

Department of Justice,  
Massey House,  
Stormont Estate,  
Belfast, BT4 3SX

By email only:

26 September 2022

Dear Department of Justice (DoJ),

**Re: Audio and Video Links (Live Links) for Northern Ireland Court and Tribunal Hearings – A Public Consultation**

Thank you for inviting the Information Commissioner's Office (ICO) to respond to the above consultation.

As you will be aware, the Information Commissioner's role includes the regulation of the Data Protection Act 2018 (DPA), the UK General Data Protection Regulation (UK GDPR) and the Freedom of Information Act 2000 (FOIA), among other pieces of legislation. Some of the proposals and questions within the consultation are outwith the scope of the ICO's remit, therefore our response will focus on the information rights elements of the consultation document.

**General observations**

The ICO recognises that the right to a fair trial is a fundamental part of society and as such, the judiciary must retain an appropriate amount of independence. Consequently, our intention is to provide useful data protection advice whilst also respecting judicial independence.

The ICO is also aware that live links have been widely used since the beginning of the Covid-19 pandemic and therefore DoJ will have already given consideration to their obligations under data protection legislation, however we would like to provide comment to further aid compliance.

## **UK GDPR – Article 36(4) statutory requirement to consult the ICO**

The consultation document states that DoJ seeks to introduce new legislation to integrate live links within the justice system. We would like to remind DoJ of their obligations under [Article 36\(4\) of the UK GDPR](#). This imposes a requirement on Government Departments and relevant public sector bodies to consult with the ICO when developing policy proposals relating to the processing of personal data. Article 36(4) states that: *“Member States shall consult the supervisory authority during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing”*.

If a decision is made to proceed with the proposed legislation, DoJ may need to initiate the requirement under Article 36(4) to consult with our office. Your Data Protection Officer will be able to guide you on this if it becomes relevant, and provide the necessary Article 36(4) Enquiry Form, which can be found [here](#).

### **Engagement of relevant data protection regime(s)**

To begin with, DoJ must consider whether the proposed processing falls under the UK GDPR and part 2 of the DPA 2018 (general processing) and/or part 3 of the Act (processing by a [competent authority](#) for [law enforcement purposes](#)). The application of the data protection regime(s) may impact a controllers data protection and personal information rights handling practices therefore this will need to be considered during the initial stages of the proposals.

### **Data protection by design and default**

DoJ and those implementing the proposals will need to comply with their obligations under Article 25 of the UK GDPR in relation to [data protection by design and default](#). Implementing the appropriate technical and organisational measures during the initial phases of the design process will help to safeguard privacy and individual rights.

## **Data protection impact assessment (DPIA)**

A [DPIA](#) will need to be completed to help identify and minimise data protection risks and demonstrate compliance with your data protection obligations. DoJ may have previously completed a DPIA at the onset of the Covid-19 pandemic, however the assessment should be refreshed and revised as and when the proposals evolve.

Where there is a high risk to the rights and freedoms of individuals which cannot be mitigated, the controller must consult with the ICO prior to the processing commencing in accordance with [Article 36](#) of the UK GDPR. Even when processing is not considered to be 'high risk', we recommend that DPIA's are completed as a course of good practice, documenting any risks and assessing whether or not remaining risks are justified.

### **What types of personal data will be processed?**

DoJ must assess what types of [personal data](#) live links will be capturing. Certain types of data are awarded additional protection, such as [special category data](#) and [criminal offence data](#). Depending on which data protection regime will be engaged, consideration should be given to the lawful bases under Articles 6 and 9 of the UK GDPR and/or Sections 41 and 42, part 3 of the DPA.

### **The 'lawfulness, fairness and transparency' principle**

DoJ has identified the need for the proposals to comply with the European Convention on Human Rights, the Human Rights Act 1998 and an individual's right to a fair trial. Whilst the ICO does not govern these matters, failure to comply with these and other laws would likely render the processing activity unlawful under the [lawfulness, fairness and transparency principle](#). For this reason DoJ must comprehensively review its compliance with its wider legal obligations.

Whilst it would not be within our remit to express views on the inclusion of the proposed 'statutory tests for participating remotely', we should explain that an assessment of this nature may help to consider the lawfulness and fairness of personal data processing on a case-by-case basis.

## **The 'data minimisation' principle**

Having considered the proposals, it is not clear to the ICO if the information communicated through live links will be recorded and stored for any purposes. In the event that the data will be retained, DoJ must give consideration to the [data minimisation principle](#) to ensure that the personal data processed is adequate, relevant and limited to what is necessary.

## **Live links for juries and the 'integrity and confidentiality' principle**

We note that DoJ has requested views on whether juries should have access to live links or whether they should attend court in person, and also, whether certain types of cases should be completed remotely. Whilst it is not within the ICO's remit to provide a view of this nature, we would like to remind DoJ to consider the potential risks and harms of the proposed processing activities.

DoJ must assess risks in relation to the [integrity and confidentiality](#) of data, including the potential loss of control of information and [section 170 offences](#). Suitable measures to protect personal data may include an 'appropriate use policy' document which:

- addresses when it is and is not acceptable for a juror to participate via a live link,
- clearly sets out how jurors are to handle personal data,
- explains the purposes for which any video and audio footage is handled, retained and processed in the given circumstances,
- articulates the general need to exercise care when utilising live links and how to maintain the integrity and confidentiality of information,
- affirm who is entitled to view and have access to the information exchanged via the live link, and
- outline how the policy is enforced and detail sanctions and/or penalties which exist for a breach of policy.

You may find our [working from home guidance](#) of use in this regard.

## Open justice

The consultation highlights the need to balance the principle of 'open justice' against obligations under the Criminal Justice Act (Northern Ireland) 1945, s29 and the Contempt of Court Act 1980, s9. Whilst the ICO does not regulate these legislations, we must explain that processing contrary to either of these Acts would also be contrary to your obligations under the data protection principles, specifically the [lawfulness, fairness and transparency principle](#). Consequently, we would urge DoJ to comprehensively consider and document the use of live links and how open justice would be balanced against the quoted Acts, as well as the resulting effects on participants, the judiciary, wider society, democracy and more.

## Staff training

Given the potential scope for personal data processing and the sharing of personal information, staff should be provided with practical [data protection training](#) specific to their role. Training on the appropriate use of the technology and software should also be carried out to ensure data security. Such training should be refreshed on a regular basis, especially as the proposals state that the legislation will be flexible in order to accommodate the evolution of, and improvements in technologies.

## Individual rights

Individuals have [information rights](#) afforded to them under data protection law, such as the right of access and the right to object to processing. DoJ must consider how these rights will be promoted and facilitated in advance of any live links processing.

When assessing personal information rights, consideration must be given to whether any of the proposed processing activities constitute 'judicial processing' and if so, whether DoJ or other relevant controllers, can and/or should engage the exemptions under [Schedule 2, Part 2, Paragraph 14 of the DPA 2018](#).

## Concluding remarks

We ask that DoJ keep the ICO updated on any significant changes in approach via formal consultation routes where these apply and/or via existing engagement points of contact. In the meantime, you may find it helpful to consult our website and the information contained within the [Guide to the UK GDPR](#).

We hope you find the above comments helpful as you move forward with the consultation. Should you require clarification of any of the points made, please feel free to contact us at [ni@ico.org.uk](mailto:ni@ico.org.uk) or on 0303 123 1114.