



Response to DOJ Consultation on Proposals on the Use of Live Links for Police Detention/ Interviews

**Children's Law Centre
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Introduction

The Children's Law Centre is an independent charitable organisation established in September 1997 which works towards a society where all children can participate, are valued, have their rights respected and guaranteed without discrimination and every child can achieve their full potential.

We offer training and research on children's rights, we make submissions on law, policy and practice affecting children and young people and we run a legal advice/information/ representation service. We have a dedicated free phone advice line for children and young people and their parents called CHALKY and a youth advisory group called Youth@CLC.

Our organisation is founded on the principles enshrined in the United Nations Convention on the Rights of the Child, in particular:

- Children shall not be discriminated against and shall have equal access to protection.
- All decisions taken which affect children's lives should be taken in the child's best interests.
- Children have the right to have their voices heard in all matters concerning them.

From its perspective as an organisation which works with and on behalf of children, both directly and indirectly, the Children's Law Centre is very grateful for the opportunity to make this submission to the consultation on proposals on the use of live links for police detention/ interviews.

Section 75 of the Northern Ireland Act 1998

CLC would be grateful if DoJ would explain the reasoning for not publishing this consultation on the consultation page on the DOJ website, or indeed anywhere else online. CLC received notification of this consultation by email and only received the Equality Screening document after a follow up email requesting same. We note that a response form can be completed on the 'citizenspace' website however this does not contain a link to the full consultation document.

The Department's equality duties continue during the crisis. **The Equality Commission have emphasised the importance of discharging section 75 duties during the crisis and in the context of the need to legislate and develop policy quickly.** They also recognised that decision made in the current circumstances may actually exacerbate the disadvantage already suffered by some for the protected categories. The Department of Justice will be aware of the advice note prepared by the Equality Commission, for public authorities on the Section 75 duties when developing Covid-19 related policies:

https://www.equalityni.org/Footer-Links/News/Employers-Service-Providers/Section-75-duties-when-developing-Covid-19-related?utm_source=NewZapp&utm_medium=email&utm_campaign=May20ezine

Under their Equality Scheme, the Department of Justice have a duty to consult including directly with children and young people in respect of the development of these proposals. In failing to do so the Department have not only breached their Equality Scheme they have also deprived themselves of the opportunity to be fully informed when developing these proposals.

Direct consultation with children and young people

Central to compliance with the statutory duties imposed under section 75 is the concept of increased participation in policy making and development. The Equality Commission's guidance¹ states that consultation must be meaningful and inclusive, in that all persons likely to be affected by a policy should have the opportunity to engage with the public authority. It also states that targeting consultation at those most affected by particular policies is also beneficial, in terms of identifying any adverse impact of policies or proposed policies at the earliest possible stage.²

The Equality Commission's Guidance for Public Authorities on implementing Section 75 of the Northern Ireland Act 1998 also states that in conducting consultations, the accessibility of language and the format of information should be considered to ensure that there are no barriers to the consultation process, with information being made available on request in accessible formats. Systems should be put in place so that information can be made available in accessible formats in a timely fashion. In addition, they recommend that specific consideration is given to how best to communicate information to children and young people, people with learning disabilities and minority ethnic communities.³ The Equality Commission's guidance for consulting with children and young people, "*Let's Talk, Let's Listen*"⁴ reminds Government that children and young people have particular needs concerning information and that actions should be taken by Government to facilitate young people to take part in consultation and decision-making processes, especially on issues that affect them. It emphasises the particular importance of considering which methods are most appropriate for consulting children and young people. Public authorities should also make sure to provide information that is clear, easy to understand and in an

¹ 'Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities' Equality Commission for Northern Ireland, April 2010, p.14

² Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities' Equality Commission for Northern Ireland, April 2010 p. 38 and 39

³ Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities' Equality Commission for Northern Ireland, April 2010, p.14

⁴ 'Let's Talk, Let's Listen: Guidance for public authorities on consulting and involving children and young people'. Equality Commission for NI, May 2008.

appropriate format, to ensure there are no problems preventing effective consultation with children and young people.⁵

Furthermore, the Department of Justice's Equality Scheme states that:

*"The Department of Justice is committed to communicating effectively with the public, recognising the growing range of communication channels and the differing needs and preferences of different groups. The Department will use evidence-based evaluation and a range of communications channels to enable wide access to information, to mitigate the risk that some sections of the public might not enjoy equality of opportunity in accessing information provided by the Department."*⁶

CLC would therefore welcome details of any direct consultation with children and young people that the Department of Justice has carried out, or intends to carry out on the proposals on the use of live links for police detention/ interviews in compliance with its equality scheme and fulfilment of its statutory duty, including details and copies of any child accessible versions of the Guidance which have or will be made available. These proposals directly affect children and young people and therefore children and young people must be consulted in relation to them. Failure to consult with children and young people is a breach of section 75 of the Northern Ireland Act, Article 12 of the UNCRC and the Department of Justice's Equality Scheme. **CLC accept that during the consultation period, it may not have been possible to consult with young people face-to-face because of the current COVID 19 restrictions, however, online methods to consult directly with young people could be employed.** The statutory duty to consult remains as outlined by the Equality Commission's guidance referenced above.

Consultation period

CLC believes that it is also incumbent upon us to raise the timeframe for responses to the current consultation. Respondents have been given from 20th April 2020 to 1st June 2020. The Department's approved Equality Scheme states that:

*"The consultation period lasts **for a minimum of twelve weeks** to allow adequate time for groups to consult amongst themselves as part of the process of forming a view. However, in exceptional circumstances when this timescale is not feasible, for example when implementing EU Directives or UK wide legislation, meeting Health and Safety requirements, addressing urgent public health matters or complying with Court judgements, the Department may shorten timescales to eight weeks or less before the policy is implemented. The Department may continue consultation thereafter and will*

⁵ Para 2.26 'Let's Talk, Let's Listen: Guidance for public authorities on consulting and involving children and young people'. Equality Commission for NI, May 2008.

⁶ Department of Justice Equality Scheme (para 3.1 <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/doj-equality-scheme-revised.pdf>)

review the policy as part of the monitoring commitments. Where, under these exceptional circumstances, the Department must implement a policy immediately, as it is beyond our control, it may consult after implementation of the policy to ensure that any impacts of the policy are considered.”⁷

CLC acknowledges the current health emergency. However, CLC would respectfully suggest that the health related exceptional circumstances referenced in the DoJ’s equality scheme relate to circumstances when the policy relates to “*meeting Health and Safety requirements, addressing urgent public health matters*” as opposed to the health related circumstances in which we currently find ourselves. This analysis is supported by the consultation process including timescale the DoJ has adopted in this instance i.e. had the Department been availing of the ‘exceptional circumstances’ exception, the process and timescale would have been significantly different. If anything, the current COVID-19 restrictions reinforces the duty on the Department of Justice to adhere to the stated consultation period in their equality scheme allowing for consultation engagement including with children and young people to be undertaken via technology. Further, given that these proposals are intended to last beyond the current lockdown period, CLC would request that the DoJ comply with their Equality Scheme and at a minimum extend the consultation to 12 weeks. We would also recommend that in recognition of COVID-19 restrictions, the DoJ consider extending the current consultation period beyond 12 weeks. We would further suggest that the DoJ should again, in compliance with their Equality Scheme, take proactive steps to create opportunities for effective and meaningful consultation with children and young people and their representative groups regarding these policy proposals. Ongoing monitoring and review will be required to ensure that these proposals, if implemented, promote equality of opportunity.

Purpose of Equality Screening

The Equality Screening document provided by the Department of Justice in relation to these proposals states that “*the proposal will impact anyone detained in custody*” and “*the policy will impact all areas of the community equally as it focusses on those detained in custody only*”.

The fact that the proposals will be applied equally across all section 75 groups and the fact that there was no intention to target a specific group is a concerning misunderstanding of the Department’s duties under section 75. It is irrelevant that the proposals apply equally for the purposes of compliance with the Department’s obligations under section 75 of the Northern Ireland Act 1998 and proper discharge of its Equality Scheme. The question the DoJ should have asked was whether or not there is the potential for adverse impact and if that potential exists, as CLC strongly believes it does in respect of this policy, then a full EQIA must be carried out. This

⁷ Department of Justice Equality Scheme para 3.10 <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/doj-equality-scheme-revised.pdf>

principle is set out clearly in the 2004 Final Report of the Equality Commission's Investigation under Paragraph 10 of Schedule 9 of the Northern Ireland Act 1998 – Children's Law Centre and the NIO, the Equality Commission stated that:

"...the purpose of screening, as set out in the Commission's Guide to the Statutory Duties, is;

"to identify those policies which are likely to have a significant impact on equality of opportunity..."

The Commission did not accept that the... reasons for not undertaking an Equality Impact Assessment, which focused on the reasons for adverse impact and the fact that such impact was not intentional, rather than the potential for adverse impact, represented a proper consideration of whether the policy was "likely to have significant impact on equality of opportunity.

It is necessary but not sufficient to establish whether a proposed policy is 'targeted' at a s75 sub-category such as children and young people. It is also necessary to establish 'inadvertent differential impact'. It is not adequate to deny significant differential impact if a majority of those likely to be affected are 17 or younger (and in some cases as young as 10)....".⁸

We are very concerned that 16 years after the Equality Commission produced the above referenced SDI Report the DoJ, who is now discharging the functions which the NIO discharged when the report was prepared, is still misapplying this test when determine if there is a need to carry out a full EQIA.

We would also have expected the DoJ to have carried out a much more thorough examination of its proposals at the screening stage and to carry out a full and comprehensive EQIA on its policy proposals including direct consultation with children and young people and relevant organisations like CLC. Within the Equality Screening document, for example, the Department of Justice has not considered the impact that the use of live links will have on a child or young person's ability to understand the proceedings and to participate effectively in their hearing. The only consideration given to children and young people is in relation to obtaining appropriate consent.

Section 75 of the Northern Ireland Act 1998 requires more than avoidance of adverse impact, it also requires a proactive approach to be taken by designated public bodies to ensure the promotion of equality of opportunity. The Equality Commission's Guidance for public authorities in relation to section 75 states that:

"The promotion of equality of opportunity entails more than the elimination of discrimination. It requires proactive measures to be taken to facilitate the promotion of equality of opportunity between the categories identified in Section 75 (1). The

⁸ SDI/22/04.

equality duty should not deter a public authority from taking action to address disadvantage among particular sections of society – indeed such action may be an appropriate response to addressing inequalities.”⁹

Designated public bodies are required to not only ensure that there is no adverse impact suffered by members of any of the section 75 categories as a result of the proposed legislation, policy or practice, but also to have due regard to the need to promote equality of opportunity among members of the nine groups. This means that there is a statutory obligation on the Department of Justice as a designated public authority for the purposes of section 75 of the Northern Ireland Act 1998 to take action to mitigate adverse impact or inequality as well as to proactively promote equality of opportunity in order to comply with section 75 of the Northern Ireland Act 1998. There appears to be no examination by the Department to consider the ability of young people to understand and participate in live links, or the ability of the young people to form a rapport or relationship with their legal representative, the police or the judge when participating via live link. Subsequently, the Department has also failed to include measures to mitigate such impacts to ensure equality of opportunity within these proposals.

Use of data in Equality Screening

CLC are concerned that there is no information within the Equality Screening document relating to what data has been used (quantitative or qualitative) to demonstrate how the Department has arrived at the conclusion that there is no potential adverse impact on any of the section 75 groups.

Given the importance of the child’s right to a fair trial we would have expected the DoJ to take all required measures to uphold this right and be as robust in the development of its policy proposals as possible, relying on fresh independent research into the use of live links in proceedings involving children and scrutinising the impact on the child’s ability to participate in and understand the court proceedings. In addition, DoJ should have consulted relevant organisations working with young people who have experience of the criminal justice system to gather up to date evidence in respect of the challenges young people experience in engaging with the legal system including court hearings and engagement with lawyers. Further, given the profile of young people in the criminal justice system and the recognised over representation of children with SEN, mental health needs and drugs and alcohol, the DoJ should have sought disaggregated data in respect of how these factors impact on a child’s ability to engage in their cases before determining if a full EQIA was required. We would

⁹ Equality Commission’s Guidance for public authorities in relation to section 75
<https://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/S75GuideforPublicAuthoritiesApril2010.pdf>

welcome details of what disaggregated data was sought by DoJ prior to reaching their conclusion that no EQIA was required and from where and whom the data was sought.

It is insufficient to make an equality screening decision without using data including independent disaggregated data to provide evidence for the decision. To fulfill its statutory duties under section 75 and before this policy is progressed CLC would assert that the DoJ should gather relevant disaggregated data and carry out a full EQIA.

Screening decision

The Screening document states that *“an equality impact assessment is unnecessary as the proposed amendments have no negative differential impact on any of the s75 categories.”* **We do not agree with the DoJ’s screening decision, we believe the way in which the DoJ has carried out its screening is flawed. Given the clear potential of these proposals to adversely impact on children and young people, CLC would request that the Department of Justice would properly discharge their S75 duty and comply with their Equality Scheme and carry out a full EQIA using comprehensive disaggregated data sets and accessible information. The DoJ must also consult publicly and widely, including direct consultation with children and young people as part of this process.**

International Standards

CLC wish to bring to the Department’s attention the Department’s obligations under the UNCRC and the UN Committee on the Rights of the Child’s Concluding Observations following the examination of the UK Government’s compliance with the UNCRC¹⁰ and reiterate the Government’s obligation to ensure that all legislation is in compliance with both the UNCRC and the Committee’s recommendations. Of particular relevance to the DoJ when considering this policy vis-à-vis children are the following UNCRC Articles: Article 4, Article 3, Art 12, Art 37 and Art 40.

Article 4 of the UNCRC states that:

“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”

In addition, Article 3 (1) of the UNCRC states that:

¹⁰ 3rd October 2008 CRC/C/GBR/CO/4.

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Also of relevance to the Department of Justice are the Committee’s 2016 Concluding Observations which places an obligation on Government to ensure that:

With reference to its general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, the Committee recommends that the State party, in all parts of its territory:

- (a) Ensure that this right is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions and in all policies, programmes and projects that are relevant to and have an impact on children;*
- (b) Develop procedures and criteria to provide guidance to all relevant persons in authority for determining the best interests of the child in every area and for giving it due weight as a primary consideration.¹¹*

The Committee’s 2016 Concluding Observations are also relevant to this consultation which states as follows:

“The Committee regrets that the right of the child to have his or her best interests taken as a primary consideration is still not reflected in all legislative and policy matters and judicial decisions affecting children, especially in the area of... criminal justice....

With reference to its general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, the Committee recommends that the State party, in all parts of its territory:

- (a) Ensure that this right is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions and in all policies, programmes and projects that are relevant to and have an impact on children.”¹²***

The UNCRC Committee’s General Comment No. 5 on General Measures of Implementation for the Convention on the Rights of the Child also states that in order to ensure that the provisions of the UNCRC are being fully implemented in law, policy and practice there is a need for a process of continuous child impact assessment and child impact evaluation.¹³ This is reemphasised by the Committee in their 2016 Concluding Observations:

¹¹ CRC/C/GBR/CO/5 para 27

¹² CRC/C/GBR/CO/5 paras 26 & 27

¹³ Para 45 CRC/GC/2003/5.

“The Committee recommends that the State party:

(a) Introduce a statutory obligation at the national and devolved levels to systematically conduct a child rights impact assessment when developing laws and policies affecting children, including in international development cooperation;

(b) Publish the results of such assessments and demonstrate how they have been taken into consideration in the proposed laws and policies.”¹⁴

In compliance with the DOJ's obligations under the UNCRC, the above recommendation by the UN Committee and the UN Committee's General Comment No. 5 the DoJ should have considered the best interest of the child when developing this policy and undertaken a child rights impact assessment of the policy. We can see no evidence of the Department having engaged in such an exercise.

Further, Article 12 of the UNCRC states that:

- 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

In addition, the UN Committee on the Rights of the Child's Concluding Observations and recommendations to the UK government in 2016 recommended that:

“With reference to its general comment No. 12 (2009) on the right of the child to be heard, the Committee recommends that the State party:

(a) Establish structures for the active and meaningful participation of children and give due weight to their views in designing laws, policies, programmes and services at the local and national levels, including in relation to discrimination, violence, sexual exploitation and abuse, harmful practices, alternative care, sexual and reproductive education, leisure and play. Particular attention should be paid to involving younger children and children in vulnerable situations, such as children with disabilities;

....

(d) Ensure that children are not only heard but also listened to and their views given due weight by all professionals working with children.”

¹⁴ CRC/C/GBR/CO/5 para 10

Article 12 is of particular importance in this context, not only in relation to directly engaging and consulting with children and young people on these proposals, but also in the context of a young person's fundamental right to fully participate in their own trial.

With regard specifically to criminal justice, the UNCRC places a number of obligations on the Government which are relevant to the proposed extension of the use of live links in Northern Ireland. Article 37 states (inter alia) that States Parties shall ensure that:

“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

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.”

In addition, Article 40 of the UNCRC states that:

- (1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.”*
- (2) To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:*
 - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;*
 - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:*
 - (i) To be presumed innocent until proven guilty according to law;*
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;*

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

(3) States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

Furthermore, General Comment no 24 on Children's Rights in the Child Justice System states that:

"Safeguards against discrimination are needed from the earliest contact with the criminal justice system and throughout the trial, and discrimination against any group of children requires active redress.... Accommodation should be made for children with disabilities, which may include physical access to court and other buildings, support for children with psychosocial disabilities, assistance with communication and the reading of documents, and procedural adjustments for testimony..."

Proceedings should be conducted in an atmosphere of understanding to allow children to fully participate. Developments in child-friendly justice provide an impetus towards child-friendly language at all stages, child-friendly layouts of interviewing spaces and courts, support by appropriate adults, removal of intimidating legal attire and adaptation of proceedings, including accommodation for children with disabilities." ¹⁵

¹⁵ CRC/C/GC/24 paras 40 and 46

We also wish to draw the Commission's attention to the Council of Europe's Guidelines on Child Friendly Justice adopted in November 2010 and developed following widespread consultation, including with children and young people and CLC. Child-friendly justice is defined as:

*"...justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child, including the rights to due process, to participate in and understand proceedings, to respect for private and family life and to integrity and dignity."*¹⁶

To ensure compliance with its children's rights obligations it is therefore essential that all policies which relate to access to services for children and young people coming into contact with the criminal justice system, including the use of live links in Northern Ireland are UNCRC compliant i.e. in the best interests of the child, takes in to account the child's age and conducted in an atmosphere of understanding to allow children to fully participate.

General Comments

CLC has been consistent in our opposition in general to the use of live links in legal cases which involve children and young people, as we believe they breach Article 6 of the ECHR and Articles 3, 12 and 40 of the UNCRC.

We firmly believe that the use of live video links must always be driven by the best interests of the child and their right to a fair trial and not what is an efficient use of police and judicial resources.

Children have a right to liberty under Article 5 and a right to a fair hearing under Article 6 of the European Convention on Human Rights and Article 40 of the UNCRC. The CLC would argue that Art 5 and Art 6 ECHR and Art 40 are engaged in respect of the proposals within the consultation document. CLC believe that fundamental due process rights and the child's right to fair trial will be compromised when a child is not physically present and participates via a live link.

In addition, if the child is not physically present, the child's legal representative and the court or police officer(s) are greatly disadvantaged in being able to determine the competency of the child to give instructions, the child's understanding of the implications of the hearing and if the child is able to participate effectively. This disadvantage will increase the younger the child, some of whom may be only 10 years of age. This disadvantage presents a real risk of a resulting diminution of the child's Art 5 and Art 6 ECHR and Art 40 rights.

¹⁶ Para II c.

One of CLC's concerns with regard to the use of live video links is the fact that we do not believe that there is a sufficient capability when video links are being used to ensure that children understand the nature of proceedings and can fully participate in their hearing, particularly children with literacy problems, special educational needs, mental health needs and language difficulties, who are all overrepresented in the criminal justice system. Our concerns are further heightened by the fact that lawyers, including barristers, who represent children in the criminal justice system are not required to undergo the same training and safeguarding checks as solicitors who are on the Children Order Panel.

CLC when participating to the Family Justice Review in 2017¹⁷ put forward the following points, which were documented in the Review Group's Report on Family Justice. Many are relevant to this consultation:

- First, the common law rights of such a child to attend a court hearing and their Art. 6 rights under the European Convention on Human Rights demand to be respected but are not adequately met through a video link 'attendance' at hearings when one of the outcomes could be a lengthy period in custody.
- Secondly, these children are amongst the most vulnerable in our society. To deprive them of attendance in person in court denies a direct engagement face-to-face with the judge.... which enables [the observation of] the young person, how they present and project themselves and relay their feelings through their countenance and body language. The way they conduct themselves ... should be viewed other than on a small screen.
- The young person may have a learning disability, autism, dyslexia, dyspraxia or another disability that could be magnified under the pressure of a need to convey as much as possible via a remote link in a short period.
- It can be difficult to consult by video link with a young person who.... is vulnerable. They are often on edge or hyper at hearings, which makes consulting and taking instructions in person difficult. This might only be amplified if done by video link.

Similarly, the Children's Law Centre addressed the issue of the use of live links in Article 44 proceedings in some detail in our organisational response to the Law Commission's Consultation on its first programme of Law Reform and to a sub group of the Children's Order Advisory Committee considering the matter of the use of live links. CLC's response focused on additional factors including the child's right to a fair

¹⁷ Review Group's Report on Family Justice pages 101 – 105 <https://judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Family%20Justice%20Report%20September%202017.pdf>

hearing under Article 6 ECHR and Article 12 of the UNCRC. The following are key points from our response:

- The child's right to a fair hearing under Article 6 of the ECHR in such proceedings must be respected. Article 6 of the ECHR should be interpreted in light of Article 12 of the UNCRC¹⁸.
- It is CLC's view that in order to comply with international children's rights standards, as a general rule, a child or young person who wishes to attend court should be facilitated to do so.
- The right to a fair hearing in the context of children and young people means that they must be able to *participate in* and *understand* proceedings in which they are involved.¹⁹ Particular care must be taken to ensure that the rights of children with a mental health difficulty or learning disability are afforded a fair hearing under Article 6 ECHR.²⁰
- If it is accepted that in certain very limited circumstances where a risk assessment indicates that there is a serious risk of injury to the child/young person if he or she travels to court, the protocol should require the child's solicitor/guardian ad litem to have taken full instructions from the child in person, explained the decision to use video link to the child/ young person and obtained the child's consent to the use of video link.
- Should the decision be to recommend the implementation of video link, the child or young person concerned must not be prejudiced i.e. must be ensured that he or she has the same level of legal representation as he or she would have had in court. This means that the child or young person must be given the opportunity in advance of the hearing to consult in person with his/her solicitor/guardian ad litem and provide full instructions.
- CLC has additional concerns with regard to the use of video link in cases involving children with mental health difficulties, learning difficulties or special educational needs. We are challenged as to how the UNCRC Article 12 and ECHR Article 6 rights can be fully guaranteed for this particular group of vulnerable children. Special consideration needs to be given to the facilitation of a child/young person with a mental health difficulty, learning difficulties or special educational needs.

¹⁸ See *TP A Minor*, [2005] NIQB, 64, paragraph 30, per Mr Justice Weatherup, endorses the use of the UNCRC to expand upon arguments made under Article 8 of the ECHR.

¹⁹ *T & V v UK*, App. No. 24724/94 and 24888/94, (16 Dec 1999)

²⁰ *S.C v UK* App No 60958/00, (15 June 2004)

- Further consideration needs to be given to the location of the solicitor when the matter is heard.

Furthermore, in engagement with the Children's Order Advisory Committee (COAC) in October 2012, officials from the (then) DHSSPS and the DOJ attended the meeting to present a DHSSPS position paper on the potential for future introduction of a live link facility at Lakewood for use in SAO proceedings. The DHSSPS confirmed its position that, where possible, a child should be physically present in court during his/her hearing.²¹

CLC would assert that these arguments remain pertinent to the current policy proposals and that when a decision is being made in relation to a child's liberty Art 5 ECHR, in this context in relation to the extension of their detention by a PSNI superintendent or by the courts, the child's Article 6 rights should be vindicated by their being physically present.

Safeguards

The consultation document outlines a number of safeguards, one being that a custody officer considers that the use of live links is appropriate. If the decision is made to go ahead with the use of live links (which CLC is clearly opposed to) in cases where a child or young person is involved, CLC would assert that the decision should not be made based on *"circumstances where it would take the authorising officer a significant amount of time to arrive at the police station either because of duties or requirements elsewhere or due to the location of the police station"* but instead should be based on the best interests of the child and how best to guarantee the child's Article 5 Right to Liberty and Article 6 ECHR right to a fair trial, taking account of the age and particular vulnerability of the individual child.

In respect to enabling such decisions to be made appropriately, CLC would draw the Department's attention to General Comment No. 24 (2019) on children's rights in the criminal justice system, which emphasises the need for ongoing training in children's rights:

*"It is essential for the quality of the administration of child justice that all the professionals involved receive appropriate multidisciplinary training on the content and meaning of the Convention. The training should be systematic and continuous..."*²²

CLC therefore recommend that any custody officer making these decisions, and indeed all PSNI officers, should be receiving ongoing training on children's rights to ensure that they comply with all their children's rights obligations and in particular to

²¹ CLC's Response to the COAC Options Paper (as revised) on use of live links for Article 44 Secure Accommodation Order Applications (December 2015)

²² General Comment No 24(2019) Children's Rights in the Criminal Justice System
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en

ensure best interests of the child are at the forefront of the decision making process. CLC would request that any guidance issued by the Department on the use of live links requires mandatory children's rights training for all PSNI officers and that the best interests of the child is always the primary consideration, rather than the location of a police officer.

In relation to the second safeguard outlined in the consultation i.e. that the arrested person has had advice from a solicitor on the use of the live link, CLC would assert that should the decision be to recommend the implementation of video link in the circumstances outlined in the consultation document, the child or young person concerned must not be prejudiced. This means that the child or young person must be given the opportunity to be advised by and consult in person with his/her solicitor in respect of the use of live links.

In relation to consent, CLC note that it is proposed that children under the age of 14 required the consent of his or her parent or guardian and those aged 14 – 17 require both the child's consent and his or her parent or guardian. CLC recommend that the issue of consent is approached on an individual basis, assessing each child's competency to consent. Competency should be assessed depending on the level of understanding of the child, rather than their obtained age.

Furthermore, CLC would suggest that there is a need for clear guidance as to who constitutes an 'appropriate' appropriate adult. In some cases, it may not be suitable for a parent or guardians to act as an appropriate adult e.g. if the alleged offence was against the parent or guardian or if there have been allegations of abuse or ill treatment. Likewise, it may not be suitable for a social worker to act as an appropriate adult if there is any potential for a conflict/perceived conflict of interest vis-à-vis where the offence is committed or against whom it is committed.

If a young person is being held for interview then the defence solicitor will need sight of the evidence to be presented at interview. This needs to be emailed in advance of the interview, it will not be sufficient to "show" this on camera at interview. The solicitor will require time with the young person in person to go through this evidence.

CLC would also assert that there needs to be a joined-up approach to technology so that solicitors, appropriate adults and interpreters can fully participate in the interview process. The child being interviewed requires their own screen where they can view all of the participants and their right to privacy is protected.

In addition, the solicitor will need a secure means of taking instructions from the young person, who they may never have met before. Similarly, the appropriate adult and any interpreter will need a similar means of communication prior to the interview so that introductions can be made before the interview begins. There must be a guarantee that all such communications are not being recorded or are accessible by PSNI on the system. **Confirmation is sought as to whether the audio-visual interview will be recorded and if so that copies will be made available to the solicitor and accused.**

The Equality and Human Rights Commission (EHRC), commissioned a report which considered access to justice for disabled people in the criminal justice system. In particular it highlights the use of video hearings in England and Wales which can significantly hinder communication and understanding for people with learning disabilities, autism spectrum disorders and mental health conditions. Given the increased use of technology as a result of COVID, they recently issued an interim report which highlighted concerns about the impact of conducting cases without defendants being present in court, in so doing they sought to mitigate the risks that these technologies pose to disabled people at this time.

“[EHRC] found that video hearings can significantly impede communication and understanding for disabled people with certain impairments, such as a learning disability, autism spectrum disorders and mental health conditions. People with these conditions are significantly over represented in the criminal justice system.

[They] identified a number of other barriers, including the absence of processes to identify, record and share information about impairments. [EHRC] are also concerned about the availability of adjustments to ensure that disabled people accused of crime can understand and effectively participate in legal proceedings against them.”

One legal professional interviewed as part of the research that underpinned the report is quoted as follows:

“I have not seen any real thought given where people appear from the police station to the court as to whether or not that person is suitable to go over the link or not. It’s more a case of they’ve got the orders to do all first appearances by video link and that’s what we’re going to do. There’s no real consideration being given to children or people who may have learning difficulties or mental health problems.”²³

CLC share the EHRC’s concerns and are worried that there has been no meaningful consideration in the consultation of how to address the impediments to participation referenced in the EHRC report especially as they relate to children, including children and young people who have mental health difficulties, learning difficulties, special educational needs, physical disability such as sight or hearing impairment or who require a translator. To overcome these impediments CLC would strongly recommend as a minimum the inclusion of an additional safeguard that would include the presumption that children and young people with any additional needs do not participate in live links proceedings.

With specific reference to COVID David Isaac, the Chair of EHRC is quoted in the press following the publication of the Inclusive Justice report (referenced above):

“Coronavirus presents an unprecedented public health emergency and we know that the government is working hard to allow our justice system to continue to function ...

²³ EHRC Interim Report: Inclusive Justice – A System Designed for All (April 2020)
https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf

[But] it is vital that any new approaches should not accentuate the difficulties that already exist for disabled people in accessing justice.

Equality before the law means that no one defending themselves in court should be disadvantaged because they are disabled - even during a time of national crisis.”²⁴

CLC share the EHRC’s concerns regarding the imperative to ensure COVID-19 does not accentuate the disadvantage already been suffered by children in the administration of justice. Many of the young people that CLC work with and who find themselves the subject of a police interview, have underlying conditions which make them particularly vulnerable to the COVID-19 and also likely to be disadvantaged by the use of live links. Many young people, especially those within the Looked After population find themselves facing police interviews for matters which a family would not report to the police. As such interviews may increase their potential risk to exposure to the virus, PSNI interviews of children at this time should be limited to the most serious offences to reduce risk of infection. When such interviews are absolutely necessary, they should take place outside of a PSNI station and whenever possible, following a full risk assessment, in person. When it is absolutely necessary because of COVID-19 to conduct the interviews or extend detention via Live Links all the safeguards referenced above must be in place.

If a young person refuses to be interviewed on the basis that they are a vulnerable category, or a member of their household is, and do not wish to risk exposure to COVID-19 then no adverse inference should be drawn from this.

It is important the DoJ considers and takes account of this important and highly relevant interim report, and the full report when published, in relation to the use of Live Links and other technology during COVID 19 and also in relation to their potential use in the long term.

Conclusion

The Children’s Law Centre is grateful to have the opportunity to make this submission to the DoJ. CLC looks forward to receiving the documents requested and clarification sought. CLC looks forward to continuing its engagement on the use of live links in proceedings involving children and young people with a view to achieving children’s rights compliant youth justice system in Northern Ireland.

We hope that our comments have been constructive and useful and are more than happy to discuss anything raised in this response with the Department. We wish to be kept informed of progress in the development of its policy proposals to extend the use

²⁴ Court hearings via video ‘risk unfairness for disabled people’, The Guardian, 22nd April 2020
https://amp.theguardian.co.uk/uk-news/2020/apr/22/court-hearings-via-video-risk-unfairness-for-disabled-people?_twitter_impression=true

of live links and look forward to the issues raised in this response being addressed and taken forward by the DoJ.