

This document relates to the Coronavirus (Scotland) (No.2) Bill (SP Bill 71) as introduced in the Scottish Parliament on 11 May 2020

# Coronavirus (Scotland) (No.2) Bill

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## 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) (No.2) Bill introduced in the Scottish Parliament on 11 May 2020.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 71-EN);
  - a Financial Memorandum (SP Bill 71-FM);
  - Statements on legislative competence by the Presiding Officer and the Scottish Government (SP 71-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) (No.2) 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 UK Act"), passed by the UK Parliament on 25 March 2020, to which the Scottish Parliament gave its consent on 24 March 2020;

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- the Coronavirus (Scotland) Act 2020 (“the 2020 Act”), passed by the Scottish Parliament on 1 April 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 proportion of the population, and the public health measures required to control and limit the spread of the outbreak will continue to 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 guidance<sup>1</sup> continues to require business and public authorities to operate very differently to the way they have done until now by implementing, for example, physical distancing policies, or by requiring their workforce to work from home, where possible. In addition the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020<sup>2</sup> (S.S.I. 2020/103) (“the 2020 Regulations”) require the closure of businesses selling food or drink for consumption on the premises, and of a wide range of other businesses 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 changes need to be made to the way they operate and the way that they are regulated.

9. Even beyond the new restrictions on living and working in Scotland, the coronavirus outbreak continues to have an effect on essential public services which demands a response. Central and local government, and

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

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

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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 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 continuing 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 laws which protect individuals to ensure their effective operation 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.

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13. The Bill is part of a concerted and coordinated effort within Scotland, and across the UK, to tackle the coronavirus outbreak. It has been developed taking into account the effects of the UK Act, 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 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:

- Part 1 of the Bill will automatically expire less than six months after it comes into force. The Scottish Parliament may extend this for two further periods of six months, giving Part 1 of the Bill a maximum duration of 18 months;
- where a provision in Part 1 of the Bill is no longer considered necessary, Scottish Ministers may 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.

15. 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.

## Alternative approaches

16. Given the need to respond to the developing emergency situation, no alternative to emergency legislation exists. Where appropriate,

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consideration has been given to alternative approaches to primary legislation. This is set out below, for each of the measures in the Bill.

## Consultation

17. 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

### **Student residential tenancy: termination by tenant (paragraphs 1 to 3 of schedule 1)**

#### **The coronavirus outbreak**

18. As a result of the coronavirus outbreak and the public health measures taken to control and limit its spread, many students have returned to their family homes. While students living in the mainstream private rented sector (“PRS”) have been able to end their tenancies early by giving their landlord 28 days’ notice under the Private Housing (Tenancies) (Scotland) Act 2016, this has not been the case for some students living in Purpose Built Student Accommodation (“PBSA”) which is not covered by the provisions of that Act. Although all universities and colleges and a number of the larger PBSA providers have allowed their tenants to end their contracts early, some students have not been allowed to do so.

19. These tenancies are let to the tenant while the tenant is a student, with the purpose of accommodating the student while the student undertakes a course of study. The coronavirus outbreak has made the continuation of attendance by students at such courses of study impossible in many situations, with courses no longer being provided in the ordinary way. The purpose of these tenancies can no longer be fulfilled.

#### **Policy objectives**

20. The Bill introduces:

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- a 7-day notice to leave period for those currently tied into a student accommodation contract; and
- a 28-day notice to leave period for agreements entered into while these provisions are in force.

21. The 7-day notice period will ensure that students who left their PBSA, or have been unable to return to it, and who wish to end their contract early, are able to do so, in light of the supervening and unexpected consequences of the coronavirus outbreak.

22. The 28-day notice period will give students seeking accommodation for next academic year reassurance that, should the uncertainty about the operation of universities continue, an appropriate notice period will exist in respect of their tenancy.

### **Necessity and urgency**

23. These provisions are necessary because some students who are no longer residing in their PBSA are required to continue paying for accommodation they are not using. While some PBSA providers have been sympathetic to the needs of students to leave their accommodation early, this is not universally the case. It is anticipated that many students will exercise that option, and that the practical effect of the measure will lead to the extinction of many such leases. Further, it is recognised that it is unlikely that landlords will be able to re-let the premises for the remaining term of the lease. The investment and funding model of such landlords reflects the nature of the tenancies which they offer – including the absence of any statutory right for the tenant to terminate. There is a relatively certain income stream for the duration of the tenancy. The impact on landlords is therefore likely to be significant.

24. However, the purpose of the tenancies is to confer on the tenant the right to occupy the property while the tenant is a student. Educational institutions are unable to provide students with academic instruction that involves physical attendance. Government guidance has been that students should return home and many students have complied with that guidance. To return to that let without reasonable excuse would be a criminal offence. The students are under a continuing obligation to pay rent, in return for a tenancy which they cannot use and the essential purpose has been radically undermined. The students will often be in a

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relatively vulnerable financial position. The reality is that there is also considerable uncertainty about the manner in which education is to be provided to students in the next academic year.

25. Action is therefore required to release students locked into contracts as quickly as possible because of the unforeseen event which has undermined the purpose of the contract. It is not reasonable to expect students to continue to bear this financial burden.

## **Consultation**

26. The Scottish Government is in regular contact with student accommodation providers including universities, colleges, PBSA providers, their representative bodies, and students' organisations. This includes Universities Scotland, Colleges Scotland, the Scottish Funding Council, Association for Student Residential Accommodation, College and University Business Officers, NUS Scotland, AMOSSHE –The Student Services Organisation and Emily Test. The Scottish Government is engaging with them proactively to respond to the needs of students and accommodation providers during this challenging period.

27. Informal consultation on these specific measures has been undertaken as part of this engagement.

## **Alternative approaches**

28. These changes to the law require primary legislation because current accommodation contracts are governed by common law. Primary legislation is therefore required to introduce a statutory notice period to end these contracts early. It would have been possible to apply the same period of notice in respect of existing tenancies as the period of notice proposed for new tenancies. However, that would not recognise the distinguishing feature of existing tenancies which have been the subject of an intervening event which neither party envisaged. Their position is different from a new tenancy entered into in full knowledge of the impact of Covid.

29. It would also have been possible to choose a slightly longer period of notice than 7 days. That approach would not have achieved the purpose of enabling termination as quickly as possible subject to the minimum

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period necessary to allow for the necessary administrative steps to be taken.

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

### **Equal opportunities**

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.

### **Human rights**

31. Consideration has been given to Article 1 of Protocol 1 and Article 14 of the ECHR. The proposal involves a control of the use of property for the purposes of Article 1 of Protocol 1 rather than a deprivation of property. What is proposed is essentially the imposition of a new statutory term into existing lease contracts. This is of the same character as the application of new statutory rent controls to existing leases, as discussed in *Mellacher and others v. Austria*<sup>3</sup> (1989) (see in particular paragraph 44 of the judgment).

32. The provision enables the tenant to bring the lease to an end, thereby extinguishing the contract (which is a possession of the landlord's) and the future income stream which the landlord could expect under that contract, as well as the other benefits which such a contract may provide to a landlord. The social protection of tenants is a legitimate aim recognised by the European Court of Human Rights<sup>4</sup>.

33. The provision is concerned with student accommodation, which is made available to students for the purposes of accommodating them while

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<sup>3</sup> no. 10522/83, 19 December 1989; (1990) 12 E.H.R.R. 391. The judgment is available at <http://hudoc.echr.coe.int/eng?i=001-57616>.

<sup>4</sup> *Anthony Aquilina v Malta*, no. 3581/12, 14 December 2014. The judgment is available at <http://hudoc.echr.coe.int/eng?i=001-148636>.



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undertaking their studies. As a result of the coronavirus outbreak, those studies have been very significantly disrupted. Academic institutions are no longer able to provide courses in the normal way. The coronavirus outbreak has undermined the underlying practical purpose of these particular tenancies.

34. The Scottish Ministers have factored in the impact of these measures on landlords and are satisfied that it is in the public interest to give students the ability to bring leases to an end with either 7-day notice periods (for currently existing leases) or 28-day notice periods (for leases entered into in future). In respect of both scenarios, it is the Scottish Ministers' judgment that it is not reasonable to expect students to continue to bear the financial burden of a tenancy where the purpose of that tenancy has or may become, fundamentally undermined.

35. In respect of student tenancies newly entered into, a period of 28 days' notice reflects the current law on private residential tenancies. This change will only apply while the provision remains in effect, which will be governed under sections 8 to 12 of the Bill by the Scottish Government and Scottish Parliament's judgment about the continued effect of the coronavirus outbreak, and the continued necessity and proportionality of the change.

36. Existing student tenancies are in a different situation. An unforeseen and supervening event has undermined the practical purpose of the contract. That event also undermines one of the functions of a period of notice - namely, to allow the landlord an opportunity to re-let the premises. In all the circumstances, the Scottish Government considers that the tenant should be able to bring the tenancy to an end quickly. It takes the view that, having regard to the particular nature of these tenancies, and the exceptional circumstances, a 7-day notice period is appropriate. The Scottish Ministers are satisfied that the difference in circumstances between existing and prospective tenants, set out above, means that the two situations are not analogous and accordingly, there is no incompatibility with Article 14 ECHR to apply different notice periods to these different situations.

### **Island communities**

37. 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.

### **Local government**

38. 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.

### **Sustainable development**

39. The Scottish Government has assessed the potential impact of the proposed measure on sustainable development and no detrimental effects are anticipated. Whilst these provisions could lead to loss of rental income for providers of student accommodation, the measures are temporary and come at a time when the academic year has almost ended and such tenancies would have come to a natural end, making the loss of income minimal. It should be noted that a large number of providers of student accommodation have – in light of the coronavirus outbreak – voluntarily changed their policy to enable students to terminate their tenancies earlier.

### **Coronavirus Carer's Allowance Supplement (paragraph 4 of schedule 1)**

#### **The coronavirus outbreak**

40. The coronavirus outbreak has an impact on many of Scotland's estimated 800,000 unpaid carers that is specifically connected to their caring role. While it is not possible to quantify this impact precisely, the Scottish Government considers that many unpaid carers will be experiencing a loss of income and increased costs at this time.

41. In most cases, this is likely to be more severe for those unpaid carers with a more intensive caring role and lower financial resilience. The Scottish Government considers that the receipt of carer's allowance is a way of identifying these unpaid carers, because it requires 35 hours or more caring per week with a weekly income threshold of £128. Around 83,000 unpaid carers in Scotland receive carer's allowance, and they are

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more likely to be in the lower income deciles and have poorer health and educational outcomes.

## **Policy objectives**

42. The policy objective is to provide unpaid carers who receive carer's allowance with extra financial support due to the loss of income and increased costs many face as a result of the coronavirus outbreak. It is intended that this will help to mitigate negative financial impacts of the outbreak and help to relieve some of the stress associated with additional and different caring responsibilities. This is in line with the Scottish Government's broader policy objective to support carers to protect their health and wellbeing, so they can continue to care if they so wish, and have a life alongside caring.

43. This extra support will be known as Coronavirus Carer's Allowance Supplement ("CCAS") and will be paid as an increased amount of Carer's Allowance Supplement ("CAS") for the period from 1 April 2020 to 30 September 2020 to help address the effects of the coronavirus outbreak.

## **Necessity and urgency**

44. Providing additional funding for unpaid carers in Scotland currently in receipt of carer's allowance is necessary to help address the issues of potential financial hardship and resulting negative impacts on the health and wellbeing of these carers and the people for whom they care.

## **Consultation**

45. It has not been possible, given the urgency, to formally consult on these provisions. However, ongoing engagement with carer organisations in Scotland on the impact of the coronavirus outbreak on unpaid carers has been a key consideration in developing these provisions. These changes will be communicated to carer organisations, and will be communicated to carers and the public generally via the Scottish Government and Social Security Scotland websites.

## **Alternative approaches**

46. The Scottish Government has considered a range of legislative options to make payments to unpaid carers, such as using the carer's assistance or short term assistance provisions in section 28 and 36 of the Social Security (Scotland) Act 2018, or amending the current carer's

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allowance legislation. The Scottish Government has also considered different payment mechanisms. However, anything other than an automatic payment through Social Security Scotland would require the cooperation of the Department for Work and Pensions, which currently delivers carer's allowance in Scotland on behalf of the Scottish Ministers under an agency agreement, and capacity within the Social Security programme and Social Security Scotland to deliver and operate new systems. Making a payment alongside the June CAS would ensure that there is not risk to Social Security Scotland's capacity to deliver the seven existing benefits it already provides to people on low incomes. It would also have minimal impact on the Department for Work and Pensions as they seek to meet unprecedented demand for universal credit.

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

### **Equal opportunities**

47. 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.

48. The Scottish Government anticipates that CCAS will likely have a disproportionately positive impact on women, as they make up more than two-thirds of recipients.

49. The Scottish Government also anticipates that it will have a disproportionately positive impact on disabled people, as the person the carer looks after will be disabled. The payment can help maintain the health and wellbeing of the carer, which has knock on positive impacts for the looked after person, and in cases where the carer lives with the cared for person, a potentially positive impact on overall household finances.

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## **Human rights**

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

51. Young carers under 16 will not benefit directly from CCAS, as it is necessary to be 16 or over to apply for carer's allowance which is an income replacement benefit. However, there will be indirect positive impacts on children and young people who are cared for by someone in receipt of carer's allowance.

## **Island communities**

52. 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.

## **Local government**

53. 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.

54. In relieving financial need amongst carers (who are typically in the lower half of income deciles), this may have a positive financial and operational impact on local government as it may reduce applications to the Scottish Welfare Fund which is under particular pressure during the coronavirus outbreak.

## **Sustainable development**

55. 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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## **Bankruptcy (paragraphs 5 to 11 of schedule 1)**

### **The coronavirus outbreak**

56. The coronavirus outbreak has already caused, and will continue to cause, significant economic hardship to large numbers of individuals and smaller businesses (in this context, “smaller businesses” means those covered by Scotland’s personal insolvency system). Inevitably, many will be faced with unsustainable debt, in particular those in the greatest financial hardship.

### **Policy objectives**

57. The Bill contains measures to:

- make bankruptcy easier to access for those who need it;
- make it harder for creditors to make individuals (and sole traders) bankrupt; and
- make bankruptcy processes easier to administer.

58. The first set of changes are focused on Minimal Asset Process (“MAP”) bankruptcies. This process is a route into bankruptcy for people with few assets<sup>5</sup>.

59. These measures remove application fees from for those whose sole income comes from certain benefits, and reduce them from £90 to £50 for others. The maximum level of debt covered by the process is increased from the current £17,000 to £25,000 and student loan debt (which survives bankruptcy) is removed from that calculation. Taken together, these measures should allow more individuals who decide to enter bankruptcy to do so in a way that minimises the burden to them. The reduction in protection afforded to creditors is considered acceptable given the current circumstances.

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<sup>5</sup> Further details of the process are available on the Accountant in Bankruptcy’s website: <https://www.aib.gov.uk/bankruptcy/types-routes-bankruptcy#whatisMAP>

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60. The application fee for full administration bankruptcies is also reduced from £200 to £150 to make bankruptcy easier to access for those who do not qualify for the MAP.

61. The second change raises the minimum amount that must be owed to a creditor before that creditor can apply to the courts to make an individual bankrupt. It is raised from £3,000 to £10,000. This measure complements the moratorium extension included in the 2020 Act. Taken together, the principal purpose of these measures is to ensure adequate time for those who will be able to repay their debts in time, once they have recovered from the immediate financial shock caused by the economic impacts of the coronavirus outbreak. A secondary benefit is that increasing the minimum amount will reduce the number of these applications, allowing the courts and the Accountant in Bankruptcy to focus resources elsewhere.

62. The final set of changes is intended to deal with the impact of physical distancing, particularly to facilitate the use of electronic communication and to permit virtual meetings of creditors.

## **Necessity and urgency**

63. Since the introduction of the public health measures taken to control and limit the spread of the coronavirus outbreak, there has been a dramatic reduction in the number of bankruptcy applications. This results from the additional support creditors have introduced, with a wide range of payment holidays available for various forms of debt. At the same time, individuals will have found it much harder to access help from a money adviser, especially if they are seeking face to face advice. Individuals may also be running down savings where they have them, or using overdraft and other credit facilities until the impact of the outbreak on their personal finances becomes clearer. Initial analysis from Citizens Advice Scotland<sup>6</sup> shows that advice queries coming to them in March were focused on employment rights and benefits, rather than directly on debt.

64. It is not clear either how long creditor forbearance will continue, or how long the most severe economic impacts of the coronavirus outbreak will last. However, the Scottish Government considers that people's perception of the outbreak as a temporary interruption to normal life

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<sup>6</sup> <https://www.cas.org.uk/publications/march-2020-data-scottish-citizens-advice-network>

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followed by a rapid return to normality is shifting instead towards perceiving a “new normal”. As household finances come under sustained pressure, the Scottish Government expects to see rapid increases in the demand for debt advice, and consequent demand for formal debt solutions including bankruptcy. It is important to act as quickly as possible to ensure those solutions can be made as accessible as possible.

65. The Accountant in Bankruptcy commissioned research into the MAP and published a report in November 2019<sup>7</sup>. One of the principal findings was that 39% of applicants were not able to pay the £90 fee for a MAP bankruptcy without either having to borrow, receiving help from a charity, or paying by instalments, with 13% reporting it “very hard” to find money to cover the fee. Removing or reducing this fee is therefore necessary to increase accessibility of this route to bankruptcy.

66. Greater electronic transmission of documents and enabling virtual meetings of creditors are necessary to facilitate alternative ways of working in response to the public health measures taken to control and limit the spread of the coronavirus outbreak. These measures will significantly improve efficiency should the public health measures be lifted and subsequently reimposed.

## **Consultation**

67. Limited informal consultation has been carried out with representatives of the debt advice sector (Money Advice Scotland, StepChange, and Citizens Advice Scotland) and creditors (UK Finance, the Association of British Credit Unions, and the Convention of Scottish Local Authorities). All of these stakeholders supported the measures in the Bill.

## **Alternative approaches**

68. Although changes in debt levels and fees can be made by secondary legislation, some of the changes to make the bankruptcy process easier to administer can only be delivered by primary legislation. There are advantages to using primary legislation to deliver all changes that are introduced for a reason to coronavirus, especially for reasons of accessibility and transparency. Although it would be possible to cut fees and raise debt levels further, there is a need to strike a balance between

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<sup>7</sup> <https://www.aib.gov.uk/news/releases/19191919/1111/minimal-asset-process-user-journey>



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the interests of those in unsustainable debt, the proper protection of creditors' interests, and the need to maintain funding for Accountant in Bankruptcy.

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

### **Equal opportunities**

69. 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.

### **Human rights**

70. The Scottish Government has assessed the potential impact of the proposed measure on human rights and considers 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. This is directly relevant to the proposal to increase the minimum debt level before a creditor can seek to have a debtor made bankrupt from the current £3000 to £10,000.

71. The Scottish Government considers that 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. Nor are creditors debarred from taking other action short of bankruptcy, including diligence measures, to recover debts below this threshold, so that creditors' claims are not lost. Finally, this is an interim time-limited measure, rather than a permanent increase in minimum debt levels, and takes account of the need to preserve court and administrative time for cases where creditors are pursuing higher levels of debt.

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### **Island communities**

72. 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.

### **Local government**

73. 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.

### **Sustainable development**

74. The Scottish Government has assessed the potential impact of the proposed measure and has determined that moves to allow more electronic communication and virtual meetings should have some small benefit in terms of sustainability.

### **Mental Health (Care and Treatment) (Scotland) Act 2003: nomination of named persons (paragraph 12 of schedule 1)**

#### **The coronavirus outbreak**

75. Under the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"), a patient aged 16 or over may choose an individual to be his or her named person. A named person represents the interests of and supports a patient subject to proceedings under the 2003 Act.

76. The procedure for nominating a named person is set out in section 250 of the 2003 Act. Subsection (2A) imposes requirements that must be complied with if the nomination is to be valid. The nominated person has to

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add a docket to the nomination consenting to it. They must also sign the docket and this signature must be witnessed by a “prescribed person”<sup>8</sup>.

77. Due to the public health measures taken to control and limit the spread of the coronavirus outbreak, there are difficulties arranging for a prescribed person to witness these signatures. In particular, changing workforce priorities and changes to practice to reflect the impact of the outbreak have resulted in this service being assigned a lower priority especially given physical distancing requirements and restrictions on movement.

78. Where dockets have not been witnessed, the validity of named person nominations is affected. This is causing difficulties for the Mental Health Tribunal for Scotland (“MHTS”), with a resulting increase in time spent liaising with stakeholders regarding named person nominations.

## **Policy objectives**

79. The Bill temporarily removes the requirement for a nominated person to have their signature witnessed by a prescribed person when they agree to become a named person. The policy intention is to ensure that the safeguards a named person offers remain effective during the coronavirus outbreak and to minimise the obstacles to this caused by the outbreak.

80. The other safeguards around the nomination process are unaffected by the Bill. In particular, nominations continue to have to be made in writing. The patient will still require to have their signature witnessed by a prescribed person, in order to minimise the risk of coercion and to ensure that the patient is content that the nominated person should be their named person.

81. The provisions in the Bill ensure that patients still have the ability to choose their own named person, while minimising any delays in the

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<sup>8</sup> The classes of prescribed person are set out in the Mental Health (Patient Representation) (Prescribed Persons) (Scotland) Regulations 2017 (S.S.I. 2017/175). They include: independent advocates; medical practitioners; arts therapists, dieticians, occupational therapists, physiotherapists, practitioner psychologists and speech and language therapists; people employed in the provision of, or managing the provision of, a care service; registered nurses; social workers; and solicitors.

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process of nomination caused by the outbreak which in turn will reduce any delays in having the patient involved in their care and treatment decisions.

### **Necessity and urgency**

82. The MHTS and Social Work Scotland have reported a slowing down of processes. The requirement for a prescribed person to witness the nominated person's signature has been identified as causing practical difficulties in compliance with the mental health legislation, because of difficulties in securing the validity of nominations. The increase in time spent liaising with stakeholders regarding named person nominations can have an impact on the point at which the MHTS is able to sit to consider whether the patient should continue to be detained under the 2003 Act.

### **Consultation**

83. The Scottish Government has consulted key stakeholders, including the MHTS, Social Work Scotland, the Mental Welfare Commission, the Scottish Courts and Tribunals Service ("SCTS") and the Royal College of Psychiatrists. These stakeholders fully support the need for this change. Additionally, the Scottish Government has support from the Scottish Association for Mental Health (SAMH) which recognises the difficulties caused by the coronavirus outbreak.

### **Alternative approaches**

84. The Scottish Government has considered whether it would be possible to continue with the current nominations process while the public health measures taken to control and limit the spread of the coronavirus outbreak are in place. This would involve using email or telephone conversations as well as the postal service, but these workarounds make the process extremely lengthy and contribute to delays. Accordingly, this approach does not resolve the existing difficulties.

85. The Scottish Government has also considered whether adding additional classes of prescribed persons would assist, by ensuring that a larger pool of individuals could act as a prescribed person. However, as the current public health guidance involves physical distancing, and this has dramatically reduced face to face contact (which is generally necessary when witnessing a signature), this approach does not resolve the existing difficulties.

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86. Accordingly, the Scottish Government takes the view that the best approach is temporarily to remove the requirement for the nominated person's signature to be witnessed by a prescribed person. As the requirements for a nominated person to consent to nomination and to have their signature witnessed by a prescribed person are set out in 250(2A) of the 2003 Act, primary legislation is necessary to deliver the preferred policy.

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

### **Equal opportunities**

87. 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.

### **Human rights**

88. The Scottish Government has assessed the potential impact of the proposed measure on human rights and does not consider that any issues arise. Neither the patient's rights or the named person's rights are affected.

### **Island communities**

89. 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.

### **Local government**

90. 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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## **Sustainable development**

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

## **Time limits in criminal proceedings (paragraph 1 of schedule 2)**

### **The coronavirus outbreak**

92. There are a number of time limits applicable to criminal proceedings. These are prescribed in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) 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.

93. It is highly likely that the coronavirus outbreak will lead to time limits not being met because of its impact on the ability to hold proceedings in court, given public health guidelines on physical distancing.

94. The 2020 Act extended some of these time limits to take account of the impact of the coronavirus outbreak on the justice system. However, a number of further time limits have been identified that are likely to be affected.

### **Policy objectives**

95. The Bill makes provision to disapply certain time limits contained in the 1995 Act so that, from the coming into force date of these provisions, there is a period during which these time limits will not apply and the court can adjourn a case for such period as it considers appropriate.

96. These time limits are contained in:

- section 145 (power of the court to adjourn a summary case at first calling where the accused is present to allow time for inquiry into the case or for any other cause which it considers reasonable)
- section 145A (corresponding provision where the accused is not present at first calling)

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- section 200 (power of the court to remand an accused for inquiry into their physical or mental condition where the accused has committed an offence punishable with imprisonment)
- section 245J (power of the court to adjourn a hearing and remand an offender for inquiry in respect of their apparent failure to comply with a requirement of a community payback order, drug treatment and testing order or restriction of liberty order)

97. In relation to section 145 of the 1995 Act, the Bill enables the court to adjourn a case where the accused is released on bail or ordained to appear at a subsequent court hearing for such a period as it considers appropriate, removing the current 28-day time limit. The existing time limits for cases where the accused is being held on remand will continue to apply.

98. In relation to section 145A of the 1995 Act, the Bill removes the requirement that no single period of adjournment can exceed 28 days, and so enables the court to adjourn the case for such period as it considers appropriate.

99. These modifications to sections 145 and 145A are intended to address the fact that the coronavirus outbreak may result in inquiries into a case taking longer than would otherwise be the case.

100. In relation to section 200 of the 1995 Act, the Bill removes the requirement that no single period of remand or committal to a hospital can exceed three weeks. This is intended to ensure that, in the event that the coronavirus outbreak means that it is not possible to obtain medical advice within the specified time period, the court can adjourn the case for a longer time period if they consider this necessary in order to obtain medical advice. There is no requirement for a further hearing to be convened solely to adjourn the case for a further period.

101. Section 245J of the 1995 Act provides that where an offender appears before the court in respect of their apparent failure to comply with a requirement of a community payback order, drug treatment and testing order or restriction of liberty order the court can adjourn the case for up to 4 weeks, or, on cause shown, 8 weeks at a time, to enable inquiries to be made or to determine the most suitable method of dealing with the offender. Often this takes the form of a Social Inquiry Report. It is

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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 enables the court to adjourn a case prior to sentencing for such period as it considers appropriate, removing the 4 and 8 week limits.

## **Necessity and urgency**

102. The Scottish Government anticipates that the effects of the coronavirus outbreak and the public health measures taken to control and limit its spread are such there will be large numbers of criminal cases where the time limit for a single adjournment is about to be exceeded. As a result, individual hearings would be necessary to further adjourn these cases. These provisions seek to minimise the need for significant numbers of hearings to take place for this reason.

## **Consultation**

103. No formal consultation has taken place. However, the Scottish Government has discussed these provisions with the Crown Office and Procurator Fiscal Service (“COPFS”) and SCTS, and they have been identified as key measures to ensure the efficient operation of court business during the coronavirus outbreak, particularly to ensure that court business can be conducted in a way which will minimise unnecessary travel and gatherings of people.

## **Alternative approaches**

104. An alternative approach would be to do nothing, as the courts do have a power to further adjourn where the time limit for a single adjournment is about to be exceeded. However, requiring the courts to continue to consider this on a case-by-case basis risks placing a significant additional burden on the justice system in terms of requiring additional judicial decisions and associated hearings. It also risks people having to congregate in open court for these hearings to take place. Accordingly, the Scottish Government considers that it is preferable to disapply the time limits identified, and as they are contained in the 1995 Act primary legislation is required to do so.



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

### **Equal opportunities**

105. 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.

### **Human rights**

106. 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 permitted length of a single adjournment, and so potentially the time period that an accused person is held on remand, prior to sentencing or pending a decision regarding an alleged breach of a court order, together with other time limits for the length of a single adjournment in summary cases after first calling where the accused is not in custody.

107. However, the Scottish Government considers that these modifications are compatible with the right guaranteed by Articles 5(3) and 6(1) of the ECHR to a trial within a reasonable time. They are necessary to address the disruption to the justice system that is already being caused by the coronavirus outbreak. There is no reason to anticipate that the court will exercise the powers conferred in a way which would delay proceedings to the extent that these Convention rights were breached in an individual case. A person can, at any time, apply to the court for a bail review under section 30 of the 1995 Act 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.

### **Island communities**

108. 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

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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.

### **Local government**

109. 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.

### **Sustainable development**

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

## **Arrangements for the custody of persons detained at police stations (paragraphs 2 to 5 of schedule 2)**

### **The coronavirus outbreak**

111. Custody hearings in criminal proceedings are usually held in person in a court building, with all parties physically present. During the coronavirus outbreak, gatherings of this nature expose those involved to an increased risk of infection. In light of the public health guidance about self-isolation and physical distancing, some virtual custody hearings have been organised to take place within dedicated police hubs across Scotland by way of video link.

112. However, the ability to conduct custody hearings in this way is limited by the fact that it is not currently possible for Prisoner Custody Officers (“PCOs”), contracted by the Scottish Prison Service, to carry out the functions that they would normally carry out in court buildings within police stations.

### **Policy objectives**

113. The Bill enables the Scottish Ministers to make arrangements for PCOs to carry out their functions within police stations for the purpose of facilitating the appearance before a court by electronic means of prisoners

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in police custody. This will involve prisoners appearing before the court by video link from police stations.

114. PCOs will be able to carry out the functions that they normally would carry out in court buildings within police stations. These functions include the service of papers, the management of the timetable of the virtual court, solicitor consultations, the movement of prisoners between cells and the virtual court room, attending to wellbeing, and the release and remanding of prisoners after the hearing.

115. These provisions aim to further minimise the need for physical attendance at custody hearings in court buildings.

### **Necessity and urgency**

116. The requirement for the accused to attend all court hearings in person within court buildings is unsustainable during the coronavirus outbreak. Transporting prisoners to court exposes justice workers to an increased risk of infection.

117. The 2020 Act contains provisions enabling hearings to be conducted remotely, and this allows the risks inherent in attending court hearings in person to be mitigated. However, the inability for PCOs to carry out their functions within police stations is a barrier to utilising those provisions in relation to first appearances from custody. To make those provisions effective for first appearances, the further provision in the Bill is necessary. In addition, enabling PCOs to carry out their functions within police stations will free police officers and other staff to return to critical front line services.

118. These provisions are also needed to deal with the disruption caused by the coronavirus outbreak to operational business across the criminal justice system. It is essential that the criminal justice system continues to function during the outbreak to keep communities safe. The Bill provides for increased operational flexibility around custody hearings, and so ensures that the criminal justice system can deliver essential business effectively throughout the outbreak.

### **Consultation**

119. No formal consultation has taken place. However, the Scottish Government has discussed these provisions with Police Scotland, the

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COPFS, SCTS and the Scottish Prison Service. These provisions have been identified as a key measure to ensure the continued effective operation of the criminal courts during the coronavirus outbreak.

## **Alternative approaches**

120. No alternative approaches have been identified which would enable PCOs to carry out their functions within police stations for the purpose of facilitating the appearance before a court by electronic means of prisoners in police custody. The functions that PCOs may carry out are set out in primary legislation. Primary legislation is therefore required to modify those functions so that they may be carried out within police stations.

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

### **Equal opportunities**

121. 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.

### **Human rights**

122. The Scottish Government has assessed the potential impact of the proposed measure on human rights. Detention engages a person's right to liberty under Article 5 of the ECHR. The provisions do not change the substantive rules or time limits regarding detention. The provisions only change the location in which PCOs can carry out their functions. PCOs exercise functions of a public nature and must act compatibility with the ECHR.

### **Island communities**

123. 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

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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.

### **Local government**

124. 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.

### **Sustainable development**

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

### **Expiry of undertakings (paragraph 6 of schedule 2)**

#### **The coronavirus outbreak**

126. Where a person is in police custody and has been arrested under a warrant or is arrested without a warrant and is subsequently charged with a criminal offence, that person may be released by the police on giving a written undertaking under section 25(2)(a) of the Criminal Justice (Scotland) Act 2016 (“the 2016 Act”). The undertaking requires the person to appear at a specified court at a specified time.

127. Under section 26(3) of the 2016 Act, the police may impose conditions, and the person must undertake to comply with them while subject to the undertaking. These can include protective conditions, having regard to risk and safety considerations. For example, they may prohibit the person from approaching or contacting witnesses, including the complainer. Breach of any conditions of an undertaking without reasonable excuse is a criminal offence. Undertaking conditions can be seen as a means of regulating a person’s behaviour before they make their first appearance in court. Once they have made their first appearance in court, it becomes a matter for the court to determine whether the person should be held in custody, admitted to bail or ordained to appear through the court process.

128. Under section 29 of the 2016 Act, an undertaking (as well as any conditions attached to it) expires either at the end of the day when a person was required to have appeared at court, or at the end of the day when a

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person appears at court having been arrested on a warrant for failing to appear as required by the terms of the undertaking. While the procurator fiscal may modify the terms of an undertaking under section 27 of the 2016 Act by giving notice changing the time specified at which the person is due to appear at court, this is not always possible when timely notice of the accused's non-appearance is not given.

129. Where an accused fails to appear but the court is advised that the reason for the accused's failure to appear is for a reason relating to coronavirus, the court may take the view that this amounts to a good reason for their non-attendance and decline to grant a warrant for their arrest. The person's undertaking will then expire at the end of that day (if the court had granted a warrant for the person's arrest, the undertaking and its conditions would not expire). There is therefore a risk that any protective conditions attached to an undertaking may be lost in these circumstances. Any loss of these conditions creates public safety concerns, with particular risks associated with domestic abuse cases.

130. To address this concern in the short term, COPFS has agreed with Police Scotland to extend undertakings so that the person is required to appear at a specified court within 90 days of liberation by the police. Prior to the coronavirus outbreak, the Lord Advocate's Guidelines on Liberation said that the police should generally set a date within 28 days of liberation and in domestic abuse offences, within 14 days of liberation. Extending the period of undertakings to 90 days reduces the number of undertaking hearings that have to call in court during the coronavirus outbreak, while ensuring that protective conditions attached to undertakings do not expire.

131. However, this does not address the underlying issue, which is that an accused may still be unable to attend court in accordance with their undertaking for reasons relating to coronavirus, with the result their undertaking and any associated conditions may expire.

## **Policy objectives**

132. The Scottish Government considers that giving a power to the court to prevent the expiry of an undertaking and any associated conditions where an accused fails to appear at court for a reason relating to coronavirus will resolve the public risk and safety issues which have been identified.

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133. Accordingly, the Bill modifies the 2016 Act so that the court may modify the terms of an undertaking (by changing the time at which the person is to appear at the court). The court may do so where the person fails to appear at court as required by the terms of the undertaking, the court considers that this is attributable to a reason relating to coronavirus, and the court does not consider it appropriate to grant a warrant for the person's arrest. Where the court exercises this power, this has the effect of preventing the undertaking and any associated conditions from expiring. The court may exercise this power more than once to allow for situations where the accused is unable to appear at court for a longer period of time for a reason relating to coronavirus, for example if the accused continues to require hospital treatment.

### **Necessity and urgency**

134. The Scottish Government considers that this legislative change is necessary to ensure that the undertaking regime continues to operate effectively and to preserve public safety, especially in domestic abuse cases where conditions attached to undertakings are of particular importance. Without action, there is a risk that protective conditions attached to undertakings will expire in an increasing number of cases, raising safety concerns and an increased risk for the public, including witnesses and complainers.

### **Consultation**

135. No formal consultation has taken place. However, the Scottish Government has discussed these provisions with COPFS and Police Scotland. This legislative change has been identified as a key measure to ensure the continued effective operation of the undertaking regime while preserving public safety.

### **Alternative approaches**

136. An alternative approach would be to do nothing and rely on existing provisions in the 2016 Act in conjunction with the short term approach agreed between Police Scotland and COPFS. This approach is of limited effectiveness given the ongoing nature of the coronavirus outbreak, because the underlying issue of conditions expiring (and so creating public safety risks) will continue to arise in current and future undertaking cases.

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137. The circumstances in which undertakings expire are set out in primary legislation. Primary legislation is therefore required to modify those circumstances so that the court can prevent an undertaking from expiring without granting a warrant for the arrest of a person who has failed to appear, if that failure is for a reason relating to coronavirus.

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

### **Equal opportunities**

138. 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.

### **Human rights**

139. The Scottish Government has assessed the potential impact of the proposed measure on human rights. In relation to Article 8 even if undertakings continue longer than might have initially been anticipated, the conditions are those that the person agreed to. The penalty for breaching the undertaking is unchanged. Any increased interference with Article 8 rights can be justified as proportionate to the aim of public safety. In addition, the courts must act in a manner compatible with the ECHR.

### **Island communities**

140. 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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## **Local government**

141. 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.

## **Sustainable development**

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

## **Proceeds of crime: extension of permitted period for purpose of confiscation order (paragraph 7 of schedule 2)**

### **The coronavirus outbreak**

143. Section 92 of the Proceeds of Crime Act 2002 (“the 2002 Act”) makes provision about confiscation orders, which are orders requiring an accused person convicted of a criminal offence or offences to pay a sum of money representing the accused person’s benefit from crime. Proceedings for a confiscation order take place as part of the sentencing process.

144. The coronavirus outbreak has disrupted the disposal of court business generally. In addition, some investigative orders (such as production orders) which COPFS obtain to progress confiscation orders are not currently being treated as priority business by the courts.

145. Further, the ability of both COPFS and defence solicitors to investigate and prepare for these proceedings is affected by the coronavirus outbreak. The ability of other institutions involved in the process, such as banks and legal firms, to comply with orders is also affected.

146. Section 99 of the 2002 Act enables the court to postpone confiscation proceedings for a specified period. While this period may be extended, it cannot generally be extended beyond the permitted period, which is two years from the date of conviction. Section 99(4) provides that, where there are exceptional circumstances, a period of postponement may end after the end of the permitted period.

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147. There is a concern that the permitted period may expire before the necessary work in relation to a confiscation order can be completed as a result of the delays to the disposal of court business and to investigations in connection with confiscation proceedings. Furthermore, these delays may not amount to exceptional circumstances for the purposes of section 99(4). If those concerns are borne out, then no confiscation order may be made, frustrating the pursuit of confiscation orders against convicted criminals.

### **Policy objectives**

148. The policy intention is to make provision so that confiscation orders can continue to be applied for despite delays caused by the postponement of court business and associated difficulties caused by the coronavirus outbreak. The Bill provides that, in circumstances where confiscation proceedings have been postponed or otherwise affected by coronavirus, the permitted period can be extended by stating that, for the purposes of section 99(4) of the 2002 Act, exceptional circumstances will include the effect (whether direct or indirect) of coronavirus on the proceedings. The effect is that confiscation orders may continue to be made even after the permitted period has expired.

### **Necessity and urgency**

149. If a confiscation order is not made within the permitted period as a result of the coronavirus outbreak and exceptional circumstances do not exist, then no confiscation order under the 2002 Act can be made in that case. This could allow serious organised criminals to continue to use funds obtained from their criminality to further their criminal activities in communities and be a threat to public safety and public order.

150. Accordingly, the Scottish Government considers that it is necessary to put it beyond doubt that circumstances where confiscation proceedings are delayed as a direct or indirect result of coronavirus are exceptional circumstances for the purposes of section 99(4) of the 2002 Act.

### **Consultation**

151. No formal consultation has taken place, but the Scottish Government has discussed this issue with COPFS and agrees that it is important to provide for this clarification.

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## **Alternative approaches**

152. An alternative approach would be to do nothing and rely on section 99(4), on the basis that the coronavirus outbreak (and particularly its impact on the disposal of court business) constitutes exceptional circumstances. However, decisions about exceptional circumstances would then fall to be made in individual cases and would not ensure consistency regarding the circumstances occasioned by coronavirus.

153. In order to put it beyond doubt that circumstances where confiscation proceedings are delayed as a direct or indirect result of coronavirus are exceptional circumstances for the purposes of section 99(4) of the 2002 Act, amendments to section 99 are necessary. There are no provisions within the 2002 Act or elsewhere that enable the Scottish Ministers to specify exceptional circumstances by subordinate legislation and therefore primary legislation is required.

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

### **Equal opportunities**

154. 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.

### **Human rights**

155. The amendment to Section 99 of the 2002 Act will extend the postponement period of a confiscation order due to the coronavirus outbreak which is equitable to both prosecution and defence parties. Consideration has been given to the ECHR, in particular Article 7, however this amendment does not create any new offences and no heavier penalty will be imposed than would otherwise have been the case.

### **Island communities**

156. 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.

### **Local government**

157. 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.

### **Sustainable development**

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

### **Proceeds of crime: time limits for payment of confiscation order (paragraph 8 of schedule 2)**

#### **The coronavirus outbreak**

159. Section 116 of the Proceeds of Crime Act 2002 ("the 2002 Act") provides that the amount to be paid under a confiscation order must be paid immediately. However, if the accused can demonstrate that they require further time to pay, the court may make an order giving a period to pay that does not exceed six months. In exceptional circumstances, this may be extended to a maximum of twelve months from the date that the order was made.

160. If a confiscation order is not paid on time, section 117 of the 2002 Act provides for interest to accrue on the outstanding balance and the court has no power to disapply the accrual of interest. If an accused is unable to pay a confiscation order on time, the sum of the order is to be treated as a fine, with the result that the accused may receive a sentence of imprisonment in default of payment of between six months and fourteen years, depending on the monetary value of the confiscation order.

161. An accused may be unable to pay confiscation orders as a consequence of the coronavirus outbreak and the public health measures

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taken to control and limit its spread. For example, it is often necessary to sell property or other assets in order to make payment, but there are widespread difficulties in doing so at present, particularly in connection with the housing market which is effectively closed.

### **Policy objectives**

162. The Bill makes provision so that an accused who has been, or will be, unable to pay a confiscation order within the period allowed by the court for reasons relating to coronavirus are not prejudiced. It enables the accused to apply to the court for a further extension. If the court is satisfied that the accused is unable to pay the amount due for a reason relating to coronavirus, it may extend the period in which the order is to be paid for such period as the court considers appropriate in the circumstances.

163. The Bill also makes provision to ensure that no amount of interest is to be paid in connection with any further extended period that is allowed by the court.

### **Necessity and urgency**

164. As the court has no discretion to extend the time for payment of a confiscation order beyond twelve months or to disapply the accrual of interest, there is a real possibility that individuals will suffer prejudice (including the prospect of being recalled to court and imprisoned) because, for a reason relating to coronavirus, they have been unable to realise assets in order to pay the confiscation order. This is particularly urgent for individuals whose twelve month extension ended during the start of the unexpected impact of coronavirus on the housing market or who are presently approaching the twelve month point.

### **Consultation**

165. No formal consultation has taken place, but the Scottish Government has discussed this issue with COPFS and agrees that it is a priority.

### **Alternative approaches**

166. There are no provisions within the 2002 Act or elsewhere that would enable the Scottish Ministers to modify sections 116 and 117 by subordinate legislation, and therefore primary legislation is required.

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

### **Equal opportunities**

167. 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.

### **Human rights**

168. Amendments to section 116 and 117 of the 2002 Act ensure that the accused individuals subject to a confiscation order are not treated unfairly and do not receive a default custodial sentence in circumstances that are outwith their control due to the coronavirus outbreak. Consideration has been given to the ECHR, in particular Article 7, however these amendments do not create any new offences and no heavier penalty will be imposed than would otherwise have been the case.

### **Island communities**

169. 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.

### **Local government**

170. 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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## **Sustainable development**

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

## **Intimation of documents on the walls of court (paragraph 9 of schedule 2)**

### **The coronavirus outbreak**

172. Due to the coronavirus outbreak, courts are not open and operating in the usual way. For example, sheriff court business is being carried out at ten hub courts rather than the full range of sheriff courts across the country. Members of the public who are not directly involved in proceedings are not permitted to enter court buildings.

173. Legislation governing civil and commissary business<sup>9</sup> contains provisions requiring or permitting the service or intimation of documents by display on the “walls of court”: in practice, this means displaying the document in a public place in the court building. The location may be slightly different in each court, but is often in the reception area or main public office area of the building.

174. The intention of the provisions which require or permit display on the walls of court is to make these documents available to the public. Due to the current advice regarding public access to court buildings, members of the public cannot currently access the walls of court, even in the ten hub sheriff courts that are currently operating. As a result, displaying documents on the walls of court does not presently achieve the required effect of making these documents available to the public.

175. The most pressing area where this is an issue relates to petitions for the appointment of an executor dative<sup>10</sup>. As this is the only manner by which these petitions may be intimated, they cannot be processed at the present time. In certain civil matters (such as an application for a

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<sup>9</sup> Commissary business is court business that relates to establishing the succession rights to and disposal of a deceased person’s estate.

<sup>10</sup> An executor dative is a person appointed by the court to gather and distribute the estate or property of a deceased person.

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commission as a sheriff officer) displaying documents on the walls of court is a requirement. More often, it is an option available to the court, for example, to serve a document where a party's whereabouts are unknown. This option is not presently available during the coronavirus outbreak.

## **Policy objectives**

176. The Bill provides an alternative means of ensuring that documents are made available to the public where display on the walls of court is presently either a requirement or an option. It permits these documents to be displayed on the SCTS website. It will remove the existing requirement in commissary procedure to intimate dative petitions by display on the walls of court, instead allowing notification online. This will allow vital commissary business to progress. In civil cases where displaying documents on the walls of court is presently a requirement or an option (for example, where a party's whereabouts are unknown), the Bill will enable the court to order that documents be displayed on the website in place of the walls of the court.

177. The Scottish Government considers that displaying documents on the SCTS website instead of the walls of court achieves the intended purpose of making documents available to the public because the website is equally a public place.

## **Necessity and urgency**

178. Requirements for documents to be served or intimated by display on the walls of the court cannot be satisfied during the coronavirus outbreak. There is a risk that aspects of commissary business in particular will be unable to progress. Digital tools exist to allow the risk to be mitigated and alternative approaches adopted. It is essential that the justice system continues to function during the coronavirus outbreak so that both civil and commissary business can proceed in a reasonable timeframe.

## **Consultation**

179. No formal consultation has taken place. However, the Scottish Government has discussed these provisions with SCTS. This has been identified as a key measure to provide for the continuation of civil and commissary business, aspects of which would otherwise be unable to proceed during the coronavirus outbreak.



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## **Alternative approaches**

180. No alternative approaches have been identified for intimation of dative petitions in commissary proceedings which would maintain the delivery of this essential court work during the period of coronavirus outbreak.

181. Similarly, for some civil matters, such as an application for a commission as a sheriff officer, display on the walls of court is a requirement. In other circumstances, such as in cases of unknown whereabouts, service by way of display on the walls of court is not always the only option available. Advertisement in a newspaper is also often an option. However, given the restricted movement of people during the coronavirus outbreak, it is considered that newspaper advertisement should not be the only option available. If the court is to continue to have viable options to consider, it is necessary to permit the display of documents on the SCTS website, and primary legislation is necessary to achieve this.

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

### **Equal opportunities**

182. The provisions allowing the display of documents on the SCTS website may have more of an impact on some of the protected characteristic groups, in particular those who have been identified as using online technologies less than other groups such as older persons and those with physical and mental disabilities. Conversely, whilst they are not designed for this purpose, the provisions relating to display of documents online may be particularly beneficial to those with physical or mental disabilities who, under normal circumstances, would be unable to access court buildings.

183. With respect to the remaining protected characteristics (sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), the Scottish Government has assessed the potential impact of the proposed measure and has identified no unlawful direct or indirect discrimination.

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## **Human rights**

184. The Scottish Government has assessed the potential impact of the proposed measure on human rights. It has identified that it could be argued that Article 8 (right to respect for private and family life) may be engaged in that personal information from the documents will be available online making it readily accessible to a global audience. However, the documents displayed on the walls of court that are affected by this Bill are already public domain documents and there are also “safeguards” inherent in the current system: for example, display on the walls of court is not typically permitted in family actions. This Bill does not seek to alter existing safeguards and preserves existing powers for judicial office holders to direct how specific documents are to be made available.

185. The SCTS (and the courts themselves) have legal duties under the Human Rights Act 1998 and data protection legislation.

186. To further mitigate risk, the Bill provides direction-making powers for the Lord President or Lord Justice General which further assist in ensuring that the change brought about by this provision is proportionate. The direction-making powers provide latitude for the courts to adjust the operation of the new provision as necessary. This could allow, for example, redaction of sensitive information to account for any issues arising from the potential publication of sensitive data on the SCTS website.

187. Article 8 is a qualified right: interference can be justified “in the interests of public safety” and “for the protection of health”.

188. The Scottish Government considers that replacing the physical display of documents in court buildings with online display does not go beyond what is proportionate or necessary to ensure that the justice system can continue to function during the period of the pandemic.

189. The Scottish Government has assessed the potential impact of the proposed measure on children’s rights and no detrimental effects are anticipated.

## **Island communities**

190. 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.

191. 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. Although not specifically designed for this purpose, displaying court documents online may be beneficial to those who, by virtue of their rural location, would find travel to court buildings a significant barrier. No detrimental effects are anticipated.

### **Local government**

192. 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.

### **Sustainable development**

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

### **Extension of time for creation of nitrogen balance sheet (paragraph 1(2) of schedule 3)**

#### **The coronavirus outbreak**

194. Section 8A of the Climate Change (Scotland) Act 2009 ("the 2009 Act") came into force on 23 March 2020. It provides for the Scottish Ministers to create a nitrogen balance sheet no later than 18 months after section 8A comes into force.

195. The Scottish Government's response to the coronavirus outbreak has led to the reprioritisation of resources. This limits capacity to progress the initial phases of a project to establish a national nitrogen balance sheet, given that the project needs to encompass a wide range of policy areas (including agriculture, waste management, transport and climate change) in order to be effective. Furthermore, the outbreak also limits the scope to undertake programmes of research work such as data development and stakeholder engagement to inform the project.

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## **Policy objectives**

196. The Bill extends by six months the deadline in section 8A(1) of the 2009 Act for the creation of a nitrogen balance sheet. The current deadline is 23 September 2021 and the Bill extends it until 23 March 2022.

## **Necessity and urgency**

197. The current deadline means that the initial phases of the project to establish a national nitrogen balance sheet will need to be progressed in late spring and summer 2020. The project involves resource commitments across a range of Scottish Government policy teams, the commissioning of new research and the initiation of a programme of engagement with stakeholders.

198. While the Scottish Government intends to work towards the September 2021 deadline for establishing the nitrogen balance sheet wherever it is appropriate to do so, extending the deadline minimises the risks resulting from any need to reprioritise resources to address the coronavirus outbreak, and will ensure that the nitrogen balance sheet is of sufficient quality when it is created.

## **Consultation**

199. It has not been possible to undertake stakeholder consultation on the proposed change in the time available. However, some stakeholder organisations recently expressed support for a coronavirus-related delay to the publication of the Climate Change Plan update. The need to focus on the quality of the nitrogen balance sheet was raised by MSPs during Stage 3 of the Climate Change (Emissions Reduction Targets) (Scotland) Bill in September 2019. The statutory requirements around the nitrogen balance sheet will also provide for it to be maintained, reviewed and updated, giving opportunities for ongoing stakeholder engagement.

## **Alternative approaches**

200. The current deadline is set in the 2009 Act. It does not contain any powers to amend, or introduce flexibility into, this deadline. Primary legislation is therefore required to introduce the necessary flexibility in the event that the deadline cannot be met.

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

### **Equal opportunities**

201. 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.

### **Human rights**

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

### **Island communities**

203. 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.

### **Local government**

204. 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.

### **Sustainable development**

205. 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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## **Extension of time for report of citizens assembly on climate change (paragraph 1(3) of schedule 3)**

### **The coronavirus outbreak**

206. Section 32A of the Climate Change (Scotland) Act 2009 (“the 2009 Act”) came into force on 23 March 2020. It provides for the establishment of a citizens assembly on climate change, which must have concluded its work and reported to the Scottish Parliament and the Scottish Ministers by 28 February 2021.

207. The public health measures taken to control and limit the spread of the coronavirus outbreak impose restrictions on gatherings of more than two people. This means that large gatherings are not possible, and the timescale for when such gatherings might be able to safely resume is currently uncertain, and this has an impact on the practical preparations for holding the citizens assembly.

### **Policy objectives**

208. The Bill introduces a degree of flexibility into the deadline in section 32A(10) of the 2009 Act. The Bill retains the original target date of 28 February 2021, but if the citizens assembly cannot conclude its work and lay its report by that date for a reason relating to coronavirus, the Bill enables it to do so as soon as reasonably practicable after that date.

### **Necessity and urgency**

209. In order for the citizens assembly to have concluded and issued a meaningful report by 28 February 2021, practical preparations for holding it (e.g. recruiting members and securing a venue, if one is to be used) will need to be progressed during late spring and early summer 2020. If the independent secretariat for the citizens assembly has to make those preparations in order to meet the current statutory deadline, this risks limiting its flexibility to design a process that supports the most effective possible set of deliberations.

### **Consultation**

210. The Scottish Government has consulted the Citizens Assembly Stewarding Group (on which around 20 stakeholders including environmental non-governmental organisations, business groups, land-use sector representatives and young people are represented) on how the

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citizens assembly will operate, including adaptations in light of the public health measures taken to control and limit the spread of the coronavirus outbreak. Informal discussions have also been held with key stakeholders, who have indicated a focus on holding a timely, impactful assembly.

## **Alternative approaches**

211. The current deadline is set in the 2009 Act. It does not contain any powers to amend, or introduce flexibility into, the deadline. Primary legislation is therefore required to introduce the necessary flexibility in the event that the deadline cannot be met.

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

### **Equal opportunities**

212. 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.

### **Human rights**

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

### **Island communities**

214. 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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## **Local government**

215. 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.

## **Sustainable development**

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

## **Extension of deadline for accounts of registered social landlords (paragraph 2 of schedule 3)**

### **The coronavirus outbreak**

217. Registered Social Landlords (“RSLs”) are under a statutory duty to provide the Scottish Housing Regulator (“the Regulator”) with their annual accounts within six months of the end of their financial year. It is an offence for an RSL not to comply with that duty.

218. The public health measures taken to control and limit the spread of the coronavirus outbreak, including home working and physical distancing, have resulted in an inability for RSL staff and auditors to conduct physical stocktakes, inspect paper files, and gather the materials and information required to complete year end audits. This particularly affects RSLs with audits due in May or June.

219. Auditors have also reported that they have limited availability to undertake audits later in the year due to the number of requests from clients to shift audit dates, making it increasingly difficult for RSLs to submit their accounts on time.

## **Policy objectives**

220. The Scottish Government wishes to minimise the level of unease for RSLs at a time when their focus is on delivering and maintaining essential services to their tenants and communities.

221. The Bill accordingly extends the statutory timescales for RSLs to submit audited annual accounts to the Regulator, and so protects RSLs



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from the risk of prosecution where they are unable to submit those accounts within existing deadlines.

### **Necessity and urgency**

222. This measure is necessary because a significant number of RSLs may fail to comply with their statutory duty to submit their annual accounts to the Regulator. This is particularly urgent for RSLs whose accounts are due to be submitted by 30 June. However, there is also likely to be an impact on RSLs whose accounts are due to be submitted by 30 September.

223. If no action is taken, it is likely that RSLs will fail to comply with their statutory duty, which is an offence. The Regulator would have to consider reporting the circumstances to the Crown Office and Procurator Fiscal Service. The Scottish Government does not consider that RSLs should be subject to potential prosecution in these circumstances.

### **Consultation**

224. The Scottish Government has consulted relevant stakeholders on these measures through the Social Housing Resilience Group. Its participants include representatives from across the social housing sector, including the Scottish Housing Regulator, the Scottish Federation of Housing Associations and the Glasgow and West of Scotland Forum of Housing Associations. These stakeholders are supportive of the measures in the Bill.

### **Alternative approaches**

225. There are no alternative approaches that can be taken to deliver this policy change. The Regulator has no powers to change the statutory deadline for submitting accounts within the current regulatory framework. The Scottish Government considers that this is a reasonable and proportionate measure to ensure that RSLs are not unreasonably penalised.

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

### **Equal opportunities**

226. 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.

### **Human rights**

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

### **Island communities**

228. 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.

### **Local government**

229. 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.

### **Sustainable development**

230. 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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## **Duties under the Public Finance and Accountability (Scotland) Act 2000 (paragraph 3 of schedule 3)**

### **The coronavirus outbreak**

231. Paragraph 15 of schedule 6 of the 2020 Act enables the Scottish Ministers to make regulations modifying the effect of the Public Finance and Accountability (Scotland) Act 2000 (“the 2000 Act”) to adapt the statutory reporting timetable in respect of accounts that are required for the financial year ending with 31 March 2021, and to apply those regulations to the following financial year.

232. These powers are intended to be exercisable in respect of periods most likely to be affected by the coronavirus outbreak (i.e. financial years 2019/20 and 2020/2021), as part of the response to the accounting timetable disruption caused by the outbreak.

### **Policy objectives**

233. The Bill amends the powers in the 2020 Act to allow amendments to be made to the 2000 Act in respect of periods most likely to be affected by the coronavirus outbreak.

### **Necessity and urgency**

234. This provision is necessary to ensure that the powers in the 2020 Act can be used effectively in relation to the periods most likely to be affected by the coronavirus outbreak.

### **Consultation**

235. No formal consultation with affected bodies has been possible. However Audit Scotland acknowledged that there might be a need to introduce some flexibility into the statutory frameworks to allow public bodies to report during the Public Audit and Post-legislative Scrutiny Committee session on 19 March 2020<sup>11</sup>.

### **Alternative approaches**

236. The statutory reporting deadlines are set out in the 2000 Act and they can be amended by regulations made under the 2020 Act. The 2020 Act

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<sup>11</sup> <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12593>

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requires to be amended to change the periods for which those regulations can be made, and this can only be achieved by primary legislation.

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

### **Equal opportunities**

237. 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.

### **Human rights**

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

### **Island communities**

239. 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.

### **Local government**

240. 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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## **Sustainable development**

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

## **Referral of application for accommodation to another local authority: extension of deadline for Ministerial statement (paragraph 4 of schedule 3)**

### **The coronavirus outbreak**

242. Section 8 of the Homelessness etc. (Scotland) Act 2003 came into force on 7 November 2019. It amended the Housing (Scotland) Act 1987 (“the 1987 Act”) by inserting section 33A, which gives the Scottish Ministers the power to modify the operation of referrals between local authorities of applications for accommodation on the grounds of local connection. It also inserted section 33B, which provides that the Scottish Ministers must prepare and publish a statement on how the new power is to be exercised within 12 months (i.e. by 7 November 2020). Section 33B also requires that the Scottish Ministers consult before preparing the statement.

243. Due to the uncertainty and pressures of responding to the coronavirus outbreak, the Scottish Government does not consider that it is practically possible at this time to conduct the necessary statutory consultation on the statement. Local authorities and third sector partners are facing particular challenges in their efforts to accommodate and support people who were rough sleeping and to prevent further homelessness during the outbreak. This significantly limits their capacity to engage at this time.

### **Policy objectives**

244. The Bill extends the 12 month deadline for preparing and publishing the statement on local connection as required by section 33B(1) of the 1987 Act by six months.

245. It also confers powers on the Scottish Ministers to make regulations that further extend the deadline by up to six months if necessary.

246. These measures provide the necessary flexibility to postpone the launch of the consultation until the organisations within the homelessness

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sector are able to participate, while retaining the Scottish Government's intention to proceed with the consultation just as soon as it is practical to do so.

### **Necessity and urgency**

247. An extension to the deadline is necessary in order to avoid a potential failure to comply with the requirements of section 33B of the 1987 Act because there is insufficient time to consult before the statement is due to be published.

248. Pausing this work and postponing the consultation would give local authorities and third sector front-line services the time and space needed to focus efforts on responding to the outbreak on behalf of those who are homeless or threatened with homelessness.

249. The Scottish Government considers that an extension to the deadline for preparing and publishing the statement is the only reasonable and proportionate way to ensure that the requirements of section 33B of the 1987 Act are complied with.

### **Consultation**

250. There has been no opportunity to undertake formal consultation on extending the deadline, although the difficulties of consulting on the local connection statement during the response to the coronavirus outbreak have been discussed with representatives of local authorities, including the Convention of Scottish Local Authorities. They agreed that the deadline should be extended.

### **Alternative approaches**

251. The Scottish Government has not identified any delegated powers which could be used to make these changes or an alternative approach that would guarantee that the existing deadline in section 33B(1) of the 1987 Act could be complied with. Primary legislation is therefore required to extend the deadline.

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

### **Equal opportunities**

252. 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.

### **Human rights**

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

### **Island communities**

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.

### **Local government**

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.

### **Sustainable development**

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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## **UEFA European Championship (paragraph 1 of schedule 4)**

### **The coronavirus outbreak**

257. UEFA EURO 2020 (“the Championship”) was intended to take place during June and July 2020, with Glasgow due to host four matches at Hampden Park.

258. To support successful delivery of the Championship, the UEFA European Championship (Scotland) Act 2020 (“the 2020 Act”) was enacted to protect the rights of the Union of European Football Associations (“UEFA”) and its sponsors in relation to ticket touting, trading and advertising. Having these protections in place is a requirement of hosting the event.

259. As a result of the coronavirus outbreak, UEFA announced on 17 March 2020 that the Championship would be postponed until June and July 2021. UEFA has indicated that the postponed Championship will have the same format and Glasgow has completed the process of reconfirming its host city status.

260. The 2020 Act is framed on the basis that the Championship will take place on the original dates in June and July 2020, and in particular section 36 provides for the 2020 Act to cease to have effect on 31 December 2020. The 2020 Act therefore requires to be amended to ensure that has effect in relation to the rescheduled Championship in June and July 2021.

### **Policy objectives**

261. The Bill amends the 2020 Act by:

- changing the dates of the Championship period, the definition of the Championship and the repeal date to enable the event to be held in Glasgow in 2021 (with the possibility of further postponement into 2022 if necessary);
- correcting a European Convention on Human Rights (“ECHR”) compliance issue with an exception to the ticket touting offence for auctions of match tickets where the proceeds are given to charity.

262. The Bill amends a number of dates in the 2020 Act as these are currently based on the Championship taking place in 2020. Although there



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is no suggestion from UEFA that the Championship will be delayed beyond the proposed dates in 2021, the Scottish Government believes that it is prudent for the Bill to make provision for the possibility of further postponement of the Championship into 2022 if necessary for reasons relating to coronavirus. This is achieved by providing that the Championship period may now consist of a period, not exceeding 42 consecutive days, during 2021 or 2022. The 42 day period replicates the existing length of the Championship period in the 2020 Act. The specific dates of operation for each of the three event zones will continue to be specified in regulations, as at present. The repeal date for the legislation is also extended to 31 December 2022.

263. The policy objective of the second change to the 2020 Act is to ensure that an exception to the ticket touting offence complies with the ECHR. Work to correct this issue had been underway in early 2020 but was disrupted by the coronavirus outbreak and postponement of the Championship to 2021.

264. Section 3 of the 2020 Act currently provides an exception from the ticket touting offence where an auction of a match ticket is conducted by a charity, or by a person other than a charity and the proceeds are donated to a charity based in the UK or the EU. The Bill removes the requirement that the charity be based in the UK or the EU while ensuring that there are equivalent criteria for Scottish and non-Scottish charities alike, removing any scope for discrimination based on the ground of the national origin or other status of the charity.

### **Necessity and urgency**

265. The changes to the 2020 Act are necessary in order to meet UEFA's requirements to host the event, as UEFA has indicated that it expects the rights protection legislation to be in place in 2021 as was the case in 2020. Progressing legislation now which meets the rights protection requirements to host the Championship will demonstrate Scotland's continuing commitment to hosting a gold standard event, supporting ongoing work to ensure Scotland remains the Perfect Stage for major events as the nation recovers from coronavirus. In addition, urgent action to amend the 2020 Act and then to lay regulations will allow the Scottish Government to provide certainty to businesses in the event zones that will be affected by the legislation so that they understand this and can take any action required to prepare.

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266. UEFA has announced that tickets already sold for Euro 2020 will remain valid for the rescheduled event (unless the ticket holder elects to return the ticket and receive a refund) and therefore the change to the 2020 Act to ensure ECHR compliance is necessary to ensure it is possible to auction these tickets without an offence being committed. For that reason, the Scottish Government considers that this change is particularly urgent so that the ticket touting offence can be brought into force as swiftly as possible.

## Consultation

267. The Scottish Government has been in regular dialogue with UEFA and event partners, including the Scottish Football Association, Glasgow City Council and Police Scotland, to consider the impact of postponement of EURO 2020 as a whole and arrangements for the postponed Championship, taking into account the uncertainty and financial demands caused by the coronavirus outbreak. The Scottish Government has updated UEFA and event partners on the measures included in this Bill.

268. Prior to the postponement of the Championship, a draft remedial order under section 12 of the Convention Rights (Compliance) (Scotland) Act 2001 was laid before the Scottish Parliament in February 2020 to address the ECHR compliance issue. It was also published on the Scottish Government website<sup>12</sup> and written representations were invited from anyone with an interest on the policy, although none had been received by 17 March 2020. Information about the proposed draft remedial order was also shared with the Office of the Scottish Charity Regulator and with a number of key stakeholders who had provided views on the legislation during the Parliamentary process for the 2020 Act. The Culture, Tourism and External Affairs Committee took evidence about the draft remedial order from the Minister for Public Finance and Migration on 12 March<sup>13</sup>. The views expressed as part of this process have been considered in preparing the Bill provisions that address the ECHR compliance issue, but the Bill contains no substantive policy changes compared to the content of the draft remedial order.

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<sup>12</sup> <https://www.gov.scot/publications/uefa-european-championship---remedial-order-public-notice/>

<sup>13</sup> <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12579>

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## **Alternative approaches**

269. The Scottish Government has considered whether any other routes (such as an order under the Public Services Reform (Scotland) Act 2010)) could be used to amend the 2020 Act. However, there is no way to make all the changes that are required other than through primary legislation, and in particular the changes to the dates in the 2020 Act that are required can only be made through primary legislation.

270. While a draft remedial order under the Convention Rights (Compliance) (Scotland) Act 2001 had been laid in the Scottish Parliament to address the ECHR compliance issue, this was withdrawn as it became apparent that further amendments to the 2020 Act would be required. In addition, further details about alternative policy solutions that were considered to resolve the ECHR compliance issue but which were discounted are set out on the Scottish Government website<sup>14</sup>. Most of these would have required primary legislation and were not considered to address the incompatibility as well as the solution in the Bill.

271. The Scottish Government also considered whether a framework Bill for rights protection and other legislative issues related to hosting events could be developed and then used for the rescheduled Championship. While this would be a more substantive piece of primary legislation, it would take longer to develop and consult on policy, given its wider scope and longer term implications. There is insufficient time to do this before the rescheduled Championship and so this option has been discounted.

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

### **Equal opportunities**

272. 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,

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<sup>14</sup> UEFA European Championship - action to ensure compliance: additional material

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gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly.

## **Human rights**

273. The Scottish Government has assessed the potential impact of the proposed measure on human rights and has determined that no detrimental effects are anticipated. The measure resolves an ECHR compliance issue, as discussed below, and to that extent has a positive impact on human rights.

274. Section 3 of the 2020 Act presently provides an exception from the ticket touting offence where a charity, or a person other than a charity auctions a match ticket and the proceeds are donated to a charity based in the UK or EU. The Scottish Government now considers that there is insufficient justification to limit the charities that the exception applies to in this way and is therefore of the view that it does not comply with Article 1 of the First Protocol to the Convention (protection of property) as read with Article 14 of the European Convention on Human Rights (the prohibition of discrimination).

275. The Bill corrects this incompatibility by removing the requirement that the charity be based in the UK or the EU while ensuring that there are equivalent criteria for Scottish and non-Scottish charities alike, removing any scope for discrimination based on the ground of the national origin or other status of the charity.

276. The Scottish Government has assessed the potential impact of the proposed measure on children's rights and has determined that no detrimental effects are anticipated.

## **Island communities**

277. 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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## **Local government**

278. Glasgow City Council will play a key role in enforcing the rights protection legislation for the Championship and in publishing guidance for business on these restrictions. The Council is a member of the Local Organising Committee for the Championship and has been involved during development of the provisions in the Bill. The provisions are expected to have minimal impact for the Council (£4,000 to £5,000) above its existing commitments in delivering the event.

## **Sustainable development**

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

## **Extension of period of listed building consent and conservation area consent (paragraph 2 of schedule 4)**

### **The coronavirus outbreak**

280. The Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (“the 1997 Act”) provides that the current default limit of duration of listed building consent (“LBC”) and conservation area consent (“CAC”) is three years. Works authorised by LBC or CAC must be commenced within that period (or such other period as is specified in the consent). Otherwise, the consent lapses at the end of the period.

281. The current outbreak and the public health measures taken to control and limit its spread have affected the operation of planning and consent regimes. In particular, advice that construction should not proceed during the coronavirus outbreak means that applicants have been unable to commence works in line with existing consents. Accordingly, there is a risk that some works will be unable to commence within the relevant limit of duration of the LBC or CAC, and so the consent will lapse.

### **Policy objectives**

282. The Bill extends the limit of duration for LBC and CAC that are due to lapse during the emergency period (which is the period beginning with the coming into force of these provisions and ending on 6 October 2020). They will instead lapse at the end of an extended period (which ends on 6 April

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2021) unless works have commenced before the end of the extended period.

283. The Bill also enables the Scottish Ministers to make regulations amending the definition of the emergency and extended periods.

284. For applicants who are unable to carry out works during the emergency period, these measures remove the risk of consents lapsing before they can commence the works.

285. The 2020 Act includes similar provision for extending the duration of planning permissions. These provisions have the effect of bringing LBC and CAC in line with planning permissions.

### **Necessity and urgency**

286. As the duration of planning permissions has already been extended, there is a need to bring other consent regimes into line. This ensures that where LBC or CAC is required then there is parity across the planning system. It also reduces the risk of complaints or challenges from applicants for LBC or CAC who are unable to commence works as a result of current restrictions.

287. These measures also reduce the burden on planning authorities, who might otherwise have to deal with applications for LBC or CAC to replace or vary the conditions of a lapsed consent.

### **Consultation**

288. The Scottish Government has engaged on these measures with Historic Environment Scotland, and concerns about LBC and CAC lapsing had also been raised by planning authorities through the Heads of Planning Scotland group. The Scottish Government has no reason to believe that these measures will be contentious.

### **Alternative approaches**

289. The current default limit of duration for LBC is set out in section 16(1) of the 1997 Act (and it applies to CAC by virtue of section 66(3) of that Act). The 1997 Act does not contain any powers to amend that default limit of duration. Primary legislation is therefore necessary to prevent LBC and CAC lapsing during the emergency period.

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

### **Equal opportunities**

290. 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.

### **Human rights**

291. The 1997 Act requires listed building consent for works to listed buildings and conservation area consent for the demolition of buildings within conservation areas. The Bill makes provision to avoid listed building consent and conservation area consent lapsing because it is not possible for works to begin during the emergency period. This period ends on 6 October 2020 but could be extended by regulations made by the Scottish Ministers.

292. Any changes to the way that regulation of works by the 1997 Act currently may interfere with property rights is by way of a relaxation of the current provisions and it is considered that the provisions are compatible with the ECHR. While the requirements under the 1997 Act for LBC or CAC may engage Article 1 of Protocol 1 to the ECHR, the provisions of the Bill simply ensure that existing LBC and CAC do not lapse for a reason relating to coronavirus. The Scottish Government therefore considers that the Bill does not have any detrimental impact on human rights.

293. The Scottish Government has assessed the potential impact of the proposed measure on children's rights and has determined that no detrimental effects are anticipated.

### **Island communities**

294. 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

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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.

### **Local government**

295. Planning authorities are responsible for issuing LBC and CAC. The proposed measure will not have any adverse effect on planning authorities, and there may be a minor positive impact for them because applicants might otherwise have had to apply to vary conditions of consents to deal with delays caused by the coronavirus outbreak.

### **Sustainable development**

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

### **Electronic registration in the Register of Inhibitions and the Register of Judgments (paragraphs 3 and 4 of schedule 4)**

#### **The coronavirus outbreak**

297. On 24 March 2020, the Keeper of the Registers of Scotland (“the Keeper”) closed her offices in accordance with public health guidance on the coronavirus outbreak to safeguard the health and wellbeing of Registers of Scotland employees, their families and communities. This closed the registers under the Keeper’s control and management to new paper registrations (for some registers, a fully digital registration service exists).

298. The 2020 Act contains provision to enable the reopening of the primary property registers, the Land Register of Scotland and the General Register of Sasines. This permits the registration of copies of traditional deeds submitted electronically in these registers.

299. Attention has now turned to those other registers under the control and management of the Keeper which remain largely closed, in particular the Register of Inhibitions (“RoI”) and the Register of Judgments (“RoJ”), in order to permit the registration of copies of documents or copies of documents submitted electronically in these registers.



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300. The Rol is a register of legal documents affecting people's ability to grant deeds relating to land. An inhibition is a block on someone being able to sell property, take out further loans on it, or make changes to the maintenance responsibilities linked to that property. Documents are typically registered by creditors pursuing unpaid debt. Registration does not deprive a debtor or their property. The Rol is still open to a small number of digital submissions where legislation is already in place to authorise this. The Rol therefore remains closed to documents where legislative provision permitting electronic registration does not exist.

301. While the Rol is closed, documents relating to inhibitions cannot be registered, denying creditors a route to recovery of debt that they would otherwise normally be able to access. Parties, including those looking to discharge inhibitions as well as register them, may therefore be denied legitimate recourse which would, under normal circumstances, be available.

302. The RoJ contains documents relating to judgments from other jurisdictions. Registration in the RoJ enables them to be recognised and enforced in Scotland. The inability to register judgments in the RoJ while it is closed creates issues around access to justice in Scotland and risks undermining the judgments of the issuing court.

## **Policy objectives**

303. The Bill enables the Keeper to accept for registration in the Rol and the ROJ, the full range of documents or copies of documents submitted electronically. The 2020 Act contains similar provision for the Land Register of Scotland and the General Register of Sasines.

304. This provision does not affect any existing ability to submit for registration a document or copy document in electronic form, for example court documents (under paragraph 1 of schedule 4 of the 2020 Act) and awards of sequestration (under section 26 of the Bankruptcy (Scotland) Act 2016).

## **Necessity and urgency**

305. These provisions are necessary to enable the reopening of the Rol and the RoJ while the Keeper's offices remain closed and she is unable to process paper registrations. If the Rol is not reopened, creditors will not be

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able to use this means of safeguarding their position, leaving debtors free to transact. Equally, debtors will be unable to discharge existing restrictions. If the RoJ is not reopened, parties will be unable to register and then enforce certain court judgments from other jurisdictions.

## **Consultation**

306. While no formal consultation has taken place on these measures, the Lord President has been consulted, they have been discussed with the Conveyancing Professorial Panel, and they have been shared with National Records of Scotland. They also reflect the views of legal professionals, who have been vocal in the period since the Keeper stopped accepting postal applications.

307. The Keeper has been contacted by several law firms, COPFS, the Civil Recovery Unit and the Accountant in Bankruptcy in relation to the closure of the RoI. All of these stakeholders have expressed a strong desire for an alternative means of submitting documents for registration while the RoI remains closed to paper applications.

## **Alternative approaches**

308. Legislative provision already exists to enable the registration of true electronic documents. However, there has been very limited uptake of this option to date and operational, technical and cultural barriers associated with this (mainly in relation to the use of advanced electronic signatures) cannot be overcome at this time, so this option is not sufficient to resolve the issues caused by the closure of the RoI and the RoJ.

309. Around 69 separate provisions in 23 pieces of legislation enable registration in the RoI alone. While some powers to modify these provisions by subordinate legislative powers exist, this option would not provide universal coverage. Nor would these powers necessarily enable the Keeper to determine the form of the documents to be received electronically (in the same way that the 2020 Act enables the Keeper to do so for the property registers). Accordingly, primary legislation is necessary to ensure a comprehensive solution and enable the Keeper to reopen the RoI and the RoJ.

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

### **Equal opportunities**

310. 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.

### **Human rights**

311. 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. The measures will preserve the legitimate expectations of parties prior to the closing of these registers ensuring recourse to diligence and the intended effect of court judgments is available to the public.

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

### **Island communities**

313. 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.

314. These provisions do not have any direct impact on island communities. The Keeper will work with solicitors in island communities who have any particular challenges with connectivity, although none are envisaged and solicitors in island communities already use many of the Keeper's digital services. 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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## **Local government**

315. These provisions do not have any direct impact on local authorities. They will assist local authorities in using these registers at this time, ensuring recourse to inhibition as a means of debt recovery is available to local authorities.

316. 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.

## **Sustainable development**

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

## **Land and Buildings Transaction Tax: extension of period for disposal of previous main residence (paragraph 5 of schedule 4)**

### **The coronavirus outbreak**

318. Land and Buildings Transaction Tax (“LBTT”) is a tax applied to residential and commercial land and buildings transactions (including commercial purchases and commercial leases) where a chargeable interest is acquired. Additional Dwelling Supplement (“ADS”) is an LBTT supplement on purchases of additional residential properties in Scotland (such as buy-to-let properties and second homes) of £40,000 or more.

319. ADS applies to most purchases of additional dwellings by individuals where the buyer owns more than one dwelling after purchasing a dwelling and they have not replaced their previous main residence. It also applies to most purchases of dwellings by non-natural persons (e.g. companies and partnerships). ADS is charged at 4% of the purchase price and is paid as part of any LBTT due on the transaction.

320. The arrangements for ADS recognise that some people may purchase a new home before selling their previous main residence. If ADS has been paid, a taxpayer can make a claim for repayment if they dispose of the ownership of a previous main residence (used as such in the 18

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months prior to the purchase on which ADS was paid) in the following 18 month period.

321. The length of the 18 month period for selling a previous main residence is intended to offer a balanced approach which takes account of the potential for sales of property to be delayed for various reasons, while also providing certainty within the tax system.

322. The coronavirus outbreak has had a much more significant impact on the housing market than could have been foreseen when the 18 month period was selected. The temporary closure of the application record by the Keeper of the Registers of Scotland on 25 March 2020 and the Scottish Government guidance published on 31 March 2020<sup>15</sup> (recommending that buyers delay moving to a new home while stay-at-home measures are in place) may have resulted in some transactions being pushed out of the 18 month period or in those transactions falling through completely.

323. More generally, the public health measures taken to control and limit the spread of the coronavirus outbreak have the effect of significantly restricting sellers' ability to market and find a buyer for their previous main residence, making it more difficult to complete this process within the 18 month period.

## **Policy objectives**

324. The Bill makes provision to assist taxpayers whose ability to reclaim ADS has been most directly affected by the coronavirus outbreak. It increases the 18 month period by nine months, with the result that these taxpayers have 27 months to dispose of their previous main residence and still be eligible for a repayment of the ADS.

325. The provisions apply to taxpayers who paid ADS in relation to a transaction with an effective date prior to 25 March 2020, but had not yet sold their previous main residence and were still within their 18 month period on that date (i.e. the effective date was between 24 September 2018 and 24 March 2020). This is because these taxpayers will not, in general,

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<sup>15</sup> <https://www.gov.scot/publications/coronavirus-covid-19-guidance-moving-home/pages/advice-to-the-public/>

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have been able to take into account the impact of the coronavirus outbreak on the housing market when paying ADS.

326. Given the current uncertainty about the extent and duration of any disruption to the housing market that is related to the coronavirus outbreak, the Bill enables the Scottish Ministers to make subordinate legislation amending these provisions. They can be amended to further extend the period within which the disposal must take place, or to apply the provisions to transactions with an effective date falling within a longer period of time. These powers may only be exercised where the Scottish Ministers are satisfied that it would be appropriate to do so for a reason related to coronavirus.

### **Necessity and urgency**

327. These provisions are necessary to ensure that affected taxpayers do not suffer financial detriment because they have been unable to reclaim ADS due to a failure to dispose of a previous main residence within the 18 month period. This is particularly urgent for taxpayers who are approaching the end of their 18 month period, and indeed the period may have expired for some since 25 March 2020.

### **Consultation**

328. No formal consultation has been undertaken on this measure. However, the Scottish Government has given careful consideration to stakeholders' views, including those of the Law Society of Scotland, about the impact of the coronavirus outbreak on the arrangements for ADS. It has also taken account of correspondence received from taxpayers concerned about their ability to claim a repayment of ADS.

### **Alternative approaches**

329. The requirements to be satisfied when a taxpayer seeks to reclaim ADS are set out in Part 5 of schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013, including the 18 month period. Where taxpayers who have paid ADS cannot satisfy those requirements (for example, if they are unable to dispose of a previous main residence within the 18 month period), Revenue Scotland has no discretionary power to assist, regardless of taxpayers' individual circumstances or of the reasons for not disposing of the previous main residence. As such, legislative

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change is required to assist taxpayers whose ability to satisfy the requirements has been affected by the coronavirus outbreak.

330. While the Scottish Ministers have powers to modify the arrangements for repayment of ADS by subordinate legislation, this approach would not assist taxpayers who have already paid ADS. It would therefore not be possible to deliver the intended policy solely by subordinate legislation, and so primary legislation is necessary.

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

### **Equal opportunities**

331. 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.

### **Human rights**

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

333. Consideration has been given to the impact of the provision on a person's property rights. Whilst taxation measures generally fall within the ambit of Article 1 of Protocol 1 of the European Convention on Human Rights, the Scottish Government's view is that by increasing access to a repayment of tax, there is no property right which has been detrimentally affected by the provision. In any event, interference with an individual's property for taxation purposes is justified in terms of the second paragraph of Article 1 of Protocol 1 and the measure taken will not be an unjustified interference unless it is devoid of reasonable foundation. The measure is considered to be in the general interest of the public at large by limiting the effects of the pandemic on taxpayers. Whilst the provision is retrospective in its nature, this is not considered in itself to give rise to a violation of Article 1 of Protocol 1.

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334. The Scottish Government has assessed the potential impact of the proposed measure on children's rights and has determined that no detrimental effects are anticipated.

### **Island communities**

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. No new or separate impacts have been identified in relation to the provisions of this Bill.

### **Local government**

336. The Scottish Government has assessed the potential impact of the proposed measure on local government and has determined that there will not be any additional administrative or compliance burdens specifically affecting local government beyond those duties local authorities are already subject to, regarding tax returns and records.

### **Sustainable development**

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

### **Non-domestic rates relief (paragraph 6 of schedule 4)**

#### **The coronavirus outbreak**

338. The Scottish Ministers may provide for non-domestic rates (NDR) reliefs in subordinate legislation made under section 153 of the Local Government etc. (Scotland) Act 1994. These powers may not currently be used to introduce an NDR relief retrospectively.

339. The Scottish Ministers are determined to help keep companies in business and the Scottish Government's financial support now totals £2.3 billion. This includes 100% relief for 2020-21 to help support businesses in the retail, hospitality and leisure sectors as well as airports and 1.6% relief for all non-domestic properties.



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340. Faced with continued uncertainty over the duration and potential economic impact of the coronavirus outbreak on businesses, a power to introduce further NDR relief in the year 2020-21 for all or part of the year with the ability to backdate relief, would provide an additional mechanism through which businesses may potentially be supported.

### **Policy objectives**

341. The Bill provides the Scottish Ministers with the power to introduce NDR relief in the year 2020/21 for all or part of the year should they choose to do so, potentially backdated to 1 April 2020.

### **Necessity and urgency**

342. If this provision were not introduced, Ministers might not be able to offer additional NDR relief in 2020-21 in a way that the circumstances justify.

### **Consultation**

343. No formal consultation has been carried out.

### **Alternative approaches**

344. The power to introduce NDR reliefs is contained in section 153 of the Local Government etc. (Scotland) Act 1994. To enable the Scottish Ministers to introduce in-year NDR reliefs retrospectively, that power requires to be amended, and this can only be achieved by primary legislation.

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

#### **Equal opportunities**

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.

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## **Human rights**

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

## **Island communities**

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

## **Local government**

348. Local authorities administer and collect non-domestic rates and are also non-domestic ratepayers for the properties they occupy. 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.

## **Sustainable development**

349. 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) (No. 2) Bill

## Policy Memorandum

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