

PACE Code C/E consultation 2020

Consultation submission

2nd July 2020

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Introduction

Coronavirus (Covid-19) is an unprecedented public health crisis. For some, the virus causes a horrendous illness. For others, death. It is critical that the health and safety of suspects, employees, workers and volunteers is taken seriously and protected. Police custody presents a specific context, in which social distancing is difficult – and in some cases impossible. The use of remote legal advice in police interviews has come about as a short-term emergency response to this context.

Yet, the needs of children and vulnerable adults, and the life-changing risks associated with being a suspect in a criminal investigation, are such that physical presence is critical. The requirement for appropriate adults to be physically present for these groups is explicit in PACE. Organised appropriate adult services have continued to attend police custody subject to three elements. NAAN has been clear with its members. If any of the above tests are not met, they should not remain present to enable an interview or other procedures:

- Detentions/procedures are necessary (cannot be delayed or alternatives used); and
- Appropriate PPE is provided to AAs by police whenever it is needed; and
- The custody environment is being run in a safe manner.

NAAN has provided guidance to its members regarding the Joint Interim Interview Protocol (v2) and consent for remote legal representation. Evidence from our members suggests that a significant number of police officers, in a range of forces, are not fully aware of the provisions of the protocol. There has been regular non-compliance in terms of failure to request/obtain consent. Suspects and AAs are not always being properly informed of their rights in this regard. We recognise that changing the PACE Codes could improve the information provided to suspects and compliance with the requirement for consent from suspects and AAs. However, we have several concerns:

- Failure to meet health and safety responsibilities to officers, lawyers and appropriate adults does not justify measures which disadvantage suspects
- The use of remote legal advice for children and vulnerable adults presents a risk to the integrity of the justice system
- Amending the PACE Codes will normalise remote legal advice, thereby increasing the risk that measures are adopted in the long term
- While the amendments are intended to support the continued use of the joint interview protocol but can be used in isolation from the wider context of that protocol
- Under the joint interview protocol the safeguards (i.e. consent) are not being fully implemented and appear to have become a default route
- Police are not trained to deliver assessments of suitability for interviews involving remote legal advice.
- People who have an untrained familial appropriate adult are likely to be at increased risk due to the reliance on AAs to ensure police conduct effective assessments of suitability for remote legal advice and to withhold consent appropriately.
- The 12-month fixed period for operation of the temporary arrangements does not reflect the dynamic nature of the risk
- If revisions will be made without Parliamentary approval, the need for regular review is even greater.

Evidence of risks to justice

NAAN has been unable to identify specific research into the impact it might have on children and vulnerable suspects. This lack is itself a cause for concern, caution, and considered thought before any amendment. We note that while systems for reporting the dissatisfaction of professionals with remote arrangements have developed quickly and effectively, there are no such effective systems for reporting suspect dissatisfaction – and as such their voices are not present.

We have considered the evidence on the impact of *defendants appearing in courts* via live link. This is also limited. There has been very limited assessment of the potential impact of using video hearings in cases with disabled defendants.

There do appear to be some arguments may be made in favour of remote legal advice, ostensibly from the perspective of the suspect. These might include:

- It will be faster so they will spend less time in custody and be less stressed
- Young people are used to using video apps like WhatsApp, Zoom or Skype

In response, we would suggest that:

- While it is important that police investigations and detentions should be expeditious, especially regarding children and vulnerable adults, speed is not always of the essence. The quality of the process is key to fairness and the integrity of the justice system. The psychological impact of time under detention/investigation should not be used as justification for an unfair process, given the potential for lifelong negative impacts
- *Some* young people may be used to using digital services – some may not. However, the circumstances of that use are more likely to be informal interactions which lack the level of risk attached to ineffective participation / communication in a police interview. In Transform Justice's report a YOT Officer observed that, "Children do not appreciate they are in a court not on a computer game".

The available research (Equality and Human Rights Commission, 2020; Fielding N., Braun S. and Hieke G. 2020; Harris M., 2018; Gibbs P., 2017) identify largely potential negative impacts.

The EHRC concluded: *"Most of our evidence focused on the barriers that video hearings can present to defendants with a cognitive impairment, mental health condition and/or neurodiverse condition. We found that for many people with these impairments, a video hearing would not be suitable."*

The key issues are that:

- Poorer relationship between the person and their legal representative
- Legal representative is unable to read the person's body language
- Suspects are less likely to communicate their issues and needs
- There are particular effects for people with specific conditions

Poorer relationship between the person and their legal representative

Studies have indicated that lawyers believe video hearings can negatively affect their relationship with the person they are representing. In the EHRC report, legal professionals were quoted as saying:

“In my view, anybody who’s got language issues, mental health problems, or autism, ADHD, or any other learning-based difficulty, they shouldn’t be appearing by video link. It’s difficult enough working with somebody who has those problems to make sure that you’re doing your job properly and making reasonable adjustments to do it in person, so it should be avoided at all costs, other than for the most simple things”.

The University of Surrey’s, Video Enabled Justice Evaluation report found that:

“As indicated earlier in relation to the communication between defendants and their advocates, courtroom participants also recognised that defendants who appear via video may also feel uncomfortable or unable to bring a matter to the court’s attention during a hearing: ““They could feel, although they’re not able to verbalise it, they could feel that they’re not able to speak freely, they may not be encouraged to do that in the same way as they would if they were in a court room with us and we could pick up on how they were feeling and empathise more with them. I think there’s inevitably always going to be a distancing””.

“Issues with the quality of the audio-visual and framing could exacerbate the problems associated with distancing, whilst concerns were also raised about the efficacy of defence advocates when appearing from the remote location”.

“Requests made by defence advocates to speak to clients during hearings were less common in video court”

“...it’s the disconnect between me and the client in the video link hearing or if you choose to do it at the police station, it’s the disconnect between you and the prosecutor as a Defence Lawyer as opposed to when the person is produced in court, you have that face to face contact.”

The Standing Committee for Youth Justice’s report, “They just don’t understand what’s happened or why”, raised concerns from two lawyers:

“For young clients it is impossible to build a rapport with them. Also, everything takes longer to explain as you have to modify your language to ensure they understand.”

“I think with the youths you need that personal contact with them because otherwise you’re just some old guy on a screen. You know, even if you’re only like 25, you’re still old to a youth, like, you’re an adult, why should I trust you?”

Legal representative is unable to read the person’s body language

Human communication is a combination of:

- verbal (the words we use)
- vocal (our tone and inflections)
- visual (our ‘body language’)

Academic studies suggest that the words we use may make up less than 10% of our communication. The majority of our communication is actually visual.

Video links may make it more difficult for lawyers and suspects to use visual communication. Audio only links would make it impossible.

A lawyer participant in the University of Surrey's, Video Enabled Justice Evaluation report said that, *"...we could miss their body language"*.

The research noted, *"The loss of non-verbal communication in the video court may inhibit the ability of defence advocates to identify when defendants may wish to speak with them, with some commenting that video court felt more detached and impersonal "...if it's on a video link, it's not that social, it's become very sanitised...". Communication issues were relayed by former defendants, who recognised the gravity of the situation they found themselves in, "Difficult, difficult looking at my solicitor, because unless you're... it's a very personal thing...."*

"Nevertheless, for magistrates and legal advisors, video court reduced the level of non-verbal communication (e.g. eye contact) with those appearing over the link. This made it more difficult to assess body language and inhibited the ability of participants to pick up on any issues the defendant might be experiencing."

"You can only see their face and there is little interaction. In my experience unless you have time with the young person to prepare, it is very hard to tell the difference between surly teenage behaviour, a total lack of confidence and/or significant learning difficulties and a lack of understanding" (YOT officer)

Suspects are less likely to communicate their issues and needs

However, there was also evidence to suggest that defendants may be less willing to raise any issues with communication during video court hearings, owing to a perception that they would not be able to request a traditional in person hearing, "...it's not going to change nothing, it is?... They're not going to say, "Just a minute we'll get a van there for you and bring you to court for what should be your... human rights."" (007_DEF)

Particular effects for people with specific conditions

Autism

Transform Justice's report, Defendants on video – conveyor belt justice or a revolution in access? identifies specific concerns around the participation of autistic individuals:

"Dr Marie Tidball has done in-depth research into defendants with autism and their experience of the criminal justice process. She has concerns about the suitability of video hearings based on her observations of a remand hearing and a case management hearing since "the process had the effect of atrophying their ability to participate". "People on the autism spectrum often... can't take one set of experiences and transfer the learning from that experience to another scenario. So when doing a video link, giving evidence via a video link, or having part of the court procedure via video link, it was clear that they didn't associate that as being part of their case. They weren't in that space of the courtroom, so they didn't have the communicative aspect of that space to understand the significance of what was happening and what was being said to them."

ADHD

Dr Samantha Fairclough: *"Vulnerable defendants could, for example, be suffering from attention deficit hyperactivity disorder (ADHD) and thus be easily distracted by the multiple stimuli within a crowded court. (Transform Justice report).*

Anxiety and stress

Dr Samantha Fairclough (Transform Justice report) said: “... they might have an anxiety disorder which is intensified by the requirement to give evidence in a courtroom filled largely with strangers.”

The EHRC found that even where remote attendance might help a vulnerable defendant, they would still need someone physically with them:

“...those who experience high levels of stress or anxiety when attending court hearings in person might find a video hearing to be a helpful adjustment but would need support in the room where they are”.

For some suspects, the AA’s presence may be enough to allow them to participate effectively. However, the AA cannot give legal advice, so they cannot necessarily compensate for the lack of a legal representative being present.

Proposals:

- **Consideration is given to the availability of evidence concerning the potential impact on children and vulnerable adults**
- **Exclude any suspect for whom an AA is required from the provisions allowing remote legal advice during interview.**

Remote legal advice: default position or last resort?

Relationship with the joint interview protocol

The joint interview protocol makes clear that remote legal advice is an “option to be made available to a suspect”. However, we are concerned that the use of remote legal advice for children and vulnerable adults has become a default position, assumed to be the normal path unless blocked (e.g. by an appropriate adult).

The covering letter to the consultation states: *“The changes ...support continued operation of the Interview Protocol”*. The draft amendments do not seek to import the entirety of the joint protocol. Rather, they specifically add provisions that enable remote legal advice in interviews. However, once amended the provisions of the Code will be applicable without need for reference to the joint interview protocol. It is a reasonable assumption that police may focus purely on the amended Codes. The consequence of this is that the provisions of the Annex can be used in ways and contexts that do not necessarily reflect the protocol.

Proposals:

- **Exclude any suspect for whom an AA is required from the provisions allowing remote legal advice during interview**
- **To Annex AA note AA1 add the following: “and should be read and used in conjunction with it” (to retain a link with the wider context of the protocol)**
- **The signatories to the amended joint interview protocol should publish a revised version that recognises the temporary amendment to the PACE Codes (to emphasise that the two should be used in conjunction)**

Or if the Government does not agree in relation to the exclusion of children and vulnerable adults:

- **Require that the use of remote legal advice in interviews with children and vulnerable persons should be:**
 - **Only used in extremis, within tightly prescribed circumstances (taking the Code C provisions for urgent interviews in the absence of an AA as a template)**
 - **Only used where social distancing is not possible and appropriate PPE is unavailable**
 - **Only used where live-link is available (never audio-link only)**
 - **Subject to the consent of the person, and (if they are a child or vulnerable adult) their appropriate adult, and (if they are a child) the consent of their parent/guardian**

Right to face to face legal advice

In NAAN's discussion with other parties, there appears to be consensus that children and vulnerable adults are put at greater risk by remote legal advice.

In fact, PACE Code C (2019) already recognises that children and vulnerable adults are put at risk by remote legal advice. Paragraph 6B states provides that in cases where a suspect would otherwise only be provided with telephone advice from CDS direct, if the person needs an AA "the DSCC should arrange for advice to be given by a solicitor at the police station". Allowing children and vulnerable adults to be represented by remote legal advisors runs contrary to this provision.

This is of course a note for guidance rather than a provision of the Codes, which themselves are not law. The proposed amendments highlight how unsatisfactory this is. Irrespective of whether the children and vulnerable adults are excluded from remote advice, or included with consent safeguards, it ought to be explicit that children and vulnerable adults have a right to free legal advice in person. Without this, it is a temporary privilege to be removed when inconvenient to the system.

In our view, the proposed Code C Annex AA notes for guidance AA2 and AA3 could be more focused on emphasising rights, to act against remote arrangements being considered 'business as usual' and presented fait accompli.

Proposals:

- **Amend Code C to explicitly state in a provision (not a note for guidance) that children and vulnerable adults have a right to free legal advice in person**
- **Amend Code C AA2 "the custody officer, or interviewer if you have not been arrested, may well ask if you agree to the solicitor using a live telephone or live video link to advise you during the interview and explain how these arrangements would work" to read "the custody officer, or interviewer if you have not been arrested, may well ask if you agree to the solicitor using a live telephone or live video link to advise you during the interview. Before you decide they must show you and explain how these arrangements would work"**
- **Amend AA2 "before you agree" to read "before you decide whether or not you agree"**
- **Amend AA2 "both must also agree" to read "both will need to decide whether or not they agree".**
- **Amend AA3 "The explanation and if practicable, demonstration is intended to help the suspect, solicitor and appropriate adult make an informed decision and to allay any concerns they may have" to "[The explanation](#) and if practicable, demonstration is intended to answer any questions the suspect, solicitor and appropriate adult may have and make an informed decision" (removing references to AAs if children and vulnerable adults are excluded from remote arrangements)**
- **Amend Code E Annex A A1 "Together, these Annexes enable, but do not require, a solicitor whose presence at an interview has been requested by a suspect to give them advice during the interview by means of a live link or a telephone conference link" to read "Together, subject to assessment of suitability and consent, these Annexes enable, but do not require, a solicitor whose presence at an interview has been requested by a suspect to give them advice during the interview by means of a live link or a telephone conference link"**

Period of application

The covering letter to the consultation states that the changes “*will apply only for the duration of the COVID-19 outbreak*”. However, Annex AA 1 states, “*This Annex shall apply only for the 12-month period specified in The Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes C and E) (Coronavirus) Order 2020*”.

Coronavirus remains a significant public health crisis. It presents a risk to health and indeed life. Police custody is a closed environment and, depending on the facilities, this can make social distancing impossible.

However, it has often been said that the coronavirus pandemic presents a fast-moving situation and that government guidance is subject to daily change. Whilst reliance on the joint interview protocol involves some uncertainty in the absence PACE Code changes, it is more flexible. Unlike these proposed changes to PACE Code C, it can be quickly amended or stood down in response to real-time assessments of risk.

The covering letter to the consultation states that the temporary amendments are made: “*with the overall purpose of limiting the number of cases that have to be abandoned because solicitors are unable to attend in person*”. We are concerned that the amendments suggest that there is a blanket inability of legal representatives to attend in person. This is no more the case for legal representatives than it is for appropriate adults.

The reality is more complicated and dynamic. Some appropriate adults and legal representatives are shielding and cannot attend. More widely there is a concern to protect their health and safety, and to comply with Government regulations and guidelines, as there has been across the UK economy. As the joint interview protocol recognises:

- “*Government guidance on social-distancing will affect police interviews with suspects; whether in custody or elsewhere*” (para 6)
- “*In police premises that are equipped with secure interview rooms with screens that allow for social distancing; those rooms should be utilised for consultations and interviews*” (para 13)

The UK lockdown started on the 23rd March. On that day, 967 new cases were reported. The number daily reported new cases rose consistently but is now trending down. On the 1st July, the number of new cases reported had reduced to 829, below the level at which the lockdown was imposed. On the 23rd March 149 daily deaths were recorded. This has fallen back considerably since being 1,172 deaths a day on the 20th April but on the 1st July June the figure was 176. The Government’s direction of travel in relation to the coronavirus is now an easing of restrictions. Non-essential shops have opened. The 2-metre social distancing rule has been relaxed. People are being encouraged to go back to work. A new system of local lockdowns is in place.

These measures are understandably surrounded by debate and controversy. People continue to die. We do not argue that there is no need for special measures currently. However, given the dynamic context, it seems appropriate that the principle of flexibility should be reflected in the justice system.

Therefore, in our view, a fixed 12-month period represents an excessive period for temporary measures in this context. This is compounded by the following factors:

- The amendments present a significant risk to the integrity of the justice system
- The amendments can be used in isolation from the wider context set out in the joint interview protocol (e.g. the potential for social distancing)

- No mechanism is set out for reviewing the continued appropriateness of the temporary amendments within the period in light of developing circumstances
- The 12-month period will not start until August at the earliest (subject to the Home Affairs Committee approval; even later if the normal route of an affirmative resolution from both House of Parliament is required)

Proposals:

- **The operation of the temporary arrangements should be explicitly linked to the context from which its purpose derives (e.g. legal pandemic status, health data)**
- **A formal review mechanism is established, with a period no shorter than 2 months between reviews, which includes relevant external stakeholders.**
- **Consideration should be given to the role of the PACE Strategy Board in considering, discussing, and recommending changes to the Codes, with NHS/PHE representatives invited to join the group**

Health and safety

It seems clear that the central issue is the level of risk to which people in custody are being exposed.

The current draft of Code E Annex A states at A1, that remote legal advice “removes the need for the solicitor to attend the police station or other place where the interview takes place in person and thereby avoid the solicitor being exposed to the public health risks associated with the Covid-19 pandemic”.

The Fair Trials report “Justice Under Lockdown: A survey of the criminal justice system in England & Wales between March and May 2020” stated that “there is limited adherence to COVID-19 related health and safety standards in police stations, endangering public health, and putting the lives of suspects, defence lawyers, police officers, and their families at risk”. This was based on 89 responses, the majority of which came from defence lawyers.

NAAN conducted a poll of appropriate adult scheme coordinators, asking whether custody staff were using the correct PPE at appropriate times. We received responses from 16 schemes covering 15 police forces. Only one reported full compliance with the PPE guidance provide by the National Police Chiefs’ Council (NPCC).

While it is recognised that dealing with the underlying cause (health and safety issues) generates costs, whereas remote offers the opportunity of reduced costs, this does not justify measures which disadvantage children and vulnerable adult suspect.

Proposals:

- **A clear level of risk should be defined that triggers/removes the availability of these temporary, emergency arrangements**
- **The strategic focus should be on doing whatever is necessary to achieve this, (e.g. by introducing checks/accountability, assigning/adapting additional rooms) not on disadvantaging suspects by modifying their right to legal advice**

Consent

The effectiveness of consent as a safeguard in relation to remote legal advice

The requirement for informed consent is at the heart of the safeguards placed in the joint interview protocol and reflected in the Code C temporary amendment. NAAN has evidence that:

- Police officers have not been seeking the consent of suspects or appropriate adults prior to the use of remote legal advice interviews (data from around a quarter of force areas)
- Remote legal advice is presented as a *fait accompli* (e.g. “Do you want legal advice? It will be remote because the lawyers won’t come to the station at the moment”).)
- Some suspects/AAs have consented to live-link and then, at the last moment, informed that it is not functioning, and the interview will proceed with audio-only legal advice
- Vulnerable suspects and their AAs have felt pressured into consenting against their better judgement, especially where a refusal to consent would force them to develop a relationship with new lawyer and/or mean that the investigation is extended by a significant period

The latter issue is particularly important in relation to untrained familial AAs who:

- Are reliant on police to give them the correct information about their role, and to respect and support the power to withhold consent
- Are required to be sufficiently assertive to enforce the requirements (e.g. consent) where police do not respect and support them
- Are in an emotional, sometimes intimidated position; may feel under pressure, particularly where police and legal adviser wish to use remote, and may find it difficult to be assertive
- May feel that the distress and anxiety to the child/vulnerable person caused by delay and change of legal representative outweighs justice risks they may not fully appreciate.

Even in the case of experienced trained appropriate adults, this is a significant additional responsibility and there is a risk of overload. If remote legal advice remains possible, in addition to their existing tasks, they will be expected to:

- Ensure that police conduct a rigorous assessment of suitability, which may involve engaging with other parties such as liaison and diversion
- Ensure that children and vulnerable adults fully understand the potential consequences of consenting to remote advice
- Make their own determination based on various sources of information about whether to consent.

This is all in the context of a role that is still largely delivered by community volunteers and, in the context of vulnerable adults, is a non-statutory service for which no body or agency is responsible. Funding for these services is often very low, with no spare resources for additional training. Appropriate adults are an incredible resource and one that has continued to attend custody throughout the pandemic. It is important to respect that resource and its limits.

Proposal: Exclude any suspect for whom an AA is required from the provisions allowing remote legal advice during interview.

Informed consent

The provisions of the current draft of Code C Annex AA uses the term 'consent' (paragraphs 4(a)(ii), 4(b), 5(d)). In contrast, the term "informed consent" is used in:

- The joint interview protocol paragraph 11.
- The detailed overview of proposed revisions 1(d)(vi)
- Existing provisions of Code C (3.21(b)(ii), 3.22, 6J)

Additionally, Code C Annex M 4 uses the term "unconditional and fully informed consent" and 3.21B(v) uses "informed agreement".

Appropriate adults, including parents etc, need to have information about:

1. Their right to give or withhold consent; and
2. The factors which may influence the person's suitability for remote advice

Proposals:

- **The term "*informed consent*" should be used throughout Annex AA and defined**
- **The exact wording of the information that police must provide to suspects regarding the modifications (Annex AA 2) should be specified**
- **A standardised addition to the Notice of Rights and Entitlements should be published**
- **Appropriate adults (who may be parents etc) require full information (see Assessment below)**

Consent as an ongoing process

It cannot be right that consent given at one time is treated as permanent. Aside from the ethical implications, if informed consent to remote advice were a 'one shot deal', this would act as a strong disincentive for suspects and AA to consent to remote legal advice. There may be situations in which a suspect decides that, on balance, that they would be willing to begin an interview with remote advice, subject to the ability to stop the process if concerns arose (as they become more informed). This requires that consent is explicitly recognised as an ongoing and reversible state.

Annex A 6(b)(ii) and (iii) copy Code C 12.9A in referring to the ability of suspects and appropriate adults either before or during the interview to make "representations" that live link should not be used. Representations in PACE are associated with contexts in which there is a right to express a view, but the decision is in the hands of the police. However, this is inappropriate in this context because the suspect can withhold or withdraw consent. This has significant potential to confuse.

Proposal: References to the ability to make representations in Annex AA (b)(ii) and (iii) should be replaced with explicit references to the right to withhold (ii) or withdraw (iii) consent.

Specifying what consent is required for

Paragraph 4(a)(ii) does not specify that it is referring to consent for legal advice by live link or audio link. It is juxtaposed with 4(a)(i) which relates to all interviews irrespective of the presence or absence of a legal representative.

Proposal: Annex AA paragraph 4(a)(ii) is amended to clarify that it is referring to consent for remote legal representation e.g. *“seeking their consent and giving them information for the purpose of seeking their consent for legal advice via live link or telephone conference link must take place in the presence of the appropriate adult”*.

Consent provisions for children and vulnerable persons

The provisions on consent in relation to children and vulnerable persons are split between paragraphs 4(a)(ii), 4(b), 5(d). If children and vulnerable adults are not excluded from remote legal support as we recommend, the consent provisions for these groups should be all in one place. This would make the annex simpler for all and reduce the risk of misinterpretation. At the current time, there is no reference to the need for AA consent in 4(a).

Proposals:

- In Code C Annex AA, addition of paragraph 4(a)(iii) e.g.: *“An interview may not take place with legal advice provided via live link or telephone conference link without the consent of the appropriate adult”*.
- In Code E Annex A 2(a)(i) add references to the specific sub paragraphs in Code C Annex AA that relate to consent, in place of the general reference to Annex AA.

Consequences of failure to secure consent

It is important that all parties are clear of the consequences if the legal representative declines to attend. We have heard differing views. Some have asked whether, where a suspect does not consent to remote advice and representation and a lawyer is refusing to attend the police station in person, this amounts to police refusal of legal advice under s 58 PACE. Some have suggested that the police may not obtain a different lawyer.

Our understanding is that though police are expected to consider other options under the joint interview protocol, ultimately, they have a right to proceed with an interview if they so wish. The person still has a right to legal advice, so in practice they can be forced to change their legal representative to one that will attend. This would come after spending considerable time developing a working relationship in private consultation (discussing events, disclosure, prepared statements). This would introduce significant delay for police. It could have a significant disruptive effect on the participation of children and vulnerable adults (both in terms of relationships and delay). Where consent is requested, people may feel under significant pressure to agree to remote support, especially where:

- the suspect is already experiencing significant anxiety,
- a large amount of time has already passed (either in custody or waiting for a voluntary interview)

Proposals:

- **Annex AA should include a requirement for police to consider the issue of remote legal advice (under 5(a)) at the earliest possible stage, not simply when they are ready to interview**
- **Lawyers should be clear with clients from the outset whether they would be willing to attend physically should consent for remote advice be refused**
- **The Codes should be clear on what options are available to police, lawyers and suspects where there is no consent and a lawyer is unable or unwilling to attend.**

Decision-making

Assessment

The amendments seek to support the joint interview protocol. Paragraph 8 of the protocol states:

“Special care should be taken in deciding whether, and how, an interview of a child or vulnerable adult should proceed. Where legal representation in interview is to be provided remotely the custody officer (or interviewing officer when the suspect is not in custody) should comply with the principles contained in PACE Code C 12.9A. This includes considering, on a case by case basis, whether a suspect’s ability to communicate confidently and effectively for the purpose of the interview is likely to be adversely affected, undermined or limited without the physical presence of a legal advisor. This assessment must be made in consultation with the legal advisor and appropriate adult (where one is required).”

Unlike the protocol, the draft Annex AA does not reference 12.9A in relation to assessments regarding the use of remote legal advice. Instead, the proposed provisions in Annex AA draw heavily on 12.9A. However, they are not replicated exactly.

12.9A states that, *“the custody officer must consider whether the ability of the particular suspect, to communicate confidently and effectively for the purpose of the interview is likely to be adversely affected or otherwise undermined or limited...”*. Annex AA 5(a) states that the officer must be *“would not adversely affect or otherwise undermine or limit the suspect’s ability to communicate confidently and effectively with the solicitor for the purpose of the interview”*. This is a subtle difference but the effect on the suspect’s effective participation should be considered in the round (as per 12.9A).

Proposal:

- **Annex AA 5(a) should be amended to match the language in 12.9A**

Code C 12.9A states, *“Although a suspect for whom an appropriate adult is required may be more likely to be adversely affected as described, it is important to note that a person who does not require an appropriate adult may also be adversely impacted if interviewed by means of a live link”*. Annex AA does not include such a provision and as such is perhaps less clear that the relevant officer must make a case by case determination for all suspects.

Annex A 5 states that the officer’s determination must be made *“in consultation with the appropriate adult (if applicable) and taking account of other sources information about the suspect that are available (see Note 1GA)”*. We support the inclusion of content from 1GA, which encourages links to information sources, such as liaison and diversion. However, that note for guidance relates to when officers are determining under Code C 1.4 whether a person is vulnerable and therefore needs an appropriate adult. It does not mention assessments of suitability for live link. Whereas, the officer must decide about the use of remote legal advice for all suspects. Code C 12.9A does not refer to 1GA. So there is scope for confusion about vulnerability versus suitability.

We are also concerned that officers are not in a position to determine suitability. Liaison and diversion certainly present a significant opportunity and it should be clear that this should be taken wherever possible. However, while liaison and diversion teams encompass a wide range of skills, individual professionals available to police may also be limited in their ability to assess how the a person may be affected by remote legal advice in the context of the high pressure situation of a PACE interview – and may have limited insight into the legal risks. It may be that the only suitably

qualified person is a speech, language and communication professional with specific knowledge and experience of criminal justice (e.g. an intermediary). Research has demonstrated clearly that it is unreasonable to expect that police custody staff and officers will be able to identify mental vulnerability without additional, evidence-based tools that are informed by relevant professionals (NAAN 2015, 2019; McKinnon and Grubin 2013, 2014; Dehaghani 2019).

Proposals:

- **Annex AA should refer to or include the text in 12.9A. “Although a suspect for whom an appropriate adult is required may be more likely to be adversely affected as described, it is important to note that a person who does not require an appropriate adult may also be adversely impacted if interviewed by means of a live link.”**
- **Before introducing remote methods, the Government should consider how the public can have confidence that the system is operating fairly, by ensuring that evidence-based, well tested methods are used to determine suitability / risk levels to individual suspects**

Demonstration

As mentioned above the draft Annex AA draws heavily on 12.9A but does not replicate it exactly.

Code C 12.9A states, *“At the same time, the operation of the live-link must be explained and demonstrated to them”*. However, Annex AA 6(b) states, *“the custody officer or (as the case may be) the interviewer, must: (i) explain and if practicable, demonstrate the operation of the live link or telephone conference link”*. The addition of “if practicable”, which is a determination made by the police, is a significant reduction in the safeguard. Given that this relates to something as important as legal advice, it is reasonable to have the same safeguards on the uses of live link.

Proposal:

- **Remove “if practicable” in Annex AA 6(b) in line with 12.9A**

Code C 12.9A states, *“they must be advised of the chief officer’s obligations concerning the security of live-link communications under paragraph 13.13”*. This does not appear to be included in Annex AA.

Proposal:

- **In Annex AA add a requirement for the suspect, solicitor and AA to be advised of the chief officer’s obligations concerning the security of live-link communications under paragraph 13.13**

Accurate and secure communication

The amendments seek to support the joint interview protocol. Paragraph 8 of the references Code C 12.9A, which includes a provision concerning accurate and secure communication between the interviewing officer, the suspect and anyone else. This is not mentioned or referenced in Annex AA.

Proposal:

- **In Annex AA, include provision for secure and accurate communication (or refer to the existing one under PACE Code C 12.9A)**

Telephone Conference Link

The use of telephone conference link with children and vulnerable persons is particularly concerning. Human communication is highly dependent on non-verbal information. For people for whom an AA is required, the ability to see and be seen by their legal advisor may have a significant impact on their ability to effectively participate both before and during the interview. We are now several months into the new ways of working and live-link has been a part of PACE for several years.

In our view, telephone conferencing link should not be used for legal advice during an interview with a suspect for whom an appropriate adult is required. The acceptance audio-link is purely a response to some police forces saying they do not have access to live-link technology. However, live-link covers a very wide range of possible technologies. The appropriate solution is for Government and police to ensure all forces invest in this technology – not to modify the right to level advice. Reducing safeguards for suspects is not a reasonable alternative to solving the underlying issue.

We do recognise that in very rare circumstances police will be unable to establish a live link despite their very best efforts. It is possible that this could occur in the context where it is essential that an interview take place immediately. However, we remain concerned that a provision intended for use in extremis will not always be used in the intended way.

Code C Annex AA 5(c) offers one possibility. Here, in relation to the video recording of an interview using telephone conference link, *“an officer of rank inspector or above confirms that the necessary recording equipment in working order is not available at the time of the interview and considers that the interview should not be delayed until such equipment becomes available”*. Still, this could easily become a ‘rubber stamp’ process. At the very least, its use should be tightly defined, for example along the lines of urgent interviews under Code C 11.18-20 (urgent interviews).

However, it is often argued that the legal status of the PACE Code of Practice is such that police may derogate from them in extremis where they can demonstrate that every effort was made to comply and their actions were, on balance, in the interests of justice. Therefore, our preference is to see the use of telephone legal advice proscribed, at least for children and vulnerable adults. If, in extremis this provision is ignored, Courts can be the final arbiter.

Proposals:

- **Exclude any suspect for whom an AA is required from the provisions allowing remote legal advice during interview.**

Or if the Government continues to include children and adults in remote arrangements:

- **Exclude any suspect for whom an AA is required from the provisions allowing remote legal advice during interview via audio-link.**

Or if the Government continues to include children and adults in audio-link arrangements:

- **In Code C Annex AA / Code E Annex A include a requirement that, audio-link legal advice should only be used with children and vulnerable persons in extremis, within tightly prescribed circumstances (as per urgent interviews under Code C 11.18-11.20)**

Minor miscellaneous

- There is a typographical error in Code C Annex AA paragraph AA4. Repetition of “that”.
- In the current draft, Code C Annex AA 3 applies to both detention and voluntary interviews. Subparagraph 3(iii) refers to suspects. However, subparagraphs 3(i) and (3ii) refer to detainees and this should be changed to suspects.
- In Code E Annex A 2(b) suggest “...as soon as remote monitoring begins is illuminated;”
- The Annex AA 8 need to record live link is welcomed as this was missed in the protocol

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