Police, Crime, Sentencing and Courts Bill

Fair Trials' Briefing for Second Reading

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About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. Our work combines: (i) helping suspects to understand and exercise their rights; (ii) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (iii) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

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INTRODUCTION

Our criminal justice system is facing serious challenges that are undermining its capacity and its ability to deliver fair and effective justice. Courts are under serious strain due to the growing backlog of criminal cases, the UK has one of the highest prison populations in Europe, and thousands of people are being held in prison for more than 6 months waiting for a trial, with many being held in cells for more than 23 hours a day.

However, the Police, Crime, Sentencing and Courts Bill ('the Bill') fails to address these urgent challenges. While Fair Trials understands the need to tackle serious violence and offending, the solutions proposed by the Bill that are centred on more policing, more arrests, more offences, and more imprisonment, are unlikely to deliver the desired results. Fair Trials is concerned that the Bill risks undermining the public's confidence in the criminal justice system, and undermine equality and the right to a fair trial.

Significant concerns have already been raised regarding the impact of the Bill on the right to protest and disproportionate increases in maximum sentences for politically-sensitive crimes. Fair Trials shares many of these concerns, but we wish to draw attention to other aspects of the Bill that are likely to affect the fairness of the criminal justice system in England and Wales, and should be subject to intense scrutiny.

The Bill has many provisions that have long-lasting, serious implications on human rights, so it is essential that it is carefully scrutinised in its entirety, and not rushed through Parliament.

1. SERIOUS VIOLENCE REDUCTION ORDERS: ADDITIONAL STOP AND SEARCH POWERS

(Part 2, Chapter 1, Clauses 7-22, and Part 10, Clauses 139 – 140)

1.1 **The wide powers and discretion already afforded to police to stop and search individuals has repeatedly led to the racist profiling of black and other minority ethnic groups across the country. Stop and search powers should not be expanded. Existing powers should be reviewed to consider whether they are strictly necessary, and whether they are exercised in a proportionate and non-discriminatory manner.**

1.2 Clause 139 proposes to extend stop and search powers available to the police in relation to Serious Violence Reduction Orders, in addition to the already extensive existing police powers of stop and search. The proposal to expand stop and search ignores the overwhelmingly evidence about its discriminatory impact and growing concerns about systemic racism in the police. It is not clear how, in practice, a police officer will be able to identify an individual subject

to a Serious Violence Reduction Order without first stopping an individual and requesting identification. As a result, this additional police power appears to merely extend the police's ability to stop and require individuals to identify themselves.

1.3 It is well-evidenced that police stop and search is discriminatory in practice, targeting Black people and other ethnic minorities at rates 9 times that of white people.[1] In London, young Black men are 19 times more likely to be stopped and searched than white people.[2] Nationally, a total of 577,054 stops were carried out across England in 2019-20, the highest levels for 6 years.[3] However, 76% of these stops and searches led to no further action.[4] Rather than giving the police more powers, the priority should be to review the necessity of existing stop and search powers, and to ensure that such powers are exercised fairly and proportionately.

1.4 In addition, the Serious Violence Reduction Orders also impose criminal penalties for a failure to adhere to the order, with a maximum sentence of two years.[5] Fair Trials is concerned that this will merely further criminalise individuals already subject to multiple and overlapping criminal penalties, trapping people in a cycle of criminalisation, and frustrating rehabilitation efforts.

2. 'SERIOUS VIOLENCE' DATA SHARING DUTY ON LOCAL, EDUCATION AND HEALTH AUTHORITIES

(Part 2, Chapter 1, Clauses 7 – 21)

2.1 **Imposing a legal duty on essential service providers such as the NHS, schools and local authorities to share information with the police can result in people being unable to access those essential services, resulting in significant harm.**

2.2 Clauses 9, 15 and 16 of the Bill create and apply a legal duty on local authorities, education authorities, health authorities, prison authorities, and youth custody authorities to share data with the police and other authorities as part of collaboration to 'prevent and reduce serious violence'.

2.3 The stated aim of 'reducing serious violence' set out in Clause 12 is extremely broad, and defined vaguely as 'preventing people from becoming involved in serious violence', including

[1] Home Office, 'Police powers and procedures, England and Wales, year ending 31 March 2020 second edition (27 October 2020)
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Clause 139

becoming a victim of serious violence, and 'reducing instances of serious violence' in an area. Clause 16 gives police the power to ask any of the relevant authorities for data in relation to reducing serious violence, and imposes a duty on authorities to supply it.[6]

2.4 Fair Trials appreciates that the prevention of serious violence should be a multi-agency effort, and not the sole responsibility of the police. However, expansive powers by the police to compel other authorities to share information can result in people afraid to access those essential services, such as healthcare, and has also resulted in policing strategies specifically targeted at denying people access to those services, such as housing, education and welfare.

2.5 **When data is shared from essential service providers, such as healthcare, with the police, it results in people being afraid or unable to access those services for fear of being reported.** Previous examples of this include pregnant migrant women who chose not to access essential antenatal healthcare because they feared being reported to immigration authorities because of data sharing between the NHS and the Home Office as part of the 'hostile environment'.[7] Victims of domestic abuse have also previously been too afraid to contact police because police shared their immigration status with immigration authorities, and even prioritised immigration enforcement over safeguarding the victims of domestic violence.[8] Similarly, some parents were afraid to send their children to school due to data-sharing between the Department for Education and the Home Office, which was passing the personal details of 1,500 children a month to the Home Office, also as part of the hostile environment.[9]

2.6 If this data-sharing is implemented, it could result in people afraid to access healthcare, welfare or even go to school over fears of being reported to the police, including people who may themselves be victims of violence.

2.7 **Data sharing between local, education and health authorities and the police as part of politicised strategies, such as which occurred as part of the police's strategy against 'gangs' using the Gangs Matrix database, has also caused serious harm to affected communities.** Many victims of violence and many innocent people were wrongly or unfairly implicated by indiscriminate and far-reaching data collection and sharing through the Gangs Matrix, which

[6] Clause 16(4)
[7] Amelia Gentleman, 'Pregnant women without legal status 'too afraid to seek NHS care' (20 March 2017) <https://www.theguardian.com/uk-news/2017/mar/20/pregnant-asylum-seekers-refugees-afraid-seek-nhs-maternity-care>
[8] Jamie Grierson, 'Police told not to share immigration data of domestic abuse victims', (17 December 2020) <https://www.theguardian.com/uk-news/2020/dec/17/police-told-not-to-share-immigration-data-of-domestic-abuse-victims>
[9] Sally Weale, 'Department of Education criticised for secretly sharing children's data', (12 November 2019) <https://www.theguardian.com/education/2019/nov/12/department-of-education-criticised-for-secretly-sharing-childrens-data>

has disproportionately targeted and criminalised friendships between young Black men.[10] Exclusion from education, eviction from housing and denial of welfare were all fundamental Gangs Matrix police tactics, aided by data sharing between these authorities and the police.[11] The police have refused to be bound by data protection laws in the profiling and data collection carried out as part of the Gangs Matrix, and were subsequently reprimanded by the Information Commissioner.[12] The data-sharing duty in the current Bill may lead to similar denials of essential services and is likely to result in similar data protection and fundamental rights breaches.

2.8 These data-sharing measures could also facilitate the increased use of automated profiling systems and data analytics, which have repeatedly resulted in discriminatory and unfair outcomes when used by police.[13]

3. 'UNAUTHORISED ENCAMPMENTS'

(Part 4, Clauses 61 – 63)

3.1 **Fair Trials has serious concerns that new offences criminalising "unauthorised encampments" will result in the over-criminalisation, and further over-representation of Gypsy Roma and Traveller ('GRT') people in the criminal justice system.**

3.2 Clause 61 of the Bill creates a new offence of "residing on land without consent in or with a vehicle" with a maximum sentence of 3 months' imprisonment, and the police are to be given expanded powers under Clauses 61-63 to seize property.

3.3 The Government has made it very explicit that the primary targets of the newly proposed 'unauthorised encampment' offences are GRT communities. While it has been suggested that these new offences will help to tackle the "*unfair, negative image of… travellers*",[14] we believe that they will have the exact opposite impact - of drawing GRT people disproportionately into the criminal justice system, and subjecting them to discriminatory treatment by the police and other decision-makers.

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[10] Peter Yeung, 'The grim reality of life under Gangs Matrix, London's controversial predictive policeing tool' (2 April 2019) <https://www.wired.co.uk/article/gangs-matrix-violence-london-predictive-policing>

[11] Amnesty, 'Trapped in the Gangs Matrix', <https://www.amnesty.org.uk/trapped-gangs-matrix>

[12] Information Commissioner's Office, 'ICO finds Metropolitan Police Service's Gangs Matrix breached data protection laws' <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/11/ico-finds-metropolitan-police-service-s-gangs-matrix-breached-data-protection-laws/>

[13] Matt Burgess, 'UK police are using AI to inform custodial decisions – but it could be discriminating against the poor' (1 March 2018), https://www.wired.co.uk/article/police-ai-uk-durham-hart-checkpoint-algorithm-edit

[14] Home Office, 'Policy Paper – Police, Crime, Sentencing and Courts Bill 2021: unauthorised encampments factsheet' (10 March 2021)

3.4 **GRT people already face some of the worst criminal justice outcomes amongst ethnic groups in the UK.**[15] According to a survey HM Inspectorate of Prisons, roughly 5% of male prisoners, and 7% of female prisoners are from GRT communities[16] – a very significant overrepresentation given that GRT people are reported to only number around 63,000 in the UK (less than 0.1% of the total population). Criminalising more GRT people can only worsen this challenge. It also risks promoting the harmful and unjust association of GRT communities with criminality that can influence policing practices, and biased attitudes within the criminal justice system.

4. EXPANSION OF REMOTE JUSTICE PROCEEDINGS

(Part 12, Clauses 168 – 169, and Schedule 19)

4.1 **The plans to expand the use of remote hearings via video and audio links in criminal proceedings raise significant concerns regarding equality and the right to a fair trial. While during the pandemic video and audio link proceedings have been required as an exceptional measure to facilitate the continuance of criminal justice proceedings, the long-term normalisation of this practice could undermine fair and equal justice for the foreseeable future.**

4.2 Clause 168 of the Bill would enable the use of video and audio for a wide range of criminal proceedings including: a preliminary hearing, a summary trial, a trial on indictment, appeals to the Crown Court, sentencing hearings, bail hearings, proceedings under the Criminal Procedure (Insanity) Act, and under the Mental Health Act.[17] The safeguards set out in Clause 168(4) and (6), considered below, are not sufficient.

4.3 Multiple studies have shown that remote justice proceedings are an inadequate substitute for in-person hearings, with vulnerable defendants especially at risk of unfair trials. Remote hearings can interfere with defendants' right to access effective legal assistance, to participate effectively at their own hearings, and to review and challenge information and evidence relevant to the proceedings. There is also evidence suggesting that remote hearings disproportionately result in custodial sentences.

Vulnerable defendants

[15] House of Commons, Women and Equality Committee, 'Tackling inequalities faced by Gypsy, Roma and Traveller communities – Seventh Report of Session 2017-2019' (5 April 2019)
[16] HM Inspectorate of Prisons, Annual Report 2019-2020 (20 October 2020)
[17] Clause 168(3)

4.4 **Vulnerable defendants are especially vulnerable to unfair trials where trial proceedings are conducted remotely.** According to the Equality and Human Rights Commission ('EHRC'), video hearings are unsuitable for disabled people, such as those with learning difficulties, cognitive impairment or a mental health condition.[18] It has noted that *"opportunities to identify impairments and make adjustments"* were lost or reduced where defendants appeared in court by video link. The EHRC were also concerned that the emergency use of remote justice may *"place protected groups at further disadvantage and deepen entrenched inequality."*[19]

4.5 The EHRC has also pointed out that *"poor connections cause important information to be missed"*, and they *"can cause disconnection and separation from people and legal process"*,[20] significantly restricting vulnerable people's access to justice.

Disproportionately severe outcomes

4.6 **Remote court proceedings can produce less favourable criminal justice outcomes for defendants.** The March 2020 report on 'video-enabled justice' funded by the Home Office concluded that individuals whose cases were handled remotely are more likely to be jailed and less likely to receive a community sentence. The proportion of unrepresented defendants receiving custodial sentences was higher than the rate for represented defendants. Moreover, those sentenced in the more traditional court setting were more likely to receive fines or other community sentences. [21] In addition, the 2010 Ministry of Justice study into video justice also found that the rate of guilty pleas and custodial sentences were higher in the video pilot than in traditional courts.[22]

Communication in remote proceedings

4.7 **Remote court proceedings can affect the effectiveness of lawyer-defendant communications, undermining defendants' ability to access legal advice and effective legal representation.** Fair Trials has found that lawyer-defendant communications have been badly affected during the COVID-19 pandemic, meaning that defendants are finding it more difficult to consult with their

[18] Equality and Human Rights Commission, 'Inclusive justice: a system designed for all: Interim evidence report', April 2020. <https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf>

[19] Equality and Human Rights Commission, 'Preventing the health crisis from becoming a justice crisis', 22 April 2020. <https://www.equalityhumanrights.com/en/our-work/news/preventing-health-crisis-becoming-justice-crisis>

[20] Equality and Human Rights Commission (n 18).

[21] Fielding, N., Braun, S. and Hieke, G. 'Video Enabled Justice Evaluation', March 2020. <http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>

[22] Terry, M., Johnson, S. and Thompson, P. 'Virtual Court pilot: Outcome evaluation', in *Ministry of Justice Research Services 21/10*, December 2010. <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>

lawyers, and to seek advice before, during, and after court hearings. [23] Some of these difficulties are attributable to the poor quality or unreliability of the technology used to facilitate client-lawyer consultations.

4.8 A March 2020 report on 'video-enabled justice' funded by the Home Office, and carried out by the Sussex Police and Crime Commissioner in conjunction with the University of Sussex, reinforced many of these same concerns, especially with regards to defendants' and lawyers' experiences of the process. The report found that found that defendants appearing via video-link were less likely to have legal representation. Even when they did, there were serious issues. The report stated that *"loss of face-to-face contact in video court can create challenges in terms of advocates developing trust and rapport with their clients"* and *"appearing over the video link could make defence advocates less effective, particularly in relation to bail applications."*[24]

Safeguards

4.9 The 'interests of justice' test set out in Clause 168(4) of the Bill, which gives parties to the proceedings the ability to make representations, considers the views of the defendant as just one of the factors to be taken into account. The defendant's views are not determinative, or even recognised as being a primary factor for deciding whether or not court proceedings should take place remotely.

4.10 In addition, the vague requirement to take into account "*all of the circumstances of the case*" including "*whether that person would be able to take part in the proceedings effectively*,"[25] does not provide sufficient safeguards for vulnerable defendants. There is no requirement or mechanism within the Bill for the court to assess the needs of vulnerable defendants, and how their ability to participate in remote justice proceedings might be impacted.

5. PRE-CHARGE BAIL

(Part 2, Chapter 4, Clause 43, and Schedule 4)

[23] Fair Trials, 'Justice Under Lockdown: A survey of the criminal justice system in England & Wales between March and May 2020', 2020. Pg 8 <https://www.fairtrials.org/sites/default/files/publication_pdf/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf>

[24] Fielding, N., Braun, S. and Hieke, G. (n 21)

[25] Section 168 (4) and (6)

5.1 **The removal of the presumption against pre-charge bail undermines the presumption of innocence. The extension of time limits for pre-charge bail risks disincentivising expeditious investigations, and it is likely to add to existing delays in the criminal justice system.**

5.2 The Bill proposes significant changes to laws on pre-charge bail (or 'police bail'), including the removal of the presumption against pre-charge bail under the Police and Criminal Evidence Act 1984 (Schedule 4, Part 1), and the extension of time limits on pre-charge bail (Schedule 4, Part 4).

5.3 Fair Trials recognises that there needs to be more information and certainty for suspects, victims and witnesses during police investigations, and we agree with the Government that it is in no-one's interests for suspects to be released under investigation for excessively lengthy periods. However, we would strongly dispute that the incentivisation of pre-charge bail, and the relaxation of time limits are appropriate ways to address these challenges.

5.4 First, pre-charge bail amounts to interference with the right to be presumed innocent. Individuals under criminal investigation are legally innocent, and are entitled to be treated as such. However, being released under pre-charge bail often means that they are subject to conditions that considerably limit their rights and freedoms without any judicial oversight, even though they are not formally accused of any wrongdoing. We appreciate that there are circumstances where precautionary measures might be necessary to ensure the integrity of investigations, and/or to prevent serious harm to others (for example, in domestic violence cases). However, these should be exceptions applied on a case-by-case basis, not the rule. Where an individual is presumed innocent, there should be a general presumption in favour of unconditional liberty.

5.5 Second, extending time limits for pre-charge bail is likely to be counterproductive to the aim of ensuring efficient management of investigations. The Bill proposes extending the initial period of pre-charge bail more than threefold, from 28 days to 3 months, and in total, it could subject people to pre-charge bail for a maximum period of up to nine months without any judicial intervention. Despite these proposed relaxations on time limits, the Government has stated that it still "*expects [police] forces to continue to conduct their investigations in an expeditious manner*."[26] This expectation seems misguided given that in some areas, the average length for which an individual can be released under investigation is 228 days.[27]

[26] Home Office, 'Policy Paper – Police, Crime, Sentencing and Courts Bill 2021: pre-charge bail factsheet' (10 March 2021)
[27] The Law Society, 'Release under investigation' (October 2019)

5.6 Instead of extending time limits for pre-charge bail, there should be new time limits for individuals released under investigation (at present there are no legal timescales). This could incentivise more efficient investigations by the police, and less time spent by suspects in limbo, not knowing how, if, and when the cases against them will progress.

6. OVERSEAS PRODUCTION ORDERS

(*Part 2, Chapter 4, Clause 47, and Schedule 5*)

6.1 **The Bill fails to address shortcomings in existing laws on Overseas Production Orders that prevent transparency and effective judicial scrutiny.**

6.2 Clause 47 and Schedule 5 of the Bill propose amendments to the Crime (Overseas Production Orders) Act 2019 ('COPO Act') that seek to clarify the types of electronic data that can be sought through Overseas Production Orders, and that relax restrictions on the service of such orders.

6.3 As the Government explains in its factsheet, these amendments are intended to address issues highlighted during the implementation of the COPO Act, and to allow a more effective process for accessing electronic data held overseas.[28] Fair Trials understand the need for a more streamlined approach for obtaining electronic evidence across borders for criminal investigations and prosecutions. However, the COPO Act contains insufficient safeguards for defendants against whom the order is sought. Although individuals subject to the order are able to challenge it before courts, section 8 of the COPO Act enables judges to include 'non-disclosure' orders. The circumstances in which such non-disclosure orders can be made are not clearly defined, which in practice, could prevent many, if not most, defendants from finding out about an order against them. This Bill is a missed opportunity by the Government to address this challenge, and to ensure that Overseas Production Orders are subject to transparent and effective scrutiny.

[28] Home Office, 'Policy Paper – Police, Crime, Sentencing and Courts Bill 2021: police powers factsheet' (10 March 2021)