Coronavirus (Recovery and Reform) (Scotland) Bill
[As amended at Stage 2]

Revised Explanatory Notes

Introduction

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Coronavirus (Recovery and Reform) (Scotland) Bill (which was introduced in the Scottish Parliament on 25 January 2022) as amended at Stage 2. Text has been added or amended as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the margin.

2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

The Bill – Overview

4. To help manage the coronavirus pandemic, the Scottish Parliament passed the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No.2) Act 2020. The Coronavirus (Extension and Expiry) (Scotland) Act 2021 amended these Acts to extend much of their operation initially until 31 March 2022, with the potential for further extension by secondary legislation to September 2022 (which was confirmed with the approval of the Parliament). The Extension and Expiry Act also expired certain provisions within the Scottish Acts which were no longer necessary or appropriate.

5. The Scottish Government's Programme for Government 2021 committed to consulting on what further legislation would be needed to support recovery from the pandemic and to bring forward a Coronavirus Recovery Bill in the first year of

Parliament to deliver on aspects of that. This Bill delivers on that commitment: its overall policy intention is to embed reforms in Scotland's public services and justice system that, though necessitated by the pandemic, have delivered improvements to service users and efficiencies, and to help build resilience against future public health threats. The Bill will also continue certain temporary provisions on a longer extension basis as a response to the impact of coronavirus on Scotland's justice system.

6. As well as the Scottish Coronavirus Acts mentioned above, the Bill also makes permanent provision based on certain temporary measures within the UK Coronavirus Act 2020. The UK Act was due to expire on 25 March 2022, although there is a Ministerial power (in section 90 of the Act) to make regulations to extend the effect of particular provisions for up to 6 months and this was exercised with the approval of the Parliament to extend relevant provisions to 24 September 2022.

7. Further information on the Bill's policy can be found in the Policy Memorandum.

Part 1: Public Health Protection

Chapter 1: Modifications of the Public Health etc. (Scotland) Act 2008

Section 1: Public health protection measures

8. Chapter 1 of Part 1 of the Bill provides the Scottish Ministers with a regulation-making power for the purpose of protecting public health in Scotland and a regulation-making power to confer functions about monitoring health risks on local authorities, health boards and other persons.

9. Schedule 19 of the Coronavirus Act 2020 conferred a temporary power on the Scottish Ministers to make similar provision by regulations in respect of coronavirus alone. Part 1 of the Bill would give the Scottish Ministers the power to provide for a national public health response to any infectious disease or biological or chemical contamination.

10. New section 86A(1) of the Public Health etc. (Scotland) Act 2008 ("the 2008 Act") contains the new power for the Scottish Ministers to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland. The threat to public health can come from within or from outside Scotland. Subsection (2) clarifies that only infection or contamination which presents or could present significant harm to human health can trigger the use of this power.

11. Subsection (3) of section 86A allows this power to be used in relation to infectious disease or contamination in general, or in response to a specific public health threat; moreover, regulations under the power may make provision of a general nature, make

provision contingent on particular circumstances occurring, or make specific provision in response to particular circumstances.

12. Subsection (4) of section 86A gives general examples of provision which might be made by the power in subsection (1), including restrictions or requirements in relation to persons, things or premises in the event of, or in response to, a threat to public health. These restrictions or requirements may be imposed directly in the regulations on the face of the regulations or indirectly and sections 86B and 86C make further provision about that. Subsection (5) gives specific examples of the restrictions or requirements mentioned in subsection (4): a requirement to keep a pupil away from school; a restriction on the holding of an event; or a restriction or requirement relating to the handling, transport, burial or cremation of dead bodies, or the handling, transport or disposal of human remains. This type of measure also includes “special requirements”, which are defined in new section 86E.

13. The power to make regulations under section 86A cannot be used to respond to a particular infection or contamination unless a public health declaration under section 86AA is in force. This restriction does not apply to regulations that are establishing standing preparedness arrangements.

14. A public health declaration is a declaration that the Scottish Ministers think that an infectious disease or contaminant poses a danger to human health and that the using of the power to make regulations under section 86A may be a way of protecting against that danger. Before making a public health declaration, the Scottish Ministers must consult the Chief Medical Officer or another person that Ministers designate to give advice. For example, if the danger is caused by a contamination rather than an infectious disease, advice from the Chief Scientific Adviser may be more relevant.

15. A public health declaration can come into force in two ways. The usual way is set out in section 86AA(2) to (8). After making a declaration, the Scottish Ministers will lay the declaration before the Scottish Parliament. A member of the Scottish Government will then lodge a motion that the declaration be approved and, if it is approved, the declaration can come into force and regulations under section 86A can be made. The Scottish Ministers must publish the declaration and also a notice of the approval of the declaration and when it comes into force.

16. If, while a public health declaration is in force, the Scottish Ministers decide that the tests for making a declaration no longer apply, they must revoke the declaration, tell the Parliament and publish a notice that the declaration has been revoked. The declaration stops applying as soon as it is revoked.

17. The other way a public health declaration can come into force is if the Scottish Ministers think that it is not practicable to get prior Parliamentary approval for a declaration before it comes into force (for example, because the Parliament has been dissolved for an election), the Scottish Ministers may instead follow the process set out in section 86AB.

18. Under section 86AB, the public health declaration comes into force as soon as it is made by the Scottish Ministers. The Scottish Ministers must lay the declaration before the Parliament and a member of the Scottish Government will lodge a motion that the declaration be approved. If the declaration is not approved by the end of the period of 28 days after the day it is made, it stops applying. It may stop applying earlier if the Parliament comes to an earlier decision not to approve the declaration.

19. New sections 86B to 86D restrict how the power to make public health protection regulations in section 86A(1) can be used.

20. New section 86B makes provision about where the regulations impose restrictions or requirements directly on the face of the regulations. In such cases the regulations may not make provision by virtue of section 86A(4) – that is, provision directly or indirectly imposing restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health – unless the Scottish Ministers consider that the restriction or requirement of this kind is proportionate to what is sought to be achieved by imposing it.

21. Furthermore, where regulations impose restrictions or requirements directly on the face of the regulations, they cannot impose a restriction or requirement mentioned in section 86E(2)(a), (b), (c) or (d) at all: that is that a person submit to medical examination, be removed to a hospital or other suitable establishment, be detained in a hospital or other suitable establishment, or be kept in quarantine.

22. New section 86C makes provision about where the regulations impose restrictions or requirements indirectly via a decision-maker (such as a health board or local authority, or the Scottish Ministers themselves). In such cases the regulations may not make provision by virtue of section 86A(4) unless the regulations provide that a decision to impose a restriction or requirement of this kind may only be taken if the decision-maker considers that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.

23. In addition, where regulations impose restrictions or requirements indirectly, section 86C(2) prohibits them from enabling the imposition of a special restriction or requirement (as defined in new section 86E) unless certain conditions are met. Those conditions are that there is a serious and imminent threat to public health when the regulations themselves are made, or that the decision to impose the restrictions or requirements is expressed in the regulations to be contingent on there being such a threat at the time at which that decision is made.

24. New section 86D provides that the regulations (whether making direct or indirect provision) cannot be used to make a person undergo medical treatment, including vaccination.

25. New section 86E defines "special requirements" for the purposes of this Part. These include requirements relating to persons, as well as requirements relating to seizure and disinfection of things, and the closing and disinfecting of premises. Where

regulations enable the imposition of a requirement to submit to medical examination, section 35 of the 2008 Act will apply: the effect of this is that a health care professional authorised to undertake a medical examination must not use invasive or intrusive procedures unless they are necessary to achieve the purpose for which the examination is being carried out. However, if that professional needs to carry out such procedures, the least invasive and least intrusive procedures practicable must be used.

26. New section 86F makes further provision about the regulations, providing (among other things) that the regulations can create offences and other means of enforcement of any restrictions or requirements imposed by virtue of the regulations; can provide for appeals and reviews of decisions taken by virtue of the regulations; and can modify primary legislation. Subsection (4) sets out the maximum penalties which can be imposed if offences are created. Subsection (5) requires that the regulations provide for a right of appeal to the sheriff against any decision taken under the regulations by virtue of which a special restriction or requirement is imposed in relation to a person, thing or premises.

27. New section 86G makes provision about the review of public health protection regulations made under section 86A(1). In general, where the regulations make provision mentioned in section 86A(4) – that is, provision directly or indirectly imposing restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health – the Scottish Ministers must review the regulations every 3 weeks. This duty to review regulations every 3 weeks does not apply to regulations which are only making general provision or provision which is contingent. This would include standing preparedness arrangements as mentioned in paragraph 13 above.

28. Where regulations under section 86A(1) enable a special restriction or requirement to be imposed indirectly, i.e. by virtue of a decision taken under the regulations, the regulations must provide for the review of that restriction or requirement at specified intervals by a person named in the regulations. Furthermore, where regulations under section 86A(1) enable the imposition of detention or quarantine, the specified intervals for review must be 3 weeks or less, and the regulations must require the detention or quarantine to be reviewed without an application having to be made to the decision-maker who imposed it.

29. New section 86H gives power to the Scottish Ministers to make regulations in order to confer functions on local authorities, health boards or other persons in relation to the monitoring of public health risks. Regulations under this section will be subject to the negative procedure by virtue of section 122(4) of the 2008 Act.

30. The effect of subsection (3) of section 1 is that public health regulations under section 86A(1) will be subject to the affirmative procedure (the standard affirmative procedure, set out in section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010, is sometimes known as the draft affirmative procedure). However this does not apply if the Scottish Ministers consider that the regulations need to be made urgently: in such cases they can come into effect immediately, but will cease to have

effect after 28 days of being made unless they have been approved by a resolution of the Scottish Parliament before the expiry of that period. This is known as the made-affirmative procedure.

31. Subsection (3) of section 1 inserts 3 new subsections into section 122 of the 2008 Act. New subsection (11) means that if regulations under section 86A(1) make provision modifying an Act of the Scottish Parliament or an Act of Parliament, the regulations cannot be made using the made-affirmative procedure set out in paragraph 30. Instead, such regulations will be subject to the affirmative procedure.

32. New subsection (12) means that where regulations are made using the made-affirmative procedure set out in paragraph 30 the Scottish Ministers must explain why the regulations need to be made urgently and the regulations have to include a date for them to expire - a “sunset” provision. Under subsection (13), regulations do not have to include a “sunset” provision if they are amending existing regulations which already contain one.

Section 2: International travel regulations

33. This section amends section 94 of the 2008 Act, a provision which allows the Scottish Ministers to make regulations to give effect to the International Health Regulations 2005, as well as other international agreements relating to the spread of infectious disease and contamination, so far as they have effect in or as regards Scotland.

34. Subsection (2)(a) expands the scope of the regulation-making power in section 94 to include giving effect to arrangements and recommendations made under international agreements, as well as the agreements themselves. International legal texts (including the International Health Regulations - see for example Article 14 of those Regulations) reference agreements or arrangements. This amendment puts beyond doubt that Scottish Ministers are able to implement both the former and the latter.

35. Subsection (2)(b) inserts further material on what regulations under section 94 may contain, including provision enabling a court to order a person convicted of any offence under the regulations to take or pay for remedial action, provision for the enforcement of restrictions and requirements imposed by virtue of the regulations, and provision for appeals from and reviews of decisions taken by virtue of the regulations.

36. Subsection (2)(c) adds a new restriction on international regulations under section 94: the effect is that they cannot be used to make a person undergo medical treatment (including vaccination). This is the same for public health protection regulations under new section 86A of the 2008 Act, as per new section 86D, both inserted by section 1 of the Bill.

Section 3: Meaning of "premises"

37. This section extends the definition of "premises" set out in section 123 of the 2008 Act to include tents and also offshore installations.

Chapter 2: Arrangements for vaccination and immunisation

Section 4: Arrangements for vaccination and immunisation

38. This section allows health boards to design vaccination programmes with vaccines delivered by a wide range of staff, including junior staff under supervision from more senior staff (who may not necessarily be doctors) and by other experienced vaccinators who are not themselves medical practitioners. This gives permanent effect to the modifications to the National Health Service (Scotland) Act 1978 provided for on a temporary basis by section 36 of the Coronavirus Act 2020.

Part 2: Education

Chapter 1: Educational establishments etc.

39. Chapter 1 of Part 2 of the Bill enables the Scottish Ministers to make regulations to ensure the continuity of educational provision in a manner which is consistent with the protection of public health. It also requires educational establishments to have regard to public health advice and guidance. Similar provision was made in respect of coronavirus alone by schedules 16 and 17 of the Coronavirus Act 2020.

Section 5: Interpretation of Chapter

40. This section defines the key terms used in Chapter 1 of Part 2 of the Bill, including "educational establishment", "protecting public health", and the meaning of "relevant operator" in relation to educational establishments.

Section 6: Duty to have regard to public health advice

41. This section requires relevant operators of educational establishments (including early learning and childcare settings, schools, colleges, and further and higher education institutions), as well as relevant managers of school boarding accommodation and student accommodation, to have regard to guidance on protecting public health from the Chief Medical Officer of the Scottish Administration ("the CMO").

42. In this Chapter of the Bill, as set out in section 5, "protecting public health" has the meaning given by section 1(5) of the Public Health etc. Scotland Act 2008 – that is the protection of the community from infectious diseases, contamination or other such hazards which constitute a danger to human health, including through prevention, control and other public health responses.

Section 7: Guidance on public health measures

43. This section gives a power for the Scottish Ministers to issue statutory guidance to the relevant operators of educational establishments, as well as managers of school boarding accommodation and student accommodation, on protecting public health and ensuring the continuity of education, which those operators and managers must have regard to. Subsection (2) requires Ministers to publish any guidance issued under this section.

Section 8: Regulations on continuing operation of educational establishments

44. This section confers a power on the Scottish Ministers to make regulations applying to educational establishments on their continued operation during the subsistence of threats to public health in Scotland. This follows the use of a direction-making power with a similar scope under schedule 17 of the Coronavirus Act 2020, which was used during the coronavirus pandemic in 2020 and 2021 to secure the continuing provision of education.

45. Subsection (2A) places a limit on the scope of regulations under this section: where they apply to further education institutions or higher education institutions, the regulations may not relate to the non-educational functions of the institution, as defined in subsection (2B): for instance, functions relating solely to research and not to teaching are excluded.

46. Subsection (3) sets out the preconditions for making regulations under this section: Ministers must have regard to any advice from the CMO about protecting public health, and, in that context, must also be satisfied that making the regulations is a necessary and proportionate action for or in connection with the continued provision of education.

47. Subsection (4) states that regulations under this section may provide that any failure of compliance by an educational establishment with statutory or common law rules relating to education is to be disregarded where it is attributable to the regulations: the effect of this is that, where regulations under this section contain such provision, they effectively override other legal requirements on educational establishments while in force to the extent required by the regulations.

48. Subsection (5) sets out the substantive content of what regulations under this section may provide for, including: the conferral of additional functions on an educational establishment relating to the provision of education or (only where an education authority or a further or higher education institution is concerned) the use of an educational establishment's premises for the purpose of protecting public health, for example for testing or vaccination; the alteration of term dates and of opening times; the direction of service provision; the restriction or prohibition of access to an educational establishment's premises (or part of such premises). The restriction or prohibition of access may be framed in terms of specified activities. Furthermore, the regulations may

require actions to be taken by educational establishments in general terms, or may require particular actions to be taken by them.

Section 9: Regulations on school boarding accommodation

49. This section confers a power on the Scottish Ministers to make regulations applying to boarding schools during the subsistence of threats to public health in Scotland.

50. Regulations under this section may require the restriction or prohibition of access to boarding accommodation premises (or part of such premises). The restriction or prohibition of access may be framed in terms of specified activities (for example, access could be permitted only for urgent pupil welfare reasons or the carrying on of activities which are necessary for the continuing provision of education). Furthermore, the regulations may require actions to be taken by school boarding establishments in general terms, or may require particular actions to be taken by them.

51. Regulations under this section may also, alternatively or additionally to making provision on the restriction of access, require the managers of school boarding establishments to provide support for pupils in order to assist them to comply with any legal requirement relating to public health: an example would be a requirement to quarantine under Part 4 of the Public Health etc. (Scotland) Act 2008. Support may also be required for pupils to assist them to follow public health guidance or advice from a public authority, for instance from the CMO; or to assist them to respond to specific requests or recommendations relating to public health from a public authority, for instance a recommendation from a health board for an individual pupil or group of pupils to self-isolate. The detail of what support should be provided will be set out in guidance.

52. Subsection (3) of this section sets out the preconditions for making regulations under this section: Ministers must have regard to any advice from the CMO about protecting public health, and in that context, must also be satisfied that making the regulations is a necessary and proportionate action to protect public health.

53. Subsection (4) states that regulations under this section may provide that any failure of compliance by a school with statutory or common law rules relating to education is to be disregarded where it is attributable to the regulations: the effect of this is that, where regulations under this section contain such provision, they effectively override other legal requirements while in force to the extent required by the regulations.

Section 10: Regulations on student accommodation

54. This section confers a power on the Scottish Ministers to make regulations applying to the managers of student accommodation during the subsistence of threats to public health in Scotland.

55. Regulations under this section may require the restriction or prohibition of access to student accommodation premises (or part of such premises). The restriction or

prohibition of access may be framed in terms of specified activities (for example, access could be permitted only for urgent student welfare reasons or for the carrying on of activities which are necessary for the continuing provision of education). Furthermore, the regulations may require actions to be taken by the managers of student accommodation in general terms, or may require particular actions to be taken by them.

56. Regulations under this section may also, alternatively or additionally to making provision on the restriction of access, require the managers of student accommodation to provide support for students in order to assist them to comply with any legal requirement relating to public health: an example would be a requirement to quarantine under Part 4 of the Public Health etc. (Scotland) Act 2008. Support may also be required for students to assist them to follow public health guidance or advice from a public authority, for instance from the CMO; or to assist them to respond to specific requests or recommendations relating to public health from a public authority, for instance a recommendation from a health board for a student or group of students to self-isolate. The detail of what support should be provided will be set out in guidance.

57. Subsection (3) of this section sets out the preconditions for making regulations under this section: Ministers must have regard to any advice from the CMO about protecting public health, and, in that context, must also be satisfied that making the regulations is a necessary and proportionate action for or in connection with protecting public health.

58. Subsection (4) states that regulations under this section may provide that any failure of compliance by the managers of student accommodation with statutory or common law rules relating to education is to be disregarded where it is attributable to the regulations: the effect of this is that, where regulations under this section contain such provision, they effectively override other legal requirements while in force to the extent required by the regulations.

Section 11: Compliance and enforcement

59. This section concerns the enforcement of regulations that are made by the Scottish Ministers using any of the powers in this Chapter of the Bill. Subsection (1) provides that the regulations may make provision for the carrying out and enforcement of restrictions and requirements contained in them.

60. Subsection (2) provides that relevant authorities must have regard to any guidance issued by Ministers about how to comply with the regulations. Subsection (3) requires Ministers to publish this guidance.

Section 12: Procedure for regulations

61. This section provides that regulations made by the Scottish Ministers under section 8, 9 or 10 are subject to the affirmative procedure. However, where the Scottish Ministers make a declaration that the regulations need to be made urgently, the made-affirmative procedure will apply: this means that the regulations can come into effect

immediately, but will cease to have effect after 28 days of being made unless they have been approved by a resolution of the Scottish Parliament before the end of that period. In such cases, Ministers must explain why they are of the opinion that urgency requires the regulations to be made without their being subject to the affirmative procedure; and the regulations must include an expiry date – a “sunset” provision (unless they amend previous regulations which already contain a “sunset” provision).

62. In addition, subsection (9) of this section provides that where regulations merely revoke previous regulations made under section 8, 9 or 10 – or merely revoke such regulations and make related transitional, transitory or saving provision – then the regulations are not subject to the affirmative procedure but must be laid before the Scottish Parliament as soon as practicable after being made (sometimes known as the laid only procedure).

Section 12AA: Regulations: public health declarations

63. The powers to make regulations under this Chapter of the Bill cannot be used to respond to a particular infection or contamination unless a public health declaration under section 12AA is in force. A public health declaration is a declaration that the Scottish Ministers think that an infectious disease or contaminant poses a danger to human health and that the using of the power to make regulations under this Chapter may be a way of protecting against that danger. Before making a public health declaration, the Scottish Ministers must consult the Chief Medical Officer or another person that Ministers designate to give advice. For example, if the danger is caused by a contamination rather than an infectious disease, advice from the Chief Scientific Adviser may be more relevant.

64. A public health declaration can come into force in two ways. The normal way is set out in section 12AA(2) to (8). After making a declaration, the Scottish Ministers will lay the declaration before the Scottish Parliament. A member of the Scottish Government will then lodge a motion that the declaration be approved and, if it is approved, the declaration can come into force and regulations under section 86A can be made. The Scottish Ministers must publish the declaration and also a notice of the approval of the declaration and when it comes into force.

65. If, while a public health declaration is in force, the Scottish Ministers decide that the tests for making a declaration no longer apply, they must revoke the declaration, tell the Parliament and publish a notice that the declaration has been revoked. The declaration stops applying as soon as it is revoked.

Section 12AB: Regulations: further provision about public health declarations

66. This section makes further provision about public health declarations. If the Scottish Ministers think that it is not practicable to get prior Parliamentary approval for a declaration before it comes into force (for example, because the Parliament has been dissolved for an election), the Scottish Ministers may instead follow the process set out in this section.

67. Under this section, the public health declaration comes into force as soon as it is made by the Scottish Ministers. The Scottish Ministers must lay the declaration before the Parliament and a member of the Scottish Government will lodge a motion that the declaration be approved. If the declaration is not approved by the end of the period of 28 days after the day it is made, it stops applying. It may stop applying earlier if the Parliament comes to an earlier decision not to approve the declaration.

Section 13: Review of regulations

68. This section places a duty on Ministers to review any regulations made under section 8, 9 or 10 every 21 days.

Chapter 2: School consultations

69. Chapter 2 of Part 2 of the Bill amends the Schools (Consultation) (Scotland) Act 2010 (“the 2010 Act”), which makes provision about the consultation process that is to apply as respects various proposals made by education authorities for schools.

Section 14: School consultations: meetings and documents

70. This section inserts a new section 11ZA into the 2010 Act that provides that an education authority may make an application to the Scottish Ministers for a direction to do certain things in law, as listed in subsection (2):

- to disregard, that is to excuse their non-compliance in law with, the duties in section 4 and 9 of the 2010 Act to publish proposal papers and consultation reports on proposed changes to education provision in printed form;
- to treat the duties in those sections to make proposal papers and consultation reports available for public inspection as duties to make the documents available in a manner they consider appropriate instead;
- to meet the duty under section 7 of the 2010 Act to hold a public meeting on proposed changes to education provision by holding the meeting using remote facilities (including by telephone or by video conferencing software).

71. Subsection (3) sets out the precondition for the Scottish Ministers giving a direction of this nature: Ministers must be satisfied that doing so is a necessary and proportionate action for or in connection with the protection of public health. The term “protection of public health” has the meaning given by section 1(5) of the Public Health etc. Scotland Act 2008 – that is the protection of the community from infectious diseases, contamination or other such hazards which constitute a danger to human health, including through prevention, control and other public health responses.

72. Subsection (4) provides that a direction given under this section by the Scottish Ministers may vary or revoke an earlier direction.

73. Subsection (5) makes further provision about directions under this section, including that they may be varied or revoked, may relate to more than one proposal, and may be subject to conditions set out in the direction.

74. Subsection (6) requires Ministers to publish any direction given under this section.

Part 3: Public Service Reform

Bankruptcy

75. This Part of the Bill makes a series of amendments to the Bankruptcy (Scotland) Act 2016 ("the 2016 Act"), making similar provision (with some modifications) to the temporary changes to the 2016 Act made by schedule 2 of the Coronavirus (Scotland) Act 2020 and schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020.

Section 15: Bankruptcy: service of documents

76. This section inserts a new section 224A into the 2016 Act, which applies whenever the 2016 Act, or regulations made under it, authorises or requires a document to be served on a person, whatever particular wording is used to describe this. The new section 224A(1) allows service of a document by personal delivery, by post or by electronic transmission.

77. Section 224A(2) and (3) set out the practicalities of serving a document under the 2016 Act by post, including when receipt is deemed to have taken place.

78. Section 224A(4) provides further detail in relation to documents served by electronic means. Electronic transmission of a document must be effected in a manner that the recipient has indicated to the sender that they are willing to receive the document electronically. Subsection (4)(b) makes provision as to the circumstances in which willingness to receive a document electronically may be given or inferred. Subsection (4)(c) provides that uploading a document to an electronic storage system from where it may be downloaded by the recipient may constitute electronic transmission, where the recipient is sent a notification that the document has been uploaded in that way. Finally, subsection (4)(d) provides that a document transmitted electronically is to be taken to have been received on the day on which transmission took place: however this is only a presumption which can be displaced if there is evidence to the contrary.

79. The effect of subsection (5) is that different provision may be made regarding the service of documents by rules of court, or by an order of court depending on the circumstances of an individual case, and the rest of section 224A will not apply.

80. Subsection (3) of section 15 repeals section 187 of the 2016 Act, which previously only applied to Part 14 of the 2016 Act on administration, accounting and discharge, as the new section 224A is to apply across the whole of the 2016 Act's provisions.

81. Subsection (4) of section 15 makes transitional provision to ensure that the new law represented in section 224A only applies to documents served on or after the commencement date of 1 October 2022 (see section 46 for commencement arrangements).

Section 16: Bankruptcy: meaning of “qualified creditor” and “qualified creditors”

82. This section amends the definitions of “qualified creditor” and “qualified creditors” in section 7(1) of the 2016 Act by raising the amount of money a creditor or a group of creditors must be owed in order to be “qualified” from £3,000 to £5,000. A qualified creditor has the right to petition the court for a debtor’s bankruptcy in terms of section 2(1)(b)(i) of the 2016 Act, where the debtor is apparently insolvent. The new definition will apply in relation to any sequestration in respect of which the petition was presented on or after the commencement date of 1 October 2022 (see section 46 for commencement arrangements).

Section 17: Bankruptcy: remote meetings of creditors

83. This section amends schedule 6 of the 2016 Act to allow meetings of creditors to take place using electronic means, as well as in person.

DiligenceSection 17A: Bank arrestments: protected minimum balance

84. This section of the Bill relates to the sum that is protected in an individual’s bank account when a bank arrestment is executed under the law on diligence for a debt owed. This is known as the protected minimum balance and previously, under the Debtors (Scotland) Act 1987, had been linked to the monthly threshold for earnings arrestment, which is a different type of diligence.

85. Section 73F of the Debtors (Scotland) Act 1987 is amended to de-couple the arrangements for fixing the protected minimum balance from the provisions that set the minimum monthly salary limits for earning arrestments. The protected minimum balance for bank arrestments is raised to £1,000, and a power is provided for the Scottish Ministers to amend the protected minimum balance in the future through negative procedure regulations. However, the new law has no effect in relation to an arrestment executed before the commencement date of 1 November 2022 (see section 46 for commencement arrangements).

Section 17B: Period of moratorium on diligence

86. This section increases the length of the moratorium against diligence created by sections 195 to 198 of the Bankruptcy (Scotland) Act 2016, from a period of 6 weeks to 6 months. Subsection (3) makes a consequential change to the arrangements for those in a moratorium who then enter a protected trust deed, allowing the moratorium to remain in place beyond 6 months for a further 7 weeks, in order to allow sufficient time for the registration of protected status.

Section 17C: Power to amend period of moratorium on diligence

87. This section adds to the amendment of section 198 of the Bankruptcy (Scotland) Act 2016 effected by section 17B by providing the Scottish Ministers with a power to amend the period of the moratorium against diligence through affirmative procedure regulations.

Registration of births

Section 18: Giving information of particulars of birth remotely

88. This section amends the Registration of Births, Deaths and Marriages (Scotland) Act 1965 ("the Registration Act") to enable the process for registering a birth to be carried out remotely, and also to facilitate registers being kept electronically.

89. Currently, registering a birth normally requires that a parent of the child, or another person in certain circumstances, provide the district registrar with details of the birth in person. The registration form then has to be signed in the registrar's physical presence.

90. Section 18 amends section 14(1A) of the Registration Act to enable district registrars to set out alternative ways of providing them with details of a birth. District registrars will only be able to offer alternatives that have been approved by the Registrar General for Scotland (see proposed section 14A(1), which would be inserted by section 18(3) of the Bill).

91. Section 18 further amends section 14(1A) of the Registration Act so that alternative ways of providing details of a birth can be set at a national level by the Registrar General for Scotland.

92. The amendments to section 14 provide that where the informant can provide information remotely or attest a birth registration form remotely, the choice of whether to do so is for the informant.

93. Proposed section 14A requires that any directions setting out alternatives to physically attending a registration office to provide details of a birth be put in the public domain. It ensures that directions can be changed or withdrawn. And it makes clear that although district registrars, and the Registrar General, have the option of allowing details of births to be provided otherwise than by physically attending a registration office, they are not required to do so.

94. Section 18 also allows for the registration form to be attested without requiring that the person attesting it do so physically. As mentioned, attestation of the form currently entails physically signing it in the registration office. Proposed subsection (1C) of section 14 of the Registration Act (which would be inserted by section 18(2)(c) of the Bill) provides two options for attesting a registration form:

- the form might be attested by the person providing the details of the birth through a process that the Registrar General has approved, or
- an official might attest the form on the person's behalf (for example by transposing the person's signature onto an electronic version of the form), which must also be done in a way approved by the Registrar General.

95. Section 18 makes similar adjustments to sections 16, 18 and 18B of the Registration Act. Section 16 deals with the completion of a birth registration form in a case where nobody has done so within the period required by section 14. Amendments to section 16 provide that where the informant can provide information remotely or attest a birth registration form remotely, the choice of whether to do so is for the informant.

96. Section 18 deals with the joint registration of a child's birth by the child's mother and father in cases where they are not married to, or in a civil partnership with, one another. Section 18B deals with the joint registration of a child's birth by the child's mother and another woman in cases where they are not married to, or in a civil partnership with, one another. The amendments made by section 18 of the Bill allow those registration processes to be carried out remotely too and allow a birth registration form to be attested on a person's behalf (whether or not the particulars of birth are given remotely). Amendments to section 18 provide that where the informant can attest a birth registration form remotely, the choice of whether to do so is for the informant.

97. The adjustments made to section 16B(2) of the Registration Act by section 18 of the Bill, and the insertion of new section 21A, are consequential on those already discussed. Section 16B(2) prevents the registration of a birth from being completed, where the birth registration form has been completed remotely, until a public authority (such as a health board) has confirmed the details of the birth. Section 18 of the Bill amends section 16B so that it refers to the processes for completion of birth certificates enabled by the amendments discussed above. The new section 21A of the Registration Act defines "birth registration form", following the repeal of the original definition as part of the modifications made to section 14.

Registration of deaths

Section 19: Funeral director giving information of particulars of death

98. This section amends the Registration of Births, Deaths and Marriages (Scotland) Act 1965 ("the Registration Act") so that a funeral director can provide details of a death for registration purposes on behalf of a person who would otherwise have a legal duty to provide them under section 23(1) of the Registration Act. The effect of the amendment is that anyone subject to that duty is absolved from having to comply with it once the funeral director has given a district registrar the required information.

99. This section's amendment to section 23(1A) of the Registration Act means that a funeral director is to give information about a death in the same way as a person subject to the duty to do so under section 23(1).

Section 20: Giving information of particulars of death remotely

100. This section amends the Registration of Births, Deaths and Marriages (Scotland) Act 1965 ("the Registration Act") to enable the process for registering a death to be carried out remotely, and also to facilitate registers being kept electronically.

101. Currently, registering a death normally requires that a person (commonly a relative of the deceased) provide the district registrar with details of the death in person. The registration form then has to be signed in the registrar's physical presence.

102. Section 20 amends section 23(1A) of the Registration Act to enable district registrars to set out alternative ways of providing them with details of a death. District registrars will only be able to offer alternatives that have been approved by the Registrar General for Scotland (see proposed section 23A(1), which would be inserted by section 20(3) of the Bill).

103. Section 20 further amends section 23(1A) of the Registration Act so that alternative ways of providing details of a death can be set at a national level by the Registrar General for Scotland. Amendments to section 23 provide that where the informant can provide information remotely or attest a death registration form remotely, the choice of whether to do so is for the informant.

104. Proposed section 23A requires that any directions setting out alternatives to physically attending a registration office to provide details of a death be put in the public domain. It ensures that directions can be changed or withdrawn. And it makes clear that although district registrars, and the Registrar General, have the option of allowing details of a death to be provided otherwise than by physically attending a registration office, they are not required to do so.

105. Section 20 also allows for the registration form to be attested without requiring that the person attesting it do so physically. As mentioned, attestation of the form currently entails physically signing it in the registration office. Proposed subsection (1C) of section 23 of the Registration Act (which would be inserted by section 20(2)(b) of the Bill) provides two options for attesting a registration form:

- the form might be attested by the person providing the details of the death through a process that the Registrar General has approved, or
- an official might attest the form on the person's behalf (for example by transposing the person's signature onto an electronic version of the form), which must also be done in a way approved by the Registrar General.

106. Section 20(3A) makes similar adjustments to section 25 of the Registration Act. Section 25 deals with the completion of a death registration form in a case where nobody has done so within the period required by section 23. Amendments to section 25 provide that where the informant can provide information remotely or attest a death registration form remotely, the choice of whether to do so is for the informant.

107. The adjustments made to section 25B(2) of the Registration Act by section 20 of the Bill, and the insertion of new section 28A, are consequential on those already discussed. Section 25B(2) prevents the registration of a death from being completed, where the death registration form has been completed remotely, until a public authority (such as a health board) has confirmed the details of the death. Section 20 of the Bill amends section 25B so that it refers to the processes for completion of death certificates enabled by the amendments discussed above. The new section 28A of the Registration Act defines “death registration form”, following the repeal of the original definition as part of the modifications made to section 23.

Further modifications of the Registration of Births, Deaths and Marriages Act

Section 20A: Regulations under the 1965 Act

108. This section amends the Registration of Births, Deaths and Marriages (Scotland) Act 1965 to ensure that the powers that Act confers on the Scottish Ministers to make regulations can be exercised to make different provision for different cases or circumstances.

Civil Partnership Register

Section 20B: Power to make a register electronic

109. This section amends the Civil Partnership Act 2004 to enable civil partnership registers to take electronic (rather than paper-based) form if the Registrar General for Scotland so determines. This mirrors the position in relation to other registers (including a register of marriages) under section 32(1A) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965.

Civic licensing

Section 21: Civic licensing: how hearings may be held

110. This section makes similar provision to civic licensing as is made for alcohol licensing by section 23 of the Bill (see paragraphs 115-118 below). A new paragraph 18B is inserted into schedule 1 of the Civic Government (Scotland) Act 1982 (“the 1982 Act”), giving a licensing authority the ability to hold a licensing hearing through remote facilities, as well as in person, or through a mixture of both (often called a “hybrid” format). Sub-paragraph (2) of paragraph 18B defines “remote facilities” for these purposes, a definition which would include telephones and video conferencing software.

111. Sub-paragraph (1A) of paragraph 18B ensures that any views which participants at a licensing hearing may offer with regard to the appropriate format for the hearing must be taken into account by a licensing authority, prior to finalising its decision on the format. This applies to anyone who notifies the authority of their intention to participate, such as the licence holder or an objector.

112. Equivalent provision is then made for licensing hearings for sex shops and sexual entertainment venues by the insertion of a new paragraph 24B into schedule 2 of the 1982 Act.

Section 22: Civic licensing: how notices may be published

113. Schedule 1 of the 1982 Act provides that licensing authorities must give public notice of certain applications that are made to them and may give public notice in other cases. This is to be given by publication of a notice in a newspaper or newspapers circulating in the area of the licensing authority (as per paragraph 2(8) of schedule 1). Similarly, schedule 2 of the 1982 Act requires applicants for the grant or renewal of a sex shop licence to give notice of the application by publishing an advert in a newspaper specified by the local authority to supply a copy of the advert to the local authority (as per paragraph 7(1)-(2) of schedule 2). Section 45B of the 1982 Act then applies the same requirements (with certain modifications, including one relating to giving notice electronically, which section 22(2) supersedes) to the licensing of sexual entertainment venues.

114. Schedule 6 of the Coronavirus (Scotland) Act 2020 temporarily modified these notice requirements in the 1982 Act in order to allow notice to be given by publication of a notice on the local authority's website (in the case of sex shops and sexual entertainment venues) or the licensing authority's website (in the case of other civic licensing). Section 22 of the Bill gives these modifications permanent effect.

Alcohol licensing

Section 23: Alcohol licensing: how hearings may be held

115. This section makes similar provision to alcohol licensing as is made for civic licensing by section 21 of the Bill, replicating the temporary modifications to the Licensing (Scotland) Act 2005 ("the 2005 Act") made by paragraph 1 of schedule 5 of the Coronavirus (Scotland) Act 2020.

116. A new section 133A is inserted into the 2005 Act, giving a Licensing Board the ability to hold a licensing hearing through remote facilities, as well as in person, or through a mixture of both (often called a "hybrid" format). Subsection (2) of section 133A defines "remote facilities" for these purposes, a definition which would include telephones and video conferencing software.

117. Subsection (1A) of section 133A ensures that any views which participants at a licensing hearing may offer with regard to the appropriate format for the hearing must be taken into account by a Licensing Board, prior to finalising its decision on the format. This applies to anyone who notifies the Board of their intention to participate, such as the licence holder or an objector.

118. Equivalent provision is then made for Licensing Board meetings by amendments to paragraph 12 of schedule 1 of the 2005 Act. In addition, because the existing paragraph 12(2) requires that Licensing Board meetings are held in public, a new paragraph 12(2A) is inserted in order to clarify that this requirement for public access is complied with, where a remote or hybrid meeting is held, by the Board enabling the public to observe the meeting remotely – for example through the public provision of a web link to the meeting.

Land registration

119. This part of the Bill makes a series of changes to the law of land registration, making similar provision to the temporary modifications made by schedule 7 of the Coronavirus (Scotland) Act 2020 and schedule 4 of the Coronavirus (Scotland) (No.2) Act 2020.

Section 24: Electronic submission of copies of deeds and writs to Registers of Scotland

120. This section amends the Land Registration etc. (Scotland) Act 2012 and the Land Registers (Scotland) Act 1868 to make provision for registration in the Land Register and recording in the Register of Sasines to proceed on a copy of a deed submitted to the Keeper of the Registers by electronic means.

121. Subsections (1) and (2) of this section make provision for the Land Register, amending section 21 of the 2012 Act. The new section 21(5) sets out that a copy of a deed submitted electronically is sufficient to allow registration to proceed. Inserted section 21(6) provides that this applies when the means and form for electronic submission of copy deeds are specified as acceptable on the Keeper's website. Inserted section 21(7) sets out the forms submission by electronic means can take, such as attachment to an email.

122. Subsections (3) and (4) of this section make similar provision for the Register of Sasines, amending the 1868 Act. Subsection (4)(a) removes the existing reference to electronic documents to allow section 6A of the 1868 Act, as amended by subsection (4)(b) of this section, to apply to copies of deeds transmitted electronically. Inserted section 6A(6) sets out that a copy of a deed submitted electronically is sufficient to allow recording in the Register of Sasines to proceed. Inserted section 6A(7) provides that this applies when the means and form for electronic submission of copy deeds are specified as acceptable on the Keeper's website (www.ros.gov.uk). Inserted section 6A(8) sets out the forms submission by electronic means can take.

Section 25: Register of Inhibitions: electronic signature of documents

123. This section relates to the Register of Inhibitions and makes provision for registration or recording in that register to proceed on the basis of electronic submission of documents and copies of documents to the Keeper of the Registers, inserting a new section 148A into the Bankruptcy and Diligence etc. (Scotland) Act 2007.

124. Section 148A(1) sets out that this provision applies to any document which is required or permitted to be registered with the Keeper in the Register of Inhibitions.

125. Section 148A(2) provides that documents may be signed by way of a basic electronic signature in order to be registered in the Register, including a version of an electronic signature which is reproduced on a paper document.

126. Section 148(3) and (4) provide that any legal requirement that a document be given to the Keeper in order to be registered or recorded in the Register may be fulfilled by transmitting it to the Keeper electronically, so long as the means and form for electronic submission are specified as acceptable on the Keeper's website (www.ros.gov.uk).

Legal Aid and Advice and Assistance

Section 26: Claim for interim payment of fees and outlays

127. This section makes provision for and about the making of interim payments in cases where legal fees and outlays are due to be paid out of the Legal Aid Fund ("the Fund") under the terms of the Legal Aid (Scotland) Act 1986. The section introduces a more flexible process for making interim payments in place of the temporary adjustments to existing rules which were provided for in paragraphs 21 to 23 of schedule 4 of the Coronavirus (Scotland) Act 2020.

128. Subsection (2)(a) modifies the existing duty to make payments out of the Fund so as to take account of the introduction of interim payments. Subsection (2)(b) similarly modifies the obligation for certain payments to be paid into the Fund: it requires any sums due by way of reimbursement of interim payments to be paid into the Fund.

129. Subsection (3)(a) modifies the provision that is made in section 33 of the 1986 Act about the ability to set fixed payments for work undertaken. As a general rule, because of the nature of a fixed payment, a solicitor who undertakes work for which a fixed payment is due will not be entitled to other payments from the Fund for that work. However, new subsection (3BA) ensures that this rule does not prevent the payment of an interim payment.

130. Subsection (3)(c) provides that any sum paid by way of interim payment is to be deducted from the final amount paid (so as to avoid double payment).

131. Subsection (4) inserts two new sections into the 1986 Act: new section 33ZB and new section 33ZC.

132. New section 33ZB provides for interim payments. It provides as follows—

- A claim for such a payment can be made by a solicitor who is providing advice and assistance or legal aid and by an advocate who is providing legal aid.

- A claim must include a declaration that the sum being sought does not exceed the total sum the person expects to be paid from the Fund for their work.
- Where a claim for an interim payment is made, it must be granted, unless the Legal Aid Board considers that the sum sought is likely to exceed the total sum it would expect to pay the person for their work.
- In assessing the total sum that is expected to be paid for the person's work, the fact that the interim payment being sought will, if paid, in due course be deducted from the total sum (to avoid double payment) is not to be taken into consideration. However, any previously claimed interim payment would be deducted for the purposes of assessing the total sum that is expected to be paid for the work. The assessment is essentially looking at how much more the Legal Aid Board expects to pay the person than has already been paid.

133. New section 33ZC provides for the repayment of interim payments which prove to have been overpayments. This applies where the solicitor or counsel in question subsequently stops providing legal aid or advice and assistance to the person concerned (whether that is because the matter in relation to which it was being provided is at an end, the lawyer has withdrawn from acting, or for any other reason), and the total sum actually due to the solicitor or counsel is less than the total sum which was assumed would be due at the time of applying for the interim payment. The section provides as follows—

- The solicitor or counsel in question is required to pay the Legal Aid Board a sum equal to the amount by which the interim payment exceeds the total sum that is due for the work.
- For these purposes, the total sum that is due for the work is assessed without reference to the fact that interim payments have already been made: the comparison is between the total amount that would have been due had no interim payments been made, and the amount that was paid out as interim payments.
- Where the interim payment was, at the solicitor's request, paid to their firm rather than being paid to them personally, the firm is jointly and severally liable for the repayment due by that solicitor.
- Where a firm is jointly and severally liable for a repayment and a separate sum is due to be paid to that firm, the Legal Aid Board is entitled to offset all or part of the repayment that is due to the Board.
- The recovery mechanisms provided for by the section are in addition to, and do not limit, the use of any other recovery mechanisms that are available under the general law (for example, under the law of unjustified enrichment).

134. Subsection (5) revokes regulation 11 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. That regulation also allowed for interim claims for payment to be made pending the completion of legal proceedings. The new scheme for interim payments means regulation 11 is no longer required.

Freedom of information

Section 27: Freedom of information: giving notice electronically

135. This section amends section 74(1)(a) of the Freedom of Information (Scotland) Act 2002 so that formal notices under that Act may be given electronically, as well as being delivered in person or posted. This makes permanent the temporary modification of the 2002 Act which was made by paragraph 7 of schedule 6 of the Coronavirus (Scotland) Act 2020.

Mental health

Section 28: Mental health: removal of need for witnessing of signature of nominated person

136. Section 250(2A) of the Mental Health (Care and Treatment) (Scotland) Act 2003 provides that the nomination of a named person is only valid if a docket to the nomination states that the person nominated has consented to the nomination, the docket is signed by the nominated person, and the nominated person's signature is witnessed by a "prescribed person" (an independent advocate; medical practitioner; arts therapist, dietician, occupational therapist, physiotherapist, practitioner psychologist and speech and language therapist; person employed in the provision of, or managing the provision of, a care service; registered nurse; social worker; and solicitor) when they agree to become a named person.

137. Section 28 of the Bill amends section 250(2A) of the 2003 Act so that the nominated person's signature will no longer require to be witnessed by a prescribed person. This replicates permanently the temporary modification made by paragraph 15 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020.

Care services

Section 29: Care services: giving of notices by SCSWIS

138. Section 101 of the Public Services Reform (Scotland) Act 2010 sets out how Social Care and Social Work Improvement Scotland (otherwise known as the Care Inspectorate) is to give a notice to a person providing, or seeking to provide, a care service when required to do so under that Act.

139. Section 29 of the Bill amends the law on giving notice by "personal service" in relation to corporate bodies, and on giving notice electronically, making permanent the temporary modification of the Public Services Reform (Scotland) Act 2010 which was made by paragraph 5 of schedule 4 of the Coronavirus (Scotland) (No.2) Act 2020.

140. The new section 101(1)(a)(ii) and (2) of the Public Services Reform (Scotland) Act 2010 enable the Care Inspectorate, when delivering a notice personally to a body corporate (for instance, following an on-site inspection), to serve it on a wider range of

people, including a care home manager or a director, secretary or other similar officer of the body. Section 101(1)(c) also enables the Care Inspectorate to send formal notices to registered care service providers, and those seeking to provide a care service, by electronic means.

141. Section 101(3) and (4) set out the practicalities of giving notice by post or electronic means to care service providers and those seeking to provide a care service, including when receipt of those notices is deemed to have taken place.

142. Section 101(4) provides further detail in relation to notices given by the Care Inspectorate by electronic means. Notices under this paragraph may be given when a person has indicated to the Care Inspectorate that it is willing to receive them in this way. An indication of a person's willingness may be specific to the notice in question or more generally applicable to notices or other documents of that kind. Willingness may be communicated directly to the Care Inspectorate or expressed more generally on a website or by some other similar expression. Unless a person has indicated otherwise, willingness to receive a notice by electronic means may also be inferred from a person's previous willingness to receive notices or documents in this way. Electronic transmission may also take place where a notice has been uploaded to an electronic storage system from which the person is able to download the notice and that person is sent a notification informing them that a notice has been uploaded in this way.

Requirements of writing

Section 30: Disapplication of physical presence requirements

143. This section enables lawyers to carry out certain formal processes remotely. Specifically, it removes any legal requirement for a lawyer to be physically present in order to witness someone signing a document or to take someone's oath or to receive their affirmation or declaration and it removes any legal requirement for a lawyer who is signing a document to do so in the physical presence of another person.

Custody at police stations

Section 31: Custody officers' functions

144. This section allows prisoner custody officers and police custody and security officers to have custody of a person who is appearing before a court virtually from a police station.

145. Once a person has been charged by the police (or arrested by police on a warrant requiring them to be brought before a court), if the person is to remain in custody, the person has to appear before a court as soon as possible. Before there was the possibility of having someone appear before a court remotely, prisoners would be taken to a court building by the police or by prisoner custody officers (a role created by the Criminal Justice and Public Order Act 1994). In court, they would usually be in the custody of prisoner custody officers. Prisoners in a court building could also be kept in

the custody of police custody and security officers (a role first created by the Criminal Justice (Scotland) Act 2003, but which now has its legal basis in the Police and Fire Reform (Scotland) Act 2012).

146. The legislation giving prisoner custody officers and police custody and security officers the power to hold people in their custody while appearing before a court is framed so that they can only exercise the power in a court building. Therefore they cannot hold in their custody arrestees appearing before a court from a police station via a TV link. Subsections (2)(a) and (4) extend the powers of prisoner custody officers and police custody and security officers (respectively), so that they can.

147. Subsection (2)(b) makes a consequential adjustment so that a prisoner custody officer in a police station has the same duty to give effect to an order from a court under section 212 of the Criminal Procedure (Scotland) Act 1995 as the officer would in a court building. An order under section 212 of the Criminal Procedure Act is an order a court can make having imposed a fine on a person. It is an order to an official to search the person for money that can be used to pay the fine.

148. Subsection (6) makes a consequential adjustment to the definition of “police custody” in Part 1 of the Criminal Justice (Scotland) Act 2016. Being in police custody (as defined) has various consequences under Part 1 of the Criminal Justice Act. Being transferred into the custody of someone who is not a police constable or a police custody and security officer is one way that someone who has been arrested can stop being in police custody. Being transferred into the custody of a prisoner custody officer is therefore one way that a person can stop being in police custody. Subsection (3) adjusts the definition so that a person who is transferred into the custody of a prisoner custody officer while at a police station is not treated as having left police custody at that point.

149. Subsection (8) makes a connected adjustment to section 2 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. That section sets out circumstances in which an investigation into a death has to be carried out because the person died in custody. One of the circumstances in which an investigation must be carried out is when a person has died in “police custody” as defined for the purposes of Part 1 of the Criminal Justice (Scotland) Act 2016. Under that Act, a person ceases to be in “police custody” once the person has been brought before a court. With the advent of virtual court appearances, it is now possible for a person to be simultaneously in custody at a police station and before a court, so for the Fatal Accidents Act’s purposes having the obligation to investigate end the moment the person is brought before a court would be premature.

150. Section 31(8) of the Bill therefore amends the Fatal Accidents Act so that the obligation to investigate persists so long as a person is in custody at a police station, even if a virtual court appearance means the person is no longer in “police custody” as defined for the Criminal Justice Act’s purposes.

Parole Board for Scotland

Section 32: Chairperson's functions

151. Legislation gives the chairperson of the Parole Board for Scotland certain powers and duties. Circumstances may arise in which the chairperson is temporarily unable to fulfil the functions of the office (due to illness, for example) or the office of chairperson may become temporarily vacant (for example in the event of the office holder's death).

152. Section 32 enables, and indeed creates a requirement for, the chairperson to produce a scheme setting out which other member, or members, of the Parole Board can exercise the chairperson's functions in the event that the chairperson cannot or there is no chairperson. Section 32 also allows the chairperson to delegate functions of the office to other members of the Parole Board at times when the chairperson is available to exercise them.

Children's hearings

Section 32A: Members of children's hearings

153. This section modifies the duty that section 6(3) of the Children's Hearings (Scotland) Act 2011 imposes on the National Convener of Children's Hearings Scotland to ensure that every children's hearing includes both a male and female member. It qualifies the duty to allow for its not being practicable in every case for a hearing to have both a male and female member.

Part 4: Tenancies

Removal of mandatory eviction grounds

Section 33: Private residential tenancies: discretionary eviction grounds

154. This section puts on a permanent footing the temporary changes made by paragraph 1 of schedule 1 of the Coronavirus (Scotland) Act 2020. It amends the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Tenancies Act") which governs private residential tenancies. The result of this section is that all eviction grounds for such tenancies will become discretionary eviction grounds on a permanent basis.

155. The vast majority of tenancies which have been granted in the private rented sector since the 2016 Tenancies Act came fully into force are private residential tenancies. It is not possible to opt out of the private residential tenancy regime, although there are some tenancies which will not meet the necessary criteria to fall within it. For example, to be a private residential tenancy, the tenant must at some point have occupied the property as their only or main home. In addition, some property types or letting arrangements are excluded, such as designated student

accommodation, living with a resident landlord or social housing (see schedule 1 of the 2016 Tenancies Act for a full list of excluded tenancies). Nevertheless, in most cases, the rules on eviction from privately let properties will be governed by the rules in schedule 3 of the 2016 Tenancies Act (read alongside Part 5 of that Act).

156. Prior to the temporary modifications made by the Coronavirus (Scotland) Act 2020, some eviction grounds for private residential tenancies were mandatory and some were discretionary. An eviction ground is referred to as "mandatory" in these notes where, if the First-tier Tribunal finds that the required elements of the landlord's specified eviction ground apply in a particular case, it is obliged to issue an order evicting the tenant (subject to any other prerequisites being satisfied, such as any notice requirements having been fulfilled). An eviction ground is referred to as "discretionary" in these notes where, upon deciding that the specified eviction ground applies, the Tribunal is simply empowered (rather than required) to issue an eviction order and has to consider whether it would be reasonable to do so.

157. The eviction grounds which are changed from mandatory to discretionary on a permanent basis under this section are as follows—

- the landlord intends to sell the property (paragraph 1 of schedule 3 of the 2016 Tenancies Act),
- the property is to be sold by the lender under a heritable security (paragraph 2 of schedule 3),
- the landlord intends to refurbish and it would be impracticable for the tenant to continue to occupy the property throughout those works (paragraph 3 of schedule 3),
- the landlord intends to live in the property as their only or main home (paragraph 4 of schedule 3),
- the landlord intends to use the property for a non-residential purpose (paragraph 6 of schedule 3),
- the tenancy was granted as part of the tenant's ongoing or proposed employment by the landlord but the tenant is no longer, or did not become, such an employee (paragraph 8 of schedule 3),
- the tenant is not occupying the property as their only or main home, and nor is any person with a lawful sub-tenancy of the property (paragraph 10 of schedule 3),
- the tenant has been convicted of a relevant crime (being one either relating to the property or one which occurred in the vicinity of it and which is punishable by imprisonment) (paragraph 13 of schedule 3).

158. In addition, there are two eviction grounds which, prior to the temporary changes made by the Coronavirus (Scotland) Act 2020, could be either discretionary or mandatory depending on the precise circumstances in which eviction was being sought. Both of those eviction grounds are modified by this section so that there will, on a

permanent basis, now only be a discretionary eviction ground available. Those grounds are as follows—

- the property is held for use in connection with a religious purpose and is required for that purpose (paragraph 7 of schedule 3),
- the tenant has been in rent arrears for at least three consecutive months (paragraph 12 of schedule 3).

159. All of these eviction grounds will be dealt with in the same way as those eviction grounds which have always been discretionary under the 2016 Tenancies Act (such as the landlord's close family member intending to live in the property, or the tenant having breached the tenancy agreement in some way unrelated to rent arrears).

160. Although there is a reference in subsection (3)(k) of this section to the eviction ground of anti-social behaviour, it should be noted that this has always been a discretionary eviction ground. Since enactment, paragraph 14(2) of schedule 3 of the 2016 Tenancies Act has provided that the Tribunal "may", rather than "must", issue an eviction order where eviction is sought on the basis of anti-social behaviour. Paragraph (k) simply adds in, for the sake of consistency, that if ordering eviction on this ground then the Tribunal must be satisfied that it is reasonable to do so.

Section 34: Assured tenancies: discretionary eviction grounds

161. This section puts on a permanent footing the temporary changes made by paragraph 3 of schedule 1 of the Coronavirus (Scotland) Act 2020. It amends the Housing (Scotland) Act 1988 ("the 1988 Act") which governs assured tenancies, including short assured tenancies. The result of this section is that all eviction grounds for such tenancies will become discretionary eviction grounds on a permanent basis, in a similar fashion to the change made by section 33 in respect of private residential tenancies.

162. Prior to the 2016 Tenancies Act, most tenancies were assured tenancies. As with private residential tenancies, it was not possible to opt out of the assured tenancy regime, although there were some tenancies which did not meet the necessary criteria to fall within it. For example, to be an assured tenancy, the tenant had to be a person occupying the property as their only or main home. In addition, schedule 4 of the 1988 Act lists various property types or letting arrangements which cannot be assured tenancies, such as certain student lets, a tenant living with a resident landlord or social housing. The private residential tenancy replaced the assured tenancy and since the 2016 Tenancies Act came fully into force, it has not been possible to grant a new assured tenancy (see schedule 5 of that Act). However, existing assured tenancies were allowed to continue (although the parties could opt to convert them if they wished).

163. As with private residential tenancies, prior to the temporary modifications made by the Coronavirus (Scotland) Act 2020, some eviction grounds for assured tenancies were mandatory and some were discretionary. A commonly used type of assured tenancy was the short assured tenancy, which, unlike other assured tenancies, could be terminated under section 33 of the 1988 Act simply on the basis of having reached its

previously agreed end date. However, the majority of eviction grounds (referred to in the 1988 Act as "grounds for possession") are set out in schedule 5 of the 1988 Act and apply to all types of assured tenancy.

164. The eviction grounds which change from mandatory to discretionary on a permanent basis under this section can be broadly summarised as follows—

- the property was let under a short assured tenancy, the tenancy has reached its end date, and tacit relocation is not operating (section 33 of the 1988 Act),
- the property was previously occupied by the landlord and is now needed for the landlord or their spouse/civil partner as their only or main home (ground 1 in schedule 5 of the 1988 Act),
- the property is to be sold by the lender under a heritable security (ground 2 in schedule 5),
- the property was let for 8 months or less, and was let as a holiday home within the year preceding the tenancy (ground 3 in schedule 5),
- the property was let for a year or less, and was let as student accommodation within the year preceding the tenancy (ground 4 in schedule 5),
- the property is held for use in connection with a religious purpose and is required for that purpose (ground 5 in schedule 5),
- the landlord intends to demolish or carry out substantial work to the property and cannot reasonably carry out the work without the tenant giving up possession (ground 6 in schedule 5),
- the tenancy was inherited and proceedings for recovery of possession were commenced within a year of the former tenant's death (ground 7 in schedule 5),

165. These eviction grounds will be dealt with in the same way as those eviction grounds which have always been discretionary under the 1988 Act (such as the tenant having been convicted of relevant anti-social behaviour, having been persistently late in paying rent, or having breached the tenancy agreement in some other way).

166. In addition, one eviction ground is repealed on the basis that it is now superfluous. Ground 8 in schedule 5 allowed eviction on the basis of rent arrears provided that, both at the date of serving notice of proceedings and at the date the proceedings begin, the arrears amounted to at least three months' rent. However, Ground 12 in schedule 5 allows eviction on the basis of rent arrears without the arrears having to be of a particular amount (although they must still exist both at the date of serving notice of proceedings and at the date the proceedings begin). While previously the more serious rent arrears ground served a purpose because it gave rise to a mandatory, rather than discretionary, case for eviction, that will no longer apply. As such, ground 8 no longer serves any purpose as any eviction that would otherwise have been sought under it can be sought under ground 12 instead.

Section 35: Tenancies under the Rent (Scotland) Act 1984: discretionary eviction grounds

167. This section puts on a permanent footing the temporary changes made by paragraph 5 of schedule 1 of the Coronavirus (Scotland) Act 2020. It amends the Rent (Scotland) Act 1984 ("the 1984 Act"). The result of this section is that all eviction grounds for tenancies under that Act will become discretionary eviction grounds on a permanent basis, in a similar fashion to the changes made by sections 33 and 34 in respect of private residential tenancies and assured tenancies.

168. The 1984 Act tenancy regime of "regulated tenancies" pre-dated the introduction of assured tenancies. Again, this was effectively a type of "wrapper" imposing certain rules which automatically applied to tenancies which met the criteria set out in the legislation. Part 1 of the 1984 Act sets out various property types or letting arrangements which are excluded from the regime, such as certain student lets, a tenant living with a resident landlord or social housing. New tenancies under the 1984 Act were phased out under sections 42 to 46 of the 1988 Act. There are therefore likely to be exceedingly few tenancies (if any) still operating under this legislative regime.

169. As with private residential tenancies and assured tenancies, prior to the temporary modifications made by the Coronavirus (Scotland) Act 2020, some eviction grounds for tenancies under the 1984 Act were mandatory and some were discretionary. The grounds for granting an eviction order (referred to in the 1984 Act as an "order for possession") are set out primarily in schedule 2 of the 1984 Act.

170. The eviction grounds which change from mandatory to discretionary on a permanent basis under this section can be broadly summarised as follows—

- the property was previously occupied by the landlord and it is now needed for the landlord or their family member, or is to be sold by the lender under a heritable security or is required following the landlord's death (case 11 in schedule 2 of the 1984 Act),
- the property was acquired with the intention of being used as a retirement home and the landlord has now retired and requires it, or it is to be sold by the lender under a heritable security or is required following the landlord's death (case 12 in schedule 2),
- the property was let for 8 months or less, and was let as a holiday home within the year preceding the tenancy (case 13 schedule 2),
- the property was let for a year or less, and was let as student accommodation within the year preceding the tenancy (case 14 in schedule 2),
- the property was let under a short tenancy and the short tenancy has ended (case 15 in schedule 2),
- the property is held for use in connection with a religious purpose and is required for that purpose (case 16 in schedule 2),

- the property has been used in connection with agricultural work and various other related criteria are met (cases 17 to 19 in schedule 2),
- the property is tailored to meet special needs, the tenant does not have such needs and the property is required for a person who has such needs (case 20 in schedule 2),
- the landlord is in the armed forces and requires the property as a residence or it is to be sold by the lender under a heritable security or is required following the landlord’s death (case 21 in schedule 2).

171. These eviction grounds will be dealt with in the same way as those eviction grounds which have always been discretionary under the 1984 Act (such as the tenant having been convicted of relevant anti-social behaviour, being in rent arrears, or having breached the tenancy agreement in some other way).

Pre-action protocol in respect of evictions relating to rent arrears

Section 36: Private residential tenancies: pre-action protocol

172. This section puts on a permanent footing the temporary changes made by paragraph 5 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020. It amends the 2016 Tenancies Act to allow for the implementation, on a permanent basis, of a pre-action protocol which will apply in relation to any attempt by a landlord to end a private residential tenancy on the ground of rent arrears.

173. The section gives the Scottish Ministers a regulation-making power (subject to the affirmative procedure) to stipulate a pre-action protocol which will apply in such cases. While compliance with this protocol will not be compulsory, the First-tier Tribunal will be required, when considering whether it is reasonable to grant an application for an eviction order on the ground of rent arrears, to take into account the extent to which the landlord has complied with the protocol.

174. As the change is to be a permanent one, any pre-action protocol that is imposed will apply regardless of why the rent arrears have arisen, so it will not matter whether or not they arose during the period of the coronavirus pandemic. This contrasts with the Coronavirus (Scotland) (No.2) Act 2020 where the legislation required there to be a link.

175. The terms which have been imposed using the comparable power under the Coronavirus (Scotland) (No.2) Act 2020 are set out in the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 (SSI 2020 No. 304). These regulations require the Tribunal to consider matters such as whether the landlord has provided the tenant with clear information on how to access advice on their rent arrears, whether the landlord has made reasonable efforts to agree a reasonable payment plan, and whether the landlord has given reasonable consideration to the steps taken by the tenant and the tenant’s circumstances.

Section 37: Assured tenancies: pre-action protocol

176. This section puts on a permanent footing, subject to a minor modification, the temporary changes made by paragraph 4 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020. It amends the 1988 Act to allow for the implementation, on a permanent basis, of a pre-action protocol which will apply in relation to any attempt by a landlord to end an assured tenancy (including a short assured tenancy) on a ground relating to rent arrears.

177. The section gives the Scottish Ministers the same regulation-making power (subject to the affirmative procedure) in respect of assured tenancies that they are given in relation to private residential tenancies under section 36.

178. The 1988 Act contains more than one eviction ground relating to rent arrears. Grounds 8 and 12 require there to be arrears on a particular date, whereas ground 11 can apply where the rent has persistently been paid late regardless of whether or not it is in arrears on a particular date. However, ground 8, which required the arrears to be of a specified amount, is now being repealed under section 34 (as any eviction that would otherwise have been sought under it can be sought under ground 12 instead, given that there is now no distinction in terms of Tribunal discretion). While the Coronavirus (Scotland) (No.2) Act 2020 applied the ability to put in place a pre-action protocol only to cases where the arrears met the threshold for ground 8, it is now applied to all of the rent-related grounds remaining in the 1988 Act.

Transitional and saving provision

Section 37A: Tenancies: saving provision

179. This section makes saving provision to deal with notices that are served before 1 October 2022 (i.e. before the date of commencement of Part 4). This will affect eviction proceedings that are raised in relation to those notices even if the eviction proceedings themselves are only raised on or after 1 October 2022.

180. In all such cases, sections 33 to 37 of the Bill will not apply. Instead, the law as modified by the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No.2) Act 2020 will continue in effect, despite the expiry of Part 1 of those Acts. Similarly, the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 will also continue to apply.

181. The result is that the existing temporary law on evictions will continue to apply to all pre-commencement eviction notices and all eviction proceedings raised in relation to those notices.

182. In most places, the provision made by the Bill is the same as the existing temporary law. However, as set out above, some minor changes are made by the Bill: for example, the pre-action protocol in section 36 applies to all rent arrears eviction grounds under the 1988 Act, not just one of them. Section 37A therefore ensures that if

a notice is served by a landlord on the basis of the current law, the position that applies to the parties involved does not change.

Section 37B: Tenancies: transitional provision

183. This section makes transitional provision to ensure that there is no gap between the revocation of the current pre-action requirements and the implementation of the Bill's replacement pre-action protocol, particularly in light of the relatively early dates for expiry of the current law and commencement of the new law.

184. The avoidance of any gap is achieved by subsections (1) and (2). These subsections continue in force the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 and deem them to have been made under the powers inserted by sections 36 and 37 of the Bill. Subsection (3) deals with any references in the pre-action requirements which need to be updated in order for that document to be read as being the pre-action protocol which is provided for under the Bill. Subsection (4) then essentially ensures that this section applies only to post-commencement eviction notices and connected eviction proceedings. To the extent that the regulations are continued in force by section 37A, they should be read without any of these changes (because the existing law is continued in force without any changes for the cases covered by section 37A, and therefore no changes to the regulations are required in that context).

185. The pre-action protocol under the Bill will therefore (at least initially) contain the same provisions as the current pre-action requirements specified under the Coronavirus (Scotland) (No.2) Act 2020. The regulations will be able to be revoked at a later date, and new regulations made under the powers created by the Bill.

Part 5: Temporary Justice Measures

Overview

186. The schedule makes changes to the law that are only temporary, in the sense that they will stop being law unless the Scottish Parliament agrees each year to their continuing to be law and they can only continue to be law until 30 November 2025 at the latest.

187. Part 5 incorporates the schedule into the Bill and deals with how and when its provisions stop having legal effect. The latter sections of the Part make some changes to the law that need to stay in effect beyond the lifetime of the temporary provisions.

Section 38: The measures

188. This section introduces the schedule of the Bill.

Section 39: Power to suspend and revive

189. This section allows the Scottish Government to temporarily stop provisions in the schedule having legal effect (suspend them) and to then restore their legal effect (revive them).

190. Only provisions that have not fully expired under section 40 or 41 can be suspended and revived.

191. Regulations to suspend or revive a provision are subject to parliamentary scrutiny under the negative procedure (see section 42).

192. Subsection (2) applies the default statutory rules that deal with the effect of repealing legislation (i.e. permanently removing it from the statute book) to a case where a provision is merely suspended. In broad terms, the default rules under sections 15 to 17 of the Interpretation and Legislative Reform (Scotland) Act 2010 mean that anything that was legally or illegally done under a law before its repeal (or in this case suspension) continues to be treated as having been done legally or illegally (respectively). For example, paragraph 14 of the schedule allows the court to reschedule when a person is to appear before it. If that paragraph were to be suspended, any appearance dates the court set before the suspension would still be treated as valid.

Section 40: Expiry

193. This section will cause all the temporary measures in the schedule (apart from any that were expired earlier under section 42) to cease to have legal effect on the date stated in subsection (1). The expiry date is initially stated to be 30 November 2023.

194. Subsection (2) allows the Scottish Government to make regulations to push the expiry date back a year at a time, but they cannot push it back beyond 30 November 2025.

195. The Government cannot make any regulations to push the expiry date back unless the Parliament approves them in draft first (see section 42). Section 42 further provides that when laying draft regulations before the Parliament for its approval, the Government also has to lay before the Parliament a statement explaining why it is seeking to push the expiry date back.

196. Provisions of the schedule that expire will be subject to the same default statutory rules as they would were they repealed (see section 18, together with section 1(6), of the Interpretation and Legislative Reform (Scotland) Act 2010).

Section 41: Power to bring expiry forward

197. Rather than wait for provisions in the schedule to expire under section 40, this section allows the Scottish Government to expire provisions sooner.

198. Regulations under section 41 are subject to the negative procedure (see section 42).

Section 42: Regulations under Part 5

199. This section makes clear that regulations under the preceding sections of the Part can make different provision for different purposes and sets out the parliamentary scrutiny procedures that apply to those regulations.

200. The negative procedure is defined by section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010.

201. The affirmative procedure is defined by section 29 of that Act.

Section 43: Criminal procedure time limits: consequential modifications

202. This section makes permanent changes to the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”). The changes are needed in consequence of the modifications to that Act temporarily made by Chapter 1 of Part 5 of the schedule which makes provision to temporarily extend certain statutory time limits contained in the 1995 Act relating to criminal proceedings. The changes made by this section prevent references to those time limits elsewhere in the 1995 Act being falsified by the temporary changes. For example, section 65(3) of the 1995 Act refers to an 11 month period specified in section 65(1), which is being temporarily changed to a 17 month period. Rather than substitute the words “17 months” in place of “11 months” in section 65(3), section 43 of the Bill adjusts it so that it refers only to the period specified in section 65(1). So adjusted, the terms of section 65(3) will be the same while the temporary adjustment to section 65(1) is in force and when it is not. Accordingly the modifications made by section 43 are permanent, despite being in consequence of substantive modifications that are only temporary in their effect.

Section 43A: Criminal procedure time limits: transitional and saving provision

203. This section prevents modifications made by section 43 of the Bill, and paragraphs 19 and 21 of the Bill’s schedule, from affecting criminal proceedings that are already underway when those modifications come into effect on 1 October 2022 (see section 46, which deals with commencement arrangements). The modifications in question relate to certain time limits in criminal proceedings.

204. This section further provides that the modifications temporarily made to time limits in criminal proceedings by certain provisions of the Coronavirus (Scotland) Act 2020 continue to apply in relation to proceedings underway on 1 October 2022, despite that Act expiring. The cumulative effect of the section is to ensure that the rules on time limits which applied when criminal proceedings got underway stay the same throughout those proceedings, unaffected by changes made by the Bill or the expiration of changes made by the 2020 Act.

205. References in the preceding paragraphs to a criminal case getting underway mean the accused first being brought before a court after being served with the document indicating the charges the accused is facing. In the context of summary proceedings, that document is called a complaint. In the context of solemn proceedings, that document is called a petition (although, to be clear, the document that specifies the offences that an accused is formally being charged with in solemn procedure is served later in the process and is called an indictment).

Section 44: Effect of early release from prison or young offenders institution by virtue of regulations

206. This section makes provision in connection with the temporary provision in Part 7 of the schedule, and the temporary provision which preceded that in paragraphs 19 and 20 of schedule 4 of the Coronavirus (Scotland) Act 2020.

207. The temporary provisions in question allow regulations to be made authorising people's early release from prisons and young offenders institutions. In order to deal with the consequences of their release (for example whether they are released on licence or unconditionally), section 44 provides that people released due to regulations are to be treated as though they were released through the normal statutory process that would most likely have been the legal basis for their release had they not been released early under the regulations. Section 44 has to remain the law longer than the temporary power to release people by regulations in order to provide an ongoing basis for understanding the legal basis of those people's release.

Part 6: Final Provisions

Section 45: Ancillary provision

208. Section 45 gives the Scottish Ministers power to make ancillary provision (for example consequential amendments and transitional arrangements) in connection with giving full effect to the Act or any regulations made under it.

Section 46: Commencement

209. This section provides for when the provisions of the Act come into force. The majority come into force in accordance with the table in subsection (1): for example, sections 45, 46 and 47 of the Act come into force at the beginning of the day after Royal Assent. Subsections (1A) and (1B) make special provision in relation to sections 18 and 20.

210. The remaining provisions of the Act (that is, sections 20A and 20B) come into force as provided for in regulations made by the Scottish Ministers. Those regulations may contain transitional, transitory or saving provision and may make different provision for different purposes.

Section 47: Short title

211. This section provides that the short title of the Act which the Bill will become is the Coronavirus (Recovery and Reform) (Scotland) Act 2022.

Schedule: Temporary Measures

Part 1: Courts and Tribunals: Conduct of business by electronic means, etc.

Chapter 1: Documents

212. Paragraph 1(1) allows an electronic signature to fulfil any requirement (however expressed and for whatever purpose) that a document mentioned in paragraph 3, or a deletion or correction of it, be signed, initialled or signetted.

213. Paragraph 2(1) makes provision that any requirement (however expressed) that a document of a type mentioned in paragraph 3 be given to a person, may be fulfilled by (a) transmitting it to the person electronically, or (b) transmitting it (electronically or otherwise) to a solicitor engaged to act on the person's behalf in relation to the proceedings in question.

214. Paragraph 2(2) sets out certain requirements associated with the electronic transmission of documents, specifying that the transmission must be effected in a manner that the recipient has indicated (either specifically or generally) that they are willing to receive the document. The sub-paragraph further provides that in certain specified circumstances willingness is capable of being inferred.

215. Paragraph 2(3) sets out the interpretation applicable to terms used in paragraph 2.

216. By virtue of paragraph 3(1), paragraphs 1 and 2 apply to orders, warrants, sentences, citations, minutes or any other document produced by a court or tribunal, including any extracts of them. These paragraphs also apply to any document which is required by law be given to a person in connection with any civil or criminal proceedings before a court or tribunal; which is to include documents required to initiate proceedings.

217. Paragraphs 3(2) and (3) confer a power on the Lord President or the Lord Justice General to direct that the effects of paragraphs 1 and 2 do not apply to a specified type of document, either in relation to some or all proceedings.

218. Paragraph 4 allows a requirement to give notice for the purpose of legal proceedings to be fulfilled by giving notice on the Scottish Courts and Tribunals Service's website rather than by posting a physical notice inside or outside a court building.

219. Paragraph 5 sets out the interpretation applicable to terms used in this Chapter.

Chapter 2: Attending a court or tribunal

Suspension of requirements for physical attendance

220. Paragraph 6 removes requirements for people to physically attend court or tribunal hearings. Where the requirement to physically attend has been removed, paragraph 7 requires people to attend virtually instead. For two types of hearing, the default position is that people will have to attend physically, with the court or tribunal having an option to order virtual attendance instead. The two types of hearing are:

- hearings at which evidence is to be given (such as trials), and
- hearings at which an accused appears on undertaking; this refers to the situation in which a person has been charged with an offence by the police but rather than being held in custody to appear before a court the person is released on the strength of a promise to come to court voluntarily on a particular day, and to comply with certain other conditions in the meantime.

221. For all other hearings, virtual attendance will be the default with the court or tribunal having the option to order an in-person hearing.

222. Paragraph 6(4) sets the test for reversing the default rule by ordering physical attendance at a hearing other than one at which evidence is to be given. It provides that a court or tribunal may only require the physical attendance of a person if allowing the person to attend by electronic means would prejudice the fairness of proceedings, or would otherwise be contrary to the interests of justice.

223. Sub-paragraph (5) sets the test for reversing the default rule by ordering a person’s virtual attendance at a hearing at which evidence is to be given. The test is that the court or tribunal must be satisfied that attendance by electronic means would not prejudice the fairness of proceedings, or otherwise be contrary to the interests of justice.

224. Sub-paragraph (6) provides that the power to issue a direction under sub-paragraphs (1) and (3) includes the power to revoke an earlier direction under that sub-paragraph.

225. Sub-paragraph (7) provides that a court or tribunal may issue or revoke a direction under sub-paragraphs (1) or (3) on the motion of a party or of its own accord.

226. Sub-paragraph (8) provides that the court or tribunal must, in considering whether to issue or revoke a direction under sub-paragraphs (1) or (3), give all parties to the proceedings an opportunity to make representations, and have regard to any guidance issued by the Lord President or the Lord Justice General.

227. Sub-paragraph (9) provides that references to physically attending a court or tribunal are to being in a place for the purpose of any “proceedings” (defined in paragraph 10) before a court or tribunal or an office holder of a court or tribunal. The effect of this provision is that applications for warrants, which take place in a judge’s chambers, would be included in a reference to physically attending a court or tribunal.

Attending by electronic means

228. Paragraph 7(1) provides that a person excused from a requirement to physically attend a court or tribunal must instead appear by electronic means in accordance with a direction issued by the court or tribunal.

229. Sub-paragraph (2) provides that where a person fails to attend by electronic means in accordance with such a direction, they are to be regarded as having failed to comply with the requirement to physically attend from which they were excused under paragraph 6.

230. Sub-paragraph (3) provides that a court or tribunal may vary or revoke a direction made under sub-paragraph (1).

231. Sub-paragraph (4) provides that a direction is to set out how a person is to appear by electronic means before the court, tribunal or office holder, and may include any other provision the court or tribunal considers appropriate.

232. Sub-paragraph (5) provides that a court or tribunal may issue a direction under sub-paragraph (1) on the motion of a party or of its own accord.

233. Sub-paragraph (6) provides that before issuing a direction under sub-paragraph (1) the court or tribunal must give all parties an opportunity to make representations, and have regard to any guidance issued by the Lord President or the Lord Justice General.

234. Sub-paragraph (7) provides that a direction under sub-paragraph (1) must ensure that a party to trial proceedings, which includes an accused person, uses electronic means that enables the party to both see and hear all of the other participants in a hearing, including any witness who is giving evidence. A direction to a witness who is giving evidence at a trial using electronic means must enable all of the other participants in the trial, which includes an accused person, to both see and hear the witness. Any direction by a court or tribunal which is not in relation to trial proceedings sets no specific requirements.

235. Sub-paragraph (8) provides that nothing in sub-paragraph (7) is to be taken to mean that a person is to be enabled to see or hear a witness in a way that measures taken in accordance with an order of the court or tribunal, such as special measures in relation to a vulnerable witness, would otherwise prevent.

General directions under paragraph 7

236. Paragraph 8(1)(a) allows a court or tribunal to issue a general direction under paragraph 6(1) that applies to all proceedings of a specified type, provided that the only party to such proceedings is a public official. 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. Paragraph (b) allows a court or tribunal to issue a further direction overriding a general direction issued under paragraph (a) in individual cases. The requirement to give parties the opportunity to make representations under paragraph 7(6)(a) in relation to a general direction issued by virtue of sub-paragraph (1)(a) is disapplied.

Chapter 3: Further provision

Publication of directions and guidance

237. Paragraph 9 requires the publication of certain directions and guidance.

Transitional provision for directions under earlier enactment

238. Paragraph 10 provides that any direction made under a provision of schedule 4 of the Coronavirus (Scotland) Act 2020 specified in sub-paragraph (1) or paragraph 4(1)(a) of schedule 4 of that Act is to be treated as having been made under the corresponding provision of this Bill.

Interpretation of Part

239. Paragraph 11 provides definitions for words and terms used in the other paragraphs of Part 1 of the schedule.

Part 2: Fiscal fines

240. Paragraph 12(2) makes similar provision to the temporary modifications to the Criminal Procedure (Scotland) Act 1995 and the Criminal Procedure (Scotland) Act 1995 Fixed Penalty Order 2008 (S.S.I. 2008/108) made by paragraph 7 of schedule 4 of the Coronavirus (Scotland) Act 2020. It provides that the maximum available fixed penalty that may be offered by the procurator fiscal under section 302 of the 1995 Act is £500. Prior to the temporary modifications made by the Coronavirus (Scotland) Act 2020, the maximum penalty was £300.

241. Paragraph 13(4) substitutes the scale of fixed penalties in S.S.I. 2008/108 with a new scale. This scale is different to the scale that operated by virtue of the Coronavirus (Scotland) Act 2020. The main difference is that although the maximum penalty is the same there are now 9 levels instead of 7. The amounts in levels 1 to 7 are identical to the scale that operated prior to the temporary modifications made by the Coronavirus (Scotland) Act 2020 (i.e. £50 to £300). The 2 additional levels provide for the amounts of £400 and £500.

Part 3: Failure to appear before court following police liberation

242. Paragraph 14(1) makes provision which enables the court to prevent the expiry of an undertaking given under section 25(2)(a) of the Criminal Justice (Scotland) Act 2016 when certain conditions are met.

243. Sub-paragraph (2) makes a consequential amendment to section 29(1)(a) of the Criminal Justice (Scotland) Act 2016 by introducing reference to new section 29A.

244. Sub-paragraph (3) inserts a new section 29A into the Criminal Justice (Scotland) Act 2016, which deals with expiry of undertakings. The new section 29A enables the court to modify the terms of an undertaking given under section 25(2)(a) of the Criminal Justice (Scotland) Act 2016 by changing the time at which the person who gave the undertaking is to appear at court where certain conditions are met, as set out in subsection (1). Where the court exercises this power, this has the effect of the undertaking and any conditions attached to it continuing until the newly specified time at which the person is to appear at court.

245. Those conditions are:

- the person has failed to appear at court as required by the terms of the undertaking,
- the court considers that the failure to appear is attributable to a reason related to coronavirus, and
- the court does not consider it appropriate to grant a warrant for the person’s arrest on account of the failure to appear.

246. Subsection (2) requires the procurator fiscal to give notice, as soon as reasonably practicable, to the person who gave the undertaking that the terms of the undertaking have been modified, where the court makes such an order under subsection (1).

247. Subsection (3) prescribes the manner in which notice under subsection (2) must be effected and provides that the same requirements as in section 141 of the Criminal Procedure (Scotland) Act 1995 apply. This includes delivering the notice personally or leaving it at the person’s home.

248. Subsection (4) provides that the references in subsection (1) to the terms of the undertaking include those modified by the procurator fiscal under section 27(1) of the Criminal Justice (Scotland) Act 2016.

249. Subsection (5) provides that a reference in any enactment to the modification of the terms of an undertaking made by the procurator fiscal under section 27(1) is to be treated as including modification by the court under subsection (1).

Part 4: National jurisdiction for first callings from custody, etc.

Ability to take first calling in any sheriff court and then maintain proceedings

250. Paragraph 15 provides where a person appears in court for the first time from custody in criminal proceedings that calling of the case may be taken in any sheriff court in Scotland and may be dealt with in that court by a sheriff of any sheriffdom. Paragraph 17 goes on to ensure that when a court is dealing with a case for which it would not normally have territorial jurisdiction, the sheriff and the prosecutor have all the same powers to deal with it as they would if it were a case that fell within their normal territorial jurisdiction.

251. If more than one person is the subject of criminal proceedings, paragraph 15(3) allows the case to call before a court that would not normally have jurisdiction for the case provided that any one of the people who are the subject of the proceedings is in custody in connection with it. This means, for example, that a case in which two people are co-accused of committing a crime can call before a court that would not normally have jurisdiction for the case even although only one of them has been arrested for the crime and is therefore appearing from custody.

252. Paragraph 15(4) makes it the choice of the Lord Advocate or the procurator fiscal whether or not to rely on subsection (1) to call a case before a court that would not normally have jurisdiction to take it.

253. Paragraph 15(5) allows a sheriff court that has taken on the initial calling of a case by virtue of sub-paragraph (1) to continue dealing with it.

254. The continuing jurisdiction created by sub-paragraph (5) for criminal proceedings can continue until the proceedings' end, except in the case of a prosecution where the jurisdiction for the proceedings (or part of them) may come to an early end under sub-paragraph (6). Sub-paragraph (6) will end a court's jurisdiction for a prosecution in two situations:

- The first is where the accused pleads not guilty and the prosecutor does not accept that plea. This means it is likely that the case will go to trial, which will be handled by the court that has normal territorial jurisdiction for the case. If an accused is charged with, say, two offences and pleads guilty to one and not guilty to the other, the continuing jurisdiction that sub-paragraph (5) creates over the proceedings will be lost only insofar as the proceedings relate to the charge to which the accused has pled not guilty. The court that has jurisdiction by virtue of sub-paragraph (5) would therefore be able to deal with the guilty plea as it sees fit, including by sentencing the accused for that.
- The second point at which sub-paragraph (6) will end a court's non-territorial jurisdiction for a case is when the accused is committed until liberated in due course of law, which means that the court has ordered the accused be held in prison while solemn proceedings (see paragraph 255) are ongoing.

255. Paragraph 15(7) provides for proceedings on indictment that follow from proceedings on petition to be treated as the same proceedings. In solemn criminal procedure (which is the procedure used for the most serious crimes), cases usually begin with a petition and then progress to an indictment, which sets out the formal charges against the accused. Paragraph 15(7) means that a court which began dealing with a case at the petition stage can continue dealing with it, under sub-paragraph (5), once it has reached indictment stage. In practice, because jurisdiction under sub-paragraph (5) ends with an accused being fully committed for trial, which marks one way the petition stage can end, the effect of sub-paragraph (7) is likely to be relevant only where an accused makes an early guilty plea under section 76 of the Criminal Procedure (Scotland) Act 1995.

Ability of any sheriff court to deal with proceedings following failure to appear

256. Paragraph 16 allows a sheriff court to deal with prosecution proceedings for which it would not normally have jurisdiction where the accused has come before it having been arrested for a failure to appear in those prosecution proceedings.

257. When an accused person fails to appear in court, the court can grant a warrant for the accused's arrest. On arrest the person will be brought before a court as soon as is practicable. That court appearance will be a form of "ancillary proceedings" within the meaning of paragraph 18(1)(d) and therefore any sheriff court can deal with it by virtue of paragraph 15(1). The ancillary proceedings for failing to appear are separate from the main prosecution proceedings. If the person had been brought before the court that had normal territorial jurisdiction for the main prosecution proceedings, the court might have dealt with them as well as the proceedings for the person's failure to appear. Paragraph 17 allows a court that has jurisdiction to deal with the ancillary proceedings to deal with the prosecution proceedings in the same way that the court with normal territorial jurisdiction would. In most cases that will mean rescheduling diets in light of a hearing having been missed when the accused failed to attend, but in the case of summary proceedings if the accused pleads guilty it may include sentencing the accused or ordering reports ahead of sentencing.

Further provision about extra-territorial jurisdiction

258. As mentioned in the preceding paragraphs, paragraph 17 supports paragraphs 15 and 16 by ensuring that sheriffs and prosecutors have the necessary powers to deal with cases that come before a court by virtue of those paragraphs. It also makes clear that paragraphs 15 and 16 supplement, rather than supersede, other legal bases for a sheriff court taking a case from outwith its normal territorial jurisdiction.

Part 5: Criminal procedure time limits

Chapter 1: Extension of periods

Solemn proceedings: periods within which procedural hearings and trial must commence

259. Paragraph 19 makes provision to temporarily extend certain statutory time limits contained in the Criminal Procedure (Scotland) Act 1995 relating to criminal proceedings, making similar provision to the temporary modifications made by paragraph 10 of schedule 4 of the Coronavirus (Scotland) Act 2020 and paragraph 1 of schedule 2 of the Coronavirus (Scotland) (No.2) Act 2020.

260. Sub-paragraph (2) amends section 65 of the Criminal Procedure Act, which applies certain time limits in respect of solemn trials, by increasing the time limit within which a preliminary hearing or a first diet must be commenced following the first appearance of an accused from 11 months to 17 months and the time limit within which the trial must commence following that first appearance from 12 months to 18 months.

261. If the preliminary hearing, or (as the case may be) first diet or trial are not commenced within the respective periods, the accused must be discharged from any indictment in respect of the offence and must not at any time be proceeded against on indictment in respect of that offence. The periods mentioned may still be extended under section 65(3) or on appeal under section 65(8) or under section 74(4)(c).

Summary proceedings: period within which prosecution for statutory offence must commence

262. Paragraph 20 modifies section 136(1) of the Criminal Procedure (Scotland) Act 1995 to extend the time limit concerning summary proceedings specified in subsection (1) of that section by 6 months. It has the effect that the time limit for the commencement of proceedings for any statutory offence triable only summarily, unless the enactment fixes a different time limit, is 12 months from the date of the alleged commission of the offence.

Pre-trial and pre-sentence remand period

263. Paragraph 21 modifies section 65 of the Criminal Procedure (Scotland) Act 1995 to extend each of the time limits specified in subsection (4) of that section by 180 days. It has the effect that an accused who is remanded in custody in connection with an offence in solemn proceedings must not be detained for a total period of more than—

- 260 days, unless within that period an indictment is served on the accused, failing which the accused will be entitled to bail, and

- where an indictment has been served on the accused—
  - 290 days, unless a preliminary hearing (High Court cases), or a first diet (Sheriff Court cases) is commenced within that period, failing which the accused will be entitled to bail,
  - 320 days, unless the trial of the case is commenced within that period, failing which the accused will be entitled to bail.

264. The periods mentioned above may still be extended under section 65(5) or on appeal under section 65(8).

265. Sub-paragraph (3) modifies section 147 of the Criminal Procedure Act to extend the time limit concerning summary proceedings specified in subsection (1) of that section by 90 days. It has the effect that an accused who is remanded in custody charged in connection with an offence in summary proceedings must not be detained for a total period of more than 130 days after the bringing of the complaint in court unless the trial has commenced within that period, failing which the accused must be released and discharged for ever in connection with the offence. The period may still be extended under section 147(2), or on appeal under subsection (3) of that section.

266. Sub-paragraph (4) modifies section 200 of the Criminal Procedure Act which provides the court with a power to adjourn a case and remand the accused in custody where the accused has been found to have committed an offence punishable by imprisonment. This is to enable inquiry to be made into the accused's physical or mental condition. Sub-paragraph (4) removes the 3-week time limit for any single adjournment. The effect of this is that the court can adjourn the case for whatever period the court thinks necessary to enable a medical examination and report to be made.

Chapter 2: Adjournment periods

Power of court to adjourn cases

267. Paragraph 22(1) to (5) makes a series of temporary modifications to the Criminal Procedure (Scotland) Act 1995 concerning the power of the court to adjourn cases.

268. Sub-paragraph (2) modifies section 145, which provides the court with a power to adjourn a summary case at first calling for inquiry into the case, or for any other cause it considers reasonable for such period as it considers appropriate. It removes subsection 145(3) which provides that, where the accused has been remanded on bail or ordained to appear, no single period of adjournment shall exceed 28 days. The effect of this is that the court can adjourn a hearing of such a case for such a period as the court considers appropriate, without this limitation.

269. Sub-paragraph (3) modifies section 145A, which provides the court with a power to adjourn a case at first calling in a summary case where the accused is not present, to allow the accused to appear in answer to the complaint, or time for inquiry into the case, or for any other cause the court considers reasonable. It removes section 145A(3)

which provides that no single period of adjournment shall exceed 28 days. The effect of this is that the court can adjourn a hearing of such a case for such a period as the court considers appropriate, without this limitation.

270. Sub-paragraphs (6) and (7) make a consequential modification to section 21 of the Criminal Justice (Scotland) Act 2003 concerning the power to adjourn cases involving sexual and certain other offences for pre-sentence reports. This has the effect of temporarily applying section 201(3) of the Criminal Procedure Act, modified by paragraph 22(4), to such cases as it applies to any other case. This means that the court can adjourn the hearing of such a case for whatever period the court considers appropriate. These sub-paragraphs would no longer operate as intended following the removal of paragraph 22(4) by amendment at Stage 2.

Part 6: Proceeds of Crime

271. Paragraph 23 temporarily modifies the Proceeds of Crime Act 2002 to make clear that coronavirus-related reasons are valid reasons for allowing the confiscation-order making process to be postponed.

272. A confiscation order is an order under section 92 of the Proceeds of Crime Act requiring a person convicted of an offence to pay a sum of money representing the person's benefit from crime. The court can either make a confiscation order before it sentences the person, or it can postpone doing so under section 99 of the Proceeds of Crime Act. Section 99 provides that the process for making a confiscation order cannot, ordinarily, be postponed for more than 2 years beginning from the time that the person is convicted. However, if the court is satisfied that there are exceptional circumstances in a case, it can postpone the process for more than 2 years.

273. It is up to the courts to decide what exceptional circumstances are. Paragraph 23 temporarily inserts a new subsection (4A) into section 99 of the Proceeds of Crime Act to make clear that the direct and indirect effects of coronavirus can constitute exceptional circumstances. An example of a direct effect would be where people involved in the order-making process are too stricken with coronavirus for the process to conclude before the 2 years expire. An example of an indirect effect would be the availability of court diets due to pressures on court timetables as a result of the disruption to court business caused by the pandemic and difficulties in obtaining the necessary court documentation required to progress confiscation hearings.

Part 7: Prisons and young offenders institutions

274. Paragraphs 24 and 25 make provision in similar terms to that found in paragraphs 19 and 20 of schedule 4 of the Coronavirus (Scotland) Act 2020.

275. Associated provision is made by section 44.

Power to release early

276. Under paragraph 24, the Scottish Ministers are given the power to make regulations to release people from prisons and young offenders institutions early. For these purposes, a “prison” does not include a naval, military or air force prison.

277. Regulations may only be made if the Ministers are satisfied that making them is a necessary and proportionate response to the effects, or anticipated effects, of coronavirus on a prison or on prisons generally. The regulations must be for the purpose of protecting the security and order of the prison concerned or protecting the health, safety and welfare of those accommodated or working in the prison.

278. In addition, there are restrictions upon who can benefit from the regulations. A person may not be released under the regulations if the governor of the prison concerned considers the person to pose an immediate risk of harm to another identified person. Further, a person may not be released if the person falls within one of the categories specified in sub-paragraph (4). Those ineligible include those who are not serving determinate sentences (for example, a person sentenced to life imprisonment, or where no limit of time has been specified). Those ineligible also include those sentenced to an extended sentence for sexual, violent or terrorism offences or those who have been made subject to a supervised release order in order to protect the public from serious harm upon the person’s release.

279. Regulations under this paragraph can only have effect for a maximum of 180 days after they are made.

280. Regulations under this paragraph may make different provision for different purposes, meaning that the rules can, for example, differentiate between categories of prisoner, types of prison or parts of a prison.

Parliamentary scrutiny and expiry of regulations made under paragraph 24

281. Paragraph 25 makes provision about the parliamentary procedure which applies to the making of regulations under paragraph 24 and about the automatic expiry of any regulations made under that power.

282. Specifically, regulations are subject to the affirmative procedure (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010) unless they are made under the bespoke procedure which is provided for by sub-paragraph (3). That procedure is available only where certain conditions are met. Namely—

- the regulations in question must not provide for any person to be released more than 180 days earlier than the person would otherwise be released, and
- the regulations include a declaration that in the Scottish Ministers’ opinion the regulations need to be made so urgently that parliamentary approval of them in draft cannot be waited for.

283. Where those conditions are met, the regulations can be made and come into force immediately under the made-affirmative procedure. They must be laid before the Scottish Parliament as soon as practicable after being made, and will cease to have effect if the Parliament does not approve them within 28 days (excluding days during which the Parliament could not approve the regulations because it is dissolved or in recess for a period of more than 4 days). In addition, the Scottish Ministers must explain their reasons for thinking that the situation is so urgent that the regulations need to be made in accordance with the made-affirmative procedure provided for by sub-paragraph (3).

This document relates to the Coronavirus (Recovery and Reform) (Scotland) Bill (SP Bill 9A) as amended at Stage 2

Coronavirus (Recovery And Reform) (Scotland) Bill
[As amended at Stage 2]

Revised Explanatory Notes

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