

## EXPLANATORY MEMORANDUM TO

### THE CORONAVIRUS ACT 2020 (DELAY IN EXPIRY: INQUESTS, COURTS AND TRIBUNALS, AND STATUTORY SICK PAY) (ENGLAND AND WALES AND NORTHERN IRELAND) REGULATIONS 2022

2022 No. 362

#### 1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty. The Department for Work and Pensions have contributed to this Memorandum on behalf of the Department for Communities in Northern Ireland.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

#### 2. Purpose of the instrument

- 2.1 These Regulations extend five temporary provisions of the Coronavirus Act 2020. Four of these provisions relate to powers within the remit of the Ministry of Justice. The extension of these provisions will fill a short gap in provision, whilst the Government seeks approval to make them permanent through other primary legislation currently before Parliament. The four sections are 30, 53, 54 and 55. These provisions are required to ensure the continued effective operation of the courts, and specifically enable participation in court and tribunal hearings to take place remotely by video or audio link (“live link”) and remove the obligation for coroners to hold inquests with a jury where Covid-19 is suspected to be the cause of death.
- 2.2 The other provision is section 43. This provision will enable the disapplication of waiting days for absences related to coronavirus to continue, meaning that Statutory Sick Pay will be payable from day one for coronavirus-related eligible absences in Northern Ireland. The extension of this provision has been made on the formal request of the Department for Communities in Northern Ireland. The Secretary of State of Work and Pensions has agreed to this request as Statutory Sick Pay is a transferred matter for Northern Ireland. The legislative competence for this provision lies with the Department for Work and Pensions, with the territorial extent of the application for Northern Ireland only. The instrument will be reviewed regularly in line with broader policy in Northern Ireland.

#### 3. Matters of special interest to Parliament

##### *Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 The Parliamentary Under Secretary of State for Justice makes these Regulations in exercise of the powers conferred by section 90(2) of the Coronavirus Act 2020.
- 3.2 Paragraph 1 of Schedule 3 to the Northern Ireland Act 1998 specifies that the conferral of functions in relation to Northern Ireland on any Minister of the Crown is a reserved matter. Section 8 of the Northern Ireland Act 1998 provides that the Secretary of State’s consent is required in relation to a reserved matter. Section 90(11), read with section 90(2), of the Coronavirus Act 2020 provides that a Northern Ireland Department can only extend provisions of the Coronavirus Act 2020 where the

provision, were it contained in an Act of the Northern Ireland Assembly, would not require the consent of the Secretary of State. This instrument must be made by a Minister of the Crown because section 43 of the Coronavirus Act 2020 (the provision which is being extended) confers a regulation-making power on the Secretary of State and, therefore, could only be contained in an Act of the Assembly with the consent of the Secretary of State.

- 3.3 Statutory Sick Pay is transferred to Northern Ireland and similar provision to that contained within section 43 could be made by the Northern Ireland Assembly without the Secretary of State's consent, if the regulation-making power were conferred on the Northern Ireland Department, rather than on the Secretary of State.

#### **4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is England and Wales and Northern Ireland.
- 4.2 The territorial application of this instrument is England and Wales and Northern Ireland.

#### **5. European Convention on Human Rights**

- 5.1 James Cartlidge MP, Parliamentary Under Secretary of State for Justice has made the following statement regarding Human Rights:

“In my view the provisions of the Coronavirus Act 2020 (Delay in Expiry: Inquests, Courts and Tribunals, and Statutory Sick Pay) (England and Wales and Northern Ireland) Regulations 2022 are compatible with Convention rights.”

#### **6. Legislative Context**

- 6.1 Parts of the Coronavirus Act 2020 (“the Act”) will expire at midnight on 24th March 2022. Section 90(2) of the Act provides that a national authority may by Regulations prevent any provision from expiring and extend it for up to a further six months.
- 6.2 The Act contains four temporary provisions due to expire on 24th March 2022 which the Ministry of Justice intends to place on a permanent statutory footing. These provisions: (i) enable remote observation of wholly remote hearings (to ensure we meet our Article 6 ECHR and common law obligations); (ii) enable more criminal court and tribunal hearings to take place remotely by live link; and (iii) disapply the obligation for a coroner to hold an inquest with a jury where Covid-19 is suspected to be the cause of death.
- 6.3 The extension of these provisions are necessary to enable effective public service delivery in the courts. Replacement measures on remote hearings are contained in clauses 196 to 200 of the Police, Crime, Sentencing and Courts Bill (as amended on Report – see Bill Print 18<sup>th</sup> January 2022). Replacement measures for inquests are contained in clause 41 of the Judicial Review and Courts Bill. The predicted Royal Assent dates for these two Bills means that there will be a gap in provision before the new measures can be commenced which would significantly reduce the number of hearings and inquests which could be heard each week. We, therefore, propose using section 90(2) of the Act to extend these provisions for a further six months from 25<sup>th</sup> March 2022.
- 6.4 The Act contains three provisions related to Statutory Sick Pay which apply to Northern Ireland, these are sections 42-44. This instrument extends section 43 of the Act (Statutory sick pay: power to disapply waiting period limitation: Northern

Ireland) so that employers in Northern Ireland are required to pay Statutory Sick Pay to eligible employees from their first qualifying day of absence where that absence is related to coronavirus. The Department for Work and Pensions has agreed to a formal request to facilitate this extension on behalf of the Department for Communities in Northern Ireland as Statutory Sick Pay is a transferred matter in Northern Ireland.

- 6.5 Statutory Sick Pay is paid for by employers to eligible employees who are incapable of work due to sickness at a flat rate of £96.35 a week (rising to £99.35 from 6th April 2022) for up to 28 weeks. To be eligible, an individual must: be classed as an employee and have done some work for their employer; have been ill for at least 4 days in a row (including non-working days); earn an average of at least £120 per week; and tell their employer that they are sick before the employer's deadline or within 7 days where no deadline is set.
- 6.6 Section 151(1) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (SSCBA NI) provides that Statutory Sick Pay is not payable for the first three qualifying days in any period of entitlement. Regulations made by virtue of section 43 provide that section 151(1) of the SSCBA NI does not apply in relation to an employee where that employee's period of incapacity is related to coronavirus. The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations (Northern Ireland) 2020/54 were made under this power.
- 6.7 Existing powers under section 147(4) of the SSCBA NI provide that regulations may be made which deem an employee to be incapable of work, meaning that they can be eligible for Statutory Sick Pay. Under those powers, regulations have previously been made to amend the Statutory Sick Pay (General) Regulations (Northern Ireland) 1982 to deem those who are self-isolating, in line with government advice, to be incapable of work, even if they are not exhibiting symptoms. The individual may therefore be eligible for Statutory Sick Pay, subject to meeting the usual qualifying conditions. These regulations remain in effect.
- 6.8 Section 90(2) of the Act makes provision for a national authority to make Regulations to extend temporary provisions within the Act beyond the time when they would otherwise expire and for them to expire at such a time as specified in the Regulations. The time specified must not be later than the end of the period of 6 months beginning with the time when the provision would otherwise have expired.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The Coronavirus Act 2020 contains four temporary provisions which the Ministry of Justice intends to place on a permanent statutory footing.

Section 30 disapplies the obligation for a coroner to hold an inquest with a jury in relation to a death where Covid-19 is suspected to be the cause.

Sections 53 and 54 extend the powers of criminal courts to make a direction enabling participation by video and audio link to any participant (except for jurors) in a criminal hearing.

Section 55 enables most of our courts and tribunals to transmit proceedings to remote observers, including the press and the public and creates offences in relation to broadcasting.

7.2 These provisions are helping courts to quickly tackle the backlog of cases which has built up during the pandemic. They will be replaced by permanent measures in the two Bills (the Police, Crime, Sentencing and Courts Bill and the Judicial Review and Courts Bill) which are currently making their way through Parliament. These Bills will not receive Royal Assent in time to implement the new measures before the current temporary provisions expire and would therefore leave a gap in legislative provision. This would lead to an increase in the backlog of cases and an increase in demand on court and coroner services, which is likely to have a significant negative impact on the court recovery programme.

### *Explanations*

7.3 Section 30 of the Act has prevented local authority funded coroner services from being overwhelmed by the need to schedule additional jury inquests and has enabled more timely inquests, reducing the distress of bereaved people and ensuring that resources are allocated appropriately. Many coroner areas have built up backlogs of inquests during the pandemic because of the increased demand for these inquests coupled with limited capacity to run any inquests due to control measures being in place to prevent the spread of the virus.

7.4 Section 30 of the Act is supporting the Chief Coroner's and coroners' post-pandemic recovery plans. A two-year replacement measure is included in the Judicial Review and Courts Bill (clause 41) but this is not predicted to receive Royal Assent before April 2022 at the earliest, leaving a gap in provision of at least three months until the new measure can be commenced.

7.5 A gap in provision would mean that inquests where death by Covid-19 is suspected would need to be held with a jury which would:

- disproportionately add to the demand on coroner services, adversely impacting their ability to operate as they seek to recover from the effects of the pandemic;
- exacerbate the existing backlog of inquests across England and Wales;
- increase the cost to local authorities (which resource coroner services); and
- add to the distress of the bereaved people who would have to wait much longer for inquests into the deaths of their friends and relatives.

7.6 Sections 53 and 54 of the Act provide criminal courts with powers to allow any participant in a criminal hearing (except jurors) to attend by live link. Permanent replacement measures are combined into one regime dealing with criminal hearings in clause 198 of the Police, Crime, Sentencing and Courts Bill. However, this Bill is not predicted to achieve Royal Assent until late March 2022 at the earliest; leaving a gap in provision before the new measures are commenced two months after Royal Assent. Civil courts and tribunals already have inherent powers to allow participants to attend by live link.

7.7 Section 55 of the Act provides that all courts and tribunals can direct that a hearing can be livestreamed to enable any observers, such as members of the press and public, to see or hear the proceedings. It provides protections for courts and participants by making it an offence for anyone to record or transmit any proceedings which are broadcast and likewise an offence for any person participating remotely in proceedings by live link to record or transmit any proceedings.

- 7.8 These three provisions are helping to ensure that courtroom space is maximised for the use of hearings which must happen in the courtroom and helping maintain “open justice” where hearings are conducted by live link. The permanent replacement measures in clauses 196 to 200 of the Police Crime Sentencing and Courts Bill will be further provided for by secondary legislation (e.g. revised Criminal Procedure Rules) following Royal Assent.
- 7.9 These live links provisions have been vital in supporting court recovery, enabling courts and tribunals to deal promptly and safely with proceedings during the pandemic, avoiding unnecessary social contact and travel, but allowing justice to be delivered while upholding the principle of open justice.
- 7.10 After March 2020, there was a steady increase in outstanding cases in the Crown Court; by June 2021 the number of outstanding cases had increased by over 50%. The measures in sections 53 and 54 are helping criminal courts work through the backlog of cases more efficiently by enabling hearings to take place remotely wherever possible so that courtrooms can be reserved for the hearings (particularly trials) that must happen in court. The increase in the backlog of cases has begun to decline as a result.
- 7.11 Over 11,000 hearings per week are currently taking place using live links. Over 39% of hearings each day in physical courtrooms include one or more participants joining remotely by live link. If courts are unable to continue to use these provisions, even for a few months, it would have a significant negative impact on our court recovery programme further increasing waiting times for victims and bereaved friends and families.
- 7.12 We are therefore extending sections 30 and sections 53, 54 and 55 of the Act under these Regulations by six months to ensure that replacement measures in clause 41 of the Judicial Review and Courts Bill and clauses 196-200 of the Police Crime Sentencing and Courts Bill come into force before the four sections ultimately expire.
- 7.13 As part of the response to the pandemic, several temporary changes were made to Statutory Sick Pay in Great Britain and Northern Ireland to support compliance with public health advice on self-isolation. These changes made Statutory Sick Pay payable from day one of a coronavirus-related absence and extended eligibility to individuals who were self-isolating but would otherwise not have been considered sick or incapable of work, including where they had no or very mild symptoms, or were following guidance on household isolation. Other qualifying criteria continued to apply.
- 7.14 The majority of the changes made to Statutory Sick Pay have been linked to the Coronavirus Act 2020; either directly because they were made under powers taken in that Act or, where they were made under pre-existing powers, indirectly by being clear that the regulations would be reviewed in line with the Act.
- 7.15 The Minister for Communities in NI has requested an extension of section 43 of the Act so that Statutory Sick Pay remains payable from day one of a coronavirus-related absence. The Secretary of State, DWP has agreed to facilitate this decision.
- 7.16 Statutory Sick Pay is a transferred matter in Northern Ireland and so decisions taken in respect of it are a matter for the Minister for Communities. However, as section 43 itself is a reserved matter, because it confers powers on the Secretary of State, this instrument is made by UK Government, rather than by the relevant Northern Ireland Department.

## **8. European Union Withdrawal and Future Relationship**

8.1 This instrument does not relate to withdrawal from the European Union

## **9. Consolidation**

9.1 Consolidation does not apply.

## **10. Consultation outcome**

10.1 There is no requirement to consult.

## **11. Guidance**

11.1 Further regulations and guidance on the use of live links in court proceedings is provided in Criminal Procedure Rules and Criminal Practice Directions.

11.2 Guidance continues to be available on [nidirect.gov.uk](http://nidirect.gov.uk) for individuals and employers to understand how to comply with Statutory Sick Pay rules in Northern Ireland.

## **12. Impact**

12.1 A full impact assessment has not been produced for regulation 2 of these Regulations as no, or no significant, impact on the private, voluntary or public sector is foreseen. No impact assessment has been conducted for regulation 3 of these Regulations as an impact assessment covering section 43 of the Coronavirus Act 2020 has already been provided for these provisions in the Coronavirus Act 2020. An impact assessment for the four provisions within the remit of the Ministry of Justice was produced for the Police, Crime Sentencing and Courts Bill (clauses 196 to 200) and the Judicial Review and Courts Bill (clause 41).

## **13. Regulating small business**

13.1 The legislation applies to activities that are undertaken by small businesses in Northern Ireland.

## **14. Monitoring & review**

14.1 The legislation will be in place for no longer than six months and will be monitored on a monthly basis to ensure it remains in place no longer than necessary.

## **15. Contact**

15.1 Julie Clouder at the Ministry of Justice Telephone: 07795 497127 or email: [Julie.clouder@justice.gov.uk](mailto:Julie.clouder@justice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Ben Archibald, Deputy Director for the Criminal Justice Strategy and Criminal Courts Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister Cartlidge at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.