

EXPLANATORY MEMORANDUM TO

The Coronavirus Act 2020 (Extension of Provisions Relating to Live Links for Courts and Tribunals) (No.2) Order (Northern Ireland) 2023

SR 2023 No. 138

1. Introduction

- 1.1. This Explanatory Memorandum has been prepared by the Department of Justice to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2. The Statutory Rule is made under the powers conferred by section 90(2) of the Coronavirus Act 2020 ("the 2020 Act") and is subject to the confirmatory resolution procedure.

2. Purpose

- 2.1. The Statutory Rule will further extend the provisions in the 2020 Act, which allow courts and statutory tribunals in Northern Ireland to conduct their business, wholly or in part, through the medium of audio or video live links (commonly referred to as live links).

3. Background

- 3.1. The 2020 Act introduced a number of provisions to enable the justice system to continue to operate the throughput of cases in courts, tribunals and the Coroner's court while maintaining compliance with Covid regulations and guidance to minimise the risk of exposure to ill health for all users.
- 3.2. While these provisions were initiated by the public health emergency, the 2020 Act included a specific order making power that allows the original provisions to be extended beyond the initial proposed two year period provided within that Act. The Act anticipated that Devolved Authorities may have differing requirements or needs as they recovered from any impact resulting from the pandemic. Part 2 of the 2020 Act allows each of the Devolved Authorities to make secondary legislation to extend any provisions which fell within their remit and did not require the consent of the relevant Secretary of State.
- 3.3. The benefits of the wider use of live links are reflected in our neighbouring jurisdictions introducing alternative or similar legislative provision, to replace or extend provisions, which allow for the wider use of live links within those jurisdictions. A public consultation conducted by the Department of Justice in the summer of 2022, for the continuation of the wider use of live links attracted significant support (89%) from the public.
- 3.4. In the absence of a devolved legislature to bring forward primary legislative provision to replace the 2020 Coronavirus Act provisions, a further engagement exercise was conducted, in June 2023, by the Department of Justice to assess the views and support on the need or desire for additional Statutory Rules from September 2023 onwards to maintain availability of these live links provisions within this jurisdiction. The

Department received forty-two responses with 97% of respondents indicating support for this extension order and others beyond March 2024 or until alternative legislation can be made

- 3.5. These powers are one element within the digitalisation project for courts and tribunals. They are critical to facilitating the wider participation in courts or statutory tribunal proceedings from locations outside the courtroom or tribunal room. [While progress has been made in addressing the identified excess caseload accrued within courts or tribunals, both from or since the pandemic, there remains a clear role for live links, as an essential part of the toolkit required to maintain positive case progression within the Northern Ireland Courts and Tribunal. The indicative timeframe for recovery in the Magistrates' Court and Crown Courts requires the continuing ability of the system to use remote hearings.]
- 3.6. Live links also contribute to reducing budgetary pressures by providing savings to the public purse. The recent engagement exercise, like earlier consultations, have identified attending remotely, as opposed to in person, produces savings on travelling and waiting time for the legal profession and other professional witnesses. This reduces the level of claims to Legal Services Agency and remote attendance has contributed to savings for Northern Ireland Prison Service as well as PSNI. The extension of these powers enables the continuation of improving access to justice in a proportionate way while making use of available resources including the use of new technologies and digital working.
- 3.7. Part 1 of Schedule 27 of the 2020 Act includes provision enabling any court or tribunal in this jurisdiction to allow any hearing it deems fit or necessary to proceed by way of live link so long as it is satisfied that it is in the interests of justice to do so. Included within the Schedule are a number of additional safeguards to maintain compliance with domestic and international obligations including the European Convention of Human Rights. These include allowing the parties to make representations on whether the use of live links is in the interests of justice before the relevant judge makes any decision. There is power for the court or tribunal to rescind the order allowing the use of live links should any concern arise that the continued use of the live link is not in the interests of justice. The court or tribunal have an obligation to ensure, in accordance with section 6 of the Human Rights Act 1998, the parties have a fair hearing within the requirements of Articles 5, 6 and 7 of the European Convention of Human Rights.
- 3.8. The provisions in Part 2 of Schedule 27 permit a court or tribunal to make arrangements for all or any part of a hearing, being conducted wholly by video or audio live link, to be broadcast or for a recording of the proceedings to be made. Within Part 2, provision is made to create the offence and to punish any unlawful recording or transmission of any part of proceedings being conducted through the medium of live links.
- 3.9. These powers would have automatically expired on 24 March 2022 save for the fact they were extended in accordance with section 90 of the 2020 Act, in particular sub-sections (2), (11), (13) and (15). An earlier Statutory Rule, 2022 No.24 extended these provisions from 25th March 2022 which

was the initial date of expiry provided by section 89 (1) of the Coronavirus Act 2020. No objections were received from the Committee on the proposed earlier Statutory Rule – SR 2022 No.24. The Northern Ireland Assembly approved the earlier statutory rule on 1 March 2022. The extension was due to expire on the 24th September 2022.

- 3.10. Further Statutory Rules, 2022 No.227 (made on 23 September 2022) and 2023 No.46 (made 21 March 2023) provided an additional extension of these provisions for a period of six months. Six months is the maximum period allowed for any extension under the 2020 Act. The latter Statutory Rule, SR 2023 No.46 permits the arrangements introduced under the Act to continue to be used until 24 September 2023.

4. Consultation

- 4.1. No public consultation occurred in advance of the Coronavirus Act 2020, given it was legislation created to address a public health emergency. Since then, the Department has undertaken an engagement exercise in November 2021, a public consultation exercise in July to September 2022 as well as a further engagement exercise in regard to this extension of these Provisions not solely on this September 2023 Statutory Rule but also on potential further extensions, while the formation of a Northern Ireland Executive is awaited.
- 4.2. The July 2022 public consultation commenced by the Department of Justice was titled ‘Audio and Video Links (Live Links) for Northern Ireland Court and Tribunal Hearings: A Public Consultation’. This consultation closed on the 30 September 2022. While the legislative proposals on which views were invited have the potential to assist the effective throughput of cases within the justice system, the consultation was clear it was looking to the longer-term. A report summarising the responses received was published on 13 March 2023 and can be found at the Department's website under Publications. There were thirty eight responses received and thirty four favoured the judiciary continuing to be able to determine whether the use of live links was in the interests of justice for any particular case or participant.
- 4.3. The most recent June 2023 engagement exercise with the main users of live links received forty two responses by 5 July 2023. The context for the exercise was set against the background of the timing for any new legislation being subject to the priorities established by an incoming Executive, Assembly Committee for Justice and Minister for Justice. Views were sought on the Department making further extension orders or not to make extension orders. 97% of respondents indicated support for this extension order and others beyond March 2024 or until the outworking of the summer 2020 public consultation can be reflected within a bill of the Northern Ireland Assembly or Westminster Parliament.
- 4.4. The aim of this Statutory Rule is to continue to facilitate digital working as part of a wider solution to improve and enhance access to justice in a proportionate way that meets the needs of the Northern Ireland population. The overall objective is to maintain the delivery of public services as sustainably, effectively and efficiently as possible. The Department aims

to maintain the benefits identified from the significant investment and use made of an enhanced digital court environment to date while contributing to carbon reduction and a saving for public finances.

5. Equality Impact

- 5.1. The provisions of the Statutory Rule are technical in their nature and are not identified as requiring the conduct of an equality impact assessment. No new policy is being implemented but a review was conducted of earlier screening assessments carried out for the July 2022 public consultation which included reference to the earlier September 2022 Statutory Rule. An updated screening assessment has been conducted for this Statutory Rule.
- 5.2. The relevant legislative provision includes inbuilt mitigations including the requirement the judiciary must be satisfied in any case that receiving evidence by live link is “in the interests of justice”. This facilitates the court or tribunal making any adjustment identified as relevant to the circumstances or needs of an individual participant or a party to proceedings when the use of live links is proposed. The relevant judge is required to be satisfied a ‘fair’ hearing can be provided and that the use of a remote hearing or receipt of evidence by live links is in the interests of justice. The continued use of the legislation is conducted under the control of the judiciary taking account of the most recent guidance issued by the Lady Chief Justice in May 2023 updated “Guidance on Physical (In-Person), Remote & Hybrid Attendance.”
- 5.3. The underlying policy was screened before the making of the primary legislation at Westminster Parliament and has since been reviewed by the Department on a number of occasions. The Department has noted the equality concerns expressed or suggested from surveys conducted outside Northern Ireland. For example, the potential that live links may not be appropriate for individuals who require an interpreter or are neuro-divergent.
- 5.4. However, no adverse impacts for any of the nine categories in section 75 of the Northern Ireland Act 1998 were identified through the various methods utilised by the Northern Ireland Courts and Tribunal Service (NICTS) for data collection or assessments undertaken on the use and impact of audio and visual links in the courts. The Department has conducted periodic reviews of the initial equality impact screening and draws upon feedback from main users of live links as well as the most recent assessment conducted by NICTS. To date indications are where language or another barrier, such as visual or hearing impairments or learning difficulties, may mean specific support is required such as an interpreter or some support, there is flexibility within the legislation for the judge to consider whether live link is suitable for that specific person. The legislation recognises this technology may not be suitable for all and provision is made which allows their views to be heard and taken into consideration in any decision on the use of live links. Exercises conducted to date did not provide any specific case where that flexibility has not been utilised.

- 5.5. The Northern Ireland Statistics and Research Agency (NISRA) conducted an independent review, at the request of NICTS, resulting in a report “A qualitative analysis of Remote and Hybrid Hearings”. The report identified that vulnerable people and/or those with a disability may find it easier to be in a familiar environment or a solicitor’s office where they can feel more comfortable. For face-to-face hearings the logistics of travelling to a court building, finding parking and attending a court can cause difficulties. Comment included that consideration should be given to those people with caring responsibilities, again ensuring they have access to justice that best suits their needs.
- 5.6. The Department remains of the view and as evidenced by the most recent report from NISRA that the safeguards already provided, wherein adjustments can be made 'in the interests of justice', address the needs of participants and any concerns appropriately. The Department through operational colleagues within NICTS will continue to monitor these areas of concern.

6. Regulatory Impact

- 6.1. A Regulatory Impact Assessment is not considered necessary. There will be no impact on businesses, charities or voluntary bodies.

7. Financial Implications

- 7.1. None.

8. Section 24 of the Northern Ireland Act 1998

- 8.1. The Department has considered its obligations under section 24 of the Northern Ireland Act 1998 and is satisfied that the Statutory Rule is not incompatible with the Convention rights, is not incompatible with Article 2(1) of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement (rights of individuals); does not discriminate against a person or class of person on the grounds of religious belief or political opinion; and does not modify an enactment in breach of section 7 of the Northern Ireland Act 1998.

9. EU Implications

- 9.1. None.

10. Parity or Replicatory Measure

- 10.1. The live links provisions of section 57 and Schedule 27 of the 2020 Act and the Statutory Rule are not necessary for parity elsewhere but are modelled upon similar arrangements in existence across England, Wales and Scotland. All those jurisdictions have recently made replacement provisions to the provisions initially created within the 2020 Act. The replacement provisions have been made through alternative primary legislation which either fully replaces or instead extends the arrangements for the use of live links for a maximum period of two years.

11. Additional Information

- 11.1. The Police, Crime, Sentencing and Courts Act 2022 includes provisions for the criminal courts in England and Wales to allow remote working of

courts when the relevant judicial post-holder is satisfied it is required in the interests of justice. This 2022 Act sets out ‘matters to have regard to’ when determining whether the use of live links is ‘in the interests of justice’, which reflects the pre-pandemic existing provisions for remote hearings in the civil and family courts within that jurisdiction. An extension of the 2020 Act provisions occurred in March 2022 to cover the limited period until the 2022 Police, Crime, Sentencing and Courts Act provisions could be commenced.

- 11.2. The Scottish Government considers there is a case for a longer extension of the temporary justice system measures provided for in the Coronavirus (Extension and Expiry) (Scotland) Act 2021. On 10 August 2022 the Scottish Parliament passed the Coronavirus (Recovery and Reform) (Scotland) Act 2022. Part 5 and the related Schedule to that Act will continue certain temporary justice system provisions, including the equivalent live link provisions for that jurisdiction. Secondary legislation was made in May 2023, Scottish Statutory Instrument 2023 No 172, to partially expire paragraphs 6, 8 and 9 of the schedule of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 only for the purpose of non-criminal proceedings in the Court of Session and those subject to the Ordinary Cause Rules 1993. Paragraphs 6, 8 and 9 are being partially replaced with court rules for the Court of Session to regulate the modes of attendance in court proceedings in the Court of Session and in the sheriff court. The court rules came into force on the same date, 4th July 2023 as the expiry of the provisions repealed by the Regulations.