

CONSULTATION SCHEDULE – Corporate Policy & Resources Committee 23 November 2021

	RECEIVED FROM	TITLE	SUBMISSION BY
1.	Department of Justice	Consultation on extending the provisions within Schedule 27 of the Coronavirus Act 2020	26 November 2021
	<p>Consultation letter (attached) received detailing the proposals to extending the provisions made in Schedule 27 of the Coronavirus Act 2020 for facilitating remote hearings for all courts and statutory tribunals. The consultation will run from 1 November to 5 pm on 26 November 2021.</p>		



Department of
Justice

An Roinn Dlí agus Cirt

Máinnystrie O tha Laa

www.justice-ni.gov.uk

28 October 2021

Consultation letter on extension of the provisions made in Schedule 27 of the Coronavirus Act 2020 for facilitating remote hearings for all courts and statutory tribunals. The consultation will run from 1 November to 5 pm on 26 November 2021.

Dear Consultee,

Consultation on extending the provisions within Schedule 27 of the Coronavirus Act 2020.

A Recovery Strategy for the justice system across all the differing courts and tribunals is a clear priority as Northern Ireland comes through and out of the Covid pandemic. This targeted consultation exercise has a particular focus, namely to ascertain the views of those justice stakeholders and beneficiaries of the specific legislative powers that supported and facilitated the continuation of the work of the judiciary in courts and tribunals.

There is a pressing need to focus on recovery from the impact the pandemic has had on the justice system. The ability to conduct hearings by live links has been, and remains, a critical factor in the planning for the recovery of the justice system. The use of live links for any hearing is at the discretion of the judiciary who must be satisfied that approach to the hearing is in the interests of justice.

The current recovery plan, in particular for the criminal courts, is dependent on the arrangements introduced by section 57 and Schedule 27 of the Coronavirus Act 2020 not expiring on 25 March 2022. These provisions were supported by the over-arching direction of the then Lord Chief Justice that business should be conducted remotely where possible.

The current numbers of new cases within Northern Ireland and the pressures placed on our hospitals suggest access to court and tribunal venues will continue to depend upon some form of distancing measures making normal business delivery problematic. The underlying policy reason for retaining the use of live links is to maintain court business and progress the recovery of the courts case load which accrued during the public health emergency situation.

The former Lord Chief Justice, on his final appearance before the Justice Committee of the Northern Ireland Assembly in June 2021, emphasised the importance of retaining the ability to conduct remote, hybrid and physical attendance at all forms of hearings.

Relevant Legislation

The Coronavirus Act 2020 was the UK government response, in consultation with the devolved administrations to the challenge of continuing the business of government including the responsibility for ensuring the administration of the justice system could continue through the pandemic.

The settling of legislative provisions had to be completed at speed. The relevant provisions that apply to NI primarily section 57 and Schedule 27 of that Act but also include: -

- section 54, so far as it relates to Part 2 of Schedule 24 (and that Part of that Schedule)¹; and
- section 55, so far as it relates to paragraph 2 of Schedule 25² (and that paragraph of that Schedule).

Where the provisions are outside devolved competence, such as those above, the matter for retention rests with the relevant Westminster Department.

Section 89 (2) provides that Part Two of Coronavirus Act³ falls outside the sunset clause provided at section 89 (1). Section 90 (2) of that Act will enable the Department to extend on multiple occasions, if necessary, for no longer on each occasion than six months any selected provision.

Department Proposal

The policy objective is to continue to be able to conduct proceedings by live links where legislation already provides⁴ and to extend the utilisation of such facilities to any court hearing, provided the judiciary determines it is in the interests of justice.

The Department's estimate is there may be a need for at least 3 six month extensions. Current cross justice planning, involving the judiciary, NICTS, PPS and DOJ, for criminal courts estimates Magistrates' Court recovery for 2022 with Crown Court recovery in autumn 2023 (two years hence) – on the basis the ability to facilitate remote hearings is retained over that period and that increased levels of case processing can be sustained by the criminal justice system. The department's proposed legislative extensions align with that plan.

¹ Section 54 is about specific UK wide legislation - the Crime and Disorder Act 1998, (b) the Extradition Act 2003, (c) the Police and Criminal Evidence Act 1984, (d) the Prosecution of Offences Act 1985, and (e) the Serious Organised Crime and Police Act 2005

² Section 55 provides Schedule 25 which contains temporary modifications of (a) the Courts Act 2003, and (b) the Tribunals, Courts and Enforcement Act 2007.

³ Part 2 of the Coronavirus Act 2020 covers sections 85 to 102 of that Act.

⁴ For example within the criminal courts provisions can be found within the Criminal Justice (NI) Order 2004, the Criminal Justice (NI) Order 2008, the Justice Act (NI) Order 2015 Part 7 and the PACE (NI) Order 1989 provisions at Art 80A and Art 81 and 81A (1A).

These measures, to date, have shown demonstrable benefit to the people of Northern Ireland in a number of ways: reducing footfall within court buildings; providing more effective use of court time; and reducing waiting and travelling time as well as the cost for many participants in having to physically attend a courthouse.

As at present, any extended use of remote court access would have to take appropriate account of equality and the right to a fair trial as well any specific issues relating to the vulnerability of the individuals involved.

The Future – post recovery

The benefit of remote access provision has been recognised across the UK by the judiciary. Within the Police, Crime, Sentencing and Courts (PCSC) Bill currently progressing through Westminster there are provisions for England and Wales to place the ability to conduct remote hearings on a permanent footing. The proposal within that Bill is that any use of remote facilities will be subject to judicial consideration whether that approach for a hearing is in the interests of justice.

The proposed provisions within the PCSC Bill include clauses to protect the principle of open justice as well as creating offences where unlawful recordings or access to the hearing is abused. Currently, our provisions within Part 2 of Schedule 27 of the Coronavirus Act allow for public participation in proceedings where live links are utilised. The current offences and penalties in Northern Ireland are the same as those proposed within the PCSC Bill.

Feedback from the NICTS is that the use of live link provisions continue to provide increased flexibility to conduct business across criminal and civil courts, family courts and tribunals to maximise business delivery.

The provisions contained in Schedule 27 were supported by the overarching practice direction on remote hearings,⁵ which came into operation on 29 May 2020, reviewed most recently in January 2021. Guidance was also issued in regard to the progression of court business in the County and Magistrates Courts as well as for all tiers in the family courts and across various tribunal jurisdictions.

Considerable investment has now been made in technology to support live links and remote/hybrid hearings. User feedback has been reflected in changes and enhancements introduced while alternate video conferencing products to Webex and Sightlink are being reviewed.

⁵ **Interim Practice Direction on Remote Hearings 01/2020; specific guidance issued for Family courts – Covid-19 Guidance for Family Proceedings (All Court Tiers) - Revised 8 Jan 21; COVID-19 Guidance Magistrates' Courts: Contest Hearings; Guidance On Remote Hearings - for all business heard in the County and Magistrates' Court Tiers; Remote Court Hearings - Quick Guide for Court Users available to the public on line. All the guidance is supplemented by individual guidance issued once remote attendance is confirmed.**

Continuing remote or hybrid hearings should help us to establish what works well, and to develop an enhanced digital court environment which effectively supports the needs of court users in a physical, hybrid or remote court setting. Equally, the layout or footprint of certain court buildings may not be conducive to maintaining a necessary level of social distancing and limiting physical access within certain courts or tribunals.

The increased use of remote or hybrid hearings is a critical element in the March 2021 modernisation vision for courts and tribunals, which was agreed jointly by the then Lord Chief Justice, the Minister and the NICTS Director.

The Department intends to develop policy on the continued and wider use of live links post recovery. The objective is both to optimise the benefit of the significant investment made on an enhanced digital court environment and to meet the needs of court users beyond the recovery of the justice system.

This will be supported by a wider consultation and engagement exercise next year regarding measures for permanent legislative provisions within an Assembly Bill, to be introduced early in the next Assembly mandate.

This two staged approach allows for some targeted consultation now in regard to the proposed secondary legislation extending the provisions of the Coronavirus Act 2020 followed by a more extensive consultation as part of the policy development process for primary legislation.

Proposals in this Letter

This letter is not seeking your views on what new provisions, if any, might be made in regard to the use of live links or use of remote hearings in the long term.

The Department, at this time, is simply proposing to utilise the power provided at section 90 (2) of the Coronavirus Act to extend the expiry date of the Act's provisions, to support the recovery of court and tribunal business from the impact of Covid-19.

We also invite you to express or record your view on any matters you consider relevant to the proposed policy. The Department has set out below our approach against the standards established under domestic and international obligations.

The European Court of Human Rights (ECtHR) has determined that presence at the hearing is a necessary precondition for the effective exercise of the right to defend oneself in person, to examine or have witnesses examined and, where relevant, to have the free assistance of the interpreter.⁶

The ECtHR has found that suspects or accused persons' participation in proceedings by videoconference is not *per se* contrary to the ECHR, but resorting to a video hearing is a restriction of the right to be present. Therefore, in any given case, the use of

⁶ ECtHR, *Marcello Viola v. Italy (No.2)*, App. No. 45106/04, Judgment of 5 October 2006, para. 52.

remote proceedings must serve a legitimate aim and the arrangements for giving evidence must comply with requirements for due process.⁷

The right to a fair trial guarantees the right of a person to participate effectively in their criminal trial. This right has been defined to include the right to hear and follow the proceedings. The ECtHR has found in that regard that people appearing in the hearing through video-link "must be able to follow the proceedings and to be heard without technical impediments."⁸

The specific legislative proposal to extend the Coronavirus Act 2020 is critical to supporting the Covid recovery of the justice system. To assist us with progressing this, please complete the attached Question and Answer section and return it to maire.sheehan@justice-ni.gov.uk by 5pm on 26 November 2021. Any queries about the process or the issues raised should be directed to Máire in the first instance.

⁷ ECtHR, *Marcello Viola v. Italy (No.2)*, App. No. 45106/04, Judgment of 5 October 2006, para. 67.

⁸ ECtHR, *Sakhnovskiy v. Russia*, App. No. 21272/03, Judgment of 2 November 2010, para. 98.

Extending the Coronavirus Act 2020 –

Consultation - Q & A

Q.1

The Department of Justice supports an extension to ensure that courts and tribunals can continue to function as efficiently as possible in a way which does not impede access to Justice. How the provisions have been used to date is summarised below.

The intention will be to utilise section 90 (2) of the Coronavirus Act 2020 to allow, through regulations subject to affirmative approval, the extension of the legislative provisions within Schedule 27 of CVA which permits remote hearings by live or audio links beyond the current sunset date of 24 March 2022.

Live links have been extensively used since March 2020 by a wide range of case participants including the legal professions, applicants, respondents, defendants, prosecutors, victims and witnesses across all courts – Criminal, Family and Civil.

Within the criminal courts live links has been widely used for first appearances; custody remands, PEs and PIs, plea and sentence hearings; and latterly to facilitate the appearance of professional and civilian witnesses in contested magistrates cases and Crown Court trials.

Live links are also being utilised in family hearings including care cases (both private and public law), divorce and probate hearings. High Court writs, county court civil bills and small claims cases have all utilised the live link provisions to dispose of business and provide hearings in both traditional court and non-court venues such as the ICC.

The Coroners Service has utilised live links to accommodate preliminary hearings and inquests to enable Pathologists, doctors, other experts and families to participate at inquests without causing any additional avoidable delay in sourcing appropriate accommodation or inquest dates.

Within the Tribunals it has been necessary to utilise live links for remote virtual hearings and telephone conferencing. The Review Tribunal found significant benefit in live link usage to support business disposal upon access to care homes and hospital wards for hearings and examinations being restricted.

In order to manage parole referrals and recalls the Parole Commission for Northern Ireland relied primarily on remote live link hearings to continue business delivery.

Public enquiries on the examination of Council Local Development Plans conducted by Planning and Water Appeals Commissioners have been able to proceed and have been streamed over YouTube as it provides unlimited remote public access.

Which of the following best describes what you think about this?

- I think the provisions for remote hearings should be extended beyond March 2022 and am interested in them being made permanent
- I think the provisions for remote hearings should be extended beyond March 2022, but am not interested in them being made permanent
- I do not think the provisions for remote hearings should be extended or made permanent
- Unsure
- I have no view

Additional comments/observations

Should you have additional comments on the question posed please respond to the Department by xx October.

The Department will be also happy to receive any comments which reflect your experience of remote hearings to date.

Comments/observations on your experience of remote court hearings