legislation.”

Prisons and young offenders institutions

Background

The provisions of the Bill in this area deal with powers to release groups of prisoners earlier than would be the case under normal rules (those in place before changes made in response to COVID-19). They relate to people serving a custodial sentence in a prison or young offenders institution. They do not apply to people held in custody on remand.

The normal rules for early release depend upon whether a prisoner is a:

- short-term prisoner – serving a determinate custodial sentence of less than four years
- long-term prisoner – serving a determinate custodial sentence of four or more years
- life sentence prisoner – serving an indeterminate custodial sentence (life sentence or order for lifelong restriction).

The provisions in the Bill do not cover life sentence prisoners. In relation to the other two categories, the normal rules provide that:

- short-term prisoners must be released after serving one-half of the sentence
- long-term prisoners may be released after serving one-half of the sentence, but this is not automatic - the decision on whether a prisoner should be released is taken by the Parole Board for Scotland following an assessment of whether the prisoner is likely to present a risk to the public.

In addition to the above, the Scottish Prison Service has the power to release some prisoners before the point dictated by the above rules, on what is known as home detention curfew. Prisoners may spend up to a quarter of their sentence on home detention curfew (with a maximum of six months). During this period the prisoner wears an electronic tag and is subject to conditions including a curfew.

COVID-19 related legislation agreed in 2020 gave the Scottish Government temporary powers to bring forward regulations allowing for the release of groups of prisoners earlier than would be the case under normal rules. The use of this power is limited to situations where it is a necessary and proportionate response to the impact of COVID-19.

These powers have been used once, in relation to the [Release of Prisoners \(Coronavirus\) \(Scotland\) Regulations 2020](#). The regulations set out time-limited measures, applying to a period in 2020, providing for the release of some short-term prisoners before the half-way point of their sentence without the restrictions applying to release on home detention curfew. They were aimed at supporting the safe management of prisons by reducing the prison population during the pandemic.

The Scottish Government's [COVID Recovery consultation paper](#) (para 154)⁷ noted that:

“ COVID can have a severe impact on the operation of prisons, given the risk of infection spreading amongst prisoners and staff, and the substantial changes in prison operation that are necessary to deliver daily operations in line with public health guidance. Prisons require more capacity to ensure that prisoners can be quarantined or can self-isolate, as well as ensuring there is enough flexibility to manage any necessary changes safely. There is an increased workload for prison officers to maintain day-to-day operations alongside any action required to manage any potential infections. There will also be increased pressure on staffing within prisons, when officers and other staff members may be unable to work due to ill health, self-isolation due to possible contact, shielding, or family and other caring responsibilities.”

Whilst acknowledging that the current temporary powers have not been used since 2020, the consultation argued that changes in circumstances (e.g. new variants) could require further use similar powers.

Provisions of the Bill

The Bill seeks to give the Scottish Government similar powers to those provided in 2020 to release groups of prisoners earlier than would be the case under normal rules. As before, these powers would be given on a temporary basis. The Bill provides that the regulation making powers:

- can only be used where it is a necessary and proportionate response to the impact of COVID-19 for the purpose of protecting the security of prisons, or the health and safety of prisoners and staff
- cannot be used to release certain prisoners, including those remanded in custody, serving a life sentence or subject to sex offender notification requirements.

It also provides that a prisoner is not to be released under such regulations if the prison governor considers that the individual would pose an immediate risk of harm to an identified person.

The [analysis of responses to the Scottish Government's consultation](#) (page 37)⁸ notes that the practical value of the early release provisions was commonly mentioned by those expressing support for the Scottish Government continuing to have relevant powers. The need to ensure that sufficient assistance is in place for prisoners released early was also highlighted.

Objections and concerns about the Scottish Government having these powers included:

- the view that prisoners should serve their full sentence
- the risk to the public where prisoners are released early
- the view that the Scottish Government should not be in charge of early release.

In addition to the provisions in the Bill, a Scottish Government [consultation on bail and release from custody](#)³² has sought views on whether the Scottish Ministers should have a more general power, not linked to COVID-19, to release prisoners early where exceptional circumstances arise. It indicates that these might include situations where a prison

becomes uninhabitable due to fire or flood, or unsafe due to overcrowding. The consultation closed on 7 February 2022. Relevant provisions may feature in future legislation.

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