EXPLANATORY MEMORANDUM TO

The Coronavirus Act 2020 (Extension of Provisions Relating to Live Links for Courts and Tribunals) (No. 2) Order (Northern Ireland) 2024

SR 2024 No. 173

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 for a period of six months provided the Statutory Rule is approved by resolution of the Northern Ireland Assembly within the period specified in section 96(7) of the 2020 Act. The provisions in this Statutory Rule allow courts and statutory tribunals in Northern Ireland to conduct their business, wholly or in part, through the medium of audio or video conferencing systems (commonly referred to as live links).

3. Background

3.1. Section 57 and Schedule 27 of the 2020 Act introduced a number of provisions to enable the justice system to continue to operate the throughput of cases in courts including the Coroner's court and tribunals while maintaining compliance with Covid regulations and guidance. The aim was to maintain the throughput of cases while minimising 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 these provisions to be extended beyond an initial two-year period set down within that Act. 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 regulation making powers within the Coronavirus Act were designed to enable decisions to be made quickly and then approved by resolution of the Assembly at a later date. The Act anticipated that Devolved Authorities may have differing requirements or needs as they recovered from any impact resulting from the pandemic.

3.4. 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 Schedule 27 are several additional safeguards to maintain compliance with domestic and

international obligations including the European Convention on Human Rights. These include requiring the court or tribunal before determining whether the use of live links is in the interests of justice to consider all the circumstances within the legislation particularly, that the Judge should consider the views of the person, the parties to the proceedings and public health interests. 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.

3.5. 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.

3.6. These powers would have initially automatically expired on 24 March 2022 as provided by section 89(1) of the Coronavirus Act 2020 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). A Statutory Rule, SR 2022 No.24 (made 27 January 2022) extended these provisions from 25th March 2022 for a period just short of the six-month maximum period allowed under the 2020 Act. No objections were received from the Committee on that Statutory Rule – SR 2022 No.24 - with the Northern Ireland Assembly approving the statutory rule on 1 March 2022. That first extension was due to expire on the 24 September 2022.

3.7. Further Statutory Rules have been made. These are SR 2022 No.227 (made on 23 September 2022), SR 2023 No.46 (made 21 March 2023) and SR 2023 No.138 (made on 21 September 2023, approved by the Northern Ireland Assembly on 11 March 2024) provided sequential additional extensions of these provisions on each occasion for a further period of six months. The preceding Statutory Rule to this Statutory Rule, SR 2024 No.72, was made on the 21 March 2024 and approved by the Northern Ireland Assembly on 14 May 2024. It permits the arrangements introduced under the Act to continue to be used until 24 September 2024.

3.8. The benefits of the wider use of live links are reflected in our neighbouring jurisdictions who introduced alternative or similar legislative provision, to replace or extend the provisions within their Coronavirus related legislation, which enable court and tribunal cases within their jurisdiction to be conducted, wholly or partly, remotely using live links. Within the criminal courts these provisions permit the use of ‘LiveLinks’ to facilitate the wider provision of remote evidence, mentions and hearings including for matters such as first appearances and bail applications.

3.9. These powers are not only an element within the digitalisation project for courts and tribunals but maintaining access to these wider provisions has been identified as an essential element of the toolkit for addressing the

caseload backlog, particularly within the criminal courts, caused or closely related to throughput of cases during the pandemic. The evidence that live links continues to be a useful tool in facilitating the efficient management of court time is that despite the recent November 2023 guidance from the Lady Chief Justice identifying a wider number of hearings as more appropriate for in-person attendance or hearings there is a greater use of live links than occurred before March 2020 when there would have been fewer than 100 connections per month. At the height of the pandemic, when footfall was restricted in and around the estate of the Northern Ireland Courts and Tribunal Service, the number of Sightlink connections averaged 70,000 per month and now average approximately 25,000 per month.

3.10. A co-ordinated response to recovery was adopted of which a significant element includes maintaining access to the wider use of live links to permit more use of a hybrid approach to the reception of evidence as well as case management. The most recent (June 2024), management information indicates that 11,715 defendants were processing through the criminal court system. Despite the considerable efforts made to impact upon the number of active defendants this remains 61.2% more defendants when compared to pre-Covid rates. This equates to approximately 68% more defendants within the Crown Court and approximately 60% more defendants in the magistrates' courts (adult and youth) than there was on 1 March 2020. The court system remains under considerable pressure dealing with this increased caseload and it will take further time and resources to resolve this issue. These live link provisions remain an essential tool if all engaged within the justice system are to maintain progression on addressing the backlog of cases in particular within the criminal courts. New cases are still impacted by the ripple effect created by the Covid related actions, meaning that the current court caseload is still 52% higher than pre-covid and the length of time to complete cases is longer. Based on current disposal rates an optimistic timescale is the Crown Court would be expected to recover by mid-2026, with magistrates' court taking somewhat longer.

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 to assess views and support upon the proposed September 2023 extension of these provisions and potential further extensions, while the Department develops draft replacement provisions for planned inclusion in the first Justice Bill before the Northern Ireland Assembly in this mandate, subject to Executive agreement to the inclusion of these provisions by way of amendment to the Bill at Consideration Stage.

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. 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 significant support (89%) was expressed for the continuation of the wider use of live links. Thirty-four favoured that the judiciary continue 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 more 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, an Assembly Committee for Justice and Minister for Justice. Views were sought on the Department making further extension orders or not to make extension orders. Ninety-seven percent of respondents indicated support for the September 2023 extension order and the responses displayed a recognition of the need for retention of these provisions to aid recovery of the justice system. Many recorded support for extension of the provisions beyond March 2024 to retain the benefits they perceived of this wider availability for attending court remotely. A report upon the responses received to the 2023 exercise was published in November 2023 and can be found at the Department's website at Report on extending the use of live links in courts and tribunals in Northern Ireland | Department of Justice (justice-ni.gov.uk).

4.4. The primary aim of this Statutory Rule is to retain the wider availability the Coronavirus Act 2020 provisions offer not only for remote evidence but for disposing of court business such as mentions, hearings, first appearances in the criminal courts as well as bail applications while the backlog of cases that accrued during and since the pandemic is addressed. They are considered a required element of the toolkit if current progress within the criminal courts is to be maintained. The facilitation of digital working is one part of a planned wider solution to improve and enhance access to justice in a proportionate way that meets the needs of the Northern Ireland population. This Statutory Rule will allow the maintenance of the delivery of public services as sustainably, effectively and efficiently as possible while meeting the needs of victims and witnesses as work progresses on making alternative legislative provision for the use of live links within Northern Ireland through an Assembly Bill. The Department aims to maintain the benefits identified from the significant investment and use made of an enhanced digital court environment to date while maintaining the same quality of access to justice for any party before the courts or tribunals.

5. Equality Impact

5.1. The Department had the opportunity to contribute to the equality analysis undertaken by Whitehall departments during the development of the 2020 Act which concluded that no adverse equality impacts were anticipated as a result of these provisions.

5.2. 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 several reviews of the screening assessments for equality and rural impact have been conducted by the Department on each time an extension has been considered or made. On each occasion when considering an extension of these provisions the Department's updated equality impact screening draws upon feedback from operational colleagues as well as responses received from the main users of live links. An Equality Impact Screening was also conducted for the July 2022 public consultation which included reference to the September 2022 Statutory Rule. Updated screening was conducted for the Statutory Rule S.R. 2023 No.138 made in September 2023 and S.R. 2024 No.72 made in March 2024. The conclusion on each screening is that the extension of these legislative provisions will not have a significant differential effect on the needs, experiences and priorities of any of the relevant categories. Although no adverse impact has been identified or reported since that screening, an updated screening was conducted for this Statutory Rule and determined no changes were required.

5.3. The Department considers these provisions will not result in any direct or indirect discrimination of court users with protected characteristics although there is awareness they could affect some groups with protected characteristics more than the general population because of their overrepresentation within the courts system. The relevant legislative provisions include a number of mitigations in particular requiring the judiciary 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 already required to be satisfied a 'fair' hearing can be provided. The use of the legislation is permissive and under the control of the judiciary taking account of the guidance issued by the Lady Chief Justice. The November 2023 "Guidance on Physical (In-Person), Remote & Hybrid Attendance" identifies a wider range of hearings which may be more appropriate for in-person attendance.

5.4. The Department has noted the equality concerns expressed or suggested from surveys conducted outside Northern Ireland and considers concerns highlighted from research and judicial experience is reflected or addressed on page one of the November 2023 Lady Chief Justice Guidance. The Northern Ireland Statistics and Research Agency (NISRA) conducted an independent review in 2022, at the request of NICTS, resulting in a report "A qualitative analysis of Remote and Hybrid Hearings". This 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 attending remotely, again ensuring they have access to justice that best suits their needs.

5.5. To date, no adverse impacts for any of the nine categories in section 75 of the Northern Ireland Act 1998 were identified as having occurred 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. These provisions are simply permissive. All 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. These needs have always existed within the justice system and arrangements are in place for the provision of interpreting services, registered intermediaries and reasonable adjustments to assist individuals when these needs are brought to the attention of the judiciary or Tribunal Chair. 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.

5.6. The Department remains of the view, and as evidenced by the report from NISRA, that the safeguards which allow adjustments to be made 'in the interests of justice' address the needs of participants and any concerns appropriately. The Department through operational colleagues within NICTS continue to keep these areas of concern under review.

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 Parts 1 and 2 of 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. England and Wales have made through primary legislation replacement provisions to the provisions initially created in 2020 in response to the pandemic. Scotland chose to extend through primary legislation certain temporary justice system provisions, including the equivalent live link provisions for Scotland, for a maximum period of two years to deal with backlogs within the justice system that unavoidably built up during the pandemic.

11. Additional Information

11.1. England and Wales recently made through primary legislation, the Police, Crime, Sentencing and Courts Act 2022, replacement provisions to the provisions initially created in 2020 in response to the pandemic. This 2022 Act 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. The 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 earlier provisions for remote hearings in the civil and family courts within that jurisdiction. A single 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 considered there was a case for a longer extension of the temporary justice system measures to deal with backlogs within the justice system that unavoidably built up during the pandemic. They chose to extend through primary legislation certain temporary justice system provisions, including their live link provisions for a maximum period of two years. The first extension of the temporary justice system measures was provided by the Coronavirus (Extension and Expiry) (Scotland) Act 2021 and then followed by the Coronavirus (Recovery and Reform) (Scotland) Act 2022.

11.3. Part 5 and the related Schedule to that 2022 Act continue certain temporary justice system provisions, including the equivalent live link provisions for that jurisdiction. Since then, 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 for the purpose of non-criminal proceedings in the Court of Session and those subject to the Ordinary Cause Rules 1993. Some other provisions have been 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. A public consultation was conducted from November 23 to Feb 2024 regarding the making permanent of several of the temporary justice measures in the Coronavirus Recovery and Reform (Scotland) Act 2022. An analysis of the consultation responses was published in July 2024. It indicated 30 consultation responses were received with most respondents agreeing that virtual attendance provisions for criminal courts should be made permanent. Efficiency benefits were highlighted as was a view that virtual attendance can be particularly positive for vulnerable individuals and those who may find in-person attendance frightening, emotionally taxing or (re)traumatizing. While a small number objected to the principle of the proposal, suggesting that virtual attendance cannot replace in-person communication, others suggested amendments or additions to current provisions to ensure that the future approach is effective.