

This document relates to the Coronavirus (Scotland) Bill (SP Bill 66) as introduced in the Scottish Parliament on 31 March 2020

Coronavirus (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Coronavirus (Scotland) Bill introduced in the Scottish Parliament on 31 March 2020.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 66-EN);
- a Financial Memorandum (SP Bill 66-FM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 66-LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy objectives of the bill

4. The purpose of the Coronavirus (Scotland) Bill ("the Bill") is to respond to the emergency situation caused by the coronavirus (Covid-19) pandemic. The Bill complements and supplements the Coronavirus Act 2020 ("the 2020 Act"), passed by the UK Parliament on 25 March 2020, and which the Scottish Parliament gave its consent to on 24 March 2020.

5. The coronavirus outbreak is a severe and sustained threat to human life in Scotland. The Scottish Government is committed to taking all steps necessary to address that threat. A severe pandemic could infect a large

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proportion of the population, and the public health measures required to control and limit the spread of the outbreak will require a significant adjustment to the lives of those living in Scotland, to business in Scotland, and to the way public services are delivered and regulated.

6. Current public health guidance¹ requires business and public authorities to operate very differently to the way they have done until now by implementing, for example, social distancing policies, or by requiring their workforce to work from home, where possible. In addition the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020² (S.S.I. 2020/103) (“the 2020 Regulations”) have required the closure of businesses selling food or drink for consumption on the premises, and of a wide range of other business set out in the regulations to protect against risks to public health. The 2020 Regulations also prohibit those living in Scotland from leaving the place where they live without reasonable excuse and ban public gatherings of more than two people.

7. Public health guidance is likely to require some adjustment to normal life for some time, as the effort to limit and control the coronavirus outbreak continues. The requirements and restrictions in the 2020 Regulations will continue until they are terminated by the Scottish Ministers by direction, or until they expire under regulation 11 of the 2020 Regulations.

8. The Scottish Government considers that in order for essential public services to continue to be able to discharge their functions in the way they were intended to, some temporary changes need to be made to the way they operate and the way that they are regulated. In addition, further support and flexibility for business, and for those using public services, is necessary to reflect new restrictions, in both guidance and legislation, on the way people can live and work.

9. Even beyond the new restrictions on living and working in Scotland, the coronavirus outbreak has an effect on essential public services which demands a response. Central and local government, and those involved in health and social care, are in the front line of the effort to control the spread of the coronavirus and respond to the pandemic. In many cases, these services are now planning for an extended period when much larger

¹ <https://www.gov.scot/collections/coronavirus-covid-19-guidance/>

² <http://www.legislation.gov.uk/ssi/2020/103/contents/made>

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numbers of their staff will be unable to work due to following public health guidance, which could require self-isolation, due to increased levels of illness, or due to caring responsibilities increased by or associated with the coronavirus outbreak. In many cases, central and local government, the health and social care sector, and other public services are having to re-deploy substantial parts of their workforce temporarily, or re-prioritise work across their functions and responsibilities, in order to focus on work which responds to the coronavirus outbreak and which protects the health of people living and working in Scotland.

10. This unexpected shift in resourcing and prioritisation will require a number of the obligations and duties on public services in Scotland to be adjusted temporarily, to reflect the importance which the Scottish Government places on responding to the coronavirus outbreak and protecting the health of people living in Scotland.

11. In deciding how to respond to both (i) the unexpected change in how public services, business and private lives in Scotland are conducted, and (ii) the extraordinary pressures on those involved in the effort to control the coronavirus outbreak, the Scottish Government has taken into account its responsibility first and foremost to protect the lives and health of people living in Scotland. It has also borne in mind the unprecedented pressures on Scottish business and on the public sector in Scotland, and the effect of the substantial adjustment to the way people are being asked to live by public health guidance and required to live by the 2020 Regulations.

12. To support these aims, the Bill takes the following measures:

- it makes adjustments to the law on evictions to protect those renting their homes during the coronavirus outbreak;
- it makes adjustments to criminal procedure, and to other aspects of the justice system, to ensure that essential justice business can continue to be disposed of throughout the coronavirus outbreak;
- it makes a range of provision designed to ensure that business and public services can continue to operate effectively during a period where controls on movements have been imposed, and when pressures on public services are acute.

13. The Bill is part of a concerted and coordinated effort within Scotland, and across the UK, to tackle the Covid-19 outbreak. It has been developed

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taking into account the effects of the 2020 Act, the 2020 Regulations and the other legislative and administrative aspects of the governments of the United Kingdom's collective effort to combat the coronavirus outbreak.

14. The Scottish Government considers it possible that further legislation will be required to provide the support businesses and people in Scotland need, as the pandemic develops and as its effects on our economy and society become clear.

15. The Bill contains extraordinary measures required to respond to an emergency situation. The Scottish Government is satisfied that all of the measures contained in the Bill are appropriate and proportionate, but it recognises that many are far-reaching and unprecedented. The Bill therefore contains the following safeguards:

- the measures in the Bill will automatically expire six months after they come into force. The Scottish Parliament may extend these measures for two further periods of six months, giving the measures in the Bill a maximum duration of 18 months;
- where a measure is no longer considered necessary, Scottish Ministers can bring it to an end earlier than on this six-monthly schedule;
- Scottish Ministers are required by the Bill to report on the continued need for the measures, and on the use of powers in the Bill, every two months.

16. The Scottish Government is committed to keeping the provisions of this Bill under review at all times, under the scheme set out above. No measure can last longer than six months without the Scottish Parliament's approval. Where measures are no longer appropriate or proportionate, the Scottish Ministers can terminate them earlier than they would otherwise expire under the Bill. The Scottish Ministers are required by the Bill to report on the measures in the Bill in order to facilitate and to encourage this process of scrutiny and review. In all cases, in making decisions about the continuing appropriateness and proportionality of the measures in the Bill, the Scottish Government is committed to taking into account the views of those affected by the Bill.

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Alternative approaches

17. Given the need to respond to the developing emergency situation, no alternative to emergency legislation exists. Where appropriate, consideration has been given to alternative approaches to primary legislation. This is set out below, for each of the measures in the Bill.

Consultation

18. Given the need to respond to the developing emergency situation, no formal consultation has been possible. Where possible, the Scottish Government has informally consulted with public bodies affected by the measures in the Bill. This is set out below, for each of the measures in the Bill.

Content of the bill

19. The Bill makes provision about:

- preventing evictions (schedule 1);
- protection for debtors (schedule 2);
- looked after children and children's hearings (paragraphs 1 to 10 of schedule 3);
- adults with incapacity (paragraph 11 of schedule 3);
- suspension of impediments to social distancing in courts and tribunals (paragraphs 1 to 4 of schedule 4);
- fiscal fines (paragraph 7 of schedule 4);
- cases beginning with an appearance from custody (paragraphs 8 and 9 of schedule 4);
- extension of time limits in criminal proceedings (paragraph 10 of schedule 4);
- trials on indictment (paragraph 11 of schedule 4);
- exceptions to the rule that hearsay evidence is inadmissible (paragraph 12 of schedule 4);
- community orders (paragraphs 13 to 17 of schedule 4);
- the Parole Board (paragraph 18 and 19 of schedule 4);
- release of prisoners (paragraphs 20 and 21 of schedule 4);

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- legal aid (paragraph 22 to 24 of schedule 4);
- alcohol licensing and licensing under the Civil Government (Scotland) Act 1982 (schedule 5 and paragraph 1 of schedule 6);
- freedom of information (paragraphs 2 to 8 of schedule 6);
- duties in respect of reports and other documents (paragraphs 10 to 11 of schedule 6);
- local authority meetings (paragraphs 12 to 16 of schedule 6);
- social security (paragraphs 1 to 5 of schedule 7);
- irritancy clauses in commercial leases (paragraphs 6 and 7 of schedule 7);
- duration of planning permission (paragraphs 8 to 10 of schedule 7);
- land registration (paragraphs 11 to 19 of schedule 7);
- the Anatomy Act 1984 (paragraphs 20 to 22 of schedule 7);
- powers to make subordinate legislation (paragraphs 23 to 30 of schedule 7);
- Business Improvement Districts (paragraph 31 of schedule 7).

Preventing evictions (schedule 1)

The coronavirus outbreak

20. The effect of the public health guidance introduced in response to the coronavirus outbreak, and the effect of the 2020 Regulations, is to require the widespread closure of businesses across Scotland. This has led to both job losses and a reduction in income for many households in Scotland. More tenants in both the private and social rented sectors are finding themselves in financial difficulty due to the pandemic and are unable to meet their obligations under their tenancy agreements. Some applicants may be navigating the welfare system for the first time. In addition, the measures being put in place by the UK Government to support individuals and the economy through this crisis (such as providing 80% of wages, or support for the self-employed) will also not be available for several weeks. For some tenants there will therefore be a short-term challenge in paying their rents as a result of the coronavirus outbreak, and for others it may be longer term.

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21. Under current housing legislation, tenants are at risk of having their home repossessed by their landlord, which could lead to more households becoming homeless and requiring local authority assistance, potentially worsening the health crisis as people in this position will be unable to restrict their movements. Housing, health and other public services are already under acute and ongoing pressure and this pressure would only get worse should there be an increase in evictions in the private rented sector, placing people at risk.

22. The Bill therefore aims to support tenants to be secure during the coronavirus pandemic. It will ensure that they have time to apply for and receive the available support so they can pay their bills in the short term and, if necessary, to give them time to plan for the longer term over this unprecedented crisis. This part of the Bill also supports the Scottish Government's overall objective through the coronavirus outbreak to protect and promote the health of the people living in Scotland, by enabling current public health guidance and regulation to be followed even by those in financial distress as a result of the outbreak.

Policy objectives

23. To protect private and social rented tenants from being evicted from their homes the Bill:

- temporarily extends the notice periods for all evictions, except in certain limited cases. The extended notice periods are either for six months (in most cases) or three months for certain tenant conduct grounds relating to antisocial or criminal behaviour or where a landlord or their family member need to move into the property. No change is made where possession is sought on grounds that the tenant has abandoned the property or where there is suitable alternative accommodation (in relation to an assured tenancy). In a limited number of Short Scottish Secure Tenancies cases in the social housing sector which are coming to an end, and where the landlord wishes to end the tenancy rather than extend it or convert it to a Scottish Secure Tenancy the notice period will be unchanged at two months. There are a very small number of cases in this category, for which the Scottish Government is working with the social housing sector to provide protection to affected tenants. No change will be made in relation to where eviction is sought on the ground that a property is vacant as it will have no impact on dealing with the current crisis.

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- temporarily changes all private rented sector repossession cases going before the First-Tier Tribunal (Housing and Property Chamber) to be considered on a discretionary basis. This ensures the Tribunal is able to take all circumstances of a case into account when determining whether to grant an eviction order and so allows for the individual financial circumstances of the tenant to be taken account of during this crisis. Grounds for repossession are already considered on a discretionary basis in the social rented sector; and
- makes provision for Scottish Ministers to extend the period these changes apply to and gives them the necessary flexibility in relation to the application of these provisions to respond to the uncertainty around the duration of the pandemic.

24. The extended notice periods will apply to notices which are issued after the commencement of the Bill and will apply across the board, for all statutory tenancies currently in existence in the private and social rented sectors, for at least an initial period of six months.

25. These measures will prevent evictions during the coronavirus outbreak, providing certainty for tenants who are concerned about paying their rent and supporting efforts to reduce the spread of the disease by keeping people in their homes, it will also ensure that tenants have time to apply for and benefit from the interventions available to support them to pay their bills before a landlord can take eviction action.

Necessity and urgency

26. The Scottish Household Survey (“SHS”) 2018 annual report found that the private rented sector accounts for around 340,000 households and the social rented sector for an estimated 550,000 households - a total of 1,219,000 people. 13% of private rented households and 22% of those social renting reported not managing well financially. These households are in immediate danger of falling further into serious financial difficulty through being unable to work or job losses caused by the vital measures being implemented to inhibit the spread of the coronavirus. Even where additional financial support is being provided by the UK or Scottish Governments, it will take time to apply for and receive such support.

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27. This is likely to place a significant number of tenants at risk of being unable to afford to pay their rent and other basic necessities in the short term to medium term. Tenants in these circumstances should not face the prospect of eviction during this crisis and should be allowed time to manage and plan for circumstances that have been beyond their control. The Scottish Government therefore considers it a matter of urgency to ensure that tenants receive increased protection from eviction immediately and throughout the period of the coronavirus outbreak. These measures will increase the stability and security of tenants at this difficult time helping people stay in their homes and avoid unnecessary movement and giving them the chance to return to normality after the crisis without losing their homes.

Consultation

28. The Scottish Government is in regular contact with those representing landlords, letting agents and tenants in both the private and social rented sectors, local authorities and the Scottish Housing Regulator. Officials have engaged with them proactively to respond to the needs of tenants and landlords during the period of the coronavirus outbreak. Informal consultation on these specific measures has been undertaken as part of this engagement.

Alternative approaches

29. No alternative to primary legislation is possible. The Scottish Government has not identified any delegated powers which could be used to make these changes to protect tenants.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

30. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

31. The Scottish Government has assessed the potential impact of the proposed measure on human rights. Consideration has been given to the impact of the provisions on a landlord's human rights with regards to their

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ability to be able to regain possession of their property in relation to Article 1, Protocol 1. The Scottish Government's view is that the temporary provisions strikes an appropriate balance between the landlord's rights in the property and the right of the tenant to be protected during a public health emergency like the coronavirus outbreak. A fair balance has been struck by ensuring that the measures are temporary and opting for a limited extension to 3 months' notice in certain appropriate grounds. The maximum period of notice that the landlord will have to provide will be 6 months and the provisions will not affect notices which have already been issued under existing notice periods.

32. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

33. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated. It is anticipated that action to prevent evictions during the coronavirus outbreak will result in a reduced demand for local authority services, including housing services, that will already be under pressure during the outbreak.

34. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Protection for debtors (schedule 2)

The coronavirus outbreak

35. Part 15 of the Bankruptcy (Scotland) Act 2016 ("the 2016 Act") currently provides for a moratorium on diligence for a period of six weeks or more during which creditors cannot take action against a debtor for debts owed by them. This applies on giving of notice by a debtor that they will apply for sequestration, for a protected trust deed for the benefit of creditors or to the statutory Debt Arrangement Scheme (DAS). This creates "breathing

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space” during which the debtor can seek money advice and find the right longer term solution for their circumstances. This is set out in the 2016 Act sections 195 to 198. It is an established and valuable part of what is seen as a world-leading system of helping those in unsustainable debt, as evidenced by recent proposals in England and Wales to introduce a very similar measure. If at the end of the moratorium, having considered their options, it is not appropriate for an individual to enter a statutory debt solution, then they and their creditors return to the position before the start of the moratorium, free to negotiate their own arrangements or for creditors to take formal action to recover outstanding debts.

36. In the current crisis, large numbers of additional people are likely to find themselves unable to repay their debts. For many such people, this situation may be only temporary, and that they will be able to return to making regular repayments as the recovery gathers pace. Others will need to access further help, for example, through one of Scotland’s statutory debt management or relief options. To access these, individuals need to seek the help of a qualified money adviser. But the capacity of the money and debt advice sector to take on large numbers of additional clients in current circumstances is likely to be severely curtailed, especially as people demonstrate a strong preference for face to face advice.

37. The Scottish Government is aware of the many steps creditors such as mortgage providers have taken to provide immediate relief to those who are currently unable to make their regular payments. These are very welcome. For people facing a debt crisis, however, they need more certainty, and the ability to address all of their debts at the same time. The Scottish Government also wants to do what can be done to lift the immediate burden on the debt advice sector; the moratorium is both a quick and light touch process, and those in debt can apply for it themselves. Those who apply for a moratorium have their details placed on the Register of Insolvencies (and are thus notified to all major creditors) so debtors will not lightly enter into these arrangements or abuse the provisions.

Policy objectives

38. The Bill extends the period of any new moratoria to a period of six months and removes the limitation that only one such moratorium can be applied for in any 12 month period.

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39. There may be a concern about the impact on creditors, particularly small creditors. However, the impact here is unlikely to be significant. In the medium term, the analysis produced by HM Treasury to support the “breathing space” proposals shows that allowing individuals time to access qualified debt advice greatly increases the returns to creditors. In the shorter term, where people cannot afford to pay their debts, enforcement action is unlikely to be effective; and would be unlikely to be undertaken at this point even if the majority of creditors had not already set out the additional forbearance they will extend to their customers. The real-world impact is more likely to be around reducing the stress and protecting the mental health of those concerned. The moratorium applies to individuals and legal persons who can apply for bankruptcy under the 2016 Act: trusts, partnerships, and bodies corporate and unincorporated.

Consultation

40. Informal consultation has been undertaken with both debt advice organisations, who strongly support the proposed changes, and with representatives of creditor bodies such as UK Finance and the Association of British Credit Unions. Of direct relevance to the proposal, a formal consultation³ has recently concluded on the reforms introduced by the 2014 bankruptcy legislation. Given the forthcoming introduction of “breathing space” in England and Wales, this consultation included questions on the moratorium. Of the 35 responses to a question of the length of the current moratorium, 69% felt it was not long enough, with the majority of those recommending an extension to 12 weeks.

41. The Accountant in Bankruptcy is the agency responsible for administering the moratorium. They have confirmed to the Scottish Government that they will be ready to implement the new arrangements for whenever the proposed changes come into force. The intention is to free up resources within the debt advice sector, so that these changes should impose no additional costs on them: it is unlikely to result in savings, since the time freed up will be used to help additional clients.

Alternative approaches

42. Extending the moratorium for different time periods was considered, including three months in line with the voluntary creditor forbearance so far

³ <https://consult.gov.scot/accountant-in-bankruptcy/review-of-changes-bankruptcy-and-debt-advice/>

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announced by the financial sector, and up to one year. As with the rest of the bill, the period chosen will be kept under regular review.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

43. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

44. The Scottish Government has assessed the potential impact of the proposed measure on human rights and consider that creditors' rights to recover their debts can be possessions protected by the European Convention on Human Rights, in particular, Article 1 of Protocol 1 which protects property rights.

45. This measure is proportionate and strikes a fair balance between the general interest and the rights of creditors, in the circumstances of the coronavirus outbreak. Generally the Convention recognises privileging the property rights of one individual over another can be a legitimate means for promoting the public interest. The justification is strong because of the time necessary for recovery, and the depth of the economic and personal finance shock coming. Additionally, in respect of individuals, to enter into any of the statutory debt relief or debt management products, as noted they need to go through a money adviser, access to which will be difficult in coming months, so there is a need to protect debtors in the meantime. The period is limited to six months, and the restrictions will only last for a similar period (unless there is justification for extending them). Although creditor businesses must also be able to recover their debts, court business will also be affected by the coronavirus outbreak. Debtors will not lightly use the provisions as they incur the publicity in going on the public register in the first place. The aim is to provide debtors with a breathing space to seek appropriate debt relief and advice on which debt solutions would be the best option.

46. Creditors' claims are not lost, but merely deferred, subject to any ensuing insolvency procedure. It is considered that these mechanisms,

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recognising that insolvency is likely to reduce the value of claims, again in the general interest, are proportionate not to privilege one creditor taking aggressive enforcement action over others, and to give creditors in general a fair return. In the light of the impact of the disease, and the limited burden in the effect on claims, there is a fair balance between the interests of debtors and creditors.

47. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined that these communities are likely to find it harder to access face to face debt advice during the coronavirus outbreak, so both the extended moratorium itself, and the ability for the individual themselves to apply for the moratorium via Accountant in Bankruptcy's website, are likely to be of more use to those in such locations.

48. The Scottish Government has assessed the potential impact of the proposed measure on local government and no adverse effect on local government is anticipated.

49. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Looked-after children and children's hearings (paragraphs 1 to 10 of schedule 3)

The coronavirus outbreak

Panel member requirements

50. Under section 5 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"), a children's hearing generally requires three panel members. Moreover, under section 6 of the 2011 Act, a children's hearing must contain both male and female members. There are ordinarily around 30-35,000 children's hearings and prehearing panels across Scotland each year, serviced by around 2,500 volunteer panel members. Delaying and rescheduling even emergency business because of the non-availability of

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panel members including panels with an appropriate gender balance could leave children vulnerable. Moreover, there may not be enough fit or available panel members due to illness, self-isolation or caring responsibilities to form hearings of three panel member to make decisions to protect children.

Child assessment orders

51. Child assessment orders allow a local authority to make an assessment of a child's health or development, or of the way in which the child has been or is being treated or neglected. They can contain specific requirements such as requiring the taking of a child to any place within 24 hours of the order being granted and keeping them in that place for a specified period, but for no more than three days from the issuing of the order.

52. The Scottish Government is concerned that the potential impact on staffing levels in local authorities during the coronavirus outbreak may mean that assessments are unable to be carried out before the orders expire; of particular concern is the ability of services to deliver the assessment of child protection orders ("CPOs").

53. The coronavirus outbreak will mean that there will be fewer staff available to deal with children's hearings and the number of hearings generated by a CPO.

54. A CPO is an emergency order granted by a sheriff on application by a local authority or other person, where there are reasonable grounds that a child may experience significant harm due to neglect or other treatment. The order authorises a number of matters including keeping a child in a safe place or removing the child to such a place. Sections 45 and 46 provide that where a CPO has been granted by the sheriff, a children's hearing (referred to as a "2nd working day hearing") must be held on the second working day after the day on which the child is taken to the place of safety or the second working day after the day on which the CPO is made, as the case may be.

Compulsory supervision orders

55. As a result of the coronavirus outbreak, there is a risk of reduced capacity to hold children's hearings for reasons of illness or self-isolation or social distancing for children, their relevant persons, or legal representatives, social work professionals, or children's reporters. This will have an impact on

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the ability to meet existing timescales to review a child's compulsory supervision order.

Periods in which certain cases require to be heard

56. When a court makes an order under section 109(7) of the 2011 Act there is a timescale of three days for a children's hearing to be held. This may not be possible during the coronavirus outbreak.

57. When a children's hearing order requires a child to stay in a specified place, section 143 of the 2011 Act provides the relevant chief social work officer with the power to transfer the child out of that place where such a transfer is required as a matter of urgent necessity. This would apply where the best interests of that child (or another child) cannot wait until a children's hearing has been arranged. Section 137(3) of the 2011 Act requires a hearing to be held to review the child's case following an emergency transfer within three days.

58. Due to the coronavirus outbreak there may be a high number of children who need to be moved from their current kinship, foster or residential home in an unplanned way due to illness. The resilience and availability of alternative out-of-authority emergency placements will therefore be impacted and authorities may have more difficulty in sourcing them.

Looked-after children

59. There is an upper limit in law on the number of children who may be placed with a foster carer. Due to the coronavirus outbreak, there is likely be pressure on foster placements should other carers need to self-isolate or seek medical intervention. There is currently insufficient flexibility in the current legislative framework to allow other foster carers to care for additional children if required in these exceptional circumstances.

60. Where a local authority has placed the child, in an emergency, in the care of a kinship carer, there are a number of legislative requirements to review that placement, with various compulsory time scales attached.

61. Due to the coronavirus outbreak, social workers and local authorities will be under increasing pressure and may need to prioritise their resources to help the most vulnerable children in Scotland. This means that there will be an increased risk that they will not be able to comply with these time limits.

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Interim compulsory supervision orders

62. Children may require to be subject to a 22-day interim order, specifying measures for their protection, pending either a grounds hearing, court referral proceedings to consider the grounds of referral, or a deferred hearing as a result of an urgent change to their circumstances which requires further assessment.

63. In the exceptional circumstances of the coronavirus outbreak, the existing time limits for relevant interim orders may limit the ability of those affected to contribute to decisions about their welfare, or for suitable assessments to be made for supporting the child. Flexibility is therefore required to ensure that there are not unnecessary hearings due to the restriction of these time limits.

64. The court in determining an application may also be affected by the coronavirus outbreak and be unable to deal with cases expeditiously due to lack of court capacity. This may increase the need for short term orders every 22 days, which would not necessarily be in the interest of a child.

Timescales

65. As a result of the coronavirus outbreak there is a risk of reduced accessibility to courts due to illness or self-isolation and also from social distancing by children, relevant persons, or legal representatives. These factors will impact on their ability to meet existing appeal timescales or to challenge decisions effectively.

66. In addition, the capacity of the Scottish Children's Reporter Administration ("SCRA") to meet a seven day deadline to lodge an application for proof could be impossible. If the application is not lodged timeously it will become incompetent and the child will not be protected.

67. Courts may also not be able to arrange an application or dispose of an appeal in short timescales, due to the lack of available judiciary or court staff. This could mean that an authorisation or order will expire and place a child at risk.

Dispensing with requirements for personal appearance, etc.

68. There are various provisions of the 2011 Act which require the attendance of persons at a children's hearing or pre-hearing panel, and

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which provide limited scope to be excused. This affects vulnerable children and families most acutely. A strict insistence on personal attendance may not always be practical in the exceptional circumstances of the coronavirus outbreak and may give rise to adverse health risks both for families and children's hearings personnel as well as those who would otherwise be required to attend.

69. Although the legislation already enables children to be excused where there is a risk to the child's physical, mental or moral welfare, in the current situation there are wider risks to all personnel involved in the children's hearing which the Scottish Government is required to take into account. More generally, a whole range of persons have attendance rights, with scope for the hearing to grant permission for the attendance of others. Technological solutions to promote continued child and family participation in 'virtual hearings' are in place, but require adjustments in order to be operable in relation to all relevant circumstances.

Electronic authorisation

70. The decision and reasons of the hearing, as well as other reports, orders or warrants which the hearing issues must be signed by the chairing member of the hearing. The children's reporter must send notification of the decision and reasons, copies of orders issued etc. to the affected child and their relevant persons.

71. The chair of a hearing must currently add a wet signature to any decision made or order issued. This is because a number of Rules in the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 ("the 2013 Rules") refer to the duty on the chairing member to "sign" the record, and there is no provision which allows this to be done electronically.

72. The coronavirus outbreak means that it will not be possible for children's hearings to be carried out in the usual format. The decisions will be made remotely with the panel member in a different place from the children's reporter and the paperwork will not be able to be signed by hand.

Placement in secure accommodation

73. Due to the coronavirus outbreak there may be many good reasons why there cannot be a review hearing lawfully constituted within 72 hours, even

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remotely. The secure accommodation may become affected by the virus in that period, preventing the child being able to be involved in a hearing even remotely in an emergency. There will also be significant challenges with convening a lawful children's hearing within existing timescales in the peak coronavirus outbreak period.

Policy objectives

Panel member requirements

74. The Bill amends the 2011 Act to enable a children's hearing to consist of fewer than three members of the Children's Panel where it would not be practical to comply with that provision because of the coronavirus outbreak. Similarly, the Bill also dis-applies the requirement for male and female panel members to serve on each hearing where it would not be practical to comply with it.

Child assessment orders

75. The Bill contains an extension to the time periods specified in section 35(5) of the 2011 Act to enable local authorities to ensure that they have sufficient capacity to execute the order and arrange and conduct the relevant assessments. This amends the period of effect of a child assessment order from 24 to 48 hours (in relation to when that period begins) and its maximum duration (from 3 to 5 days).

76. The Bill suspends the requirement to hold a second working day hearing outlined in sections 45 and 46 (consequently the possible decisions of the 2nd working hearing under section 47 are also suspended). The Bill also amends sections 48(3), and 51(3) and (4) to provide clarification around the variation or termination of orders normally considered in advance of a second working day hearing. This means that an application to the sheriff to vary or terminate the order can be made up to and including the seventh working day after the day the order was made, giving those affected by a CPO maximum flexibility to make a challenge.

Compulsory supervision orders

77. The Bill provides that no compulsory supervision order will lapse if it has not been reviewed and continued within its time limit, provided it is reviewed and continued within six months of its original time limit. The children's reporter will still be under a duty to arrange a review within the

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normal timescale, but if due to the pressures of the coronavirus outbreak as above the review does not take place, the order will not lapse for a further six months. The child or relevant person, and implementation authority, can also still request a review at any time.

Periods within which certain cases need to be heard

78. The Bill provides for situations where it will not be practicable for there to be a hearing within three working days, due to the likely shortage of social work, reporter, decision-makers, children and families to attend an urgent hearing in the new area.

Looked-after children

79. The Bill removes the upper limit for the period of the emergency to ensure foster carers can look after additional children if required, and where local authorities deem it safe to do so.

80. The Bill extends the timescales for local authorities to carry out reviews of emergency kinship placements, subsequent to approval from their Chief Social Work Officer, and extends the timescales for reviewing pre-existing placements.

Interim compulsory supervision orders

81. To allow more flexibility the Bill extends to 44 days the period of time that an interim compulsory supervision order or interim variation of a compulsory supervision order granted by a children's hearing lasts.

82. In relation to court-granted interim compulsory supervision orders or interim variation of a compulsory supervision orders the Bill provides that they should last for 44 days or such other date as the court determines, allowing flexibility for the circumstances of each particular child.

Timescales

83. In relation to the making appeals against children's hearings decisions, the Bill extends the making of an appeal from 21 days to 42 days.

84. For appeals to the sheriff principal or Court of Session the appeal period is extended to 56 days.

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85. In relation to lodging an application for proof by the Principal Reporter, the timescale is extended to 14 days from 7 days.

86. In relation to a court's disposal of appeals, the Bill extends the timescales for a sheriff determining an appeal against a children's hearing decision to 7 days for all appeals under section 157 of the 2011 Act which includes placing a child in secure accommodation, or a child on interim compulsory supervision orders or interim variation of compulsory supervision orders. The timescale for determination of appeals in relation to certain placements in secure accommodation is also extended to 7 days.

87. In relation to section 109(7) of the 2011 Act, the Bill extends the time limits from 3 to 7 days to allow the interim compulsory supervision order (where the child is ordered to be in a place of safety) to be reviewed by a hearing.

88. The Bill makes no amendment to the requirement of an 8th working day hearing, which will mean that the decision of the sheriff to grant a CPO will be reviewed within 8 working days.

Dispensing with requirements for personal appearance, etc.

89. The Bill makes changes to the 2011 Act and associated 2013 Rules to provide further flexibility to enable a range of parties to be excused from personally attending (whether the child, a relevant or deemed relevant person or any other person who would ordinarily be entitled to attend). The Bill also expands current provisions to require the SCRA to take any reasonable steps to enable participation by way of telephone, through video-link or by using any other method of communication, by any person excused from attending (whether or not at their request).

Electronic authorisation

90. The Bill allows decisions or orders to be authenticated electronically. The chairing member may not have the technological capacity to remotely record and authenticate documents. Therefore, the Bill allows the children's reporter to be able to do that. This will ensure maximum flexibility so that the reporter can still notify decisions, reasons and orders as promptly as possible to those who are affected by them.

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Placement in secure accommodation

91. The Bill allows the 72 hour period to be extended by up to 24 hours if the children's reporter considers it is not practicable to arrange a hearing within 72 hours.

92. The Bill also extends the maximum period during which a child may be kept in secure accommodation without the authority of the children's hearing or the sheriff from an aggregate of 72 hours (whether or not consecutive) in any period of 28 consecutive days to 96 hours.

Necessity and urgency

Panel member requirements

93. Delaying and rescheduling even emergency business because of the need for three panel members or the non-availability of a gender mix could leave children vulnerable.

Child assessment orders

94. Although not a commonly used provision in current practice, current school closures make child assessment orders more pertinent as the cohort of children most likely to be considered under this provision become less visible to other public services such as schools. Therefore the Scottish Government considers that there is the need for orders to ensure assessment of children at potential risk of harm but rendered less visible to social services.

95. The Scottish Government is concerned that the children's hearings system will not be able to cope with the extra overnight administration entailed by convening a second working day hearing at this time, and it is also possible that failing to hold one might mean a legal challenge and orders could lapse. The nature of CPOs mean they are deployed to protect the most vulnerable and the risk of their inadvertently lapsing could place a child at immediate risk.

Compulsory supervision orders

96. Children will be put at risk if their cases are not heard on time as their order will lapse and the protections of the order will no longer apply.

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Period within certain cases need to be heard

97. It will not be practicable for there to be a hearing within 3 working days, due to the likely shortage of social work, reporter, decision-makers, children and families to attend an urgent hearing in the new area.

Looked-after children

98. This response is necessary and urgent to ensure that all looked after children can be safely cared for and removed from harm.

99. This response is necessary and urgent to ensure that all looked after children can be safely cared for, and to allow local authorities to prioritise their resources to support the most vulnerable children in Scotland.

Interim compulsory supervision orders

100. There is a concern about the continuing capacity of the children's hearings system to be able to respond to the administrative requirements for dealing with 22 day repeat hearings at this time and there is a risk that relevant interim orders may lapse leaving a child unprotected. The increased time period being available will allow each child's case to be considered appropriately, particularly where illness has affected them or their families.

Timescales

101. Children will be put at risk if their cases are not able to be lodged timeously, and their rights to challenge decisions will be compromised if they are not able to access legal advice, therefore extending the existing timescales will allow children's rights to be better protected.

Dispensing with personal appearance, etc.

102. Active business and calendar management has driven down numbers of hearings taking place. For the remaining high-risk and time-critical business, it is vital that children and families are not required to attend hearings centres in person.

Electronic authorisation

103. The safety of children could be compromised if those affected by a decision are not notified of it promptly or a procedural challenge was upheld because a decision that hasn't been properly authenticated.

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Placement in secure accommodation

104. The child, family and professionals could be put at risk if there is a requirement to maintain existing practice. The extra 24 hours provides extra flexibility without being disproportionately adverse with respect to the child's rights.

Consultation

105. The Scottish Government has informally consulted the SCRA, Children's Hearings Scotland, Children 1st, Clan Childlaw, the Children and Young People's Commissioner Scotland, the Convention of Scottish Local Authorities, Social Work Scotland, the Independent Care Review, Police Scotland and The Society of Local Authority Reporters and Solicitors. They all contributed to proposed provisions designed to allow essential flexibility in relation to the continuing operation of the children's hearing and related systems to ease the extra pressures of the coronavirus outbreak and to continue to ensure the protection of care measures for the most vulnerable children and were in favour of making these changes in the current context.

Alternative approaches

106. The Scottish Government has engaged with the responsible bodies and officers to ensure that within their various responsibilities and current powers they have acted to minimise the number and range of emergency statutory changes. This activity has included the active cancellation, postponement or early clearance of non-urgent business, the application of technological and practical solutions promoting remote working and social distancing, updated practice directions and the reprioritisation of staff and other available resources. Fundamental administrative, practice and behavioural changes have been fully implemented week beginning 23 March 2020 by partner agencies Relying solely on the discretion and administrative authority of those involved in the system is insufficient to allow the system to continue to provide essential services during the coronavirus outbreak. By making changes to the legal regime, the Bill will enable agencies to take further and more effective steps to focus on the highest-risk cases by dis-applying current provisions around physical attendance, prescribed procedural timescales and lawful composition of hearings.

107. Further action from responsible agencies is limited to some extent by the current legislative framework. The Scottish Government is therefore

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satisfied that this needs to be addressed as a matter of urgency, and that only primary legislation can deliver the changes required.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

108. The Bill is designed to preserve the highest possible sustainable level of services for every child who is referred to the Principal Reporter, and the provisions will not discriminate negatively on the basis of gender, race, age, religion, disability or sexual orientation. In terms of equality, the Bill is designed to strengthen and protect a system that already places the child at the centre – and so looks already to address each child’s individual needs and circumstances.

109. The Scottish Government considers that the provisions of the Bill are compatible with Convention Rights. In the view of the Government, the main articles of the European Convention on Human Rights (“ECHR”) by reference to which issues arise under these Bill provisions are Article 5 (right to liberty and security) and Article 8 (right to respect for private and family life).

110. The Bill engages Article 5 in the context of making provision for the placing of children in secure accommodation, which would amount to a deprivation of the child’s liberty. Furthermore, the Bill makes provision in relation to child assessment orders and child protection orders, which may include measures which (albeit temporarily) deprive the child of their liberty. Such deprivation can be justified because it is pursuant to a lawful order made by an independent and impartial tribunal and is for the broad purpose of the educational supervision of the child. The Scottish Government consider that, insofar as Article 5 is engaged, any deprivation of liberty is justified and strikes a balance between the Article 5 rights of the child and the obligations of the State to protect children, under Articles 2 and 3 of the ECHR.

111. The Bill engages the Article 8 rights of children and their parents on a number of levels. The Bill makes provision in relation to existing measures such as child assessment orders, child protection orders and compulsory supervision orders. In particular, it increases the periods of time such measures can be in place for and when they are to be reviewed. Such

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measures impinge on the private and family life of the child and their parents. Such interferences are, however, in accordance with the law and are potentially necessary for several of the reasons outlined in Article 8(2): public safety; prevention of disorder or crime; protection of health or morals; or for protection of the rights and freedoms of others.

112. The Bill takes account of the UN Convention on the Rights of the Child (UNCRC). For instance, it reflects children's right to life under Article 6 and the obligation of the State to ensure, to the maximum extent possible, the survival and development of the child. The provisions in the Bill also reflect the positive obligation on States to protect children from all forms of abuse and maltreatment, as required by Article 19.

113. The provisions in the Bill will help the hearings system respond to the varied needs and circumstances of island and remote rural communities in a more sustainable and coordinated way, particularly in the context of the coronavirus outbreak making electronically-enabled remote children's hearings the default service.

114. The Convention of Scottish Local Authorities and local authorities have been engaged during development of the provisions of the Bill. The implementation of the measures contained in the Bill will not increase the financial or regulatory burden on local government.

115. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Adults with incapacity (paragraph 11 of schedule 3)

The coronavirus outbreak

Extension of the period of guardianships

116. The Scottish Government is concerned that current rules about the renewal of guardianships will be unsustainable in practice during the period of the coronavirus outbreak. A renewal application has to be submitted to the sheriff court before the expiry of the original guardianship. Once it has been submitted the period of the original guardianship continues until the renewal application has been decided upon by the sheriff. Initial guardianship applications require a summary application from a solicitor, a medical report

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from a registered medical practitioner (normally a GP), a medical report from a doctor specialised in mental health and either a report from a mental health officer (if there is a welfare aspect), or a report from a person with sufficient knowledge of the guardian's ability and of the adult (where there is financial guardianship only).

117. A renewal report is less onerous and requires a summary application by a solicitor, a medical report from a registered medical practitioner, a report from a mental health officer (where there is a welfare aspect) and a report from the Office of the Public Guardian (where there is a financial aspect).

118. If a renewal application does not reach the court by the expiry of the guardianship, then a completely new guardianship application has to be made, with all of the relevant reports. The reports obtained for the renewal application will not be valid for a new application, as they will be out of date. Reports have to be completed not more than 30 days before the lodging of the application at court. There will inevitably be a period between the expiry of the guardianship and the granting of a new guardianship where the adult has no-one to look after their welfare and/or financial affairs.

119. The Scottish Government understands that mental health officer assessments are delayed due to constraints around face to face interviews, and that medical staff who would ordinarily prepare the other reports are otherwise occupied as a result of the coronavirus outbreak. In addition, the courts are now only processing essential business. This is leading to applications for renewal of guardianship not reaching court before the existing guardianship expires, rendering the work put into the renewal reports futile and meaning that additional, unnecessary work is required for the new guardianship.

Extension of section 47 certificates

120. Section 47 certificates are issued by medical professionals under the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"), including by medical practitioners, dental practitioners, opticians, registered nurses and any individual prescribed by Scottish Ministers giving authority to give medical treatment to an incapacitated adult to promote their physical or mental health.

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121. The period of the certificate can last a maximum of one year, or if in the opinion of the person issuing the certificate any of the circumstances prescribed by Scottish Ministers applies as respects the adult, three years.

122. If the person issuing the certificate is of the opinion that that adult's circumstances have changed they can revoke the certificate or issue a new certificate with the same time restrictions as the initial certificate.

123. The Scottish Government has concerns about the ability of relevant professionals (who in most cases will be a registered medical practitioner) to sign the certificate to continue medical treatment, given the coronavirus outbreak. The Mental Welfare Commission advise that it has received calls about doctors being unwilling to enter care homes to sign certificates due to the risk of infection. The relevant professionals are also required to deal with the present crisis and removal of the requirement to sign these certificates would enable them to concentrate on urgent matters.

Section 13ZA

124. The Scottish Government has a concern relating to adults lacking capacity occupying acute hospital beds who are awaiting discharge. Hospitals are looking to increase dramatically the number of beds available to deal with the expected large influx of patients affected by coronavirus and requiring hospital treatment. Adults lacking capacity are often elderly patients with dementia who are at high risk from coronavirus and it is a high priority to move them to somewhere safer and more suitable for their care and treatment.

125. Many of these patients will have already been assessed as being incapacitated under the 2000 Act and will be awaiting appropriate legal authority for discharge. In these situations, a court order such as a guardianship or intervention order under the 1968 Act is generally necessary. The reporting requirements for these orders can require lengthy amounts of time and can result in the adult's discharge being delayed. For cases where a patient has not formally been assessed under the 1968 Act and there are no procedures in process for guardianship orders, etc, the Coronavirus Act 2020 provides a route for quicker discharge.

126. Section 13ZA of the of the Social Work (Scotland) Act 1968 cannot currently be used for cases where there is a guardian, welfare attorney,

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appropriate intervention order or an application for a guardianship or intervention order, or where the adult does not consent.

Policy objectives

Extension of the period of guardianships

127. The Bill automatically extends any guardianship due to expire while it is in force. This will avoid the requirement for renewal of guardianship during the coronavirus outbreak and release the relevant professionals to concentrate on more urgent matters related to the crisis.

Extension of section 47 certificates

128. The Bill automatically extends any section 47 certificate due to expire while it is in force. This will avoid the requirement for relevant professionals to sign certificates continuing the authority for treatment and release them to concentrate on more urgent matters related to the coronavirus outbreak.

Section 13ZA

129. The Bill removes the requirement to adhere to principle 4 of section 1 of 1968 Act: to take account of the views of the adult and of any other interested parties. It will also allow the local authority to take steps in relation to section 13ZA in the interests of expediting a move for the adult out of the hospital where there is a welfare attorney, guardian or appropriate intervention order or an application for a guardianship or intervention order. This will allow the local authority to expedite a move from the hospital to a safer and more suitable place to better meet the needs of the adult.

Necessity and urgency

Extension of the period of guardianships

130. Medical and social work staff are under unprecedented pressures dealing with the coronavirus outbreak. Extending the period of guardianships is required to protect vulnerable adults lacking capacity. Releasing these professionals from the requirement to complete reports for renewal of guardianship allows them to concentrate on more urgent matters and reduces the risk of vulnerable adults being without anyone to look after their welfare, property and financial affairs in a time of crisis.

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Extension of section 47 certificates

131. Vulnerable incapacitated adults receiving medical treatment will not be able to continue to receive this if relevant medical professionals do not sign the section 47 certificate, putting the adult at risk. The measures in the Bill will allow treatment to continue during the crisis period and will release medical professionals to continue with other urgent matters.

Section 13ZA

132. For their own safety, the Scottish Government is concerned to ensure that vulnerable adults who lack capacity can be urgently moved out of acute hospital wards due to the risks associated with the coronavirus outbreak.

Consultation

133. Officials have informally consulted the Office of the Public Guardian and the Mental Welfare Commission on these measures.

Alternative approaches

134. No alternative to primary legislation is possible. Primary legislation is required to modify other primary legislation for a set period of time, rather than making legislative changes that would need to be unpicked afterwards when it was no longer applicable.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

Extension of the period of guardianships

135. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

136. The Scottish Government has assessed the potential impact of the proposed measure on human rights and has determined that it is possible some of the guardianships due to expire within the emergency period would not have been renewed. This would be in keeping with the principle in section

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1(3) of the 2000 Act in that an intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention. Under the provisions of the Bill, they will continue for the period the emergency provisions are switched on. Accordingly, it could be argued that Article 8 (right to respect for private and family life, home and correspondence) is engaged. However, the Scottish Government is content that any infringement is in accordance with the law and is justified as it will protect the individuals health, rights and freedoms and avoid leaving individuals unsupported due to an inability to review. Guardians will require to continue to adhere to Adults with Incapacity principles and respect the adult's human rights.

137. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined that as pressures on professionals involved in renewal of guardianships apply across Scotland it will have no significantly different impact on island communities.

138. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

139. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Extension of section 47 certificates

140. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

141. The Scottish Government has assessed the potential impact of the proposed measure on human rights and has determined that it is possible

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some certificates due to expire within the emergency period would not have been signed again as the adult no longer required treatment. This would be in keeping with the principle in section 1(3) of the 2000 Act in that an intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention. Where treatment is no longer required the power to treat will remain and it could be argued that Article 8 has been engaged. However, in such cases medical professionals will continue to respect human rights of the individual and not interfere as there will be no need to and accordingly the principles of the 2000 Act will be adhered to.

142. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined that as pressures on professionals involved in renewal of guardianships apply across Scotland it will have no significantly different impact on island communities.

143. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

144. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Section 13ZA

145. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined that it is important that adults lacking capacity are treated equally to those having capacity. An adult with capacity who no longer required treatment could be quickly discharged due to the present emergency and this should equally apply to an adult lacking capacity but who has a guardian or welfare attorney.

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The local authority will have powers to move an incapacitated adult under this section and human rights considerations are dealt with below.

146. The Scottish Government has assessed the potential impact of the proposed measure on human rights. Provisions related to section 13ZA remove the requirement to consult with the adult or interested parties and also allow the local authority to use the powers in section 13ZA where there is an existing guardian, welfare attorney or intervener with relevant powers.

147. Article 5 of the ECHR (the right to liberty and security) could be engaged in particular with these amendments as they could be used to empower the local authority to speedily move adults from acute hospital beds to other more appropriate accommodation. Article 5 states:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:...

...(e) the lawful detention... of persons of unsound mind...”

148. Where the amendments to section 13ZA are utilised to provide services to the adult by way of moving them in to a care home, Article 5 ECHR will be engaged. However, this will be in accordance with a procedure prescribed by law and the adult will be able to bring judicial proceedings to challenge this. In fact, most are likely already to have a guardianship application in process.

149. Article 8 (right to respect for private and family life) may also be engaged here in that local authorities can provide services without involving the views of the adult, or other relevant party including any guardian, welfare attorney or intervener. However, the Scottish Government is satisfied that this interference would be legitimate, proportionate and justified in that the services would be provided more quickly to protect the health, rights and freedoms of the adult.

150. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers’ opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact

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of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

151. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

152. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Electronic signatures and transmission of documents (paragraph 1 of schedule 4)

The coronavirus outbreak

153. During the coronavirus outbreak, the existing requirement for physical signature and transmission in relation to a large number of varying documents forming part of criminal and civil procedure exposes justice officials, legal practitioners and others unnecessarily to increased risk of infection. The new public health guidance regarding self-isolation and social distancing means that the general administration of justice cannot practicably continue to be organised in the normal way.

154. Existing signature requirements mean that justice officials need access to secure printing facilities; a requirement which is incompatible with home working arrangements. Service and lodging requirements in civil and criminal procedure mean that police officers, court officers, legal practitioners and others are routinely involved in the physical movement of hard copy documents, such as orders, motions, interdicts, warrants and citations. These existing requirements in combination mean that existing tools, already available across the justice system, cannot be utilised to support continued effective operations during the period of coronavirus outbreak.

155. With many sheriff courts closed and large numbers of justice officials and legal practitioners working from home in compliance with public health guidance there is an urgent need to enable a system of electronic signature and transmission to allow essential administration of justice to continue.

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156. These provisions aim to minimise the requirement for court personnel, officers of court and legal practitioners acting on behalf of parties to proceedings to be physically in contact or on justice premises and will allow justice organisations the flexibility they require properly to prepare for a possible escalated health response.

Policy objectives

157. The Bill will allow documents produced by a court or tribunal, or connected with criminal or civil proceedings, to be signed and transmitted electronically, removing the existing requirement for physical movement and contact. This will enable documents to be sent, served and lodged by email or other electronic means.

158. The provisions are broadly drafted and will extend to all types of documents associated with court and tribunal proceedings. This includes documents which initiate proceedings, like complaints and indictments in criminal proceedings or initial writs, summary applications, or notices of appeal in civil proceedings. The provisions (taken together with the provisions in relation to the suspension of requirements for physical attendance) will also enable a fully digitised process for the obtaining of search warrants in the course of criminal investigations.

159. Specific provision is made to enable service of documents in both civil and criminal proceedings to be lawfully affected by electronic means on a person's solicitor. In criminal proceedings this will allow service on an accused's legal representative. This recognises that the prosecutor might not have a means of transmitting documents electronically to an accused person directly since there is no existing requirement on an accused person to provide an email address. It also generally takes account of the potential for a reduced and restricted postal service during the course of the outbreak and the fact that many offices which would normally take receipt of documentation for service will be closed.

160. It will be open to the Lord President of the Court of Session or the Lord Justice General specifically to exclude from the effect of these provisions any category of documents where it is considered that existing provision for physical signature or transmission should continue to apply.

Necessity and urgency

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161. As justice organisations, justice personnel and legal representatives comply with public health guidance, the routine administration of criminal and civil business is becoming increasingly challenging due to the existing emphasis on physical processes. Digital tools exist which will significantly assist the ability of the justice system to continue to deliver essential justice services and business during the coronavirus outbreak and there is an urgent need to enable the changes set out in this Bill.

162. There is a continued need for police (and other reporting bodies) to seek warrants for urgent searches during the period of coronavirus outbreak. Current processes based on the physical transfer of documents between parties carries unnecessary risk of infection spread and runs counter to government public health guidance.

Consultation

163. There has not been any opportunity to undertake formal consultation, though the provisions in the Bill have been discussed with Police Scotland, Crown Office and Procurator Fiscal Service (COPFS) and Scottish Courts and Tribunals Service (SCTS).

164. These provisions have been identified by those parties as a key measure to provide for the continued operation of courts and tribunals as a result of the coronavirus outbreak, to allow both civil and criminal proceedings to be conducted in a way which will minimise unnecessary travel and congregation of people, and which will save time for those involved in critical front line service delivery.

Alternative approaches

165. No alternative approaches have been identified which would provide the degree of operational flexibility required by justice organisations to maintain the delivery of essential court and tribunal business during the period of coronavirus outbreak.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

166. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not

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unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

167. The Scottish Government has assessed the potential impact of the proposed measure on human rights and is satisfied that the measures will not impact on the ability of the courts to operate in accordance with ECHR noting the ability of the Lord President and Lord Justice General to make exceptions.

168. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

169. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

170. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Suspension of requirements for physical attendance and attendance by electronic means (paragraphs 3 to 4 of schedule 4)

The coronavirus outbreak

171. At present, hearings in both criminal and civil procedure are usually required to be held in person in a court or tribunal building, with all parties either being physically present themselves or represented by an agent who is physically present at the hearing. During the coronavirus outbreak, this

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exposes them and others to increased risk of infection. The new public health guidance regarding self-isolation and social distancing mean that hearings cannot practicably continue to be organised in the normal way. These provisions aim to minimise the requirement for justice officials and parties to proceedings to be physically present in court and tribunal buildings and will allow justice organisations the flexibility they require properly to prepare for a possible escalated health response.

Policy objectives

172. The Bill provides that any participant in either criminal or civil proceedings (judge, tribunal members, clerk, legal representatives, parties to proceedings, accused, convicted persons, appellants, witnesses) can take part in any proceedings by way of live visual (television) or audio (telephone) link from any location. This will extend to the ability to conduct fully audio or video-enabled procedural hearings, where no one is physically in the same place, or in a court or tribunal building.

173. The provisions create a default position in which requirements for physical attendance at any court or tribunal hearings are suspended. This presumption can be overridden by the court or tribunal in any case by directing the physical attendance of any party.

174. In relation to criminal and civil trial diets however, the usual rules regarding physical attendance of all parties will continue to apply. However, the Bill provides courts with the flexibility to direct the appearance of any participant by electronic means instead.

175. The Bill recognises the importance of safeguarding the rights of parties to proceedings and ensures that attendance by electronic means will occur only where it will not prejudice the fairness of proceedings, or otherwise be contrary to the interests of justice.

176. Specific provision is made in relation to trial diets in recognition of the importance of parties being able to participate effectively by seeing and hearing all of the other parties and court officials involved in the proceedings.

177. The 2020 Act contains similar provisions for England and Wales.

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Necessity and urgency

178. The requirement for parties and justice personnel to attend all court and tribunal hearings in person is unsustainable during the coronavirus outbreak. Mandatory attendance at court and tribunal exposes parties, victims, witnesses, accused people, justice workers, legal representatives and members of the public to unnecessary increased risk of infection and runs contrary to the new public health guidance. Digital tools exist to allow the risk to be mitigated; this legislation will allow this technology to be appropriately leveraged. In addition, the ability for medical professionals and police officers to give evidence by live link will mitigate the time they are required to be involved and immediately free up resource to focus on delivery of critical front line services.

179. It is essential that the justice system continues to function during the coronavirus outbreak to keep our communities safe. If trials, proceedings or other hearings are unable to run due to the inability of parties or officials to attend court or tribunal in person, this will result in parties being unable to initiate proceedings or bring cases to a conclusion in a reasonable timeframe. This could have unacceptable consequences, for example detained people being held for unacceptably long times in custody which would in turn increase pressure on prisons at a time when demands are already increased as a result of the coronavirus outbreak. There is an immediate and urgent need for justice organisations to plan essential business during the period of coronavirus outbreak on the basis of the increased operational flexibility provided for in the Bill.

Consultation

180. No formal Scottish Government consultation has taken place. However, the Scottish Government has discussed these provisions with the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunal Service. They have been identified as a key measure to provide for the continued operation of criminal and civil courts and tribunals as a result of the coronavirus outbreak, to allow proceedings to be conducted in a way

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which will minimise unnecessary travel and congregation of people, and which will save time for those involved in critical front line service delivery.

Alternative approaches

181. No alternative approaches have been identified which would provide the degree of operational flexibility required by justice organisations to maintain the delivery of essential court and tribunal business during the period of coronavirus outbreak.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

182. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

183. The Scottish Government has assessed the potential impact of the proposed measure on human rights and is satisfied that the measures will not impact on the ability of the courts to operate in accordance with ECHR. The courts retain power to override the presumptions against physical attendance and attendance by electronic means is not possible if it would prejudice the fairness of proceedings.

184. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

185. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

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186. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Fiscal fines (paragraph 7 of schedule 4)

The coronavirus outbreak

187. The coronavirus outbreak poses significant challenges for the continued effective operation of business in the criminal courts and is likely to result in significantly reduced capacity to proceed with court hearings. This is due to the depletion of operational resources arising from potential court closures, illness and the self-isolation of key workers in accordance with the new public health guidance measures.

Policy objectives

188. The Scottish Government considers providing for the expansion of the use of alternatives to prosecution by increasing the maximum available fixed penalty available to Procurators Fiscal will allow a greater range of cases to be considered for disposal outwith the court system. Cases which would otherwise not have been capable of disposal with fixed fines will now be capable of being dealt with in this way. This will enable justice to be done in individual cases while easing the burden on the criminal courts which will be beneficial during the coronavirus outbreak.

189. In general terms, fiscal fines are a means of allowing less serious offending behaviour to be appropriately dealt with outwith the criminal courts. They allow the Procurator Fiscal to issue a conditional offer in relation to any offence which can be tried summarily (under the Criminal Procedure (Scotland) Act 1995, any such offence is known as a “relevant offence”). An alleged offender accepts the conditional offer by making payment to the court and any liability to conviction of the offence is thereby discharged. The alleged offender can refuse the conditional offer by giving notice to the court.

190. At present, the maximum level of a fiscal fine is set at £300 by virtue of section 302(7A) of the 1995 Act. The current level of £300 was set through the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. By increasing the available upper limit from £300 to £500, this will allow a greater number of cases to be diverted from summary court proceedings. This will enable such cases to be resolved without the need for court procedure and

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associated appearance at court. It will also free up the courts and prosecutors to deal with more serious cases and ease the burden on the courts during a time of significant resource pressure as a result of coronavirus.

191. Therefore, the Bill increases the available maximum fixed penalty under section 302(7A) of the 1995 Act so the maximum penalty that may be prescribed is now £500.

192. Any penalties offered by a prosecutor must reflect the scale prescribed under section 302(7) of the 1995 Act (by virtue of section 302(2)(b)(i) and (9)(b)). The standard scale is set out in the Criminal Procedure (Scotland) Act 1995 Fixed Penalty Order 2008 (S.S.I. 2008/108) and contains seven levels of fixed penalty which may be offered by a prosecutor, currently ranging from £50 to £300. Therefore, in order to give practical effect to the increase in the maximum available fixed penalty, the Scottish Ministers have amended this Order so as to prescribe a new scale of fixed penalties to reflect the increased maximum fine level.

193. The Bill therefore creates a new scale of fixed penalties. Seven levels of fixed penalties remain but these now range from £50 to £500. The new increments allow the option for proportionate penalties to be issued by prosecutors for lower level offences while also providing a higher maximum penalty for appropriate cases.

Necessity and urgency

194. The coronavirus outbreak creates barriers to the continued effective operation of criminal court business and access to justice. This legislative change is a key measure in helping to reduce the burden on our courts in the face of these challenges while ensuring that justice can still be administered.

Consultation

195. No formal Scottish Government consultation has taken place. However, the Scottish Government has discussed these provisions with the Crown Office and Procurator Fiscal Service. This has been identified as a key measure to expand the available use of alternatives to prosecution as a means of reducing operational pressures as a result of coronavirus.

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Alternative approaches

196. An alternative approach would be to do nothing and retain the current level of available fiscal fine, with an upper limit of £300.

197. The Scottish Government is of the view that this legislative change is a key measure in helping to reduce the number of summary proceedings during the coronavirus outbreak while ensuring that justice can still be administered.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

198. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

199. The Scottish Government has assessed the potential impact of the proposed measure on human rights and has considered that ECHR issues do not arise. Fiscal fines have been an integral part of the Scottish criminal justice system for more than 20 years and although legal challenges do occur from time to time, the Scottish Government is not aware of any specific ECHR issues in relation to increasing the amount of such fines. In any event, if there were to be any specific ECHR issues, these would relate to the existing system of fiscal fines rather than to the change in the maximum level of a fiscal fine.

200. Moreover, fiscal fines are not mandatory penalties and allow the alleged offender to refuse the conditional offer by giving notice to the court to that effect. In such an event, the refusal is treated as a request by the alleged offender to be tried for the offence in which case the procurator fiscal will then decide whether to prosecute. Any resulting criminal proceedings would be compliant with the alleged offender's Article 6 rights.

201. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on

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an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

202. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

203. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Cases beginning with an appearance from custody (paragraphs 8 to 9 schedule 4)

The coronavirus outbreak

204. In response to the coronavirus outbreak, Police Scotland are intending to put into operation a contingency plan which involves moving to a smaller number of more centralised custody suites. The consequence is that, for some of those held in police custody, it will not be possible for their first court appearance to take place in a court in the sheriffdom where the relevant offence was allegedly committed. Prisoners in this situation will have been transported some distance from that area to one of these centralised custody facilities, and their first appearance will need to be in a court which is local to the relevant facility.

205. As with all areas of the workforce, there is also a separate concern that availability of sheriffs will likely reduce as individuals become ill and self-isolate. With that in mind and following engagement with SCTS, the Scottish Government want sheriffs to be able to deal with appearances from police custody, and any continuation of a case up until a plea is tendered, where the alleged offence did not take place in their sheriffdom, and also where the accused is not appearing in their sheriffdom. An example of such a situation might be where an individual is arrested in, for illustrative purposes, Stonehaven for a crime allegedly committed there and is then taken to a centralised custody facility in Dundee, appears the next day at Dundee Sheriff Court, where they may be dealt with by a sheriff from Lothian and Borders, likely via video link.

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206. The normal rule is that criminal proceedings before a sheriff court must take place in a court in the sheriff court district where the offence was allegedly committed. While there are various qualifications of the general rule contained in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), none of these would allow the general position to be departed from for custody appearances based on an operational decision made by the police, or would confer power on a sheriff, to act outside his or her own sheriffdom (for example, the provision enabling an offence to be tried in any other sheriff court district within the same sheriffdom under section 4(2) of the 1995 Act; and the provisions referred to in section 10A(1) of the 1995 Act, dealing with jurisdiction for transferred cases).

207. Although there is some provision for transfers between sheriffdoms, this is by judicial order on an individual basis, rather than being generally permitted (for example, provision contained in section 34A of the 1995 Act, which provides for the transfer of petition proceedings outwith sheriffdom).

Policy objectives

208. The Scottish Government considers that providing for a new national jurisdiction for dealing with appearances from custody will create the necessary flexibility so as to allow implementation of Police Scotland and SCTS’s contingency plans in response to the coronavirus pandemic.

209. Accordingly, the Bill makes provision that, for the purpose of dealing with an individual appearing from police custody, and any continuation of the case up until a not guilty plea is tendered (if that occurs), a sheriffs’ jurisdiction is not territorially limited but instead extends throughout Scotland.

Necessity and urgency

210. This legislative change is a key measure to provide the necessary flexibility to allow for police centralised custody suites and the effective continued operation of custody courts in line with public health guidance. The measure would also facilitate compliance with public health requirements in response to the coronavirus outbreak. National jurisdiction will enable centralised processing of custodies minimising the requirement to operate multiple court sites and custody facilities and unnecessary exposure to infection for all court users.

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211. The Scottish Government is satisfied that these measures could be required to be used urgently.

Consultation

212. No formal Scottish Government consultation has taken place. However, the Scottish Government has discussed these provisions with the COPFS and the SCTS. This has been identified by these stakeholders as key measure to provide for the continued operation of custody courts as a result of the coronavirus outbreak and for such courts to be conducted in a way which will minimise unnecessary travel and congregation of people.

Alternative approaches

213. An alternative approach would be to do nothing and retain the status quo for custody jurisdiction, relying on existing mechanisms for transferring business and judiciary between sheriffdoms. After considering the views expressed by COPFS and the SCTS, the Scottish Government considers these existing mechanisms are procedurally intensive and not an appropriate means of dealing with the pressures placed on the courts by the coronavirus outbreak. On this basis, the Scottish Government is of the view that primary legislation concerning the making of a court appearance from police custody is the only practical way to ensure the continued operation of custody courts during the coronavirus outbreak.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

214. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

215. The Scottish Government has assessed the potential impact of the proposed measure on human rights and does not consider it impacts on the requirements for a fair trial.

216. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or

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service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

217. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

218. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Extension of time limits (paragraph 10 of schedule 4)

The coronavirus outbreak

219. There are a number of time limits applicable to criminal proceedings. These are set out in the Criminal Procedure (Scotland) Act 1995 and are intended to prevent, insofar as possible, undue delays in the criminal trial process, which can negatively impact on accused persons, victims and witnesses.

220. It is highly likely that the coronavirus outbreak will lead to time limits not being met because of its impact on the ability of the courts to conduct criminal trials, including by reason of the impact on the availability of sheriffs, court staff, COPFS staff, witnesses and defence agents. The Bill contains measures which will raise the level of fiscal fines to enable more cases to be diverted out of the summary trial process. However, if, as seems likely, the coronavirus outbreak results in significant staff absence across the justice sector, it is inevitable that there will be large numbers of cases that are delayed for various reasons.

221. In particular, the Scottish Government is concerned that time limits for solemn cases will not be met as a backlog develops. While time limits in criminal procedure are generally capable of being extended where sufficient justification exists for doing so, and the coronavirus outbreak would probably be accepted by the courts as sufficient justification, this would potentially require a very large number of individual extensions to be sought which could

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in itself cause significant difficulties in the context of a justice system which may become depleted as judges, sheriffs, prosecutors and defence agents become unwell or self-isolate.

Policy objectives

222. The Bill makes provision to suspend the time limits contained in the 1995 Act so that, from the coming into force date of these provisions, there is a period during which a 6 month extension will be made to all time limits in effect on the date of commencement or taking effect during the period in which this provision has effect, with the exception of those limits relating to summary cases where the accused is held in remand, where the extension has effect for a 3 month period. This takes account of the fact that the maximum sentencing power of the summary courts is 12 months imprisonment and, under current early release rules, someone receiving a 12 month sentence would be released from custody after 6 months. There is therefore a small risk that a person remanded in custody in a summary case could spend longer in prison than the maximum time that the court could sentence them to imprisonment for if a 6 month extension were provided for in such cases.

223. The time limits to which the provision applies are those at section 65 of the 1995 Act which sets various time limits in respect of trials under solemn procedure, section 136, which requires that proceedings in summary cases must commence within 6 months of the alleged offence, section 147, which makes provision for summary procedure in cases where the accused has been held on remand, and section 52T, which applies the custody time limits in section 65 and 147 where the accused is detained in hospital because of an assessment order or a treatment order.

224. Section 65 provides that:

- if accused is being held on remand, the indictment must be served within 80 days, failing which there is an entitlement to bail,
- if the accused is being held on remand and an indictment has been served for the High Court, the preliminary hearing must commence within 110 days, failing which there is an entitlement to bail,
- if the accused is being held on remand and an indictment has been served in respect of the High Court, trial must commence within 140 days, failing which there is an entitlement to bail,

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- if the accused is being held on remand and an indictment has been served in respect of the sheriff court, the same deadlines apply except that time to first diet replaces time to preliminary hearing,
- whether or not the accused is in custody, where an indictment has been served in respect of the High Court the preliminary hearing must commence within 11 months of service, failing which the accused is entitled to be discharged,
- whether or not the accused is in custody, where an indictment has been served in respect of the sheriff court, the first diet must commence within 11 months of service, failing which the accused is entitled to be discharged,
- whether or not the accused is in custody, the trial must commence within 12 months of the accused's first appearance on petition, failing which the accused is entitled to be discharged.

225. Section 147 provides that a person charged with an offence in summary proceedings shall not be detained in that respect for a total of more than 40 days after the bringing of the complaint in court unless their trial is commenced within that period, failing which they shall be liberated forthwith.

226. There is also provision at section 201 of the 1995 Act to enable the court to adjourn a case prior to sentencing for up to four weeks, or eight weeks, where the time limit is extended on cause shown, to enable inquiries to be made. Often this takes the form of obtaining a Social Inquiry Report. It is anticipated that it will become difficult to obtain such reports over the coming months, due to the impact of the coronavirus outbreak on criminal justice social workers and the need to prioritise urgent business in this area. The Bill therefore provides the courts with a power to adjourn a case prior to sentencing for such period as it considers appropriate, removing the four and eight week limits.

Necessity and urgency

227. The number of people who are expected to have to self-isolate or otherwise limit their movements because of the coronavirus outbreak are such that it is anticipated that there will be large numbers of criminal cases where hearings would otherwise have to take place on an individual case to extend the various statutory time-limits set out in the 1995 Act. This measure

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seeks to minimise the need for large numbers of hearings to take place to extend time limits for the same underlying reasons.

Consultation

228. No formal Scottish Government consultation has taken place. However, the Scottish Government has discussed these provisions with COPFS and SCTS. This has been identified as key measure to ensure the efficient operation of court business during the coronavirus outbreak and for court business to be conducted in a way which will minimise unnecessary travel and congregation of people.

Alternative approaches

229. An alternative approach would be to do nothing. This would mean that the existing time limits would continue to operate as they do at present. The courts do have a power to extend the time limits in individual cases where there is sufficient justification to do so and it is not unusual for this to happen. However, requiring the courts to continue to consider requests to extend time limits on a case-by-case basis risks placing a significant additional burden on the justice system, in terms of requiring additional hearings to consider large numbers of requests for an extension for reasons related to the coronavirus emergency and, for people to have to congregate in open court for these hearings to take place.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

230. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

231. The Scottish Government has assessed the potential impact of the proposed measure on human rights and has determined that the provisions have the effect of increasing the maximum time period that an accused person can be held on remand prior to trial, together with other time limits for progressing a criminal case including the maximum wait prior to trial where the accused is not in custody. However, the Scottish Government does not

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consider that these increases are incompatible with the right guaranteed by Articles 5(3) and 6(1) to a trial within a reasonable time. The increases are necessary to address the disruption to the justice system that is already being caused by the coronavirus outbreak. In any individual case, where an accused is brought before the court for a custody hearing, in determining whether to grant bail, the court requires to consider the accused's Article 5 and 6 rights in deciding whether it is appropriate to grant bail. Furthermore, an accused person can, at any time, apply to the court for a bail review under section 30 of the Criminal Procedure (Scotland) Act 1995 to enable the court to determine whether their continued detention is justified. The courts remain subject to the requirement to ensure that there is a fair and public hearing within a reasonable time.

232. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

233. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

234. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Conduct of trials on indictment (paragraph 11 of schedule 4)

The coronavirus outbreak

235. Serious criminal cases are dealt with under solemn procedure in Scotland. The Crown will generally prosecute under solemn procedure where the sentence on conviction is expected to exceed twelve months' imprisonment or detention. It includes the most serious crimes which may only be prosecuted in the High Court such as homicide and rape. All such cases are heard in the High Court or the Sheriff Court by a judge sitting with

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a jury of 15 people. In the context of coronavirus, it is not appropriate to expect members of the public to undertake this civic duty as it would require them to be in close contact with a number of other individuals both in the context of empanelling the jury and during jury service.

236. It is for this reason that as of 17 March 2020 the SCTS confirmed that no new criminal jury trials will be commenced or new juries empanelled until further notice. It was also advised that where jury trials had already commenced these would run to conclusion of the trial, if practical to do so.

237. This position will be regularly reviewed but the effect is that for the immediate future it would, in the absence of this legislation, be impossible to bring any solemn case to trial.

Policy objectives

238. The provisions in the Bill would enable trials on indictment (solemn cases) to be conducted by the Sheriff or by a High Court Judge. This means that they would consider and decide the verdict in these cases rather than a Jury.

239. The state has a responsibility to maintain an effective criminal justice system. That is reflected in positive obligations under Articles 2, 3, 5 and 8 ECHR. The provisions in the Bill would allow at least some trials of the most serious offences to continue to take place notwithstanding the social distancing requirements.

240. Without these provisions, no trials on indictment could take place until it is possible to resume jury trials. This would not only delay the resolution of cases which have already been indicted, but would result in a mounting backlog as additional cases are indicted. The delays involved would have adverse impacts on accused persons (including accused persons detained on remand) and on victims of crime, as well as on the effective administration of justice.

241. Judges act independently and impartially and possess the skills to deal objectively with evidence and to assess the credibility and reliability of witnesses. In Scotland, they already undertake this role in summary criminal trials. Other jurisdictions prosecute serious crime by means of judge trial. A

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judge conducting a solemn trial will require to give reasons for the verdict, and an appeal will be available in accordance with the existing rules.

242. The change is proposed only for the period of this emergency to seek to enable some cases to continue to be brought to trial, and to avoid the backlog of the most serious cases becoming unmanageable. It is Scottish Government policy that there should be a return to jury trials as soon as it is considered feasible.

243. This solution is however only to be considered as an emergency measure to be able to deal effectively with the impact of the coronavirus outbreak on the most serious cases in the criminal courts. For that reason, it would not come into effect immediately. The provision in the Bill provides that Ministers would only commence this exceptional measure by secondary legislation if they consider it is necessary and proportionate to do so to ensure that the criminal justice system continues to operate effectively during the period and immediate aftermath of the coronavirus outbreak.

Necessity and urgency

244. There would be significant and negative implications for the effective operation of our criminal justice system if no serious trials were able to commence during the period of this coronavirus outbreak. This would adversely affect the effective administration of the system by reason of the effects of delay, by reason of the backlog arising (and the consequence which that would have on timescales for bringing cases to trial). It would also mean that individuals would be held on remand with no prospect of a trial for an extended period and vulnerable witnesses and complainers not having any opportunity for their evidence to be heard in these most serious of cases. Such a situation would affect public confidence in the criminal justice system.

245. Enabling trials on indictment to proceed before a judge only is a significant change and therefore the principle of that change requires to be affected by primary legislation.

Consultation

246. SCTS and COPFS have been involved in the development of these provisions. There has been informal consultation with the representatives of the legal sector, third sector and human rights organisations.

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Alternative approaches

247. Without primary legislation, all solemn trials would be effectively suspended indefinitely. This would provide no flexibility if during the coronavirus outbreak it was considered necessary for some solemn trials to commence, particularly taking into account the position of those on remand, victims and witnesses and the overall impact on the operation of the criminal justice system and public confidence in it.

248. The Scottish Government considered whether a panel of judges rather than a single judge should sit in solemn cases, but this was not considered a workable option and more fundamentally the composition of Judicial benches is a matter for the senior judiciary.

249. The Scottish Government considered whether to have smaller juries, but determined that this would be an ineffective and disproportionate approach. Of particular importance during the coronavirus outbreak is the consideration that even smaller juries would still not be able to function effectively while complying with the requirement for social distancing and larger numbers would still require to attend for the purposes of empanelling.

250. The Scottish Government also considered whether it would be possible to have “remote juries” who would be able to watch the proceedings via live TV link. This was not however considered feasible. There would be a number of significant problems with making this change work in practice: for example how jurors would be empanelled for each trial and continuing public health concerns with numbers of jurors being located together to watch the proceedings by live link or during deliberations. Further, if jurors were to watch proceedings remotely and from different locations it would be difficult to secure the integrity of the process.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

251. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

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252. The Scottish Government has assessed the potential impact of the proposed measure on human rights. The provision does not alter the fundamental right to a fair trial. Article 6 ECHR does not give a right to jury trial. Trial without jury is a longstanding part of the Scottish system through summary trials. Further, the State has a responsibility to maintain an effective system of criminal justice and that is reflected in positive obligations under Articles 2, 3, 5 and 8 ECHR and to bring accused persons to trial within a reasonable time. The proposal will support respect for those rights.

253. This solution is however only to be considered as an emergency measure to be able to deal effectively with the impact and immediate aftermath of the coronavirus outbreak on the most serious cases in the criminal courts. For that reason it would not come into effect immediately. The provision in the Bill provides that Ministers would only commence this exceptional measure by secondary legislation if they consider it is necessary and proportionate to do so to ensure that the criminal justice system continues to operate effectively during the coronavirus outbreak.

254. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

255. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

256. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

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Exceptions to the rule that hearsay is inadmissible (paragraph 12 of schedule 4)

The coronavirus outbreak

257. The coronavirus outbreak is likely to result in some numbers of witnesses being unable to attend court to give evidence in person or to give evidence in any other competent manner.

258. Generally speaking, hearsay evidence, that is evidence that a statement was made by a person otherwise than while giving evidence in court, is inadmissible as evidence in criminal proceedings in Scotland. However, section 259 of the Criminal Procedure (Scotland) Act 1995 permits statements to be used in evidence in court where a person is, among other things, unfit to give evidence.

259. Section 259 provides that evidence of a statement made by a person otherwise than while giving evidence in court shall be admissible as evidence of any matter contained in the statement as long as the judge is satisfied of the matters contained in section 259(1)(a)-(d). Any statement taken from a person which has been signed by that person or where what was said by a person has been recorded electronically will constitute a statement for the purposes of section 259.

260. The Judge requires to be satisfied that the maker of the statement will not give evidence for one or other of a number of reasons detailed in subsection (2). By way of example one of the categories under section 259(2)(a) is where the person:

“(a) is dead or is, by reason of his bodily or mental condition, unfit or unable to give evidence in any competent manner;”

261. The existing provisions are not considered sufficient to allow them to be used in some circumstances that might arise as a result of the coronavirus outbreak. By way of example, as a result of self-isolation measures, it may not be possible for some witnesses to give evidence in any competent manner even if they do not come under the scope of section 259(2)(a).

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Policy objectives

262. This measure should be considered along with the provisions which allow witnesses to give evidence remotely. These provisions taken together are designed to minimise the need for witnesses to attend personally at court, but, rather, to enable witnesses to give evidence remotely, or for their evidence to be introduced by statement. The provisions, taken together, provide flexibility as regards the way in which evidence can be introduced.

263. Nothing in these modifications detracts from the duty of the court to consider the fairness of the trial and to keep the fairness of the trial under review. Nor does it detract from ECHR requirements. Judges will assess the weight to be attached to evidence introduced by statement and may be expected to take into account the fact that it has not been given on oath or subject to cross examination. In appropriate cases, they may disregard such evidence or direct the jury to disregard it.

Necessity and urgency

264. The coronavirus outbreak creates barriers to the continued effective operation of criminal court business and access to justice. This legislative change is a key measure in helping to minimise the impact of the outbreak on the ability of courts to proceed with trials and so ensure that the justice system continues to operate as effectively as possible.

Consultation

265. No formal Scottish Government consultation has taken place. However, the Scottish Government has discussed these provisions with COPFS and the SCTS. This has been identified as key measure to minimise the impact of the coronavirus outbreak on court business and enable trials to proceed in cases where witnesses are unable to give evidence.

Alternative approaches

266. An alternative approach would be to do nothing. It is considered that there would be a real risk that some trials would not be able to proceed, because one or more witnesses are not able to give evidence in person or remotely.

267. There are measures contained in the Bill to expand the use of evidence taken remotely by video-link. However, as noted above, there will be cases where witnesses cannot give evidence in such a manner.

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Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

268. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

269. The Scottish Government has considered the implications of this provision in relation to the ECHR. As per Article 6 ECHR (right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law), in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. One of the minimum rights is the right to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. However, there is no absolute rule that the defence must have some opportunity to question every witness.

270. The judge is required to take the requirements of a fair trial into account in deciding whether the statutory criteria for the admission of the evidence have been satisfied and any decision that a statement is admissible may be changed later if the trial develops in such a way as to render it inadmissible because, for example, it has become clear that to admit it would be to act incompatibly with the ECHR. Although the provision engages Article 6, the fact that the judge is under a duty to keep the fairness of the trial under review means that the provision is not incompatible with any of the Convention rights.

271. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

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272. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

273. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Community orders (paragraphs 13 to 17 of schedule 4)

The coronavirus outbreak

274. As a result of coronavirus, local authority justice social work services are experiencing significant difficulties in continuing to implement community orders (which contain requirements such as unpaid work and supervision). This is due to a combination of sickness, self-isolation, and compliance with guidance on social distancing, all of which are affecting both staff and individuals on orders.

275. Local authorities are currently having to severely restrict the provision of unpaid work in particular, and to scale back the delivery of other aspects of community sentences. As a result, a significant number of offenders will not be able to comply with the requirements of their orders (through no fault of their own), and local authorities are at risk of not complying with their own statutory obligations with regard to the delivery and oversight of such orders. Whether or not such non-compliance is considered a breach is a matter for the courts; but in order to address this, each case would need to be referred back to the court to be dealt with individually. It is estimated that around 10,000 individuals are currently subject to a Community Payback Order with an unpaid work requirement (which is currently the most pressing issue for justice social work).

276. Without action, there is a high risk that many of these court orders would be effectively abandoned, which would have serious implications for the administration of justice, the delivery of appropriate interventions, and confidence in the justice system.

277. With the outbreak, and the measures required to control it, expected to last for some time, there will be a significant accumulation of unpaid work hours (and possibly other requirements) which will need to be completed in due course. In the event that this volume of requirements becomes

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unmanageable in terms of justice social work or court resources, mitigating action on a system-wide basis will be required.

Policy objectives

278. The proposal has three aspects, aimed at addressing immediate issues around unpaid work; issues which may arise in the near future in relation to other requirements of community orders; and issues which will likely be encountered once normal (or near-normal) court activity resumes.

279. The first aspect of the proposal is to extend the time limit for the completion of all unpaid work or other activity requirements by 12 months (i.e. whatever time limit has been imposed by the court for completion of unpaid work in an individual order, the new time limit will be 12 months later). This time limit will be alterable by SSI, in order to allow it to be extended should that be necessary. A restriction will also be placed on courts for the period during which the legislation is in force, to ensure that any new unpaid work or other activity requirements have a time limit of at least 12 months from the point of imposition. Together, these measures will allow justice social work to suspend all unpaid work programmes for the duration of the crisis without affecting the ability of offenders to complete those within court-directed timescales.

280. The second aspect of the proposal is to enable the postponement of certain community orders – or requirements contained in those orders - for a specified period. The orders or requirements to be postponed would be defined in an SSI by reference to any or a combination of the type of order (e.g. Community Payback Order); the requirements imposed under an order (e.g. supervision requirements); the type of offender; and the type of offence the offender has been convicted of. On the expiry of the specified period, the orders or requirements will progress as if no time has elapsed since the postponement was put in place (but obviously moving forward relevant timescales/deadlines to account for this), allowing the requirements to be carried out post-crisis. Should the first aspect of this proposal be insufficient to enable justice social work to service all remaining community orders (or should the situation worsen significantly), this power will enable the postponement of other orders and allow a focus on higher risk cases.

281. The third aspect of the proposal is to enable the alteration in bulk of the requirements of community orders which have been imposed by the courts. The issue this seeks to resolve is slightly longer term; given the need

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to delay the carrying out of unpaid work (and possibly other requirements should the second aspect of this proposal be used) there is likely to be an unmanageably large number of hours of unpaid work (and possibly other requirements) due to be carried out post-crisis. This aspect of the proposal would enable the Scottish Ministers, by SSI, to reduce or vary (e.g. change unpaid work to a conduct requirement) the requirements of orders, or to revoke orders entirely, in order to prevent the system being unable to deliver the outstanding orders in due course. As with the second aspect of this proposal, the affected orders would be defined through some combination of the type of order; the requirements imposed under an order; the type of offender; and the type of offence the offender has been convicted of.

Necessity and urgency

282. If no legislative action is taken, a significant number of offenders who have already been sentenced to community orders or who are so sentenced in future will be unable to comply with or complete those orders. Each case will have to be referred back to the courts to be dealt with individually, which would simply not be achievable under current circumstances.

283. In addition, the workload on justice social work – even if local decisions are taken to suspend or scale back certain aspects of supervision – will quickly become unmanageable, and it is highly likely that local authorities will cease to be able to meet relevant statutory obligations. Attempts to maintain some level of service in relation to relevant aspects of community orders will also have an impact on the ability of social work to support other priorities – both in justice, such as supervision of those convicted of serious sexual, domestic, and violent offences or released from custody on licence, and more widely, such as in relation to child protection or assisting vulnerable elderly people.

284. Without this proposal, it is likely that local authorities will have to simply cease carrying out many of their statutory functions with regard to community orders, leaving those on those orders unable to comply, resulting in considerable uncertainty for all involved, a massive impact on the court system in due course, and a possibly insurmountable challenge in fairly and proportionately dealing with those offenders post-crisis.

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Consultation

285. The Scottish Government has consulted informally with a number of stakeholders (including Social Work Scotland, the Scottish Courts and Tribunals Service, the Convention of Scottish Local Authorities, and Community Justice Scotland) to inform the development of these provisions.

Alternative approaches

286. Two alternative approaches have been considered: the Scottish Government could do nothing and rely on the courts to resolve matters once the crisis is over (i.e. deal pragmatically with thousands of cases where the offender has undoubtedly breached the conditions of their order, but through no fault of their own). This is considered impractical both in terms of the impact on the court system in due course, and in relation to the massive uncertainty it would create for both offenders and local authorities (which would equally clearly be in breach of their statutory responsibilities). Continuing efforts by local authorities to service community orders at least in part would also potentially have a significant impact on the provision of other vital social work services.

287. Alternatively, the courts could be asked to extend or vary every community order currently in place, and to defer sentence on every new case where a community order would otherwise be imposed. This is not considered to be a practical solution. In relation to existing cases, court business is already being significantly reduced to deal with coronavirus, and it is unclear how sufficient capacity would be created to alter every order individually. In relation to future cases, there is no mechanism by which to compel courts to defer sentences; this would be entirely reliant on individual sheriffs choosing to do so.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

288. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

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289. The Scottish Government has assessed the potential impact of the proposed measure on human rights. ECHR Article 7 (no punishment without law) precludes the retrospective application of a criminal offence and the retrospective application of a heavier criminal penalty than would have been available at the time of the offence. The extension of the time period in which unpaid work or other activity requirements can be completed does not increase the penalty imposed on the individual, it only alters the rules on the execution of that penalty – the penalty being the amount of hours of unpaid work or other activity which must be completed. The postponement of orders or requirements doesn't increase the penalty imposed on the individual – the penalty stays the same, it is merely paused during the coronavirus outbreak. The power to vary community orders is qualified so that it could not be used to make the penalty imposed more onerous. As a result the Scottish Ministers consider that these provisions do not breach, and could not be used to breach, the Article 7 rights of individuals who are serving community orders.

290. ECHR Article 6 provides a right to a fair and public hearing by an independent and impartial tribunal. The extension of time limits for unpaid work requirements, and the postponement or variation of the requirements of community orders would take place under these provisions without giving the individual a right to make representations or challenge the changes to their sentence. The changes being made are all to the advantage of the individual and in some cases may prevent a breach of the individual's community order. In addition, the individual would be able to apply to vary or revoke their community order in the normal manner under the Criminal Procedure (Scotland) Act 1995 should they wish to reverse the effect of these changes. Accordingly, the Scottish Ministers consider that these provisions do not breach the Article 6 rights of those sentenced to a community order.

291. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

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292. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

293. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Parole Board (paragraphs 18 and 19 of schedule 4)

The coronavirus outbreak

294. There is currently no scheme of delegation expressly allowed for in legislation to enable the Parole Board for Scotland (“the Board”) Chairperson to delegate his functions to another member of the Board. Further there are no provisions to allow another member of the Board to automatically assume the functions of the Chair should they become incapacitated by the virus or be self-isolating.

295. The Board is also required to have oral hearings (either face-to-face at the prison, by video-link, or telephone) in all cases dealt with by Tribunals of the Board under Part IV of the Parole Board (Scotland) Rules 2001 (“the 2001 Rules”), unless all parties agree not to. Cases dealt with under Part IV include life sentences, orders for lifelong restriction, those who have had their licences revoked, and recalled extended sentence prisoners who are in the extension part of their sentence. Given the current situation with self-isolation, face-to-face hearings would be extremely difficult. The majority of oral hearings are currently carried out face-to-face at prisons or by video-link from Parole Scotland HQ requiring members to be in close proximity with others, including social workers and prisoners.

Policy objectives

296. The provisions allow for another member of the Board to be able to take over the functions of the Chair in the event that the current chair is unable for coronavirus reasons to carry out their functions. They will also allow the Chair to proactively delegate a particular function or functions to another member or members, to improve the Board’s resilience in advance of possible absences by Board members due to coronavirus.

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297. The provisions will also relax the Rules to allow the Board to decide for Part IV cases (Tribunal hearings) that an oral hearing is not necessary where the interests of justice do not require it. This will allow them the same flexibility they have for Part III hearings already. The provisions also make clear that the entirety of the proceedings of the Board, and not just evidence gathering by the Board, can be carried out by audio-visual link or by phone. This will reduce the risk of infection to Board members, prisoners and others involved.

298. The provisions also omit “prisoner” from Rule 2 (Interpretation), so as not to require prisoners, who have been recalled under section 17(3) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, and are in the extended part of their sentence, to be considered under Part IV of the Rules. These prisoners will now be dealt with under Part III of the rules. This has the effect in those cases able to be decided on the papers alone, of reducing the number of Board members required to determine such a prisoner’s case from 3 to 2. This increases the likelihood that hearings can still take place if a large number of parole board members are unable to work.

Necessity and urgency

299. The provisions in the Bill are procedural in nature but are urgently required in order to ensure that members, prisoners and other parties involved with a hearing are kept as free as possible from risk and that resilience amongst Parole Board members and their work is maintained.

300. They are necessary because prisoners have a legal right to have their detention reviewed at certain fixed points in time. If their sentences are not reviewed in keeping with the law, that may lead to a breach of their rights.

Consultation

301. Informal consultation has taken place with the Chairperson, Legal Vice Chair and Chief Executive of the Parole Board.

Alternative approaches

302. No alternative to primary legislation is possible. There are no existing powers which would have allowed temporary changes to be made as in the Bill.

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Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

303. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

304. The Scottish Government has assessed the potential impact of the proposed measure on human rights. Determinations by the Parole Board engage Article 5(4) ECHR (right to have lawfulness of detention speedily examined by a court) to the effect that if an oral hearing does not take place in certain circumstances, then that can lead to a breach of this right. However, while the Bill moves a certain category of prisoner from having their case determined by the Board's Tribunal to being considered by the Board alone (the amendments to Rule 2 and 17), this does not breach the Convention given the continued possibility that the Board may have an oral hearing for these cases, if it is in the interests of Justice to do so (Rule 15A). The Parole Board is required under the existing law to always act in a way that is compatible with the ECHR, so in exercising its discretion the human rights of prisoners will be safeguarded. Further, and for the same reason, the Scottish Government considers that the amendment to Rule 20, now permitting the Tribunal of the Board discretion to allow an oral hearing, rather than requiring it to have one, is not a breach of the Convention due to the continuing ability of the Board and Tribunal to always grant an oral hearing where the rights of the prisoner require that.

305. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

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306. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

307. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Release of prisoners (paragraphs 20 and 21 of schedule 4)

The coronavirus outbreak

308. The Scottish Government requires to respond to circumstances where a relatively high proportion of prison officers and other staff are unable to attend work due to illness, being in isolation and other coronavirus-related issues. In such circumstances, even with all mitigating actions being taken and a slowing down of cases from the courts, there is risk that Scotland's prisons could not continue to safely operate with current population levels. In such emergency circumstances, there is a need to have effective statutory options to respond, including the potential to release prisoners early from custody.

309. In general, prisoners are expected to serve their sentence, taking account of early release and parole arrangements. There are some established statutory arrangements for the release of prisoners.

- Home Detention Curfew ("HDC"): releasing a prisoner early up to 6 months before the end halfway stage of their sentence to a confirmed location subject to a curfew which is monitored with an electronic tag.
- Temporary Release: short-term temporary release of a prisoner under the Prison Rules. This can be, for example, on home leave or for health reasons approved by the Governor, currently for up to a maximum of 7 nights.

310. Both of these options could be adjusted to allow for the release of a larger numbers of prisoners: by reducing the requirements allowing for release on HDC or creating a new form of emergency temporary release during which someone can be subject to temporary release. Creating emergency temporary release could be achieved through secondary legislation. Neither of these statutory options are suited to current

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circumstances. The nature of an individual risk assessment required by HDC would not be practical in these circumstances and temporary release would not give the prisoner access to benefits in the community.

Policy objectives

311. Scottish prisons currently operate at staffing levels which are designed to allow for the safe and appropriate supervision and support of those in their care. A loss of a significant number, 20% or more, of Scottish Prison Service staff, either overall or within individual establishments, would place the safe operation of Scotland's prisons at significant risk. This is separate to any additional pressures associated with prisoners also being infected. In this worst case scenario, it is likely that other parts of the justice system will be affected and the pace of convicted and remand prisoners feeding into prison may slow. In very extreme circumstances with excessive staff shortages, impacting on supervision, medical services, etc, it may be necessary to consider whether to release certain, lower-risk prisoners early from prison, to allow prisons to continue to operate effectively, taking account of the level of staffing.

312. The Bill makes provision that Scottish Ministers can by regulations provide for the early release of certain prisoners in order to protect the security and good order of the prison and the health, safety and welfare of anyone accommodated or working in the prison. The Scottish Ministers can make different provision in the regulations for: different classes of person, prisons or classes of prison or other different purposes. Prison Governors can veto release where they think release would involve an immediate risk of harm to an identified person and there are a number of categories of prisoners who are excluded from being released under the regulations. The regulations made under these provisions are time-limited and cease to have effect after 180 days (or 28 days if made under the expedited procedure and not affirmed during that period), although release undertaken during their extant period will still remain in effect.

Necessity and urgency

313. The coronavirus outbreak is expected to cause significant staff shortages in prison as prison officers require to self-isolate to prevent the spread of the virus. The extent of staff shortages are difficult to predict but early estimates by the Scottish Government suggest that prisons could see a 20% reduction in staff at any one time during the outbreak. The reduction

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in staff will inevitably lead to further restrictions in the prison regime for prisoners and may lead to difficulties for those remaining prison staff to assert control over the prison. This could mean that prisoners will require to be detained in their cell for lengthy periods of time with minimal contact with prison staff. In turn, this could result in health issues for prisoners and increase the risk of unrest in the prison. The potential for a breach of the Article 3 ECHR (prohibition of torture, or of inhumane or degrading treatment or punishment) rights of prisoners and prison staff in those circumstances would become significant.

Consultation

314. Formal public consultation on these proposals has not been possible.

315. The issues surrounding emergency release have been discussed by the Prisons Resilience Leadership Group which is chaired by the Director of Justice and has senior attendees from various justice partners (including COPFS, Scottish Court Service, the Parole Board for Scotland, Community Justice Scotland and the Scottish Prison Service) and representation from NHS Scotland.

Alternative approaches

316. As set out above, the Scottish Government considered two options that would not require changes to primary legislation: the use of home detention curfew and emergency temporary release. The Scottish Government concluded that there were significant disadvantages and risks in both of these options.

317. The Scottish Government considers that HDC is not suited to the release of prisoners based on broad eligibility criteria: the focus of section 3AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993 is on the individual prisoner. This would likely preclude the use of HDC to swiftly release a large number of prisoners in an emergency situation. Furthermore, there would also be significant challenge for SPS and social work in undertaking the necessary risk assessment and home checks as required by the HDC process ahead of release of large number of prisoners. The individual currently also would require to be tagged, which may cause significant logistical challenges for the electronic monitoring provider.

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318. Emergency temporary release would not allow for the permanent release of prisoners; they would need to return to prison to formally complete their sentence. Additionally, during temporary release, prisoners cannot access benefits so would require continuing financial support (which may require the creation of what would be, in essence, a new benefits system in a very short period of time).

319. If the Governor considers that the risk to the prisoner on being released are greater than the risks faced within the prison, the Governor could veto the emergency release of that prisoner so as to safeguard their wellbeing.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

320. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

321. The Scottish Government has assessed the potential impact of the proposed measure on human rights. The Scottish Government has determined that the effect of the coronavirus outbreak may necessitate the release of lower-risk prisoners, whilst ensuring public safety. The impact of coronavirus in prisons (both on prison staff and prisoners) creates a significant risk of a breach of the Article 3 ECHR rights of prisoners and prison staff. The release of prisoners may therefore be required as a means of safeguarding the Convention rights of prisoners and prison staff. The release of prisoners also creates a risk of contravening the Convention rights of a member of the public who is harmed by a released prisoner. The Bill safeguards against this by enabling Governors to prevent the release of prisoners who pose an immediate risk of harm to an identified individual.

322. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact

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of the proposed measure on island communities and has determined that there could be some limited impact on those in the islands who may need slightly tailored arrangements as prison release needs to be timed to take account of available travel. However, this is an existing requirement which SPS already takes into account.

323. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that there is likely to be significant impact on local government services, if these provisions were used. Upon prison release there are services in place to support prisoner resettlement and reintegration (including housing, Justice Social Work etc.) and there would therefore need to be appropriate arrangements in place for those leaving custody. Emergency release if used would require these arrangements to be made in short timescales. However, most short-term sentenced prisoners do not have criminal justice social work involvement.

324. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Legal aid (paragraphs 22 to 24 of schedule 4)

The coronavirus outbreak

325. Following discussions with the Scottish Legal Aid Board (“the Board”), the Scottish Government is concerned that the disruption resulting from the coronavirus outbreak will adversely affect legal services providers who carry out legal aid work. It is anticipated that trials and hearings may not go ahead, that face-to-face meetings with clients will be reduced or suspended, and that wider disruption is likely to impede or prevent the continuation of business.

326. As well as the adverse impact on the profession in the short term, it is considered that there are risks to access to justice in the longer term, as firms and individuals currently delivering services may, if steps to mitigate the impacts are not taken, be unable to continue in business.

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Policy objectives

327. Ministers have engaged with the Board to identify steps that should be taken now to mitigate the risks to the profession. Some of these steps can be achieved within existing powers, where the Board has discretion to allow for departure from the rules (for example, to allow accounts to be submitted late if administrative support services have been disrupted) and others can be affected by regulations. However, the Board has identified that increasing the availability of interim payments would support solicitors and counsel to continue delivering services under legal aid, with acceptable levels of risk to the Board, and it is considered that this can only be achieved by way of primary legislation.

328. The specific measures that have been identified as being required through primary legislation are:

- reduction of the level of scrutiny required before interim payment may be made;
- enhanced powers of recovery in the event of overpayments resulting from interim payments;
- removal of conditions for counsel to be able to apply for interim payment.

Necessity and urgency

329. Many in the legal profession work within very tight profit margins and a slowdown in income is likely to have a significant negative impact on their ability to continue to operate. Without these measures, at such time as resumption of normal business is possible, there may be insufficient capacity remaining in the legal profession to effectively deliver legal aid services.

Consultation

330. This has been discussed with the Faculty of Advocates and Law Society of Scotland. The Minister for Community Safety has written to the legal profession setting out the intention to provide additional financial support to those who provide legal aid services.

Alternative approaches

331. The Scottish Government considered whether delaying the scrutiny of claims made at the stage of interim payment to the point of final account

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could be achieved by way of regulations, or a determination by Ministers under powers in the Legal Aid (Scotland) Act 1986 to make other payments. The Scottish Government concluded that making changes to the provisions relating to the Board's assessment of fees and outlays would be more effectively achieved by making changes to the underlying Act.

332. Corresponding enhancement to the Board's powers of recovery, where discrepancies arise following interim payments, were also considered to be more appropriate for primary legislation, and in order to ensure protection extended to the Faculty as soon as possible it was considered that this should also be included within the Bill.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

333. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

334. The Scottish Government does not consider that this proposal has an effect on any human rights.

335. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

336. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

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337. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Alcohol licensing and licensing under the Civic Government (Scotland) Act 1982 (schedule 5 and paragraph 1 of schedule 6)

The coronavirus outbreak

338. The Licensing (Scotland) Act 2005 (“the 2005 Act”) and the Civic Government (Scotland) Act 1982 (“the 1982 Act”) contain provision for the licensing of different activities such as the sale and supply of alcohol (in the 2005 Act) and taxi and private hire (in the 1982 Act). These licensing regimes contain a considerable number of strict timescales and deadlines with little or no discretion available to relevant authorities if they not adhered to. With both businesses and licensing authorities under unprecedented disruption as a result of the coronavirus outbreak, it is likely that people could lose their licences through no fault of their own. The provisions in the Bill are intended to provide additional flexibility and discretion to help minimise licence holders (such as individuals and businesses) and other key licensing interests being adversely affected.

339. In certain circumstances Licensing Boards (under the 2005 Act) and licensing authorities and local authorities (under the 1982 Act) are obliged to hold hearings. The holding of hearings will be difficult and subject to disruption as a result of the coronavirus outbreak. Accordingly, the Bill contains provision which gives new discretion to not hold in person hearings and to instead provide alternative means for persons to be heard by telephone, video-conferencing or by written communication (including electronic communication). There will also be discretion to dispense with the requirement to hold meetings in public. This is to ensure that Licensing Boards and other licensing authorities can act consistently with social distancing and other requirements.

Policy objectives

340. The Scottish Government considers the provisions in the Bill to be a pragmatic response to the coronavirus outbreak. In some areas, they empower the relevant licensing authority to extend timescales and deadlines. In other areas, they give further time to key licensing partners

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such as Police Scotland when views are being sought on licensing decisions. In some other areas, discretion is given to excuse the failure to meet a relevant deadline or other procedural step if the relevant authority considers it reasonable. As a package, the changes are designed to minimise the chances of licence holders' right to hold and keep a licence being adversely affected through no fault of their own as a result of the coronavirus outbreak.

341. There is also a change to the current powers for Licensing Boards under the 2005 Act to relieve procedural failings. Currently, a Licensing Board may relieve any applicant or other party to proceedings before the Board of any failure to comply with any procedural provision if the failure is due to mistake, oversight or other excusable cause, and the Board considers it appropriate in all the circumstance to relieve the failure. This power does not exist in relation to relieving procedural failures on the part of the Board itself and the Bill makes provision in this area where this arises as a result of the Coronavirus outbreak.

Necessity and urgency

342. Without the changes provided for in the Bill relating to licensing, there is a high risk of significant numbers of licensing interests, such as those holding premises licences which authorise the sale and supply of alcohol, being unable to adhere to the strict statutory rules that apply. In the context of the coronavirus outbreak, the Scottish Government does not consider that anyone should be penalised due to being unable to adhere to the normal rules through no fault of their own.

Consultation

343. No formal consultation has taken place, but the Scottish Government has engaged with a limited number of key licensing stakeholders including representatives of SOLAR (Scottish Local Authority Lawyers and Administrators), the Law Society and legal experts in licensing law. They are all broadly supportive of the provisions as being necessary and pragmatic in dealing with the impact of the coronavirus outbreak on the normal operation of different licensing regimes.

Alternative approaches

344. The Scottish Government does not consider that any approach other than primary legislation would meet the policy objective. While there is some limited capability for Licensing Boards to be able to relieve the failure by an

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applicant or any other party to proceedings before the Board in complying with procedural provision, this power is limited and also does not apply to the Licensing Board itself.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

345. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

346. The Scottish Government has assessed the potential impact of the proposed measure on human rights and is satisfied that the provisions of the Bill relating to licensing are compatible with Convention rights. To the extent that decision making by, and proceedings before, Licensing Boards and licensing authorities engage the protections of Article 6 (right to fair determination of civil rights and obligations), the Scottish Government is of the view that no issues arise as a result of the provisions. The provisions of the Bill change various time periods and build more flexibility into the licensing regimes but that does not affect an individual's ability to make applications or representations to Licensing Boards or licensing authorities. Where a hearing cannot be held in person for reasons related to coronavirus, the provisions of the Bill require Licensing Boards and licensing authorities to provide an opportunity to persons to be heard by telephone, video-conferencing or written representations (including electronic communications). It also remains possible for decisions of Licensing Boards and licensing authorities to be appealed and for judicial review proceedings to be taken. Accordingly, the Scottish Government is satisfied that there are sufficient safeguards to enable proceedings to remain compatible with Article 6 of the Convention.

347. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will

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have no significantly different impact on island communities. No detrimental effects are anticipated.

348. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

349. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Freedom of Information (paragraphs 2 to 8 of schedule 6)

The coronavirus outbreak

350. Section 10(1) of the Freedom of Information (Scotland) Act 2002 (“FOISA”) imposes a duty on Scottish public authorities to respond to requests for information promptly, and in any event not later than the 20th working day after receipt of the request. A similar 20 working day limit applies under section 21(1) if an authority is asked by the requester to review the initial response.

351. FOISA has no provision to allow an authority not to comply with these timescales in an emergency. The Scottish Information Commissioner (“the Commissioner”) has no discretion to take into account the circumstances when considering whether such an authority has complied with Part 1 of FOISA. Accordingly, if a requester appeals to the Commissioner about a failure to respond on time, the Commissioner would have no option but to find that the authority had failed to comply with Part 1 of FOISA.

352. Many Scottish public authorities, such as Health Boards, GPs and pharmacies, are in the front line of responding to the coronavirus pandemic, and so will be experiencing an unprecedented demand for their services. Other authorities, including central government and local authorities, are also experiencing office closures and staff absence on a scale never seen before, while diverting resources to tackle the pandemic. It is anticipated authorities are likely to need more time to meet statutory requirements and despite best efforts may fail to comply with the law.

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Policy objectives

353. The Bill makes three main changes to the current law:

- extending the deadlines for responding to requests and reviews from 20 working days to 60 working days;
- enabling Scottish public authorities to extend the period of 60 working days by a further period of 40 working days in certain circumstances;
- providing that, in any event, a Scottish public authority does not fail to comply with its duties under Part 1 of FOISA if it has reasonable cause for responding outwith the relevant timescales.

354. Extending the deadlines for responding to requests and reviews for the duration of the pandemic is intended to reduce the immediate pressure on authorities, while still providing a long-stop date by which a response is due. A legal right to request information from authorities will be maintained, but authorities will have a longer period in which to respond.

355. The Scottish Government recognises that, in some circumstances, 60 working days may still not give authorities sufficient time to deal properly with a request for information. Accordingly, the Bill gives authorities the power to extend that period for up to a further 40 working days. An authority can use that power if it is impracticable to respond within the 60 working day deadline, either because of the volume and complexity of the information requested, or because of the overall volume of requests being dealt with by the authority. Authorities will have to tell requesters why they have extended the deadline. If the requester is dissatisfied, they will be entitled to a review by the authority and can then apply to the Commissioner for a decision.

356. The Scottish Government recognises that authorities may be unable to comply with requests within these extended timescales for a range of reasons. Our policy is to enable the Commissioner to have the necessary discretion to consider whether the authorities had reasonable cause for failing to comply with the timescales. The Commissioner will have discretion to find that notwithstanding the delay the authority has complied with Part 1 of FOISA. The Bill also expressly states that the Commissioner is to take into account the coronavirus outbreak or the recovery from it as factors in determining whether the authority had shown reasonable cause for failing to comply with the timescales.

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Necessity and urgency

357. Scottish public authorities are under significant and unprecedented pressure as a consequence of the pandemic. The existing timescales in FOISA for responding to requests exacerbate that pressure. Allowing for a temporary extension of timescales is a necessary mechanism to enable authorities to focus their main efforts on pandemic issues whilst ensuring that the operation of FOISA as a whole remains effective. Urgent action is required because of the growing strain on Scottish public authorities, particularly those in the healthcare sector in managing the pandemic response while dealing with significantly increased volumes of requests.

Consultation

358. The Commissioner is responsible for promoting information rights as well as ensuring compliance with the legislation, and so is well-placed to balance the respective interests of requesters and authorities. Scottish Government officials have been in regular contact with the Commissioner to discuss temporarily extending the timescales in FOISA and have taken his views into consideration.

Alternative approaches

359. The Scottish Ministers have existing powers to extend the timescales in FOISA by regulations. However, these would only enable the delivery of the first of the changes in the Bill to extend the default deadline from 20 days to three months; the other changes require primary legislation. Additionally, the regulations would be subject to the affirmative procedure in the Scottish Parliament, and so could not be brought into force quickly enough to address the pressures arising from the coronavirus outbreak.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

360. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

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361. The Scottish Government has assessed the potential impact of the proposed measure on human rights and has determined that no detrimental effects are anticipated.

362. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

363. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that these provisions will extend the timescales within which local authorities are required to respond to requests for information and requirements for review, and therefore reduces the risk that local authorities will be unable to comply with their statutory duties.

364. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Duties in respect of reports and other documents (paragraphs 10 to 11 of schedule 6)

The coronavirus outbreak

365. There are provisions in a wide range of legislation, primary and secondary, that require public bodies to make certain reports on their activities, their discharge of their duties, or their plans and priorities. The reporting period for these requirements is typically annual. A number of reporting requirements may fall to be discharged during the period of the coronavirus outbreak, during which many public bodies are on the front line of the national effort to tackle the virus, and during which many public bodies have large numbers of staff either re-deployed in coronavirus-related roles, unable to enter their places of work to access necessary or relevant information, or absent from work for caring or health-related reasons.

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366. The Scottish Government is concerned that some of these duties may be impossible to perform during the period of the coronavirus outbreak, or that being required by law to perform these duties may interfere with public bodies' ability to respond to the outbreak.

367. There are provisions in a wide range of legislation, primary and secondary, that require public bodies to publish certain documents in a particular way or to make them available for physical inspection at a specified location. This includes, amongst others, notices and minutes of council and committee meetings to be made available at council offices, a range of documents relating to the planning system to be made available at council offices and in public libraries, and documents relating to Strategic Environmental Assessment to be available at the "principal office" of the public body responsible for the assessment.

368. Where libraries and offices are closed to the public due to the coronavirus outbreak, it will not be possible for organisations to comply with these requirements.

Policy objectives

369. The Scottish Government's policy is not to relieve public bodies from all of these duties. Instead, it is to allow each authority to make a judgment about the extent to which the coronavirus outbreak is interfering with their ability to discharge the duty, and to allow them to delay any reporting requirements only so far as they consider appropriate in the circumstances. They will have to provide the report as soon as they are able to after the outbreak.

370. It is important that information about the exercise of public functions and decision-making continues to be as widely available as possible in the circumstances. The Scottish Government's policy is therefore to require documents and information to be published online, where possible. When the coronavirus outbreak is over, public bodies will need to either publish the information in line with the original duty or explain why they are not doing so (for example if the information is no longer relevant).

371. All public bodies have websites, and the vast majority of their documents will already be published online in addition to any requirements to make them physically available. This change is therefore unlikely to have any significant impact on public bodies. It will reduce access to the

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information for those people who do not have internet access at home, but the measure is necessary to enable regular business to continue. For larger projects, the Scottish Government will encourage all public bodies to consider what alternative forms of consultation may be possible, or if it is better to pause some activities until physical access to documents can be made available.

Necessity and urgency

372. It is impossible, in current circumstances, to know how long public bodies' activities will continue to be disrupted by the coronavirus; and to know how many reporting duties will fall on public bodies during that period, or how onerous these duties will prove to be. The Scottish Government therefore considers that urgent legislation to give authorities' discretion in respect of this matter is necessary.

373. If public bodies cannot make documents available in line with the requirements, they would be unable to comply with statutory duties. In some cases, it could also mean that business cannot progress: for example, an item of business at a Council meeting may not be considered unless the agenda has been open to inspection for at least three days previously; a planning authority cannot continue with the preparation of a local development plan unless publicity requirements have been met. Amending these requirements will avoid authorities having to simply pause business until information can be made available physically.

Consultation

374. Requirements to make documents available in offices and libraries was raised as a concern by local authority representatives and others engaged in environmental assessment. While no formal consultation has taken place, the Scottish Government has held informal discussions with the Convention of Scottish Local Authorities on these measures.

Alternative approaches

375. Not legislating for this matter could raise the possibility of public bodies being required by law to divert resources from tackling coronavirus or being forced to make decisions not to comply with statutory requirements. In these circumstances, no alternative to legislation exists.

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376. Possible alternative approaches would include doing nothing or removing the duties to publish information completely. Doing nothing would leave many public bodies unable to comply with statutory duties and removing the duties could mean that the public would not have the opportunity to scrutinise public bodies' business and decision making. The Scottish Government does not consider either of these is an acceptable option.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

377. Where a reporting requirement involves reporting on equal opportunities or human rights, this provision could delay publication of a public body's assessment duties or actions in this regard. The Scottish Government has assessed the potential impact of the proposed measure on human rights and has determined that these provisions enable things to be done by electronic means where currently they must be done physically, typically by laying, placing, publishing or making a document of some kind available for inspection in a place, e.g. the Scottish Parliament, a public office or a public library. The Bill makes provision relating to duties to lay (and publish) documents etc. before the Scottish Parliament, and also makes particular provision in relation to how provisions of the Public Finance and Accountability (Scotland) Act 2000 are to operate.

378. It is important that information about the exercise of public functions and decision-making continues to be as widely available as possible in the circumstances. When the coronavirus outbreak is over, public bodies will need to either publish the information in line with the original duty or explain why they are not doing so (for example if the information is no longer relevant). The provisions provide that where any such requirement exists to publish information in a particular format, or to make it available for inspection in a particular manner, the organisation may instead make it available online. They must also consider whether to make it available physically once the emergency period is over. All public bodies have websites, and the vast majority of their documents will already be published online in addition to any requirements to make them physically available. This change has the potential to reduce access to the information for those people who do not have internet access at home, but the measure is necessary to enable regular business to continue. It is considered that the measures are proportionate and meet a fair balance between the potential

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impact on the ability of individuals to participate in decision making which may affect them and the wider public interest. The exercise of the power provided by the sections is a matter for the consideration of the authority in the circumstances. It is considered that the provisions are compatible with the ECHR.

379. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully directly discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership). The Scottish Government considers there may be some impact in terms of limiting access to documents for older people and those with long-term health conditions, who use online technologies less than other groups. However, older people and those with long-term health conditions are also identified as being at greater risk from the virus. As the aim of the policy is to allow business to continue while action is taken to reduce spread of the virus, the Scottish Government considers this to be a reasonable and appropriate measure.

380. The Scottish Government has assessed the potential impact of the proposed measure on island communities and no detrimental effects are anticipated

381. This provision will relieve local authorities temporarily from a number of their duties.

382. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Local authority meetings (paragraphs 12 to 16 of schedule 6)

The coronavirus outbreak

383. The coronavirus outbreak has presented local authorities with a number of difficulties in operating their normal council and committee meetings while social distancing and stay-at-home measures are in place. Adhering to existing regulations concerning public access to meetings and to provide hard copies of or extracts of a document if requested by a member

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of the public in their offices has become extremely challenging if not impossible in light of some council offices being closed.

Policy objectives

384. The Bill provides that, for the duration of the coronavirus crisis, local authorities have the power to exclude the public from its meetings on health grounds. In addition, the requirement to provide hard copies or extracts of a document requested by a member of the public in their offices will only be provided if it is reasonably practicable and will no longer be compulsory.

385. The Scottish Government considers that these are reasonable and proportionate measures to protect the public and local authority council members, by ensuring that no physical presence is required at local authority meetings for the duration of the coronavirus crisis.

386. It is intended that such extensions will be time limited changes, designed to deal with the challenges posed by the coronavirus outbreak throughout the duration of the crisis.

Necessity and urgency

387. Many local authorities have had to suspend committee meetings and set-up streamlined decision-making structures for the duration of the coronavirus outbreak. To ensure that legitimacy of these emergency meetings is not questioned, excluding members of the public from these meeting on health grounds and only providing hard copies or extracts of a document in their offices if it is feasible are necessary to ensure they do not breach their statutory duties.

Consultation

388. No formal consultation has been possible but officials have held informal discussions with the Convention of Scottish Local Authorities on these measures.

Alternative approaches

389. In light of current public health advice, the Scottish Government does not consider that taking no action was an option. No non-legislative option was possible, and no powers have been identified that could allow provision to be made other than in primary legislation.

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Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

390. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully directly discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership). Should a local authority decide to exclude the public from a meeting on health grounds but puts in place measures allowing the meeting to be live streamed or should there be some impact in terms of limiting access to hard copies of documents, there could be a disproportionate impact on older and disabled people, as these groups use online technologies less than other groups. However, as older people and those with long-term health conditions are identified as being at greater risk from the virus, and the aim of the policy is to allow business to continue while action is taken to reduce spread of the virus, the Scottish Government considers this to be an appropriate measure.

391. The Scottish Government has assessed the potential impact of the proposed measure on human rights and has determined that no detrimental effects are anticipated.

392. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined that, where there is lower broadband capacity than other areas, island communities might be more impacted should local authorities only provide access to documents online.

393. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that excluding the public from local authority meetings on health grounds will have an impact on the openness and transparency of council decision-making. However, it will avoid an authority potentially being unable to comply with statutory duties when offices are closed. Local authorities are expected to take reasonable measures to ensure that the public can still view meeting

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proceedings online and all public items considered at these meetings along with minutes will continue to be made accessible online. The Scottish Government considers that providing documents online is not expected to have any impact on local authorities, as the vast majority of these documents are already provided online as well as in person. The measure will avoid an authority being unable to comply with statutory duties when offices and libraries are closed.

394. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Social security (paragraphs 1 to 5 of schedule 7)

The coronavirus outbreak

395. As the effects of the coronavirus outbreak continue to escalate, Social Security Scotland is not able to maintain services at their pre-coronavirus levels due to a reduction in available staff. This has had a material impact on existing services and may also reduce capacity to take on the delivery of new benefits to the timescales previously planned. Additionally, this will have an impact on:

- the time taken to process applications and redeterminations;
- the number of people eligible and who apply for Scottish assistances, as a consequence of increased numbers of people receiving the qualifying reserved benefits such as Universal Credit;
- clients, and the time taken to gather evidence for, or complete applications for assistances, redeterminations or appeals

396. The potential for disruption caused by the coronavirus outbreak has implications for the re-determination and appeal timescales afforded to clients and the Social Security Agency as set out below.

Requests for redetermination

397. Section 41(4) of the Social Security (Scotland) Act 2018 (“the 2018 Act”) sets out that a request for redetermination of an individual’s entitlement to a type of assistance is only valid if the request is made before the end of the period prescribed by the Scottish Ministers in regulations (currently 31

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days), or after that period if there is good reason that the request was not made sooner and it is made before the end of the day that falls one year after the day on which the individual is informed of the determination. Section 42 of the 2018 Act provides that the question of whether there is good reason for a late request is determined by the Scottish Ministers or on appeal by the First-tier Tribunal for Scotland.

Agency timescales for completing re-determinations

398. Under Section 43 of the 2018 Act, the Scottish Ministers have a duty to redetermine and must aim to do so within the period allowed for redetermination. They are to prescribe this period in regulations. If a redetermination is not made timeously, then an individual has a right to appeal under section 46 of the 2018 Act. The current period allowed for the Scottish Ministers to carry out a redetermination is 16 days.

Requests for Appeals

399. Under Section 48 of the 2018 Act, an appeal can be brought without the permission of the tribunal if it is made within the period of 31 days beginning with the day the relevant event occurred, and otherwise only with the tribunal's permission, and may not be brought if not made within the period of 1 year beginning with the day the relevant event occurred.

400. Section 61 of the 2018 Act provides that appeals to the tribunal against process decisions must be brought without the tribunal's permission within 31 days, and beyond this only with their permission. It is not possible to bring an appeal after the end of a year beginning with the day they were informed of the decision.

Best Start Grant/Young Carer Grant/ Funeral Support Payment

Early Years Assistance (Best Start Grants) (Scotland) Regulations 2018/370 (amended by SSI 2019/110 and 2019/157)

401. Regulation 5(1)(c) has time limits in relation to late applications which must be within 20 working days after the last application window and 3 months of being informed of a backdated award. The application windows relate to the 24th week of the pregnancy of the applicant. A client's ability to meet these deadlines and provide supporting information could be impacted

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on by the coronavirus outbreak and thus prevent the individual from receiving a benefit entitlement.

402. Part 1 of Schedules 2, 3 and 4 of the regulations provide for an applicant to be eligible for best start grant assistance if:

“on the day the application is made the individual is:

(aa) 18 or 19 years of age; and

(bb) a dependant of another individual”

403. A client’s ability to apply when within these specified ages could be impacted on by the coronavirus outbreak and therefore prevent the individual from receiving their entitlement.

Carer’s Assistance (Young Carer Grant) (Scotland) Regulations 2019

404. Under regulation 4 of the Carer’s Assistance (Young Carer Grant) (Scotland) Regulations 2019⁴, a person is entitled to a young carer grant if, on the day their application is made, they are aged 16, 17 or 18. An application is to be treated as made on the day it is received by the Scottish Ministers.

405. A young carer’s ability to make an application for support may be impacted by the coronavirus outbreak both through increased caring responsibilities, which may not allow them the time to apply, and through Social Security Scotland’s capacity to process applications during times of higher absence. Under the current rules, a young carer that met the eligibility criteria when 18 but was unable to put in an application before their 19th birthday would not be entitled to the grant.

Funeral Expense Assistance (Scotland) Regulations 2019

406. Regulation 5(5)(c) of the Funeral Expense Assistance (Scotland) Regulations 2019⁵ contains time limits in relation to late applications which must be within 20 working days after the last application window and three

⁴ <http://www.legislation.gov.uk/ssi/2019/324/regulation/4/made>

⁵ <http://www.legislation.gov.uk/sdsi/2019/9780111040461/regulation/5>

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months of being informed of a backdated award. The application windows relate to the death of the person the funeral is for and six months after the funeral occurs. A client's ability to meet these deadlines and provide supporting information could be impacted on by the coronavirus outbreak particularly if there is an either an increase in the death rate, or if the Department for Work and Pensions struggle to process new applications for qualifying benefits. As a result, this might therefore prevent the individual from receiving a benefit entitlement.

Policy objectives

Requests for redetermination

407. Individuals are able to submit redetermination requests for up to one year from the date of receiving the original decision, as long as they have a good reason. The Scottish Ministers consider that coronavirus outbreak-related reasons fall within the "good reason" description for the gap between the prescribed period of 31 days and a year. This allows a generous amount of time for individuals to submit redetermination requests if they receive entitlement decisions during the period of coronavirus related disruption.

408. To address the specific scenarios of individuals who are presently coming to the end of the year-long period and may not be able to submit a re-determination request due to coronavirus related disruption, the Bill will give the Scottish Ministers the discretion to reasonably extend this time period if coronavirus-related disruption is deemed to be the good reason for the delay in requesting a redetermination.

Agency timescales for completing redeterminations

409. The ability of Social Security Scotland ("the Agency") to meet the 16 day deadline will be impacted by the coronavirus outbreak. The degree to which it will be impacted is at this stage unknown but at least 12 weeks of significant disruption may be expected as things stand. During the period of disruption, the Bill will therefore require the Agency to complete the redetermination as soon as reasonably practicable whilst providing an additional nine weeks, on top of the original 16 working days, to do so. In coming to this determination, the Scottish Ministers have considered the practical issues that clients and the Agency will face during this period of disruption. Clients' ability to gather and submit any further information may be impacted by the coronavirus outbreak and submission of further evidence may be delayed or impacted by inbound mail issues and for other reasons.

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The time to carry out a re-determination once all information is received may be impacted by staff absences. During the coronavirus outbreak, staff at the Agency will be dealing with absence as a result of illness, the need to care for family members who are ill, the need to provide child-care, the loss of staff to other areas of work, and other disruption related to the coronavirus outbreak.

410. This does not mean that the Scottish Government expects the Agency to necessarily take the additional nine weeks to complete each redetermination. Rather it reflects that impacts on operations are unknown and is intended to provide for the worst case scenario. The Agency will still be expected to deal with redeterminations as quickly as the situation allows.

Requests for appeals

411. Individuals are currently able to submit appeal requests without permission from the Tribunal for 31 days after the re-determination decision, and for up to one year after the re-determination decision with permission from the Tribunal.

412. To address the specific scenarios of individuals who are presently coming to the end of the year-long period and may not be able to submit a request for an appeal due to coronavirus related disruption, it is necessary for coronavirus outbreak-related matters to be considered as good reasons for delays, and also for the one-year time limit to be dis-applied.

413. It is also necessary to allow appeals by individuals against a decision by the Scottish Ministers regarding whether a coronavirus outbreak-related matter is a good reason for a late request for redetermination.

Best Start Grant, Young Carer Grant, and Funeral Support Payment

414. Provision is needed to modify the effect of the Early Years Assistance (Best Start Grants) (Scotland) Regulations 2018, the Carer's Assistance (Young Carer Grants) (Scotland) Regulations 2019 and the Funeral Expense Assistance (Scotland) Regulations 2019/292 (amended by Funeral Expense Assistance and Young Carer Grants (Up-rating) (Miscellaneous Amendments) (Scotland) Regulations 2020) in relation to the periods for making applications where these have not been able to be met directly as a result of the coronavirus outbreak. The Bill therefore allows late applications

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across all forms of assistance where the lateness is due to coronavirus. This ensures that clients are not disadvantaged and are able to claim assistance which they are entitled to and which they may have missed out on if late applications were not allowed.

Scrutiny of regulations

415. Regulations under Part 2 and 3 of the 2018 Act are subject to affirmative procedure and scrutiny by the Scottish Commission on Social Security (SCoSS). The Bill therefore allows changes to be made to the regulations without first being scrutinised by SCoSS with regulations being laid under an accelerated procedure or where Parliament is not sitting for any reason. These provisions ensure that where regulations are required as a result of the coronavirus outbreak, they can be brought forward on an expedited basis.

Necessity and urgency

416. Each of the changes made by the Bill is necessary to ensure that the devolved social security system in Scotland is able to respond to the challenge of the coronavirus outbreak.

Consultation

417. Social Security Scotland have provided information about the impact of the coronavirus outbreak on staffing and workforce capability, which has informed the policy choice in the Bill.

418. It has not been possible to consult stakeholders given the urgency of the need to respond to the developing coronavirus outbreak.

Alternative approaches

419. No alternative to primary legislation is possible. No existing powers to extend these timescales in this way exist, and in the circumstances of the coronavirus outbreak, Scottish Ministers consider it necessary and urgent to make these changes.

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Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

420. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

421. The Scottish Government has assessed the potential impact of the proposed measure on human rights. The Social Security (Scotland) Act 2018 implements a human rights-based approach to the administration of the Scottish social security system. The Scottish social security principles are set out in section 1 of the 2018 Act, including the principle that “social security is itself a human right and essential to the realisation of other human rights” (section 1(b)).

422. It is recognised that the impact of coronavirus could make it difficult for individuals to apply for or take other steps in relation to the determination of their entitlement to assistance under the 2018 Act. The provisions of the Bill are intended to mitigate that impact and protect individual rights by relaxing the statutory timescales in which individuals would otherwise require to take those steps, where they are unable to do so as a result of the coronavirus. The provisions therefore enhance protection for individual rights.

423. The impact of coronavirus is also expected to affect the operations of Social Security Scotland, which administers social security assistance on behalf of the Scottish Ministers. This, along with the anticipated impact on individuals who may be unable to respond quickly to requests for information required for their re-determination, and the anticipated increase in new applications for assistance, is expected to mean that the normal timescales for redeterminations under the 2018 Act will be unable to be met in the majority of cases. In recognition of that impact, and to avoid a large number of cases proceeding to appeal before the First-tier Tribunal unnecessarily, the Bill will also allow a longer period of time for the Scottish Ministers to carry out re-determinations. The period of extension is no more than is necessary to ensure the effective administration of the social security system in the circumstances, and in all cases, re-determinations will be made as quickly as possible ensuring that individual rights are respected.

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424. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

425. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

426. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Irritancy clauses in commercial leases (paragraphs 6 and 7 of schedule 7)

The coronavirus outbreak

427. Tenants under commercial leases in Scotland can currently be evicted for non-payment of rent after a period as short as 14 days, although this can be extended through the terms contained in an individual lease. In the current climate with many premises having to close or having no cash flow there has been a demand for assistance from tenants to assist them in the form of rent holidays, rent reductions, and rent deferment. Many declare that they cannot pay the rent in these circumstances.

428. The UK Government has announced that commercial tenants in England and Wales who cannot pay their rent because of coronavirus will be protected from eviction for a period of three months. This can be termed as a rent deferment as they will still be obliged to pay the rent at the end of this stipulated period, although there is always the possibility that this could be extended.

429. The 2020 Act achieves this through altering the forfeiture process under the Landlord and Tenant Act 1954, which does not apply in Scotland.

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430. Many landlords and tenants are already having conversations and reaching voluntary arrangements about rental payments due shortly, but the Scottish Government recognises businesses struggling with their cash flow due to the coronavirus outbreak remain worried about eviction.

431. The Scottish Government considers it appropriate to introduce comparable provision in Scotland.

Policy objectives

432. Sections 4 and 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 contain statutory provision relating to the irritancy⁶ of a lease for monetary and non-monetary breaches respectively. Section 4 provides, in respect of a monetary breach, that the landlord must serve a warning notice on the tenant allowing 14 days (or such longer period as is specified in the lease) to pay the arrears. If the tenant fails to do so, the landlord may irritate the lease. The tenant cannot purge the irritancy by payment of the arrears after the 14 day period has expired.

433. The intention of the Bill is that in respect of commercial leases the period of 14 days specified in section 4 should be changed so that it becomes a period of 14 weeks.

434. In order to ensure that there is flexibility, for example to extend this period to a longer period if necessary, the Bill gives Scottish Ministers a power to alter this 14 week period by means of regulations.

Necessity and urgency

435. There are already many instances where tenants are refusing to or simply cannot pay their rent as a result of the coronavirus outbreak. If evicted this will result in empty commercial premises across the country. The impact is being most keenly felt in the hospitality, leisure and retail sectors and closures would have repercussions particularly in the tourism industry but also socially: for example, if public houses were closed permanently. There would also be an impact on employment with redundancies following on from businesses closing. Local authority funding would also be affected through funding through lower collection of non-domestic rates. Where the public

⁶<http://www.legislation.gov.uk/ukpga/1985/73/section/4>

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sector acts as landlord the tenants often provide local services which could be lost.

Consultation

436. While no formal consultation with those affected has been possible, the commercial rented sector is aware of the implications of the provisions already made for England and Wales.

Alternative approaches

437. A decision not to legislate would rely on negotiation between landlords and tenants to provide a solution, leading to inequality and uncertainty of treatment. In the circumstances, no alternative to primary legislation exists.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

438. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

439. The Scottish Government has assessed the potential impact of the proposed measure on human rights. The Bill amends the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 to alter the period of notice which a landlord of a commercial lease must give to the tenant before the landlord can terminate the lease on the grounds of non-payment of rent. This is currently 14 days and is to be extended to 14 weeks (the exact period may yet change but it would be in this region). While the alterations to the limitations on the landlords ability to terminate a lease may potentially engage Article 1 Protocol 1 of the ECHR it is considered that this is fair and proportionate in the circumstances and any such interference with property rights is justifiable in the public interest when balanced against the impact on the individual landlord.

440. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on

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an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

441. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

442. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Planning (paragraphs 8 to 10 of schedule 7)

The coronavirus outbreak

443. The coronavirus outbreak will affect the ability of both planning authorities and applicants to deal with planning permissions which are due to expire. Planning permissions can broadly be separated into two categories: full planning permission and planning permission in principle.

444. When planning permission is granted applicants have a period of 3 years to commence development (authorities can provide for a longer period). If development is not commenced then that permission lapses and a new planning application is required. Planning permission in principle also requires the approval of conditions before development can proceed.

445. It is expected that the current restrictions on movement and potential continuation of social distancing and self-isolation will mean that applicants may be unable to satisfy the conditions attached to their planning permission or to commence development due to the shutdown of non-essential construction.

Policy objectives

446. The aim is to ensure that where a full planning permission or planning permission in principle would expire then that permission should not lapse for a period of 12 months from the date on which the provisions come into force, irrespective of that development having not been commenced. The

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permission would only lapse if development has not commenced before the end of the 12-month period.

447. In relation to applications for approval of conditions, if the last date for making an application for an approval is within the emergency period then the time limit for making such an application is to the end of the 12-month period.

Necessity and urgency

448. It is important that when the current restrictions on movement are relaxed, developers are able to pick up where they left off, continuing with construction and having a pipeline of sites ready to move onto once current sites are completed. It is also important to reduce the burden on planning authorities who may otherwise be inundated with new applications to obtain a new permission.

Consultation

449. The expiry of planning permission is an issue which has been raised by industry representatives who had expressed concerns about the ability of applicants to submit required information, apply to amend a condition to in effect get a new permission or commence development. Engagement at official level has also been undertaken with Heads of Planning, Scotland, Society of Local Authority Chief Executives, Society of Local Authority Lawyers and Administrators and the Convention of Scottish Local Authorities. Those consulted understood and appreciated the reasons for taking this action and were supportive of this intervention being time restricted.

Alternative approaches

450. No alternative to primary legislation is possible, and no powers exist which would allow these changes to be made in this way.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

451. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected

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characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

452. The Scottish Government has assessed the potential impact of the proposed measure on human rights. The Bill avoids planning permission (full planning permission or a planning permission in principle) lapsing because developers are not able to get on site to begin development during the six-month period following commencement of the section. It also extends the period within which applications can be made for approvals required by conditions. This is to avoid time limits expiring, and so permission in effect expiring as they can no longer be implemented, just because there is a delay in being able to make applications due to the current situation. Any changes to the way that planning legislation currently may interfere with property rights by regulating development is by way of a relaxation of the current provisions and it is considered that the provisions are compatible with the ECHR.

453. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

454. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that extending the duration of planning permission for up to an additional 12 months does not raise any impacts other than those highlighted in the policy memorandum which indicates that this will potentially allow developers and applicants to progress developments swiftly once current restrictions are reduced and lifted entirely. There may be a saving for local government in reducing the number of applications which are submitted seeking to extend the duration of planning permission.

455. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

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Land registration (paragraphs 11 to 19 of schedule 7)

The coronavirus outbreak

456. As a result of the health advice on social distancing for the coronavirus outbreak, the Keeper of the Registers of Scotland (RoS) on 24th March closed her offices to safeguard health and wellbeing in responding to the outbreak, given the implications for RoS employees, their families and communities. This closed the registers under the Keeper's control and management to new paper registrations (for some a fully digital registration service exists), including the two primary property registers, the Land Register and the Register of Sasines.

457. The Law Society of Scotland also instructed its members to cease settlement of property transactions in light of the reluctance of lenders to release funds where registration of title deeds cannot be sought promptly. This has the potential for housing transactions falling through and leaves some parties in a position where they are unable to secure a real right to property and may be vulnerable to things like insolvency of the granter of the deed.

458. While the government guidance is not to move house where possible, e.g. to agree changes to missives to delay, moves may complete where reasonably necessary under the movement restrictions put in place against coronavirus. That might be the case where they are contractually required, although people are still urged to seek agreement to delay, and appropriate safety precautions are taken.

459. Following consultation with the Law Society of Scotland and UK Finance, interim proposals have been agreed that would allow some property transactions already in progress to proceed to settlement, provided an advance notice (which protects the deed to be registered in the future against any competing deeds or insolvency of the granter for a period of 35 days) is in place. In order to provide certainty to transacting parties and enable property transactions to proceed to completion, changes to the existing advance notice provisions within the Land Registration etc. (Scotland) Act 2012 ("the 2012 Act") are required to prevent the protected period lapsing during the time in which the property registers are closed.

460. As the restrictions imposed by the coronavirus will continue for a sustained period, provision will also be required to allow paper deeds that

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would traditionally be submitted for registration by post to be submitted to the Keeper electronically. This will allow the housing market to function under the existing social distancing restrictions where absolutely necessary and prevent future property transactions from being postponed or falling through.

Policy objectives

Extending the protected period of advance notices

461. Closure of the property registers (in particular, the Land Register) means that applicants are unable to obtain the relevant real right, such as ownership, obtained through registration. In normal circumstances, and without protection in place, so long as the deed remains unregistered, the applicant is potentially exposed to the risk of another party registering a competing right, or the granter of deed the deed becoming insolvent. Advance notices, as provided for by Part 4 of the 2012 Act, provide the requisite protection against these risks for a period of 35 days.

462. With the closure of the property registers save for selected registrations under the interim arrangements where an advance notice is in place, the risk of a competing deed being registered is eliminated. However, given that the registers may remain closed beyond the 35-day protected period provided by any existing advance notices, the risk of the granter becoming insolvent remains.

463. The provisions contained within this Bill modify section 58 of the 2012 Act for the duration of the effect of the Bill to remove this risk in three ways:

- the protective effect of advance notices which were extant on the date of the closure of the property registers (24th March 2020) will be preserved until 10 days after the date of the full re-opening of the Land Register and Register of Sasines (i.e. the date on which the Keeper declares them fully open, in particular to postal applications).
- the protective period for advance notices added to the Land Register or Register of Sasines while the registers are fully or partially closed between the 24th March 2020 and the commencement of this Bill will last until 10 days after that full re-opening date.

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- the protective period for new advance notices added to the Land Register or Register of Sasines while the registers are fully or partially closed will last until 10 days after that full re-opening date.

Digital submission of traditional documents

464. In order to allow the registration and recording of deeds in the Land and Sasine registers to recommence against a backdrop of ongoing restrictions caused by the coronavirus outbreak, it will be necessary to complete registration on the basis of a copy of a traditional document submitted for registration through electronic means e.g. a scanned image of a wet-signed deed submitted by email. The Keeper's staff are working to put the necessary practical arrangements in place to do so.

465. The 2012 Act already makes provision for the registration of traditional documents and also for the registration of fully electronic documents authenticated by way of an electronic signature. The provision draws partly on the model of section 4 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 and effectively provides for delivery and registration of such a document to take place with the agreement of parties involved on the form of the document.

466. The provisions of this Bill provide for registration to proceed on the basis of a copy of a digitally submitted traditional document. It does this by providing that for the purposes of the provisions on applications to register deeds, submission by electronic means of a copy of the deed is sufficient evidence of the original for the purposes of accepting an application for registration.

Necessity and urgency

467. In the absence of the provisions contained within this Bill, the protected period provided by advance notices will expire, placing purchasers at risk, and this, coupled with the inability in most cases to submit deeds for registration electronically, will lead to the collapse or suspension of 'in-flight' property transactions, in many cases at the expense of the transacting parties. Individuals with personal rights in property (which in many cases they may already have taken possession of) will be unable to obtain a real right for an indefinite period.

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Consultation

468. Whilst no formal consultation has been possible, the provisions in this Bill have been developed in collaboration with the Registers of Scotland, the Conveyancing Professorial Panel as well as the Law Society of Scotland and UK Finance, who have both publicly endorsed the proposals. The provisions also reflect the requirements of citizens and legal professionals, who have been vocal in the period since the Keeper stopped accepting postal applications.

Alternative approaches

469. In the period between the Keeper closing the registers and the commencement of this Bill, RoS have been operating manual workarounds to protect parties with extant advance notices:

- RoS are encouraging all parties with extant advance notices to renew these to allow transactions to proceed to settlement in line with the published Law Society guidance.
- where there is a real apparent threat of the grantor of a deed becoming insolvent, RoS will allow the land register application record to be opened to accept an application for record of a deed.

470. Whilst this approach can be tolerated as an interim measure, it is unlikely to assuage transacting parties in the longer term due to the risk of a grantor becoming insolvent before any existing advance notices can be renewed. There are also operational difficulties with this approach in the longer term due to the closure of RoS offices which will be exacerbated if volumes increase.

471. Similarly, whilst the Law Society have advised that essential transactions can settle on the basis of an extant advance notice, this approach cannot subsist in the long term. There must be some way of reopening the property registers on a full basis and without this provision that will not be possible until public health guidance changes.

472. So long as social distancing restrictions apply and the Keepers offices remain closed, postal applications will not be possible, and registration can only be achieved through two ways:

- registration of true electronic documents authenticated by an electronic signature;

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- registration of traditional documents submitted by digital means, such email, or through an online portal.

473. Whilst legislative provision already exists to enable the registration of true electronic documents, the operational, technical and cultural barriers associated with this (mainly in relation to the use of advanced electronic signatures) would be impossible to overcome at a time of social distancing. This leaves digital submission of electronic documents, which the Bill provides for, as the only viable option, on a temporary basis.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

474. The Scottish Government is satisfied that the provisions are compatible with the European Convention on Human Rights, in particular, with Article 1 of Protocol 1 which gives protection for property rights.

475. The provision on advance notices make limited retrospective provision for a small number of advance notices which would otherwise have expired in the period between closure of the Keepers registers and commencement of the Bill, but that is necessary and proportionate to protect the rights of parties with in-flight transactions which have been unable to be registered in the usual way.

476. The measures will preserve the legitimate expectations of parties prior to the closing of the registers. This is for the legitimate aim of protecting the rights of others in the general and public interest in tackling the serious economic impact of the outbreak, given the public health restrictions imposed to deal with the health impact of the virus. The nature of any right which a trustee had acquired in the period before the provision takes effect is a personal right and the value of the claim is not removed.

477. The Scottish Government has assessed the potential impact of the proposed measure on equalities opportunities and no detrimental effects are anticipated.

478. These provisions do not have any direct impact on island communities. The Keeper of the Registers will work with solicitors in island communities who have any particular challenges with connectivity etc. though none are

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envisaged and solicitors in island communities already use many of the Keeper's digital services.

479. These provisions do not have any direct impact on Local Authorities, though they will assist local authorities in using the property registers at this time, in respect of transfers to and from local authorities and charging orders issued by local authorities.

480. These provisions will enable registration in the property registers to continue, helping essential transfers to conclude in this period.

Anatomy Act 1984 (paragraphs 20 to 22 of schedule 7)

The coronavirus outbreak

481. The Anatomy Act 1984 ("the 1984 Act") details the legal requirements surrounding the donation of a body for medical science. Section 4B(3) of the 1984 Act sets the statutory period within which lawful anatomical examination of a body can take place which is currently the period of 3 years beginning with the date of the deceased's death. Section 5 of the Act makes it unlawful to:

- retain possession of a body or a part of a body after lawful authority for anatomical examination has expired i.e. after the expiry of the statutory period set in section 4B(3),
- after the anatomical examination of the body has been concluded,
- and in the case of imported bodies if more than 3 years have elapsed since the date of the deceased's death.

482. Over the next few months universities will likely have a number of bodies falling within these categories. Due to the potential impact on the funeral industry or on the universities of the coronavirus outbreak it is possible that bodies may require to be retained beyond the statutory period, after anatomical examinations have been concluded or in the case of imported bodies longer than 3 years from the date of death. It is therefore considered to be appropriate to extend these periods and to dis-apply the restriction on holding bodies after examinations have concluded.

Policy objectives

483. The Bill makes changes to the current law by:

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- Providing that the statutory period in sections 4B and the 3 year limit in section 5 of the 1984 Act be extended until the paragraphs 21 and 22 of schedule 7 of the Bill cease to have effect; and
- by dis-applying section 5(1)(b) to make it lawful to retain possession of a body or part of a body after the anatomical examination has concluded.

484. Burial or cremation of bodies and/or body parts are subject to contractual arrangements between universities, funeral directors and crematoria. There is a likelihood that because of the pandemic, universities would be unable to fulfil the statutory requirement for disposal within the 3 year period if their staff were sick or not at work and unable to prepare the body or body parts for collection by the funeral director. Funeral directors may also not have the staff to uplift and transport the body to the crematorium. In addition, if the number of deaths in the population exceeded the capacity of funeral directors, crematoria and cemeteries to cope; the disposal of bodies bequeathed for medical science would not be a priority.

Necessity and urgency

485. Both public and private sector organisations will come under significant and unprecedented pressure as a consequence of the pandemic. Using the emergency legislation to extend the statutory period within which a body donated for medical science can be retained means that licence holders such as universities will not break the law, if bodies are retained longer than three years. Retention is likely to have to happen if burial and cremation services do not have the capacity to bury or cremate them.

Consultation

486. The issue was raised with the Scottish Government by Her Majesty's Inspector of Anatomy for Scotland as a result of discussions with the universities.

Alternative approaches

487. Existing powers to adjust the timescales involved in the lawful storage of a body could not be used quickly enough to address the pressures arising from the pandemic.

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Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

488. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

489. The Scottish Government has assessed the potential impact of the proposed measure on human rights. ECHR case law has found that the treatment of a deceased relative comes within the scope of the Article 8 (right to respect for family and private life) and could also amount to degrading treatment under Article 3 (prohibition of torture and of inhuman or degrading treatment or punishment).

490. The Scottish Government is satisfied that there will be no breach of either article as at all times. The bodies affected will continue to be treated with the utmost dignity and respect. Any interference with Article 8 rights due to the delay in returning remains to families for burial or cremation in accordance with the deceased's wishes can be justified as proportionate to the legitimate aim of protection of health and public safety. The Scottish Government is therefore content that there is no breach of ECHR.

491. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

492. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

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493. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Modification of powers to make subordinate legislation (paragraphs 23 to 30 of schedule 7)

Coronavirus outbreak

494. The coronavirus outbreak is already having, and will continue to have, an effect on the way that the Scottish Parliament functions and scrutinises government legislation. The Parliament has introduced its own social distancing arrangements and has had to temporarily reduce the frequency of committee and plenary proceedings. The Scottish Government in turn has had to adapt delivery of its legislative programme, prioritising the most essential and time-critical legislation.

495. As a direct result of the coronavirus outbreak, urgent secondary legislation may be required to make adjustments to the way public services operate or are regulated. Other essential secondary legislation not directly related to the coronavirus outbreak will also need to be progressed in the coming weeks and months.

496. The Scottish Government is concerned that the Scottish Parliament's ability to scrutinise legislation subject to the affirmative procedure may be compromised by how it needs to adapt its sitting patterns and scrutiny arrangements in response to the coronavirus outbreak. This would limit the flexibility and responsiveness of the Government's approach to tackling the coronavirus outbreak.

Policy objectives

497. The Bill therefore includes provision which allows secondary legislation which would otherwise be made under the affirmative procedure, to instead be made under an emergency draft affirmative procedure. Known as 'made affirmative' procedure, provision already exists for this form of parliamentary scrutiny in other legislation. This procedure still requires a parliamentary vote on all legislation, and is therefore affirmative in nature, but will allow this secondary legislation to be brought into force in advance of this vote, only where this is urgently required for a reason connected to the coronavirus outbreak.

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Necessity and urgency

498. Without this temporary adjustment to procedures, if urgent changes were required to a law that could be adjusted under affirmative procedure, the only options would involve either emergency sittings of the Scottish Parliament, which may be challenging or reckless to organise during the coronavirus outbreak, or further emergency primary legislation. Where the Scottish Parliament decided not to affirm secondary legislation made using this provision, it would cease to have effect at the end of the 28 day period after it was made.

Consultation

499. No formal consultation has been possible.

Alternative approaches

500. No alternative to primary legislation is possible. Provisions for parliamentary procedure are set out in primary legislation, amendment of which requires primary legislation.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

501. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

502. The Scottish Government has assessed the potential impact of the proposed measure on human rights and does not consider that they engage ECHR as such given that they concern procedural adjustments to the legislative process and still enable appropriate parliamentary scrutiny. Scottish Ministers remain subject to the requirement to act in accordance with ECHR.

503. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on

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an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined it will have no significantly different impact on island communities. No detrimental effects are anticipated.

504. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated.

505. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

Business improvement districts (paragraph 31 of schedule 7)

The coronavirus outbreak

506. Business Improvement Districts (“BIDs”) are business partnerships which vote to invest collectively to deliver local improvements and create platforms for local economic growth. There is a formal statutory process which requires a ballot of those businesses within the defined area following consultation on a BID proposal and business plan. BIDs can operate for a maximum of 5 years before re-ballot.

507. BIDs are funded through a levy on local businesses. The levy is collected by the local authority for the area as a supplement to non-domestic rates and passed to the body running the BID.

508. The coronavirus presents two problems for operating the system of BIDs:

- several BIDs are due to seek to end and/or go to ballot in the coming months and
- one already has a ballot underway. The Scottish Government does not consider it appropriate to have to ballot in that period, given the uncertainty involved.

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Policy objectives

509. The Bill contains provision to extend the duration of BIDs that are due to end and go to renewal before March 2021.

510. The Scottish Government considers that BIDs have a vital role to play as part of a local response to the coronavirus outbreak. They have generated millions of pounds in private investment, have localised intelligence, have ideas on mitigating the outbreak, and can be deployed as critical infrastructure during and after the crisis. Several local authorities have indicated that they would welcome having BIDs support them at this time.

511. The Scottish Government considers that BIDs have long established and trusted relationships with local businesses and are well placed to support them to put in place contingency measures to respond to the coronavirus outbreak, including working with local charities, food banks, transport organisations, housing associations, community development trusts or at risk individuals.

512. The Scottish Government considers that BIDs can play a vital role in stabilising and galvanising local businesses and communities in the aftermath of the coronavirus crisis. They can be a valuable mechanism for dealing with the economic consequences of the crisis by acting as a forum for local businesses and partners, examining ways to address revenue shortfalls, signposting funding and support, ensuring resources are directed where they are needed most, enlisting support from local authorities and key national organisations, and providing guidance and advice which suits local needs.

Necessity and urgency

513. Without urgent action to extend the duration of those BIDs due to end and go to renewal ballot before 31 March 2021, the Scottish Government considers that there is a risk to the future of certain BIDs which could not reasonably re-ballot during the coronavirus outbreak, but should be allowed to continue their valuable work. This failure to renew would present an increased risk to vulnerable individuals and to the survival of local businesses at this time.

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Consultation

514. No consultation has been possible. However, the Scottish Towns Partnership (“STP”) has been contacted by a large number of BIDs and local authorities relaying concerns over ballot dates. STP also recently hosted a webinar with BIDs and local authorities where a desire to support the local response to the coronavirus was expressed.

Alternative approaches

515. No alternative to primary legislation is possible.

Effects on equal opportunities, human rights, island communities, local government, sustainable development, etc.

516. The Scottish Government has assessed the potential impact of the proposed measure on equal opportunities and has determined it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

517. The Scottish Government has assessed the potential impact of the proposed measure on human rights and is satisfied that they do not engage Convention Rights.

518. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers’ opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. The Scottish Government has assessed the potential impact of the proposed measure on island communities and has determined these communities will be key beneficiaries of related support and investment.

519. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that no adverse effect on local government is anticipated. The value of BIDs to local government in Scotland, and the anticipated benefits of maintaining a system of BIDs during and after the coronavirus outbreak, formed part of the Scottish Government’s reason for making these provisions.

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520. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated.

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Coronavirus (Scotland) Bill

Policy Memorandum

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