

EXPLANATORY MEMORANDUM TO

The Coronavirus Act 2020 (Extension of Provisions Relating to Live Links for Courts and Tribunals) Order (Northern Ireland) 2023

SR 2023 No. 46

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) [and section 96 (9)] 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 receive evidence, 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 work to recover from the impact of the pandemic so Part 2 of the 2020 Act allows each of the Devolved Authorities to make secondary legislation to extend as well as suspend or expire early provisions, which fell within their remit and did not require the consent of the relevant Secretary of State.
- 3.3. The benefits of permitting the wider use of live links is reflected in the significant support recorded within the responses (89%), to the public consultation in the summer of 2022, for the continuation of their use when the judiciary are satisfied it is in the interests of justice. Our neighbouring jurisdictions have introduced alternative legislative provision, to replace the 2020 Act provisions for those jurisdictions, for the continued wider use of live links. In the absence of a devolved legislature to bring forward primary legislative provision to replace the 2020 provisions, we continue to rely upon the 2020 Act to maintain progression of the recovery of the justice system from the pandemic.
- 3.4. The extension of these powers is seen as critical to facilitating the wider participation in courts or statutory tribunal proceedings from locations

outside the courtroom or tribunal room. This facilitation for remote or hybrid hearings is essential if the positive progression of case throughput within the Northern Ireland Courts and Tribunal Service is to be maintained. The progression of the recovery plan for the justice system, including the indicative timeframe for recovery in the Magistrates' and Crown Courts, requires the continuing ability of the system to use remote hearings. The extension of these powers also 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.

- 3.5. 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.
- 3.6. Parts 1 and 2 of Schedule 27 include 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 equally a power for the court or tribunal to rescind the order allowing the use of live links should any concern arise following the order that the continued use of the live link is not in the interests of justice. The court or tribunal also 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.
- 3.7. 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. The court or tribunal can issue a direction for the proceedings either to be broadcast to enable members of the public to hear the proceedings (as a route to preserving the principle of open justice). Alternatively, the direction can provide for the court or tribunal to keep an audio record of the proceedings. 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.
- 3.8. These powers would have automatically expired on 24 March 2023 save for the fact they were extended in accordance with section 90 of the 2020 Act, in particular sub-sections (2), (7), (13) and (15).
- 3.9. 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. 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. A further Statutory Rule, 2022 No.227, made on 23 September 2022 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. This permits the arrangements introduced under the Act to continue to be used until 24 March 2023.

4. Consultation

- 4.1. No public consultation occurred in advance of the Coronavirus Bill, given it was legislation created to address a public health emergency, but since then the Department has undertaken a public consultation exercise in July to September 2022 on the appropriate legislative provisions to govern the use of live links by courts and tribunals within Northern Ireland as well as an engagement exercise in regard to an earlier extension of these provisions.
- 4.2. There has not been a specific consultation exercise solely on this March 2023 Statutory Rule but the need for this further extension order was identified within the introduction to the July 2022 consultation. 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 aid the recovery of 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. Earlier in November 2021, an engagement exercise with the main users of live links in November 2021 was conducted by the Department. This followed the decision made by the Executive, in October 2021, to support extending these provisions beyond 24 March 2022 while a public consultation on more permanent provisions was prepared and conducted by the Department. A copy of the report upon the responses received to the November 2021 engagement exercise was provided to the Justice Committee of the 2017 to 2022 Assembly. No objections were received from the Committee on the proposed earlier Statutory Rule – SR 2022 No.24.
- 4.4. Both the November 2021 engagement letter and the July public consultation alerted justice stakeholders, consultees and the public that similar to Scotland, England and Wales, the Department, as part of the planning for the recovery of the justice system, extended the relevant provisions within the Coronavirus Act 2020 relating to the use of audio and video links for a six-month period in January 2022. The Department flagged that further six-month extensions were anticipated in September 2022 and March 2023.
- 4.5. 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 way that meets the needs of the Northern Ireland population. The overall objective is to optimise the benefits identified from the significant

investment and use made of an enhanced digital court environment while meeting the needs of court users beyond the recovery of the justice system.

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 by the judiciary reflecting the updated “Guidance for Remote, In-Person or Hybrid Hearings” issued by the Lady Chief Justice in June 2022.
- 5.3. The underlying policy was screened before the making of the primary legislation 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 most recent assessment conducted by NICTS was an independent exercise conducted by Northern Ireland Statistics and Research Agency (NISRA) resulting in a report “A qualitative analysis of Remote and Hybrid Hearings”.
- 5.5. 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 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 that 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 28 June 2022 the Scottish Parliament passed the bill which became the Coronavirus (Recovery and Reform) (Scotland) Act 2022 on 10 August 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, to deal with backlogs within the justice system that have unavoidably built up during the pandemic.