

# Criminal Justice Committee

**20th Meeting, 2023 (Session 6), Wednesday, 28 June 2023**

## Subordinate legislation - Note by the clerk

### Purpose of the paper

1. This paper invites the Committee to consider the following negative instrument:
  - [The Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022 \(Early Expiry of Provisions\) Regulations 2023 \(SSI 2023/172\)](#) [see page 4];
2. The purpose of the instrument is to partially expire certain temporary justice provisions in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 relating to modes of attendance in the civil courts and to expire the temporary justice provisions that modify the Proceeds of Crime Act 2002, as they are no longer required.
3. All the temporary measures in the schedule of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 expire on 30 November 2023 unless extended for a further year by regulations. Rather than wait for provisions in the schedule to expire, section 53 allows the Scottish Government to expire provisions sooner if a point is reached where they are no longer required.
4. If the Committee agrees to report to the Parliament on the instrument, it is required to do so by **11 September 2023**.

### Delegated Powers and Law Reform Committee Consideration

5. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 13 June 2023.
6. The DPLR Committee agreed that it did not need to draw the instrument to the attention of the Parliament on any grounds within its remit.

## Procedure for negative instruments

7. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.
8. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
9. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
10. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
11. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.
12. Each negative instrument appears on the Criminal Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
13. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

## Guidance on subordinate legislation

14. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee’s web page at:

<https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee>

**15. The Committee is invited to consider the instrument.**

**Clerks to the Committee  
June 2023**

## Policy Note

# The Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Early Expiry of Provisions) Regulations 2023

## SSI 2023/172

The above instrument was made in exercise of the powers conferred by section sections 53,54(1) and 58(1) of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 and all other powers enabling them to do so. The instrument is subject to the negative procedure.

The purpose of the instrument is to partially expire certain temporary justice provisions in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 relating to modes of attendance in the civil courts and to expire the temporary justice provisions that modify the Proceeds of Crime Act 2002, as they are no longer required. All the temporary measures in the schedule of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 expire on 30 November 2023 unless extended for a further year by regulations. Rather than wait for provisions in the schedule to expire, section 53 allows the Scottish Government to expire provisions sooner if a point is reached where they are no longer required.

### Legislative Background

1. The Coronavirus (Recovery and Reform) (Scotland) Act 2022 (the 'Act') came into force on 11 August 2022 with the schedule containing the temporary justice measure coming into force on 1 October 2022.
2. The schedule to the Act makes changes to the law that are only temporary, in the sense that they will stop being law unless the Scottish Parliament agrees each year to their extension. They can only continue to be law until 30 November 2025 at the latest.
3. The expiry date is initially set at 30 November 2023.
4. Section 53 allows the Scottish Government to expire provisions sooner, if a point is reached where they are no longer required, rather than wait for provisions in the schedule to expire.

### Policy Objectives

5. During the passage of the Coronavirus (Recovery and Reform) (Scotland) Bill, Ministers committed to expiring provisions as soon as appropriate. As part of the Scottish Government's regular reviews of provisions and as part of the preparations

for the potential extension of the temporary justice measures, consideration has been given to whether each individual provision continues to be needed.

### **Civil Justice**

6. As set out in the Policy Memorandum for the Coronavirus (Recovery and Reform) (Scotland) Bill it is expected that the temporary justice provisions relating to civil justice will, if considered to be of benefit to the courts and court users, be made permanent, through court rules.

7. This reflects the long-standing policy position that court rules are the natural place for regulation of civil procedures in the Scottish Courts as they concern the day-to-day routine workings of the courts.

8. The Court of Session is making an Act of Sederunt to insert new Chapters into the Rules of the Court of Session 1994 and the Ordinary Cause Rules 1993 to regulate the modes of attendance in court proceedings in the Court of Session and those subject to the Ordinary Cause Rules 1993 in the sheriff court.

9. This Act of Sederunt will come into force on the 3 July 2023. A separate policy note and impact assessments will accompany the Act of Sederunt. These will be published online.

10. This means that provisions within the schedule of the Act, that concern modes of attendance in court proceedings in the Court of Session and those raised under Ordinary Cause Rules, are no longer required.

### **Proceeds of Crime**

11. The amendments to the Proceeds of Crime Act 2002 to insert sub-sections 4A and 12 in section 99 of the Proceeds of Crime Act 2002 were to put beyond doubt that reasons directly, or indirectly, related to coronavirus could be regarded as “exceptional circumstances” for the purposes of extending the period of postponement of confiscation proceedings under section 92 of the Act.

12. Following consultation with the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunals Service it is considered that the requirement for this provision is no longer required and can be expired. It remains open for the court to decide whether exceptional circumstances, which may include coronavirus-related reasons, have been sufficiently demonstrated to warrant an extension.

### **Effect and Purpose**

13. The effect of the early expiry of these provisions is to remove the provisions in the schedule to the Act that directly relate to civil proceedings in the Court of Session and those raised under Ordinary Cause Rules; and the provisions in Part 6 Proceeds of Crime. The early expiry of the provisions in Part 6 will have the effect of removing subsections (4A) and (12) of section 99 of the Proceeds of Crime Act 2002 (POCA). No effect on any other measures contained within the schedule is intended.

14. The purpose of the early expiry is to allow court rules to come into effect and to respect the commitment given by the Scottish Ministers to seek to expire early provisions as soon as is appropriate.

15. The provisions that are being expired for non-criminal proceedings in the Court of Session and those raised under the Ordinary Cause Rules 1993 are:

- paragraph 6 (suspension of requirement for physical attendance in non-criminal
- proceedings: criminal trials and certain processes),
- paragraphs 8 and 9 (attending by electronic means: directions),
- paragraphs 10(c) and (d) (publication of directions and guidance)),
- paragraph 11(1) (transitional provision for directions under earlier enactment) to the extent it relates to paragraphs 6 (2), (4) and 8(1),
- paragraph 11(2) (transitional provision for general directions under earlier enactment) to the extent it relates to paragraph 9(1)(a),
- paragraph 12 (interpretation of Part), for the purposes of paragraphs 6, 8 and 9.

16. The provision that is being expired in relation to Proceeds of Crime is:

- paragraph 24 (making of confiscation order: postponement due to coronavirus)

17. The provisions are to expire on 3 July 2023.

### **Transitional and Savings Protection**

18. Transitional and saving provisions are made so that any directions made by the court in proceedings in the Court of Session and those subject to the Ordinary Cause Rules 1993 continue to have effect in relation to hearings which are to take place on and after the date the relevant provisions are expired.

19. Transitional and saving provisions are also made so that any decision of the court to extend a period of postponement under section 99 of the Proceeds of Crime Act 2022 continues to have effect after the date the relevant provisions are expired.

### **Consultation**

20. A full public consultation was undertaken on the Coronavirus (Recovery and Reform) (Scotland) Bill<sup>1</sup>, with questions specifically relating to whether justice measures should be introduced on a temporary or permanent basis. An analysis of

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<sup>1</sup> Covid recovery: a consultation on public health, public services and justice system reforms - Scottish Government - Citizen Space – <https://consult.gov.scot/constitution-and-cabinet/covid-recovery/>

responses has been published<sup>2</sup> together with responses where respondents gave permission for their response to be published<sup>3</sup>.

### **Impact Assessments**

21. No impact assessments have been completed for this instrument, however in development of the instrument the impacts assessments undertaken at the time of the introduction of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 have been reviewed in order to determine whether any new or additional impacts would result from expiry of the provisions covered by the Regulations.

22. No new or additional implications for children's rights or equality have been identified in relation to the decision to expire these provisions.

### **Financial Effects**

23. The Minister for Victims and Community Safety confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government  
Directorate for Justice  
31 May 2023

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<sup>2</sup> Covid Recovery - A consultation on public health, public services and justice system reforms: Analysis of consultation responses - gov.scot (www.gov.scot) – <https://www.gov.scot/publications/covid-recovery-consultation-public-health-public-services-justice-systemreforms-analysis-consultation-responses/>

<sup>3</sup> Published responses for Covid recovery: a consultation on public health, public services and justice system reforms - Scottish Government- Citizen Space – [https://consult.gov.scot/constitution-and-cabinet/covid-recovery/consultation/published\\_select\\_respondent](https://consult.gov.scot/constitution-and-cabinet/covid-recovery/consultation/published_select_respondent)