

**Transform
Justice**

Nick Ephgrave
Criminal Justice Committee
National Police Chiefs' Council
1st Floor, 10 Victoria Street
London
SW1H 0NN

Max Hill
The Crown Prosecution Service
102 Petty France
London
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23 September 2021

Dear Mr Ephgrave and Mr Hill,

RE: The Joint Interim Interview Protocol

I am writing on behalf of Fair Trials and Transform Justice to ask for clarifications regarding the legal basis for the adoption of the Joint Interim Interview Protocol ('JIIP') between the National Police Chiefs Council, Crown prosecution Service, Law Society, the Criminal Law Solicitors' Association and the London Criminal Court Solicitors' Association, the latest version of which is dated May 2021. We understand that an updated version of JIIP is due to be published/disseminated in early October.

Fair Trials is an international human rights NGO that campaigns for fair and equal criminal justice systems. Transform Justice is a UK based charity which advocates for a fairer justice system. Since the adoption of the first JIIP in April 2020, we have both been working with the National Appropriate Adult Network to monitor the impact of the JIIP, and the ways in which the Covid-19 pandemic is affecting the effective exercise of suspects' right of access to legal assistance in police custody. The findings of our research were summarised in our 2021 report 'Not remotely fair? Access to a lawyer in the police station during the Covid-19 pandemic'.¹

In advance of any decision by the signatories to update the JIIP, or to extend its application, we would reiterate that the JIIP is undermining the fair trial rights of suspects in police custody. We would also dispute the JIIP's lawfulness on the basis that, through its adoption, the signatories purported to

¹ Available at: <https://www.fairtrials.org/publication/not-remotely-fair-access-lawyer-police-station-during-covid-19>

exercise powers that they simply do not have. Our observations below are based on expert legal opinion which we have published today, and we would request that you:

- a) Provide further information about the powers under which the signatories created JIIP; and
- b) Identify the legal basis upon which the signatories effectively made amendments to the PACE Codes.

Impact of JIIP on PACE Code C

PACE Code C sets out the requirements for detention, treatment and questioning of suspects in police custody, including provisions regarding the suspects' right of access to a lawyer. While it recognises that legal advice may be provided by telephone,² there are no provisions that enable remote participation by a lawyer at a police interview by video or audio link. This is in clear contrast to the use of video or audio links for all other PACE purposes, for which explicit amendments (including safeguards) to PACE 1984 and Code C were considered necessary. Code C indicates the need for the attendance of lawyers at police interviews in several provisions. For example, it makes clear that even where a suspect would normally be limited to telephone advice from CDS Direct, *"the DSCC should arrange for advice to be given by a solicitor at the police station"* whenever *"the police want to interview the detainee"* or *"the detainee needs an appropriate adult"*³. Under paragraph C:6.8, *"a detainee who has been permitted to consult a solicitor shall be entitled on request to have the solicitor present when they are interviewed unless one of the exceptions in paragraph 6.6 applies"*.

The JIIP acknowledges that remote interviews are not *'within the current letter of the Code of Practice'*, and it does not explicitly purport to amend the PACE Codes. The signatories consider remote legal representation in interviews to be *'within the spirit of recent amendments to criminal procedure, law and evidence in the Coronavirus Act 2020'* and they *'are a fair, reasonable and proportionate option'*.⁴ However, the practical effect of the JIIP is to amend PACE because the JIIP purports to grant powers to conduct interviews via video and audio link – powers that are absent in the wording of the PACE Act and Codes.

This was recognised in June 2020, when the Home Office consulted on proposals for new powers and safeguards which *"have the effect of modifying certain existing provisions of Codes C and E...[to] support the continued operation of the Interview Protocol"*.⁵ The Government response stated that, *"[t]he temporary changes to Code C would if implemented, modify the existing provisions which allow a suspect to have their solicitor present during their interview. They would specifically allow for legal advice during interview to be provided by a live link or a telephone conference link and for the latter,*

² PACE Code C, para. C:6.1 and C6:5

³ PACE Code C para 6B

⁴ JIIP, Para. 7

⁵ Letter to statutory consultees, 12th June 2020, para.4

<https://www.gov.uk/government/consultations/revising-pace-codes-c-and-e>

*the interview must be visually recorded,*⁶ and in deciding not to proceed with the amendments, stated that, *“The consultation responses highlighted significant issues arising from the initial proposals and the need for further consideration”*⁷. This is an explicit recognition that, if codified, the JIIP would formally modify the existing provisions of PACE.

Powers to amend PACE Codes

According to PACE 1984, powers to amend PACE Codes are held exclusively by the Secretary of State,⁸ and a code, or a revision of a code, cannot come into operation unless there is an order by the Secretary of State.⁹ This order needs to be laid before Parliament,¹⁰ and the Secretary of State needs to have consulted a wide range of interested parties regarding the code or revisions to the code.¹¹

The JIIP has not been subject to any legislative process, nor has it received any scrutiny that revisions to the PACE Codes are supposed to undergo under s.67 PACE, which includes an open consultation. The signatories do not have the authority by-pass or ignore the provisions in PACE for amending the codes, and they have no powers to circumvent the provisions of the codes by mutual agreement. This means that where there is a conflict between Code C and the JIIP, the provisions in Code C should prevail.

We are of the view that the signatories to the JIIP have acted beyond their powers by effectively amending Code C with no legal basis. Accordingly, the JIIP does not provide a lawful basis for restricting a suspect’s right of access to in-person legal assistance.

Impact of JIIP on suspects’ right of access to a lawyer

The European Court of Human Rights (‘ECtHR’) has recognised legal assistance in police custody as a crucial safeguard. In particular, it has recognised that *‘as a rule Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police’*.¹² It has further clarified its judgment in *Doyle v. Ireland* that the content of the right of access to a lawyer under Article 6(3) includes the suspects’ *‘right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings’* (emphasis added).¹³

⁶ Response to the consultation on PACE Codes C and E, para 2.1.3

<https://www.gov.uk/government/consultations/revising-pace-codes-c-and-e>

⁷ Response to the consultation on PACE Codes C and E, para 3.1

<https://www.gov.uk/government/consultations/revising-pace-codes-c-and-e>

⁸ PACE, s. 67(2)

⁹ PACE, s. 67(5)

¹⁰ PACE, s. 67(7)

¹¹ PACE, s. 67(4),(7C)

¹² *Salduz v. Turkey* [GC], App. No. 36391/02, (Judgment of 27 November 2008) para. 55

¹³ *Doyle v Ireland* (App. No. 51979/17 (Judgment of 23 May 2019), para. 74

While the JIIP does not impose a blanket ban on in-person legal assistance, the remote legal assistance that it not only facilitates, but also explicitly favours, amounts to a restriction of a suspect's rights under Article 6 of the European Convention on Human Rights.

The human rights impact of the JIIP and the restriction of the right to in-person legal assistance is very real. Research conducted by the National Appropriate Adults Network ('NAAN'), Fair Trials, and Transform Justice between 2020 and 2021 found that COVID-19 was having a damaging impact on the right of early access to legal assistance particularly for children and vulnerable adults, and that there was poor awareness of, and limited adherence to JIIP.¹⁴ In particular:

- Appropriate adults reported that on average, legal representation was provided remotely in half the interviews they attended, and more than a third reported that legal representation was usually provided via audio only;
- The police did not always seek the consent of vulnerable suspects and appropriate adults to conduct interviews remotely, in clear violation of the JIIP. There were also cases in which appropriate adults felt pressurised into consenting, or had their refusal of consent overridden;
- Some solicitors refused to attend police interviews in person, even where a child or mentally vulnerable client was suspected of the most serious offences, such as rape or murder; and
- Appropriate adults perceived legal representation as less effective when provided remotely, and reported that suspects' ability to communicate and participate effectively were undermined.

Responses to freedom of information requests obtained by Transform Justice from various police forces suggest that few police forces had developed systems and procedures for informing suspects about JIIP or obtaining their consent to conduct police interviews with remote legal assistance. This was also highlighted the HM Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS): *"It was not clear how detainees had been informed and made aware of changes to legal advice, or whether any consents about how their legal representation is provided were being recorded on the custody record."*¹⁵ Also, *"We did not find information about this recorded in any the 140 custody records we examined, nor any evidence that a detainee had given their consent when legal representation at interview was to be provided by video or telephone link."*¹⁶

The guidance in the JIIP not only poses serious threat to the right to a fair trial, but it is also the product of an unlawful exercise of powers of the signatories. Covid-19, while remaining a serious risk to help in some circumstances is now endemic, and nearly all Covid-19 related restrictions have been relaxed. The JIIP has outlived its purpose as a temporary emergency response to a crisis.

¹⁴ 'Not remotely fair? Access to a lawyer in the police station during the Covid-19 pandemic'

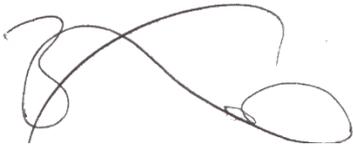
¹⁵ HMICFRS, 'Policing in the pandemic – The police response to the coronavirus pandemic during 2020'

p.4

¹⁶ p.23

As outlined above, we would request that you provide clarifications regarding the legal basis for the adoption and maintenance of the JIP as soon as possible, and before the signatories make any decisions regarding its continuation.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Bruno Min', with a stylized, flowing script.

Bruno Min
Legal Director (UK & International)
Fair Trials

A handwritten signature in blue ink, appearing to be 'Penelope Gibbs', with a clear, legible script.

Penelope Gibbs
Director
Transform Justice