



## RESPONSE

by

**THE FACULTY OF ADVOCATES**

to

**the Scottish Government consultation on extending temporary justice measures in the  
Coronavirus (Recovery and Reform) (Scotland) Act 2022**

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The Faculty of Advocates is the independent referral Bar in Scotland. Faculty is pleased to have the opportunity to respond to this consultation, although should make it clear at the outset that Faculty does not seek to comment upon issues of policy. We would comment on the topics listed in the Consultation Paper as follows:

**1. Courts and tribunals- conduct of business by electronic means**

*Criminal justice*

With regard to the criminal justice system, two aspects are of particular relevance to Faculty:

- a.** One is the continued use of Webex to conduct preliminary hearings in High Court cases. We are in favour of this continuing, not because it is necessarily ideal but because there are now too few Advocates to allow the previous ‘in person’ system to operate as it should. Put shortly, most Advocates are engaged most days in conducting trials. Few Advocates are spare, such that ‘in person’ hearings held in Glasgow are currently very difficult to accommodate. The Webex based system is flexible and should continue meantime. If it expired, a substantial number of preliminary hearings would be negatively affected either by having someone covering the case who knows less about it than the principal Advocate, or no one being available to cover it at all.
- b.** The second is the use of remote links for police and professional witnesses. There may well be positive feelings about this elsewhere by virtue of its convenience alone (such as from the police), but in general our experience is that this system detracts from the

provision of the best evidence from witnesses in a trial. There are so many problems with sound and vision, and showing witnesses items which are still in court, that a continuation of this would have to be justified on some other basis. The public health argument seems to have diminished, and in our experience it is a poorer system.

### *Civil justice*

With regard to the civil justice system, Faculty adheres to the position set out in its response to the Bill itself which should be taken to have been adopted in full here.

Faculty remains concerned at the adoption of a virtual default for all civil hearings save for those at which evidence will be led. It is difficult to see what justification there is for this. The Bill proceeded on a misconception that it is only at evidential hearings where the civil courts will make substantive decisions determining parties' rights and liabilities. That is not the case. Faculty continues to share the view of Scotland's senior judges that video hearings are "sub-optimal for most substantive business"; and that "the court as a physical place supports the public's acceptance of the legitimacy and authority of the court and the law itself. In a video conference these essential features are lost" (see Faculty's response to the Bill at paragraphs [12] – [13]).

If there is to be any virtual default then it should be strictly limited to procedural business.

At all events, it is important that the courts retain a broad discretionary power to order that any hearing of whatever form should proceed in person.

## **2. Fiscal fines**

We have no relevant comments to make.

## **3. Failure to appear before court following police liberation**

We have no relevant comments to make.

## **4. National jurisdiction for callings from custody**

We have no relevant comments to make.

**5. Criminal procedure time limits**

- a.** The reality of court resources at the moment would seem to be such that the pre-Covid time-limits cannot be adhered to, and that seems likely to remain the case beyond 30 November. A continuation of the measures is a necessary, if unwelcome step.
- b.** If there was a way to continue with an extension but for a shorter period (currently six months, and perhaps moving that down to four months) we consider that that would have a positive signaling benefit, albeit it may take time for that to have a practical impact. We appreciate that amendment of the provisions is not possible during this consultation process.
- c.** It is worth bearing in mind that the pre-Covid time limits weren't always adhered to either, and thus it would be misguided to motivate profound changes in the criminal justice system by reference to post Covid delay alone.
- d.** If the provisions expired, then it might be thought that that would lead to more accused persons being released on bail pending trial. Whether the courts would do that or not is not known. Perhaps thought is being given to imaginative solutions to avoid keeping untried people in prison on remand for up to two years. We would welcome such a development, since such long periods of remand have strongly negative impacts on those subsequently acquitted.

**6. Proceeds of crime**

We have no relevant comments to make.

**7. Prisons and young offender institutions**

We have no relevant comments to make.