

## THE CORONAVIRUS (SCOTLAND) (NO.2) BILL

### Introduction

The UK Government's [Coronavirus Act 2020](#) introduced a number of provisions aimed at tackling the spread of Coronavirus (COVID-19) in the UK. On 31 March 2020 the Scottish Government introduced its own emergency bill now the [Coronavirus \(Scotland\) Act 2020](#) containing substantial further powers and measures to ensure the continuation of essential public services throughout the coronavirus outbreak. This Bill was passed by the Scottish Parliament on 1 April 2020 with most provisions coming into effect on 7 April.

The Scottish Government has now introduced a second coronavirus Bill – [the Coronavirus \(Scotland\) \(No. 2\) Bill](#). The purpose of the new Bill is to make further changes to the way essential public services operate, to provide more support for business and to assist central and local government and health and social care services to respond effectively to the COVID-19 pandemic. The Scottish Government says that these changes are necessary:

“...to reflect the restrictions, in both guidance and legislation, on the way people live and work”. (Ex Notes, Para 7)

The Bill comprises 2 parts, 15 sections and 4 schedules. As for the Coronavirus (Scotland) Act, most of the detail is contained in the schedules to the Bill.

The proposed parliamentary timetable for the Bill is as follows:

- 11 May (am): Bill introduced in the Parliament
- 12 May: Stage 1 consideration by the Covid-19 Committee and by the Delegated Powers and Law Reform Committee
- 13 May (pm): Stage 1 debate
- 19 May (am): Stage 2 consideration by the Covid-19 Committee
- 20 May (pm): Stage 3 final consideration in Chamber

### PART 1 – MAIN PROVISIONS

Section 1 of Part 1 of the Bill reaffirms the definition of coronavirus as stated in both the UK Coronavirus Act 2020 and the Coronavirus (Scotland) Act 2020 as the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

Sections 2 to 5 introduce four areas of provision detailed in the schedules:

- Protection of the individual (Schedule 1)
- Operation of the Justice system (Schedule 2)
- Reports, accounts and other documents (Schedule 3)
- Other measures in response to coronavirus (Schedule 4)

## **PART 2: SUPPORTING PROVISIONS**

### ***Advancement of equality and non-discrimination***

Section 6 provides that Scottish Ministers must have regard to opportunities to advance equality and non-discrimination when exercising the functions contained in Part 1 of the Bill. This provision is identical to [section 9 in the Coronavirus \(Scotland\) Act 2020](#); this was an [amendment made at Stage 2](#) by Ruth Maguire MSP and received cross party support. The Equality and Human Rights Commission (Scotland) [welcomed the equalities focus](#) in the Act, and John Wilkes, Head of the Commission, said:

“We know that vulnerable and disadvantaged people are most at risk from Coronavirus so an equality-driven approach which considers the needs of different groups at the outset will ensure that actions are not only inclusive but effective.”

The Policy Memorandum provides an Equality Impact assessment and Human Rights impact assessment for each of the Bill’s provisions. This looks like a change from usual practice, either for pragmatic purposes (many officials working on different sections of the Bill to a tight timescale), or because of a commitment to advance equality and non-discrimination, or both. Usually, Policy Memorandums provide these assessments at the end of the document, and on the Bill as a whole, rather than on each provision.

The Scottish Government has published a series of impact assessments on aspect of the Bill:

- [Coronavirus \(Scotland\) \(No. 2\) Bill - Fairer Scotland Duty Impact Assessment](#)
- [Coronavirus \(Scotland\) \(No. 2\) Bill - Business And Regulatory Impact Assessment](#)
- [Coronavirus \(Scotland\) \(No. 2\) Bill - Equality Impact Assessment](#)
- [Coronavirus \(Scotland\) \(No. 2\) Bill - Child Rights And Welfare Impact Assessment](#)

### ***Subordinate legislation making powers under Part 1***

Section 7 provides that Ministers’ powers to make regulations conferred by Part 1 of the Bill include making “incidental, supplementary, consequential, transitional, transitory or saving provision” in addition to making “different provision for different purposes or areas”. These provisions allow Ministers to

fill in certain detail consistent with the provisions of the Bill, but missing from it, when making regulations under Part 1.

The inclusion of “different areas” means that Ministers can exercise the powers in Part 1 differently in different areas within Scotland. It would be usual for legislation to treat people living within the same jurisdiction the same way unless there was some relevant difference between them.

The provision in section 7 is the same as that contained in Part 2 section 10 of the Coronavirus (Scotland) Act 2020.

### ***Power to suspend and revive provisions***

Ministers are granted a power to suspend and revive any provision of Part 1 through regulations. In effect, this will allow Ministers by regulations to turn provisions on and off as is deemed necessary and appropriate.

There is no limit on the number of times that Ministers can exercise this power in relation to a provision set out in Part 1. A similar provision is provided for by part 2 section 11 of the Coronavirus (Scotland) Act 2020.

Section 8(6) provides that regulations made under this section are subject to the affirmative procedure (requiring approval by the Parliament) if they “add to, replace or omit any part of the text of an Act”. In other cases, regulations made under this section are subject to the negative procedure. [Detail on the process for Scottish Statutory Instruments is available on the Delegated Powers and Law Reform Committee webpage.](#)

### ***Expiry***

Section 9 provides that Part 1 of the Bill expires on 30 September. This can be extended, by regulations approved by the Parliament, to 31 March 2021 and then to 30 September 2021 (again on approval by the Parliament). The power to make regulations to extend expiry of the legislation to 30 September 2021 can only be exercised by Ministers after 30 September 2020.

Accordingly, the provisions in Part 1 of the Bill have a duration of six months unless they are extended. The provisions have a maximum duration of 18 months.

These dates are the same as provided for by Part 2 section 12 of the Coronavirus (Scotland) Act 2020. As such, the Coronavirus (Scotland) Act 2020 and this Bill are aligned to the same timetable.

Prior to laying regulations to extend expiry, Ministers would have to lay a report before the Parliament stating the reasons as to why the regulations should be made. This requirement is provided for by section 9(6) of the Bill.

Section 9(7) applies where the regulations extending expiry are made in accordance with paragraph 23 of schedule 7 of the Coronavirus (Scotland) Act 2020. That is to say, where the regulations are deemed to be urgent and made

under the provisional affirmative procedure (i.e. coming into force in advance of approval by the Parliament). In such an event, section 9(8) provides that Ministers must, at the same time as laying the expiry regulations, provide a report to the Parliament on the reasons for the regulations being made.

Section 9(9) allows Ministers to make regulations in connection with the expiry of provisions of the Bill which are transitional, saving, or consequential. As such, Ministers will, for example, have the power after the expiry of the Bill to clarify the status in law of anything done under this legislation whilst in force. Regulations made under section 9(9) are subject to the negative procedure unless they “add to, replace or omit any part of the text of an Act” in which case they are subject to the affirmative procedure.

### ***Power to bring forward expiry***

Section 10 allows Ministers to bring forward the date at which any Part 1 provision expires. This gives flexibility should a provision no longer be required or be deemed appropriate.

Regulations made under this section are subject to the negative procedure unless they “add to, replace or omit any part of the text of an Act” in which case they are subject to the affirmative procedure.

Ministers have a similar power under Part 2 section 13 of the Coronavirus (Scotland) Act 2020.

### ***Power to amend Act in consequence of amendments to subordinate legislation***

Ministers can, by regulations, modify any provision of the Bill which modifies the effect of a provision of subordinate legislation. This power can only be used where the modification is necessary because of the modification of the subordinate legislation by other subordinate legislation.

This is a technical provision which can be used where legislation modified by the Bill is subsequently modified by other legislation. If as a result the amendments made by the Bill no longer work, they can be updated by regulations under this power, to enable the underlying subordinate legislation to operate correctly.

Regulations made under section 11 are subject to the provisional affirmative procedure and cease to have effect 28 days after being made (not counting recess periods) unless during that period they are approved by the Parliament.

A similar provision is contained at section 14 of the Coronavirus (Scotland) Act 2020.

### ***Reports by the Scottish Ministers on the status of provisions***

Section 12 requires Ministers to keep the need for the provisions in Part 1 of the Bill under review. Ministers must lay a report before the Parliament every

two months which details their assessment of the need for the provisions; the status of provisions in Part 1 of the Bill and whether the provisions are still in force; and the use of any powers conferred by the Bill (including powers to make subordinate legislation). Ministers must also include a statement that they are satisfied that the status of those provisions is appropriate.

Where the powers in section 8 (the suspending and reviving of provisions) or section 10 (regulations bringing forward the expiry date of provisions) have been exercised in relation to the Part 1 provisions, that must be explained in the report.

Section 12(4) provides that the first reporting period begins the day after the Bill receives Royal Assent and ends on 31 July 2020. Subsequent reporting periods are set at every two months with Ministers required to lay the report before Parliament no later than 14 days after the end of a reporting period. The need to report ends with the expiry of the legislation.

The reporting periods correspond to those set out in the Coronavirus (Scotland) Act 2020.

### ***Ancillary provisions***

Section 13 allows Ministers to make ancillary regulations. These are regulations which support the principal legislation or which are connected with it. These regulations are used to give full effect to the Bill.

### ***Commencement***

The Bill will come into force the day after it receives Royal Assent. The Coronavirus (Scotland) Act 2020 was passed by the Parliament on 1 April 2020 and received Royal Assent on 6 April 2020. It is expected that Royal Assent for this legislation will also be fast-tracked.

## **SCHEDULE 1 – PROTECTION OF THE INDIVIDUAL**

### **Part 1: Student residential tenancy: termination by tenant**

Paragraph 2 of Schedule 1 of the Bill enables those with a student residential tenancy to terminate the accommodation agreement with their landlord where certain requirements are met.

Paragraph 3 sets out the requirements that a notice to terminate a student residential tenancy must meet the minimum notice periods that apply. A valid notice must be in writing (this includes electronic communications) and it must state the day on which the tenancy is to end. This date must be a day that is after the last day of the minimum notice period.

Provisions in this Bill temporarily introduce:

- 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 while the Coronavirus (Scotland) Act 2020 is in force.

These measures ensure that students who have left their accommodation, or who are unable to return to it due to the coronavirus outbreak, are able to end their contracts early. Students looking to find suitable accommodation for the next academic term have reassurance that, should restrictions continue and they are unable to occupy their accommodation, they will not be forced to pay for accommodation they are not using for a full academic term during the time that the provisions are in force.

### *Existing Tenancies*

Because of the coronavirus outbreak and the public health measures taken to control and limit its spread, many students have returned to their family homes. 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](#) (“The Act”).

Purpose Built Student Accommodation (“PBSA”) is not covered by the provisions of the 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. The coronavirus outbreak has made the continuation of attendance by students at courses of study impossible. The purpose of these tenancies can no longer be fulfilled.

The 7-day notice period will ensure that students who left PBSA or who cannot return to it and wish to end their contract early, are able to do so in light of the supervening and unexpected consequences of the coronavirus outbreak.

### *New Tenancies*

Students seeking accommodation for next academic year can have reassurance that, should the uncertainty about the operation of universities continue, an appropriate notice period will exist in respect of their tenancy. A period of 28 days’ notice reflects the current law on private residential tenancies. This change only applies while the provision remains in effect.

The impact on PBSA landlords is likely to be significant. 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 means that there is a relatively certain income stream for the duration of the tenancy. Current accommodation contracts are governed by common law.

## Part 2: Carer's allowance supplement

Part 2 of Schedule 1 to the Bill provides for an additional Carer's Allowance Supplement (CAS) payment of £230.10 at an estimated cost of c.£18.5m. This is in addition to the two payments of £230.10 that are due this year.<sup>1</sup>

### *Universal Credit increase*

Carer's Allowance Supplement (CAS) provides two payments a year to those in receipt of Carer's Allowance on the qualifying dates.<sup>2</sup> The amount is calculated based on what Job Seeker's Allowance (JSA) would be if it was uprated for inflation.<sup>3</sup> The policy aim of CAS is to increase Carer's Allowance to the level of JSA. JSA is being replaced by Universal Credit (UC) although the statutory formula is based on JSA rather than UC.

Until recently this didn't matter because the basic rates for UC and JSA were the same.

However, due to COVID-19, the UK Government increased the personal allowance in UC by £20 per week but did not increase the amount for JSA.

Various groups have asked for legacy benefits, including JSA, to be increased in the same way as UC, but the UK Government has declined to do so, partly on the grounds that the change would take longer to implement.<sup>4</sup>

If this additional CAS payment were to be calculated based on the new, increased UC rate instead of the JSA rate, it would be £710.84 rather than £230.10.

### *Not all carers get Carer's Allowance*

The additional payment is being introduced as a thank you to carers.<sup>5</sup> The Policy Memorandum states that, compared to other unpaid carers, recipients of Carer's Allowance are likely to have:

“a more intensive caring role and lower financial resilience.”

Carer's Allowance and CAS are only available to those caring for at least 35 hours a week for a person in receipt of certain disability benefits. The carer must be earning less than £128 per week (after deductions).

Many pensioners do not receive CAS because their state pension means they have only 'underlying entitlement' to Carer's Allowance. [Recent statistics](#) showed that only 2.6% of CAS payments went to people aged 65 or over.

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<sup>1</sup> For the calculation of this year's payments see Scottish Government (2020) [Social security assistance – effects of inflation report](#).

<sup>2</sup> [s.81 Social Security \(Scotland\) Act 2018](#)

<sup>3</sup> The policy in 2017 was to increase carer's allowance to the same as job seeker's allowance.

<sup>4</sup> [Hansard 5 May 2020, vol 675, col 421, DWP: Covid-19 update](#)

<sup>5</sup> Scottish Government news release 6 May 2020. [Extra payment for unpaid carers](#).

Recognising that not all young carers are entitled to Carer's Allowance, the Scottish Government introduced the [Young Carer Grant](#) in October 2019. This is an annual payment of £305.10. As these young carers are not entitled to Carer's Allowance, they are not entitled to CAS, nor to the additional payment proposed in this Bill.

More information about entitlement to CAS is available from [mygov.scot](http://mygov.scot)

#### *Other Scottish social security assistance*

The Scottish Government has announced funding in anticipation of an increase in the number of claims:<sup>6</sup>

- £45m for the Scottish Welfare Fund. This is a discretionary fund.
- £50m to cover increased claims to Scottish social security and council tax reduction consequential on the increased claims for UC.

However, apart from this proposed increase to CAS, there have been no increases to the rate at which [Scottish social security benefits](#) are paid. Other benefits are: best start grant, best start foods, funeral support payment and young carer's grant.

The Scottish Government has also delayed its programme for creating further devolved social security benefits<sup>7</sup> and relaxed some of the deadlines that apply to Scottish social security benefits.<sup>8</sup>

### **Part 3: Bankruptcy**

Part 3 of Schedule 1 of the Bill makes various provisions in relation to personal bankruptcy.

#### *Increased problem debt*

One of the likely impacts of the current coronavirus crisis is an increase in personal debt problems. People who have lost their jobs or taken a pay cut may struggle to meet their financial commitments.

Any increase in problem debt caused by coronavirus comes on top of pre-existing concerns about levels of personal indebtedness. In 2018, the UK Government's [Money Advice Service estimated that 14.2% of the population of Scotland](#) (or 629,000 people) were "over-indebted". Over-indebtedness was defined as when people have missed payments in three or more of the past six months or are finding keeping up with bills and credit commitments a "heavy burden".

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<sup>6</sup> Scottish Government news release 18 March 2020. [Helping communities affected by COVID-19](#).

<sup>7</sup> Scottish Government news release 1 April 2020. [Update on devolved benefits](#).

<sup>8</sup> [Schedule 7, Coronavirus \(Scotland\) Act 2020](#)



### *The bankruptcy process*

One option to deal with increased levels of personal debt is to make it easier for people to become debt-free via processes such as bankruptcy.

In bankruptcy, a debtor's non-essential assets (including any family home) will usually be sold. Debtors may also be expected to make ongoing contributions from their income towards the bankruptcy.

Any funds raised are shared among creditors. Once the bankruptcy process is complete, almost all remaining debts are written off.

The process is argued to balance the interests of creditors and debtors. Creditors can access all a debtor's assets in order to get repayment of their debt. Debtors can start again financially, no longer burdened by debts which they were unlikely to be able to repay.

### **The Bill's provisions**

Some of the Bill's provisions would provide greater support to debtors. Others address procedural issues affected by the coronavirus crisis.

They include:

- **making access to Minimal Asset Process bankruptcy easier** – by increasing the maximum debt level from £17,000 to £25,000 and excluding some student loans from the calculation. Minimal Asset Process bankruptcy is a simplified form of bankruptcy for those on low incomes with few assets.
- **making it more difficult for creditors to force someone into bankruptcy** – by increasing the amount a debtor must owe, from £3,000 or more to £10,000 or more. Note that, in most bankruptcies, debtors apply themselves – but creditor-led bankruptcies remain a threat.
- **reducing the fees for applying for bankruptcy** – those on certain income-based social security benefits would be exempt from the Minimal Asset Process (MAP) bankruptcy fee. For other applicants, the fee for a MAP bankruptcy would be reduced from £90 to £50 and the fee for standard bankruptcy from £200 to £150.
- **enabling documents to be sent and signed electronically** – electronic delivery would be extended to include uploading documents to a system the recipient has access to.
- **extending the deadline for insolvency practitioners to submit proposals for payments from debtors' income** – from six weeks to 12 weeks.
- **allowing meetings of creditors to be held electronically** – such meetings allow creditors to supervise the bankruptcy process.

The provisions which support debtors would apply to personal bankruptcy – including of sole traders – only.

The other provisions would apply to the bankruptcy of partnerships, trusts and certain other bodies, as well as personal bankruptcy. Importantly, the provisions increasing the financial threshold for creditor-led bankruptcies would apply to this wider group.

#### **Part 4: Mental Health**

[Section 250 of the Mental Health and \(Care and Treatment\) \(Scotland\) Act 2003](#) allows for a person over 16 years of age to nominate a 'named person' to represent their interests and provide support. This nomination must be made in writing and the signature of the nominee has to be witnessed by a 'prescribed person' in order to be valid. Someone is classed as a 'prescribed person' if they are a regulated health professional, social care worker, social worker or solicitor.

The current pandemic, and issues caused by social distancing measures, have meant that processes, such as tribunal work have slowed down. Paragraph 12 of Schedule 1 of the Bill temporarily removes the necessity to have nominees' signatures witnessed by a prescribed person by amending section 250 of the 2003 Act. The change means that one of the safety checks against someone being coerced into nominating a particular named person has been removed.

The role of the named person is considerable. Also, under the existing legislation, the nominated person remains in place, even if the person with the mental health disorder becomes unable to communicate because of the disorder. This would mean that the named person could have a high degree of responsibility/power. The person can revoke a nomination at any time, in writing, provided it is witnessed. The relevant mental health form states that this should also be witness by a prescribed person.

### **SCHEDULE 2 – OPERATION OF THE JUSTICE SYSTEM**

As highlighted in the policy memorandum, schedule 2 of the Bill contains measures seeking to make:

“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” (paragraph 12).

These include provisions in the following areas.

#### **Part 1: Criminal Justice**

##### ***Extension of time limits in criminal proceedings***

A range of statutory time limits apply to criminal court proceedings with the aim of preventing unnecessary delays.

The Scottish Parliament has already agreed changes, now set out in schedule 4 of the [Coronavirus \(Scotland\) Act 2020](#), temporarily extending some of these time limits. It was argued that the impact on court business of the coronavirus meant that a failure to comply with the original time limits was highly likely. Although those time limits could already be extended by the court in individual cases (where justified), a general extension was considered more appropriate in the current circumstances.

Similar reasons are given in relation to the current Bill for temporarily extending a further group of time limits – as detailed in paragraphs 96 to 101 of the policy memorandum.

In relation to the impact of the current proposals on human rights, the policy memorandum notes that they could lead to an increase in the time a person is remanded in custody. (This is also the case for changes made by the Coronavirus (S) Act 2020.) However, the policy memorandum argues that the proposals do comply with the European Convention on Human Rights:

“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.” (paragraph 107)

### ***Appearance in court from police custody***

Custody hearings in criminal proceedings are usually held in person in a court building, with all parties to the case being physically present. During the COVID-19 outbreak, such hearings can 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.

The Scottish Government has stated that 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.

To that end, the Bill enables the Scottish Ministers to make arrangements for PCOs to carry out their functions within police stations for the purpose of facilitating an appearance before a court by electronic means of prisoners in police custody. This will involve prisoners appearing before the court by video link from police stations as PCOs will be able to carry out the functions that they would normally carry out in court buildings within police stations. The

Scottish Government has stated that these provisions will further minimise the need for physical attendance at custody hearings in court buildings.

The Scottish Government has assessed the potential impact of the proposed measure on human rights as detention engages a person's right to liberty under Article 5 of the ECHR. The Policy Memorandum to the Bill states explicitly, that the provisions do not change the substantive rules or time limits regarding detention. The provisions simply change the location in which PCOs can carry out their functions. One of the options

### ***Undertaking to appear in court***

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

Where the person appears in court, as required by the undertaking, it is for the court to then decide what should happen next (e.g. whether the person should be released on bail subject to conditions). If the person fails to appear; the court may grant a warrant for the person's arrest. However, the policy memorandum notes that:

“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.” (paragraph 129)

To address this, the Bill will allow the court to extend an undertaking where a person fails to appear; and the court considers that this is attributable to a reason relating to coronavirus. This will have the effect of preventing the undertaking and associated conditions from expiring.

## **Part 2: Proceeds of Crime**

The Bill includes provisions which deal with two aspects relating to proceeds of crime: the extension of a permitted period for the purpose of a confiscation order; and time limits for payment of a confiscation order.

### ***Extension of the permitted period***

Section 92 of the Proceeds of Crime Act 2002 (“the 2002 Act”) makes provision for confiscation orders, which are orders requiring an accused person convicted of a criminal offence 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. While the coronavirus outbreak has disrupted court business generally, it has also resulted in some investigative orders (such as production orders) which the Crown Office and Procurator Fiscal Service (COPFS) obtain to progress confiscation orders, not currently being treated as priority business by the courts.

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.

The Scottish Government has stated that 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. In addition, these delays may not amount to exceptional circumstances. If those concerns are borne out, then no confiscation order may be made, frustrating the pursuit of confiscation orders against convicted criminals.

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 specifies that in circumstances where confiscation proceedings have been postponed, the permitted period can be extended, and that exceptional circumstances will include those as a direct or indirect result of coronavirus. The effect is that confiscation orders may continue to be made even after the permitted period has expired.

#### ***Time limits for payment of a confiscation order***

Section 116 of 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 need 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.

If a confiscation order is not paid on time, 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 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.

In the current circumstances, an accused may be unable to pay a confiscation order as a consequence of the coronavirus outbreak and the public health measures 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.

The Bill makes provision so that an accused who has been unable pay a confiscation order within the period allowed by the court for reasons relating to coronavirus is not prejudiced and is able 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 a period which the court considers appropriate in the circumstances. 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.

### **Part 3: Intimation of documents**

Court rules often require that documents are delivered to one or more of the parties involved in the case. This is usually described as “service”, but there are other terms.

Service is usually effected by post or by delivering the documents to the party in person. However, there are various legal rules which allow for – or require – service in other ways.

In these circumstances, the rules usually provide for documents to be displayed in the court building. This is intended to serve the purpose of making them available to the general public.

#### *Service during the coronavirus crisis*

Because of the current coronavirus crisis, only those with direct involvement in a case can enter court buildings. And court business has been concentrated in regional hubs, meaning a number of court buildings are not open at all. Displaying documents in the court buildings cannot, therefore, perform its usual role.

The Policy Memorandum highlights several court processes which cannot progress at all at the moment because documents cannot be displayed in court buildings. One example is applications to be appointed to administer a deceased person’s will (where no one was specifically named in the will to perform this function).

The Bill makes provision for documents to be displayed on the website of the Scottish Courts and Tribunals Service (SCTS), instead of in court buildings.

### *Directions*

The Lord President and the Lord Justice Clerk are posts held by judges. They are the heads of the civil and criminal court systems respectively. The Bill would make general provision for them to regulate the publication of documents on the SCTS website via “directions”.

[Directions](#) take the form of published statements. They are an established process for dealing with administrative issues in relation to court proceedings.

## **SCHEDULE 3 – REPORTS, ACCOUNTS AND OTHER DOCUMENTS**

Section 4 of the Bill introduces Schedule 3 which “contains modifications to the law in response to coronavirus in relation to various matters concerning the preparation of reports, accounts and other documents”.

### **Part 1: Reports etc. under the Climate Change (Scotland) Act 2009**

The [Climate Change \(Scotland\) Act 2009](#) (the 2009 Act), as amended by the [Climate Change \(Emissions Reduction Targets\) \(Scotland\) Act 2019](#) is a landmark piece of legislation, setting targets to reduce greenhouse gas (GHG) emissions to net-zero by 2045 at the latest. It also makes provision for a citizens’ assembly on climate change and puts in place provisions to ensure that key sectors reduce their emissions.

#### *Extension of time for creation of nitrogen balance sheet*

Nitrogen is a key ingredient in chemical fertilisers. When too much nitrogen is applied to crops or grass, or if it is not applied properly, nitrous oxide (a potent GHG) is released into the air, or dissolved nitrogen runs into waterways and causes pollution. A nitrogen balance sheet would monitor and help to reduce the amount of nitrogen used in Scotland.

Section 8A of the 2009 Act came into force on 23 March 2020 and provides for Scottish Ministers to create a nitrogen balance sheet no more than 18 months later. The Policy Memorandum states:

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 of programmes of research work such as data development and stakeholder engagement to inform the project.

Paragraph 1(2) of Schedule 3 of the Bill extends the requirement for Scottish Ministers to produce a nitrogen balance sheet by substituting “18” for “24”

months. This means that a nitrogen balance sheet for Scotland would now be produced by 23 March 2022.

No stakeholder consultation has taken place on the proposed change in timetable. The Policy Memorandum highlights that “some stakeholder organisations recently expressed support for a coronavirus-related delay to the publication of the Climate Change Plan update”, and that the “need to focus on the quality of the nitrogen balance sheet” was raised by MSPs during Stage 3 consideration of the Bill that became the 2009 Act.

#### *Extension of time for report of citizens’ assembly on climate change*

A Citizens’ Assembly is a representative group of citizens who are selected at random from the population to learn about, deliberate upon, and make recommendations in relation to a particular issue or set of issues.

Section 32A (10) of the 2009 Act provides for the establishment of a citizens’ assembly on climate change and requires it to have concluded its work and reported to the Scottish Parliament and Ministers by 28 February 2021.

In order for the citizens’ assembly to have concluded and reported by the end of February 2021, members will need to be recruited, and meeting places secured (if required) during late spring and early summer of this year. The Policy Memorandum states:

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.

The Policy Memorandum also notes that public health measures have been taken to control and limit the spread of the coronavirus outbreak, and that these measures impose restrictions on gatherings of more than two people. Furthermore:

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.

The Bill therefore introduces a degree of flexibility into the deadline for the citizens’ assembly, whilst retaining the original target date.

Paragraph 1(3) of the Bill amends section 32A (10) of the 2009 Act. It provides that if the citizens’ assembly, “is unable to lay the report by that date for a reason relating to coronavirus” then it should lay it “as soon as reasonably practicable after that date”.

The Citizens Assembly Stewarding Group and key stakeholders have been consulted on potential operational difficulties and required adaptation in light of the pandemic, and they have indicated a focus on holding a timely, impactful assembly.



## **Part 2: Accounts of registered social landlords**

Part 2 of schedule 3 would amend [section 70 of the Housing \(Scotland\) Act 2010](#). This states that Registered Social Landlords (“RSLs”) must submit their accounts to the Scottish Housing Regulator within six months of the period to which the accounts relate. It is an offence for an RSL not to comply with that duty.

Paragraph 2(2) would disapply the above duty, in respect of the financial year ending with 31 March 2020. Instead, the accounts must be provided within **nine months** of the end of the period to which they relate.

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.

Auditors have additionally 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. Therefore, the Scottish Government have allowed an additional three months for RSL’s to submit their accounts to the Scottish Housing Regulator.

The Bill protects RSLs from risk of prosecution and criminal conviction where they are unable to submit accounts within the existing deadline.

## **Part 3: Accounts under the Public Finance and Accountability (Scotland) Act 2000**

The Bill makes provision to amend references in paragraphs 15(1) and 15(3) of schedule 6 of the [Coronavirus \(Scotland\) Act 2020](#).

Regulations made under paragraph 15(1) are proposed to be in respect of accounts for the financial year 2019-2020 and not 2020-2021 as stated in the earlier act. The reference in paragraph 15(3) is also to be changed so that regulations made under paragraph 15(1) may be in respect of accounts for the financial year 2020-2021 and not 2021-2022 as in the earlier act.

This allows amendments to the [Public Finance and Accountability \(Scotland\) Act 2000](#) made by regulations to be in respect of accounts covering years most likely to be impacted by the coronavirus outbreak – namely 2019-20 and 2020-21. This is a response to the disruption caused to accounting timetables by the coronavirus outbreak. The regulations may make provisions related to the timescales in which accounts must be provided, the provision of information and documents by electronic means and the manner in which accounts and any other relevant documents are to be published.

These changes to the Coronavirus (Scotland) Act 2020 are not expected to result in cost implications for the Scottish Administration, local authorities or other bodies, individuals and businesses.

#### **Part 4: Housing (Scotland) Act 1987: statement under section 33B**

[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 giving 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 provided 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.

Paragraph 4 amends section [33B\(1\) of the Housing \(Scotland\) Act 1987](#) to extend, by six months, the deadline for the Scottish Ministers to publish a statement on the circumstances and criteria for exercising the power in section 33A of the 1987 Act, relating to referrals between local authorities on the grounds of local connection. It extends the deadline for publishing the statement to 18 months from the coming into force of section 33B (1) on 7 November 2019. This could extend the deadline until May 2021.

Paragraph 4(2)(b) gives Scottish Ministers the power to make regulations further extending the period in section 33B (1) by up to six months on a one-off basis, should this be necessary. This could delay the publication of the statement to November 2021.

The Scottish Government does not consider that it is practically possible at this time to conduct the necessary statutory consultation on the statement. In addition, local authorities and third sector partners are facing challenges in accommodating and supporting people who were rough sleeping and preventing further homelessness during the outbreak. This significantly limits their capacity to engage with consultations at this time.

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.

## **SCHEDULE 4 – OTHER MEASURES IN RESPONSE TO CORONAVIRUS**

### **Part 1: UEFA European Championship**

On the 17<sup>th</sup> March 2020, [UEFA announced that the 2020 European Championship](#), originally scheduled to take place during June and July 2020, would be delayed until 2021, with UEFA stating that completing domestic

competitions would be prioritised. UEFA tentatively stated that the tournament would run between 11 June 2021 and 11 July 2021.

Glasgow (Hampden Park) is one of the host cities for the Tournament. The Scottish Parliament passed the [UEFA European Championship 2020 \(Scotland\) Act](#) (the Act) on 23 January 2020. This Act granted Scottish Ministers the power to introduce regulations required of all host cities. The Scottish Government is proposing two amendments to this legislation; to reflect the change of date for the tournament and to make a technical amendment to one of the exemptions.

The [UEFA European Championship 2020 \(Scotland\) Act](#) grants Scottish Ministers the power to introduce temporary restrictions on street trading, advertising and ticket touting for the period of the tournament, as defined in the Act. Paragraph 1(2) of Schedule 4 of the Bill proposes modifications to several of the key terms:

- The “Championship” is amended so that it may take place in a year other than 2020.
- The “Championship period” is amended to be a period of not more than 42 days, ending not later than 31 December 2022.
- The Bill also changes the repeal date from 31 December 2020 to 31 December 2022.

The Act also included an exception to the ticket touting offence where an auction of a match ticket is conducted by a charity, or a person other than a charity and the proceeds are donated to a charity based in the UK or EU. The Scottish Government now considers that the geographic limitation included would not be compliant with the European Convention on Human Rights, and so, on 4 February 2020, [introduced a remedial order to amend this section of the Act](#). This amendment means that any organisation can be considered a charity, irrespective of its home jurisdiction, provided that the body is registered in a register corresponding to the [Scottish Charity Register](#), or if its purpose consist only of one or more of the charitable purposes set out in section 7(2) of the [Charities and Trustee Investments \(Scotland\) Act 2005](#) and the body provides public benefit within the meaning given by section 8 of that Act.

On 23 March 2020, the Minister for Public Finance and Migration wrote to the Culture, Tourism and Europe Committee to notify the Committee that all secondary legislation and the draft remedial order were being withdrawn from the Parliament in light of the delay to Euro 2020. This section of the Bill re-introduces the changes proposed in the draft remedial order.

## **Part 2: Listed buildings and conservation areas: consents**

An award of listed building consent normally expires after three years, measured from the date consent was granted, unless the works permitted by the consent have begun. Planning authorities can choose to set longer or shorter expiry periods for individual awards of listed building consent, but this option is rarely used and the default three-year period applies to almost all such awards.

The Bill would automatically extend the expiry date of any current listed building consent, which was due to expire before 6 October 2020, until 6 April 2021. Scottish Ministers would have the power, through Regulations, to amend these dates.

## **Part 3: Registers kept by the Keeper of the Registers of Scotland**

### ***The closure of the Registers of Scotland***

This part of the Bill relates to a little-known, but important non-ministerial government department called [Registers of Scotland](#) (RoS). It is headed up by a senior official known as [the Keeper](#). The Keeper and RoS are directly accountable to the Scottish Parliament. The Keeper, supported by RoS, maintains [20 public registers](#) which relate to land, property and other legal documents.

On 24 March, due to the Government's Coronavirus (COVID-19) guidance on the protection of employees, [the doors of the buildings which house RoS closed and the staff were sent home](#). The closure was very significant, as RoS can only accept paper-based applications for registration in some of its key registers.

Schedule 7 of the [Coronavirus \(Scotland\) Act 2020](#) ('the 2020 Act') amended the law to empower RoS to accept scanned electronic copies of paper-based applications for its two most important registers, i.e. the property registers, which enable land and buildings to change hands in Scotland. (On this, see "Land registration and the Registers of Scotland" in SPICe's [blog briefing](#) on the Bill which became the 2020 Act.)

The property registers are now open to applications submitted in this way, although a letter from the Keeper, dated 30<sup>th</sup> April, to the Convener of the [Economy, Energy and Fair Work Committee](#), suggests they are operating at reduced capacity and undertaking a "phased approach" to full reopening.

### ***What this part of the Bill does – an overview***

Schedule 4 of the current Bill contains similar measures to schedule 7 of the 2020 Act for two further registers which rely to a significant extent on paper-based applications – the [Register of Inhibitions](#) (RoI) and the [Register of Judgments](#) (RoJ). For these registers, it enables RoS to accept copies of

traditional documents submitted electronically (e.g. by scanning them in and uploading them or emailing them to RoS). On the proposed policy approach, the [Policy Memorandum](#) to the Bill comments (at para 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.”

(Advanced electronic signatures include, for example a signature involving a unique combination of letters or numbers, as with the approach currently used in online banking.)

The next sub-sections of the briefing explain what the RoI and the RoJ do and describe the Bill’s provisions in more detail.

### ***The Register of Inhibitions – background***

An **inhibition** is a legal debt recovery tool which can be used in a variety of situations. It acts as a legal block a person doing certain key things in respect of land or buildings they own, including selling it or taking out further loans over it.

An inhibition is registered in the RoI against an individual, automatically affecting land or buildings that that person owns.

Around 69 separate provisions in 23 pieces of legislation enable registration in the RoI alone ([Policy Memorandum](#), para 309). The following are some of the reasons a person or body may be placed on the RoI:

- bankruptcy;
- where someone owes someone else money and the court has sanctioned action to force repayment of that money
- a company goes into administration;
- where someone signed a divorce settlement which requires the transfer of property to a former spouse - the inhibition stops the person selling it instead; and
- a court action is raised against someone and the property is inhibited at the start of the case as security, pending the decision on the merits of the case.

Crucially, an inhibition, of itself, does *not* give a person or organisation registering it the right to repossess the land or buildings. So, for example, a mortgage lender cannot use an inhibition to repossess the property and sell it. This is a major limitation of an inhibition and creditors rely on other methods of debt recovery to repossess property.

On the other hand, an inhibition is particularly useful is where a person against whom it is registered is keen to sell a property, including that person's home or, for example (on the commercial side) property forming part of a construction or property development project.

The usefulness of an inhibition in those circumstances relates to the fact that a solicitor acting for a buyer will always check an RoI before the sale goes through. If an inhibition is registered against the seller, the buyer's solicitor will advise the buyer not to proceed. The person who has the inhibition registered against them must agree that it will be paid off in full before the sale of the property can complete.

An inhibition can be 'discharged' (i.e. removed from the register) voluntarily, by the person or organisation who registered it. It can also be discharged by court order (a 'recall'). Partial discharge or recall (sometimes called 'restriction') is possible too.

RoS are currently able to receive a small number of applications for registration in the RoI electronically from the [Accountant in Bankruptcy](#). (This is the executive agency of the Scottish Government responsible for supervising bankruptcy processes). However, the RoI is largely paper-based. The Policy Memorandum to the Bill (at para 301) describes the impact of the current crisis as follows:

“While the RoI is closed, documents relating to inhibitions cannot be registered, denying creditors a route to recovery of the 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.”

### ***The Register of Judgments – background***

Court cases sometimes have a cross-border element, affecting more than one legal system, for example, because one of the litigants is based abroad.

Sometimes a person might need a court judgment obtained in another legal system to be recognised and enforced in Scotland. Conversely, someone might need a court judgment obtained in Scotland to be enforced in another legal system.

The key point is that judgments from foreign courts (which also covers those from other UK legal systems – i.e. England and Wales and Northern Ireland)

aren't automatically enforceable in other jurisdictions. Additional steps need to be taken to enforce them.

The precise statutory rules which apply to this process vary, depending on which legal system is involved. However, as set out in [the rules of the Court of Session](#), for a wide variety of different types of court judgment, registration in the RoJ is often needed.

For example, [the Scottish Courts and Tribunals website](#) says that registration in the RoJ is part of the process of enforcing orders for the payment of money from courts in England and Wales.

The problem is that court judgments are registered using paper-based applications at the RoJ. The RoS's closure means that this is not possible. The [Policy Memorandum](#) to the Bill (at para 302) says:

“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.”

It is worth noting though that, in [a letter dated 30<sup>th</sup> April](#), the Keeper said to the Convener of the [Economy, Energy and Fair Work Committee](#) that “the usual volumes in this register are very low” (without further detail on this being provided).

### ***What this part of the Bill does – in more detail***

**Para 3** of schedule 4, Part 1 of the Bill applies to documents which require to be registered in the RoJ.

**Para 4** of schedule 4, Part 1 of the Bill applies to the RoJ. It would amend the [court rules](#) relating to the RoJ (inserting rule 62.102) for the period when the proposed legislation is in force.

For the documents relating to the RoJ covered by the current Bill, paras 3 and 4 say two key things:

- An electronic signature meets any requirement that a document be signed (para 3(2); para 4, rule 62.102(2)).
- Any requirement that the document be given to the Keeper to be registered in the RoJ can be met by sending it to the Keeper electronically (para 3(3); para 4, rule 62.102(3)(a)).

On the first bullet point, an electronic signature includes a version of a signature which is reproduced on a paper document (and then sent electronically) (para 3(5); para 4, rule 62.102(6)). This aims to overcome the issues which have arisen with use of advanced electronic signatures.

On the second bullet point, the Bill says that, in relation to the form of electronic transmission to the Keeper which is acceptable:

“the document must be transmitted by a means (and in form) which is specified on the Keeper’s website as being acceptable for those purposes” (para 3(4); para 4, rule 62.102(4)).

This has the advantage of flexibility as RoS’s IT response to the office closure develops. On the other hand, it may raise issues about clarity of the law if the information on the website keeps changing, especially if the current version leaves no formal record of what was previously on the website. Schedule 7 of the 2020 Act (at paras 12 and 14) contained a similar approach for its provisions to end the property registers’ reliance on paper-based applications.

#### **Part 4: Land and buildings transaction tax: additional amount**

The [Land and Buildings Transaction Tax \(LBTT\) Additional Dwelling Supplement \(ADS\)](#) has been in place since 1 April 2016 and places a 4% charge on purchases of additional residential properties in Scotland (such as buy-to-let properties and second homes) of £40,000 or more.

Where the ADS has been paid and the buyer has been able to dispose of their previous main residence within an 18-month period, the buyer (or their solicitor acting on their behalf) may claim a repayment of the ADS paid.

The Bill seeks to assist taxpayers who had paid the ADS in relation to a transaction prior to 25 March 2020 and have intentions to reclaim it (whether they indicated this at the time that ADS was paid) but have not yet sold a previous main residence. This will apply if taxpayers are within their 18-month window from when they bought their additional dwelling, i.e. those who will have paid ADS between 24 September 2018 and 24 March 2020. The Government consider that these taxpayers should not be unfairly penalised as they will not have been able to take into account the impact on the housing market of the covid-19 outbreak when they paid their ADS.

The Bill provisions will increase by nine months the period in which these taxpayers can dispose of a relevant previous main residence and still be eligible for a repayment of the ADS. This would result in relevant taxpayers having 27 months rather than 18 months to dispose of their previous main residence and still be eligible for a repayment of the ADS.

Given current uncertainty about the extent and duration of any coronavirus outbreak-related housing market disruption, the Bill allows for the use of future secondary legislation to extend the nine-month period, or for the extension to apply to transactions over a longer period. This power could only be



exercised where Scottish Ministers are satisfied that it would be appropriate to make an Order for a reason related to the coronavirus.

The provisions of the Bill will enable some taxpayers to reclaim a repayment of the LBTT Additional Dwelling Supplement who would not otherwise be able to do so if no change were made. As such, it is expected to result in an increase in the amount of ADS which is reclaimed over a period of time, relative to the position as it would otherwise have been. These additional costs will largely fall in the 2020-21 and 2021-22 financial years, with the potential for some repayments to occur in 2022-23. This is on the basis that the extended deadline by which the relevant taxpayers must sell a previous main residence to reclaim their ADS will begin to expire from December 2020 (for a transaction from September 2018) and run to June 2022 (for a transaction from March 2020).

The [Scottish Fiscal Commission \(SFC\)](#) is the independent fiscal institution for Scotland. It has a statutory duty to provide independent, official forecasts of Scottish GDP, devolved tax revenues and social security spending to inform the Scottish Budget.

The SFC has published [an estimate of the impact on tax revenues of the ADS provisions in the Bill](#). These equate to a forecast of the revenues foregone over the 3 years in question. The SFC estimate that there will be £4 million additional ADS reclaimed by taxpayers in 2020-21, £6 million in 2021-22 and £1 million in 2022-21.

#### **Part 5: Non-domestic rates.**

Part 5 of Schedule 4 the Bill seeks to amend section 153 of the [Local Government etc. \(Scotland\) Act 1994](#) to allow ministers to apply Non-Domestic Rates relief retrospectively.

Currently the legislation only allows for reliefs to be applied, through subordinate legislation, in advance of them being granted for a financial year. This change would mean that further reliefs could be granted during the financial year and backdated to 1 April 2020, essentially giving the Scottish Government the option to offer further reliefs to businesses in Scotland should it see the need for further business support through reliefs during 2020-21.