

Criminal Justice Committee
Wednesday 9 October 2024
31st Meeting, 2024 (Session 6)

Note by the Clerk on the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension of Temporary Justice Measures) Regulations 2024 [draft]

Overview

1. At this meeting, the Committee will take evidence from the Cabinet Secretary for Justice and Home Affairs and officials on the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension of Temporary Justice Measures) Regulations 2024 before debating a motion in the name of the Cabinet Secretary inviting the Committee to recommend approval of the instrument.
2. This is a draft Scottish Statutory Instrument (SSI), which requires approval by resolution of the Parliament before it can become law. More information about the instrument is summarised below:

Title of instrument: [The Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022 \(Extension of Temporary Justice Measures\) Regulations 2024](#) [draft]

Laid under: Sections 52(3) of the [Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022](#)¹.

Laid on: 19 September 2024

Procedure: Affirmative

Lead committee to report by: 13 November 2024

Commencement: If approved, the instrument comes into force on 30 November 2024.

Procedure

3. Under the affirmative procedure, an instrument must be laid in draft and cannot be made (or come into force) unless it is approved by resolution of the Parliament.
4. Once laid, the instrument is referred to:
 - the Delegated Powers and Law Reform (DPLR) Committee, for scrutiny on various technical grounds, and

¹ 2022 asp 8 as modified by S.S.I. 2023/172, S.S.I. 2023/360 and S.S.I. 2024/246.

- a lead committee, whose remit includes the subject-matter of the instrument, for scrutiny on policy grounds.
5. The lead committee, taking account of any recommendations made by the DPLR Committee (or any other committee), must report within 40 days of the instrument being laid.
 6. The normal practice is to have two agenda items when an affirmative instrument is considered by the lead committee:
 - an evidence session with the Minister and officials, followed by
 - a formal debate on a motion, lodged by the Minister, inviting the lead committee to recommend approval of the instrument.
 7. Only MSPs may participate in the debate, which may not last for more than 90 minutes. If there is a division on the motion, only committee members may vote. If the motion is agreed to, it is for the Chamber to decide, at a later date, whether to approve the instrument

Delegated Powers and Law Reform Committee consideration

8. The DPLR Committee considered the instrument on 1 October 2024 and reported on it in its [58th Report, 2024](#). The DPLR Committee made no recommendations in relation to the instrument.

Purpose of the instrument

9. These Regulations modify the expiry dates for certain temporary justice measures which are contained in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (“the 2022 Act”).
10. Regulation 2 modifies the expiry date in section 52(1) of the 2022 Act so that it reads “30 November 2025” rather than “30 November 2024”. The effect of this regulation is that all of the temporary justice measures which remain in force after 29 November 2023 will not expire at the end of 30 November 2024 but instead will be extended for 12 months, expiring at the end of 30 November 2025.
11. The Policy Note accompanying the instrument is included in **annexe A**. It includes a summary of consultation undertaken on the instrument, impact assessments carried out, and the anticipated financial effects.
12. The Cabinet Secretary for Justice and Home Affairs wrote to the Committee in relation to the instrument on 20 September 2024. A copy of the letter can be found in **annexe B**.
13. Further detail can also be found in the [Statement of Reasons](#) produced by the Scottish Government to accompany the instrument.

Report

14. Following today's proceedings, a draft report will be prepared by the clerks.
- 15. The Committee is invited to delegate to the Convener and clerks responsibility for drafting a report and finalising it for publication.**

**Clerks to the Committee
October 2024**

Annexe A: Scottish Government Policy Note

The Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension of Temporary Justice Measures) Regulations 2024 [draft]

SSI 2024/XXX

The above instrument was made in exercise of the powers conferred by section 52(3) of the Coronavirus (Recovery and Reform) (Scotland) Act 2022. The instrument is subject to affirmative procedure*.

Summary Box

These Regulations modify the expiry date of the remaining temporary justice measures in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (“the 2022 Act”), with the effect that those measures remain in force until the end of 30 November 2025.

Policy Objectives

The 2022 Act includes a range of temporary justice measures that were originally introduced in response to Covid-19 to support the operation of Scotland’s justice system as it responded to the impact of the pandemic and associated restrictions to which it led. These temporary measures were originally due to expire at the end of 30 November 2023. Some of them were then extended for a further year until the end of 30 November 2024. The option to extend the temporary measures is available for one more, final year. The instrument’s objectives are to extend the expiry date of those temporary measures that are continuing to play a valuable role in helping Scotland’s justice system to process business more effectively and efficiently in the wake of the Covid-19 pandemic and support the system’s recovery from the effects of the pandemic. Further detail is provided in the Statement of Reasons produced to accompany this instrument (SG/2024/180).

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, the Scottish Ministers certify that, in their view, the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension of Temporary Justice Measures) Regulations 2024 are compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government’s policy to maintain alignment with the EU.

Consultation

To comply with the requirements of section 52(4) of the 2022 Act and to inform the contents of this instrument, the Scottish Ministers have carried out a review into the operation of the temporary justice measures which remain in force. As required by section 52(6) of the 2022 Act, the Scottish Ministers have consulted a range of stakeholders as part of that review. Further detail is provided in the Statement of Reasons produced to accompany this instrument (SG/2024/180).

Impact Assessments

The provisions extended by this instrument all form part of the 2022 Act. The following impact assessments were carried out for the 2022 Act. They have been reviewed and, where necessary, updated to reflect the contents of this instrument:

- [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill: child rights and wellbeing impact assessment](#)²
- [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill: equalities impact assessment](#)³
- [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill: fairer Scotland duty impact assessment](#)⁴
- [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill: island communities impact assessment](#)⁵

Section 17(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024⁶ came into force on 16 July 2024. This requires the Scottish Ministers to prepare and publish a child rights and wellbeing impact assessment (“CRWIA”) for any Scottish statutory instrument that they make, other than one which brings a provision of an Act of the Scottish Parliament or an Act of Parliament into force.

The CRWIA for this instrument complements the CRWIA that was published for the 2022 Act. It has been reviewed and signed off by the Cabinet Secretary for Justice and Home Affairs, as confirmed by the Statement of Compatibility.

***Note on Parliamentary Procedure** - Under the terms of the 2022 Act, regulation 3 is subject to the affirmative procedure. Regulation 2 only has meaningful effect if regulation 3 is passed by the Parliament.

² [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill: child rights and wellbeing impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/coronavirus-recovery-reform-scotland-bill-child-rights-and-wellbeing-impact-assessment-eqia/)

³ <https://www.gov.scot/publications/coronavirus-recovery-reform-scotland-bill-equalities-impact-assessment-eqia/>

⁴ <https://www.gov.scot/publications/coronavirus-recovery-reform-scotland-bill-fairer-scotland-duty-impact-assessment-fsdi/>

⁵ <https://www.gov.scot/publications/coronavirus-recovery-reform-scotland-bill-island-communities-impact-assessment-icia/>

⁶ https://www.legislation.gov.uk/asp/2024/1/pdfs/asp_20240001_en.pdf

Financial Effects

The provisions expired by this instrument all form part of the 2022 Act. A Business and Regulatory Impact Assessment was carried out for the Act, and can be found here:

- [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill: business and regulatory impact assessment⁷](https://www.gov.scot/publications/coronavirus-recovery-reform-scotland-bill-business-regulatory-impact-assessment-bria/)

The Scottish Government has reviewed the Business and Regulatory Impact Assessment and is satisfied that it reflects the impact of the instrument.

Scottish Government

Justice Directorate

September 2024

⁷ <https://www.gov.scot/publications/coronavirus-recovery-reform-scotland-bill-business-regulatory-impact-assessment-bria/>

Annexe B: letter from the Cabinet Secretary for Justice and Home Affairs

20 September 2024

Dear Convener,

I would like to take the opportunity to set out the effects of regulations I have laid in Parliament relating to temporary justice measures put in place as a response to the pandemic; to provide the reasons I am proposing to extend some of these time-limited measures; and to inform you about the consultation that took place on the regulations. The regulations are:

- The Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Early Expiry of Provisions) Regulations 2024 ('the Expiry Regulations')
- The Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension of Temporary Justice Measures) Regulations 2024 ('the Extension Regulations')

The table at Annex A sets out which measures the regulations expire and which they extend. I have also laid a Statement of Reasons alongside the regulations (SG/2024/180), which sets out in more detail the reasons for extending each measure included in the Extension Regulations.

As the committee is aware, we consulted on making permanent those temporary measures that make criminal justice processes more modern and efficient, thereby improving people's experiences. In the Programme for Government we announced that we intend to introduce a Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill, which will do just that.

Background

The Coronavirus (Recovery and Reform) (Scotland) Act 2022 ("the 2022 Act") includes a range of temporary justice measures that were originally due to expire on 30 November 2023. The 2022 Act provides a mechanism for the provisions which remain in force to be extended for one year at a time, by regulations, until 30 November 2025.

This mechanism was used last year when some of the measures were extended until 30 November 2024.

The Expiry Regulations I have now laid expire the two measures that are no longer needed, while the Extension Regulations extend the remaining six measures, which continue to play a crucial role in supporting our justice system, until 30 November 2025.

Extending the temporary provisions

The provisions in the 2022 Act were originally introduced to give the justice system the resilience, flexibility and support needed to respond to the challenges presented

by the pandemic. The Act requires that, before a provision is due to expire, Ministers must review its operation and consult such persons as they consider appropriate. To inform the decision on which remaining measures to expire and which to extend until 30 November 2025, the Scottish Government has consulted with justice agencies to understand how each of the provisions are being used, the effect they are having, and what the impact would be if they were not extended. Views were also sought from the judiciary, legal profession, victim organisations and third sector organisations with a particular interest in the provisions. This process confirmed that there is strong support for retaining such measures.

There are two key reasons for proposing to extend six measures. First, the consequences of the pandemic include significantly increased criminal court caseloads, which continue to impact the justice system. The temporary justice measures mitigate this prolonged impact and help ensure court resources are used efficiently - if they were expired, the timescales for cases would increase. There would also be a serious risk that some cases could not proceed at all.

Second, although the pandemic was the catalyst for temporary legislative change, some of the measures have modernised justice processes, resulting in the system delivering better outcomes and experiences for the people using them.

Criminal procedure time-limits

The 2022 Act included temporary extensions to seven sets of statutory time limits that apply to certain aspects of criminal proceedings. Regulations expired four of these last year, and the Expiry Regulations expire one more. If the Extension Regulations are approved, this will be the final year these two remaining extended time-limits will operate, as they cannot be retained beyond 30 November 2025.

Whilst I am in no doubt that we should return to all of the pre-pandemic time limits as soon as possible, the remaining two extended time-limits continue to play an important role assisting the solemn courts in managing the current caseload and need to be continued.

The number of outstanding criminal trials increased substantially during the pandemic. Since peaking at 43,606 in January 2022 it has reduced by over 40%, to 24,951.⁸ This progress has been supported by Scottish Government recovery funding of over £180m since 2021. Criminal court capacity has been significantly increased, and projects like the Summary Case Management Pilot and Digital Evidence Sharing Capability (DESC) are contributing to making justice processes more efficient and addressing journey times.

However, the position in the solemn courts remains challenging, and modelling published by SCTS last year⁹ set out the continuing expected pressures on the solemn courts as the recovery programme progresses. If the two remaining solemn time limits were expired this year, prosecutorial and court resource would be diverted from progressing cases and would instead be spent considering applications to

⁸ [SCTS Monthly Management Information statistics](#)

⁹ [SCTS Criminal Court Recovery Modelling, December 2023](#)

extend time-limits on a case-by-case basis, resulting in cases taking longer to resolve than if the time limit extension provision remain in place. Resources could better be used to focus on throughput of trials.

Respondents to our consultation – including organisations representing victims, and respondents from the legal profession – also supported retaining these time limits, recognising that they currently remain necessary in order to aid the courts’ recovery and avoid cases falling.

Fiscal fines

As the Committee will be aware, fiscal fines are a long-standing part of criminal procedure which can only be used for offences capable of being tried summarily. In cases where they are offered, fiscal fines represent a proportionate response to the offending behaviour: they enable cases to be resolved without the need for court procedure, which gives the courts and prosecutors more time to deal with more serious cases

Before the pandemic, the maximum fiscal fine which could be offered was £300. Under the temporary measures in the 2022 Act, two higher fine levels are available: £400 and £500. These enable alternative action to prosecution to continue to be taken in a wider range of summary cases as an alternative to prosecution in court. Extending these measures will allow prosecutors to continue to deal with this level of offending appropriately, reducing the number of cases entering the criminal justice system, and thereby freeing up capacity for the courts and prosecutors to deal with more serious cases.

Although the increased levels of fines apply to the same range of summary offences as before - those in which the public interest is not served by prosecution in court – they allow for fines to be offered in a wider range of cases where prosecutors consider that a £300 fiscal fine is not an appropriate disposal in the circumstances, but a £500 fiscal fine is.

Cases that COPFS consider require a court disposal will still, as before, be marked for prosecution in court rather than dealt with by a fiscal fine. It is also important to note that as a matter of law, there are no offences that are now capable of receiving a fiscal fine which could not also have been used for a fiscal fine before the higher maximum level was first introduced in 2020 Coronavirus legislation (with the small exception of any offences created since April 2020).

I hope that this provides the Committee with helpful information ahead of considering these two sets of regulations.

Yours Sincerely,

ANGELA CONSTANCE

Effect of Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Extension and Expiry of Temporary Justice Measures) Regulations 2024	
Provision	Effect of Regulations
<p>Part 1, Chapter 1: Courts and tribunals: conduct of business by electronic means etc: Documents Allows for the electronic signing, sending and intimation of documents</p>	<p>Extended until end of 30 November 2025. These provisions are heavily used and seen as having modernised and simplified many justice processes. There is widespread support for retaining them, and ultimately making them permanent.</p>
<p>Part 1, Chapter 2: Courts and tribunals: conduct of business by electronic means etc: Attending a Court of Tribunal Enables virtual attendance at a court or tribunal</p>	<p>Extended until end of 30 November 2025 for criminal business, tribunal business and the remaining civil business other than proceedings in the Court of Session and ordinary cause proceedings (for those proceedings, the provisions expired on 3 July, and have been replaced by court rules). Justice partners remain strongly in favour of extending the provisions, to help maximise capacity and efficient use of resources as they continue to address the backlog.</p>
<p>Part 2: Fiscal fines Increases the maximum level of fiscal fine to £500, and adjusts the scale of fines</p>	<p>Extended until end of 30 November 2025. The measures support diversion of cases from prosecution, reducing the number of cases entering the criminal justice system and allowing the courts and prosecutors more time to deal with more serious cases.</p>
<p>Part 4: National jurisdiction for callings from custody Allows custody cases to be heard in any court in Scotland</p>	<p>Extended until end of 30 November 2025. This measure reduces the number of accused people who need to be transported for a custody appearance, which can reduce their time in custody. It creates flexibility to deal with custody court business efficiently.</p>
<p>Part 5, Chapter 1: Criminal procedure time limits: Extension of periods Extends the statutory limits on:</p>	
<ul style="list-style-type: none"> how long may elapse between first appearance and preliminary hearing/first diet/trial in solemn proceedings. 	<p>Extended until end of 30 November 2025. Retaining these time limits is seen as crucial to helping the courts manage resources while backlogs remain high – without blanket extensions, more court time would be spent on considering case-by-case applications for extensions. These provisions help ensure that cases are not lost due to time-bar while the justice system is under heightened pressures due to the pandemic.</p>
<ul style="list-style-type: none"> how long may elapse between the commission of an offence and the commencement of proceedings for statutory offences that are triable only summarily. 	<p>Expired from the end of 29 November 2024. These limits are no longer felt to be necessary and expiring them helps towards returning to pre-pandemic time limits.</p>
<ul style="list-style-type: none"> how long a person can be kept on remand before service of indictment/preliminary hearing/first diet/trial in solemn cases. 	<p>Extended until end of 30 November 2025. (See reasons outlined under first time limit.)</p>
<p>Part 7: Prisons and Young Offenders Institutions Enables the emergency early release of prisoners in response to the effects of coronavirus</p>	<p>Expired from the end of 29 November 2024. The permanent emergency release power in the Bail and Release from Custody (Scotland) Act 2023 supersedes this temporary Covid-specific power, and therefore it is no longer relevant.</p>