



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Briefing Paper: Department of Justice
Consultation on Proposals on the Use of Live
Links for Police Detention/Interviews**

June 2020

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Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC) recommends that:

- 2.30 the proposed amendments to the Police and Criminal Evidence (NI) Order take into the account the limitations of video-link technology and provide for additional safeguards, such as only permitting the use of video-link technology where the detained person is accompanied by a legal adviser, to ensure that it does not undermine their rights, particularly the need to ensure that there has been no ill-treatment in custody and that any physical and mental health needs are addressed.**
- 2.31 prior to roll out of video link technology, a review is undertaken to identify individuals for whom its use is not suitable for reviews, hearings or police interviews. This review should address the particular vulnerabilities of children and young people, disabled people, people experiencing mental ill-health, older people and those who require an interpreter, along with other vulnerable groups and set out the limited circumstances and appropriate safeguards for the use of video-link technology.**
- 2.32 the voluntary nature of the use of video-link technology is emphasised to all detained persons including their right to request an in person review, hearing or interview.**
- 2.33 there is an independent assessment by the magistrate of when it is not in the interests of justice for a person to attend a hearing via video-link technology at which the detained person or their representative can make submissions as to its suitability.**
- 2.34 prior to the implementation of video link technology for police interview, reviews and hearing, that the issues and concerns with its roll out in other parts of the UK are addressed to ensure that the rights of detained persons are not undermined by technology failures or inadequacies.**
- 2.35 there is an independent review after a period of six months, which looks at the impact of the use of video link technology for all detained people and specifically for children and young**

people, disabled people, people experiencing mental ill health, older people and those who require interpreters is incorporated into the roll out of this technology.

3.3 a full equality impact assessment is undertaken which takes into consideration the differential impact of this policy for disabled people, children and young people, older people and people for whom English is not their first language.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with these functions the NIHRC provides this submission to the Department of Justice's consultation on proposals on the use of live links for police detention or interviews.
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas.

2.0 Use of 'Live Link' Technology

- 2.1 The consultation proposals to focus on amending the Police and Criminal Evidence (NI) Order 1989 to extend the use of video link technology, 'live links', and bring NI Law into line with England and Wales. Video link technology can already be used in preliminary court hearings, some sentencing and appeal hearings, evidence by vulnerable witnesses, defendants and appellants and for remand hearings.¹ The consultation covers extension of these powers to extensions of police detention.
- 2.2 Under Article 41A of the Police and Criminal Evidence (NI) Order a review of detention by an inspector to be carried out by telephone. Article 46A of Police and Criminal Evidence (NI) Order permits the use of video-link technology in lieu of telephone, but the implementing regulations have not yet been laid.
- 2.3 Under Article 43 of the Police and Criminal Evidence (NI) Order an officer of superintendent rank or above may authorise the continued detention of a person in police custody from 24 hours to 36 hours. Likewise, under Article 44, a Magistrates' Court may extend detention for a period of up to

¹ Department of Justice, 'Consultation on Proposals on the Use of Live Links for Police Detention/Interviews' (DoJ, 2020).

96 hours with the requirement that the detainee and an officer appear before the court. Currently both these reviews happen in person. The proposals in the consultation relate to review of detention by a superintendent under Article 43 and by the courts under Article 44 to be conducted by 'live link'.

- 2.4 The justifications for these proposals are to provide efficiencies and cost savings in that "reviews could be dealt with speedily, whilst managing competing demands, to create a more efficient police system" and a detainee could participate in the proceedings before the court via video link, "without the need for the detainee, their legal representation, or the officer to travel to the court in person, therefore making efficiencies on travel and escort costs".²
- 2.5 Prior to the use of video link technology for custody functions, the Chief Constable must be satisfied that the live link system is "fit for purpose" and that it "provides for accurate and secure communication between the detainee, the detainee's solicitor, appropriate adult, registered intermediary and interpreter if required".³ It is noted that the "confidentiality of any private consultation between a detainee, appropriate adult (if required) and their solicitor is maintained" through this process, but no further detail of how this will be safeguarded is presented in the consultation.
- 2.6 The amendments will ensure that the "existing safeguards in place" for face to face superintendent extensions and face to face hearings will apply to live link reviews and hearings. No further details of how these 'existing safeguards' will be adapted for application across video link technology.
- 2.7 Additional safeguards are listed as follows:
- A custody officer considers that use of live links is appropriate, including where it would take the authorising officer a significant amount of time to arrive at the police station.
 - The arrested person has had advice from a solicitor on the use of the live link.

² Ibid, at paras 3.6-3.7.

³ Ibid, at para 3.5.

- In the case of a court extension, it is not contrary to the interests of justice.
- The appropriate consent to the use of live link has been given.⁴

2.8 Paragraph 15.7A of the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, which gives further guidance to police officers interpreting the Police and Criminal Evidence (NI) Order 1989 makes it clear that the detained person “must be brought to court for the hearing of the application”.⁵

2.9 The consultation also addresses amending Article 40 of the Police and Criminal Evidence (NI) Order to allow for conducting a police interview with a detained suspect via live link. No justification for this change is presented in the consultation document, other than the necessity of being interviewed by an officer who is at a station some distance away.⁶ The consultation states that the amendments will ensure that “compliance with PACE and the Codes is appropriately transferred”, however no further guidance of how this will be done is set out.⁷

2.10 Article 5(1) ECHR recognises the right to liberty and security of person. Article 5(1)(c) ECHR sets out that no one shall be deprived of his liberty unless it is for done in accordance with law and inter alia for:

the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

2.11 Article 5(3) makes it clear that:

⁴ Ibid, at para 3.8.

⁵ Department of Justice, ‘Police and Criminal Evidence (NI) Order 1989, Code C - Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers’ (DoJ, 2015).

⁶ Department of Justice, ‘Consultation on Proposals on the Use of Live Links for Police Detention/Interviews’ (DoJ, 2020), at para 3.9.

⁷ Ibid.

everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.

- 2.12 Judicial control of interferences with a person's right to liberty is an essential safeguard contained in Article 5 ECHR. The ECtHR has emphasised that "if the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer".⁸ This guarantee is one of the most effective safeguards against the risk of ill-treatment and ensures that any unjustified interference with individual liberty is minimised.⁹ The strict time constraint imposed by Article 5(3) ECHR leaves little flexibility in interpretation as to do otherwise would undermine the procedural guarantee in and risk impairing the very essence of the right to liberty and security of the person.¹⁰
- 2.13 The procedural requirement places the judge or other officer under the obligation of hearing the individual brought before her or him in person before taking the appropriate decision.¹¹ While the attendance of a lawyer is not obligatory, their exclusion from a hearing may adversely affect the applicant's ability to present his case.¹²
- 2.14 The ECtHR has made it clear that in the context of Articles 8 and 6 on the right to respect for private life, home and correspondence and on the right to fair trial respectively, that "confidential communication with one's lawyer is protected by the Convention as an important safeguard of the right to defence".¹³ In addition, the ECtHR has made it clear that communication with a lawyer in the context of legal assistance falls within the scope of the right to respect for private life. This right is necessary to "allow an individual to make informed decisions about his or her life" and "it therefore follows that ... individuals who consult a lawyer can reasonably expect that their communication is private and confidential".¹⁴

⁸ *Brogan & Others v UK* (1988) ECHR 24, at para 58.

⁹ *Ladent v Poland* (2008) ECHR 211, at para 72.

¹⁰ *McKay v UK* (2006) ECHR 820, at para 33.

¹¹ *Aquilina v Malta* (1999) ECHR 21, at para 52.

¹² *Lebedev v Russia* (2007) ECHR 873, at para 91.

¹³ *Apostu v Romania* (2015) ECHR 110, at para 96.

¹⁴ *Altay v Turkey (No 2)* (2019) ECHR 276, at para 49.

2.15 Article 9 UN ICCPR also protects the right to liberty and security of person and provides in Article 9(1) that “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” In addition to requiring that anyone who is arrested being informed, at the time of arrest, of the reasons for the arrest and promptly informed of any charges, Article 9 UN ICCPR also requires that:

3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release....

4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

2.16 The UN Human Rights Committee elaborated further on what this right means in practice in General Comment No 35 and made it clear that it applies “before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity” and that this right is “intended to bring the detention of a person in a criminal investigation or prosecution under judicial control”.¹⁵ The UN Human Rights Committee makes it clear that the physical presence of the detained person before the judge is an essential safeguard to protect against ill-treatment in line with Article 7 UN ICCPR. It has provided that:

the individual must be brought to appear physically before the judge or other officer authorized by law to exercise judicial power. The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody... It thus serves as a safeguard for the right to security of person and the prohibition against torture and cruel, inhuman or degrading treatment.¹⁶

2.17 Article 13 UN CRPD requires States to:

ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-

¹⁵ CCPR/C/GC/35, ‘UN Human Rights Committee General Comment No 35: Liberty and Security of Person’, 16 December 2014, at para 32.

¹⁶ Ibid, at para 35.

appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2.18 In its concluding observations in 2017, the UN CRPD Committee was concerned about the level of awareness of the rights of disabled people under the UN CRPD within the criminal justice system. It urged the UK Government and NI Executive to “develop and implement capacity-building programmes among the judiciary and law enforcement personnel, including judges, prosecutors, police officers and prison staff, about the rights of persons with disabilities”.¹⁷ The UN CRPD Committee also raised concerns about how disabled people are empowered to effectively participate in decision making and pressed the UK Government and NI Executive to “design and implement a decision-making regime with guidelines and appropriate resources, focusing on respecting the will and preferences of persons with disabilities, particularly persons with intellectual and/or psychosocial disabilities, in court proceedings”.¹⁸

2.19 Article 14 UN CRPD requires states to ensure that:

persons with disabilities, on an equal basis with others:

a) enjoy the right to liberty and security of person;

b) are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2.20 Article 14(2) UN CRPD makes it clear that “if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law... including by provision of reasonable accommodation.”

2.21 In addition, Article 37(b) UN CRC requires States to ensure that “no child shall be deprived of his or her liberty unlawfully or arbitrarily” and that “the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the

¹⁷ CRPD/C/GBR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI’, 29 August 2017, at para 33(a).

¹⁸ Ibid, at para 33(b).

shortest appropriate period of time". Article 37(d) UN CRC also requires States to ensure:

every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

- 2.22 In addition, Principle 37 of the UN Principles for the Protection of All Persons under Detention or Imprisonment states that "a person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention".¹⁹ Moreover, Principle 37 also makes it clear that "a detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody".²⁰
- 2.23 A report in 2017 by Justice on mental health and fair trial identified that digital reforms of the criminal justice system raises difficulties in identifying vulnerability of detained people. Any use of remote systems must be "carefully thought through to ensure that assistance is available for those who are likely to need it, and that face-to-face court proceedings are clearly offered... Where a defendant is vulnerable, online and virtual procedures are inappropriate."²¹
- 2.24 The Equality and Human Rights Commission has recently published an interim report on the use of video technology for hearings and the impact on effective participation.²² This report focused on defendants and accused people with a cognitive impairment, mental health condition and/or neuro-diverse condition and noted that both people and behaviours can be easily misunderstood when using video-link technology. Some of the key findings in this interim report relate to opportunities to identify impairments and make the necessary adjustments and how these can be missed or are more limited when a defendant appears in court by video-link rather than

¹⁹ Principle 37, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988.

²⁰ Principle 37, Ibid.

²¹ David Latham, 'Mental Health and Fair Trial' (Justice, 2017).

²² Equality and Human Rights Commission, 'Interim Evidence Report on 'Inclusive Justice: A System Designed for All' (ECHR, 2020).

in person.²³ Similarly where meetings take place over video, professionals from a range of sectors felt that this significantly undermined the ability of advocates to identify impairments and that the 'human element' is missing from these interactions, which means that it is much harder to build trust and rapport.²⁴

- 2.25 In addition, the Equality and Human Rights Commission report raised concerns about technical issues relating to poor sound and image quality or that the video connection is intermittent. It was noted that "the technology in magistrates' courts can be particularly bad" and that by separating the defendant and their solicitor and/or court, defendants "may not have a full view of the court, or know who is present in the room at the other site".²⁵ Moreover where positive outcomes were noted, "they were seldom related to participation" and more likely to be related to levels of disruption, waiting times and the need to travel.²⁶
- 2.26 The Equality and Human Rights Commission report also raised concerns about privacy and legal privilege with video-links in courts, as they are not always soundproof. It further highlighted that being alone for a video hearing, without support, can be difficult for some people.²⁷
- 2.27 The Northern Ireland Policing Board runs an Independent Custody Visiting Scheme which trains volunteers to check on detainees held in custody and to assess their treatment, health and wellbeing and ensure that the conditions of detention are appropriate.²⁸ They also assess whether the detained person has full access to range to rights to which they are entitled. This provides an essential safeguard to ensure that the rights of detainees in police custody are protected.
- 2.28 In addition, the Criminal Justice Inspection NI has powers to investigate key criminal justice organisations, including the PSNI and the NI Courts and Tribunal Service in line with its overarching Corporate Plan and Inspection Programme.²⁹ Its role includes providing "independent,

²³ Ibid, at 9.

²⁴ Ibid, at 8.

²⁵ Ibid, at 9.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Northern Ireland Policing Board, 'Independent Custody Visiting Scheme'. Available at: <https://www.nipolicingboard.org.uk/independent-custody-visiting-scheme>

²⁹ Criminal Justice Inspection NI, 'Corporate Plan for 2020-2023 and Business Plan for 2020-2021' (CJINI, 2020).

impartial and evidence-based information and expert opinion to the public, political representatives and criminal justice stakeholders about the work and performance of inspected bodies and the entire criminal justice system".³⁰

- 2.29 The human rights safeguards demonstrate the fundamental importance of prompt judicial control of detention and that this should be conducted in person to ensure the effective participation of the detained person and to protect against ill-treatment. Evidence from other parts of the UK suggests that using video-link technology limits the scope for effective participation of the detained person and in the cases of a person with a learning disability, a mental health and/or neuro-diverse condition this can lead to additional impediments to participation. These groups already have difficulties in being able to effectively participate in hearings at present and the video link reforms should look at how this wider problem can be tackled.
- 2.30 **The NIHRC recommends that the proposed amendments to the Police and Criminal Evidence (NI) Order take into the account the limitations of video-link technology and provide for additional safeguards, such as only permitting the use of video-link technology where the detained person is accompanied by a legal adviser, to ensure that it does not undermine their rights, particularly the need to ensure that there has been no ill-treatment in custody and that any physical and mental health needs are addressed.**
- 2.31 **The NIHRC recommends that prior to roll out of video link technology, a review is undertaken to identify individuals for whom its use is not suitable for reviews, hearings or police interviews. This review should address the particular vulnerabilities of children and young people, disabled people, people experiencing mental ill-health, older people and those who require an interpreter, along with other vulnerable groups and set out the limited circumstances and appropriate safeguards for the use of video-link technology.**
- 2.32 **The NIHRC recommends that the voluntary nature of the use of video-link technology is emphasised to all detained persons**

³⁰ Ibid.

including their right to request an in person review, hearing or interview.

- 2.33 **The NIHRC recommends that there is an independent assessment by the magistrate of when it is not in the interests of justice for a person to attend a hearing via video-link technology at which the detained person or their representative can make submissions as to its suitability.**
- 2.34 **The NIHRC recommends that prior to the implementation of video link technology for police interview, reviews and hearing, that the issues and concerns with its roll out in other parts of the UK are addressed to ensure that the rights of detained persons are not undermined by technology failures or inadequacies.**
- 2.35 **The NIHRC recommends that there is an independent review after a period of six months, which looks at the impact of the use of video link technology for all detained people and specifically for children and young people, disabled people, people experiencing mental ill health, older people and those who require interpreters is incorporated into the roll out of this technology.**

3.0 Equality Screening

- 3.1 As noted in the consultation, section 75 of the Northern Ireland Act 1998 requires a public authority to identify whether a policy has a differential impact upon relevant groups; the nature and extent of that impact; and whether such impact is justifiable. However, the equality screening in consultation document has not engage in an analysis of how this policy will impact on people across protected grounds in section 75. Guidance from the Equality Commission NI makes it clear that a full equality impact assessment is required where “the policy is highly relevant to the promotion of equality of opportunity” and “where it affects fewer people but where its impact on them is likely to be significant”.³¹
- 3.2 It is clear from the experience in other parts of the UK that the policy of moving to video link technology will have an impact on particular protected

³¹ Equality Commission NI, 'Effective Section 75 Equality Assessments: Screening and Equality Assessments - A Short Guide' (ECNI, 2017), at 11.

groups. For example, disabled people, particularly people with sight and/or hearing impairments and people with a learning disability or a mental health and/or neuro-diverse condition risk being particularly impacted by this policy. It is noted that there has been no assessment of how this policy will impact on people who will often be of a minority ethnic background, for whom English is not their first language and who may require an interpreter, on children and young people or on older people who may be less familiar with video-link technology.

- 3.3 **The NIHRC recommends that a full equality impact assessment is undertaken which takes into consideration the differential impact of this policy for disabled people, children and young people, older people and people for whom English is not their first language.**

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