



## **Covid-19 and the criminal law**

### **Fair Trials submission to the Justice Committee**

**9 April 2020**

#### **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 & SUMMARY**

New Covid-19 related criminal offences, changes to the operation of the criminal justice system and the increasing use of certain mechanisms during the pandemic have had a huge impact on criminal justice in England & Wales.

There have been significant and serious issues with disproportionate policing of Covid-19 regulations and laws, and in the resulting imposition of fines (through Fixed Penalty Notices) and criminal charges under those laws and regulations. As a result of this, and confusion amongst police, prosecutors, magistrates and judges over the new laws, there have been a significant and unacceptable number of unlawful prosecutions under those regulations and laws.

The increased use of trial waiver systems for Covid-19 related criminal cases, such as the Single Justice Procedure, has led to extremely concerning outcomes, with the vast majority of charges receiving no plea.

Defendants are also facing prolonged pre-trial detention as custody time limits are extended repeatedly, with record numbers of people held in pre-trial detention and thousands held beyond the legal custody time limits, made to suffer in inhumane prison conditions due to the Government's refusal to release people on bail or to get cases heard on time.

## 1. THE PROCESS OF MAKING NEW CRIMINAL OFFENCES

- 1.1 A very large number of Health Protection (Coronavirus) Regulations ('the 'Regulations') have been brought in over the last year since March 2020, with one assessment calculating that the 'lockdown' rules made by the Regulations had changed 64 times since March 2020.<sup>1</sup>
- 1.2 These have created unprecedented criminal restrictions on society and people's lives, with new Regulations brought in on a regular basis, and often published mere hours before they come into force, and in doing so, create a raft of new restrictions on the way people have to live their lives and related criminal offences for breaching those restrictions.
- 1.3 While Fair Trials appreciates that there has been an unprecedented need for the Government to take urgent action to protect lives and the country's health, the processes by which these Regulations were adopted have lacked sufficient scrutiny, despite the serious implications on individual freedoms. On average, these Regulations have changed every four and a half days since March 2020, with the total size of all coronavirus legislation amounting to 108 pages and 50,000 words after the introduction of Tier 4 measures in December 2020.<sup>2</sup> Further measures have since been brought in. This confusing matrix of oft-changing rules and regulations has significantly contributed to unnecessary and unlawful levels of criminalisation, discussed in more detail below.
- 1.4 **New criminal laws must be subject to proper parliamentary scrutiny, with consultation where necessary; they must be brought in with reasonable notice, enabling those subject to them and those enforcing them the time to properly understand them. We also question whether criminal offences are needed to deal with a public health issue.**

## 2. FIXED PENALTY NOTICES

- 2.1 There are serious challenges with the enforcement of the Regulations through financial penalties, Fixed Penalty Notices (FPNs). FPNs are issued on the spot, with almost no scrutiny compared to criminal prosecutions, without the additional checks and balances of the Crown Prosecution Service pre-charge, a defence lawyer, or magistrate/judge. The only way a person can contest a FPN is to subject themselves to a prosecution, incurring significant legal and financial risks. We are concerned that people are, in practice, being forced to pay FPNs, even if they have been inappropriately issued, at what is an extremely difficult time financially for many.
- 2.2 There are also serious and significant issues with the unlawful issuing of FPNs. As of 14 February 2021, police forces across England and Wales had issued a total of 68,952 Fixed Penalty notices

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<sup>1</sup> The Guardian, 'English Covid rules have changed 64 times since March, says barrister' , 12 Jan 2021 <https://www.theguardian.com/world/2021/jan/12/england-covid-lockdown-rules-have-changed-64-times-says-barrister>

<sup>2</sup> The Guardian, 'English Covid rules have changed 64 times since March, says barrister' , 12 Jan 2021 <https://www.theguardian.com/world/2021/jan/12/england-covid-lockdown-rules-have-changed-64-times-says-barrister>

for breaches of Coronavirus restrictions.<sup>3</sup> However, there is clear evidence of a ‘postcode lottery’ of FPNs throughout the entire pandemic, with FPNs distributed at significantly different rates by police forces in different areas of the country.<sup>4</sup> Fines have also been given to children, despite the Regulations not applying to children.<sup>5</sup> Some of these failings are unsurprising given that 9 out of 10 police officers do not understand the lockdown rules and regulations,<sup>6</sup> and it there have been many reported examples of police enforcing the government’s non-legal ‘guidance’ as opposed to actual criminal offences.<sup>7</sup>

- 2.3 **In addition, the police figures on FPNs show a serious racial disparity, with Black and Asian people punished disproportionately more than white people.** Nationally, in 2020, Black, Asian and ethnic minority (BAME) people in England were 54% more likely to be fined under the Regulations than white people.<sup>8</sup> Whilst 3.5% of the population in England is Black, Black people received 5% of fines issued in England. Asian people represent 7.8% of the population in England but received 13% of FPNs. This disparity occurs even with no ethnicity being recorded for 23% of those receiving FPNs.<sup>9</sup> In the most recent figures available in February 2021, police again issued FPNs in a discriminatory manner, issuing 12% of FPNs to Asian people and 7% of FPNs to Black people.<sup>10</sup>
- 2.4 **It has been acknowledged by the CPS and the police that their failures to apply the Coronavirus Act and Regulations correctly has led to many unlawful prosecutions, leading to their ongoing review.**<sup>11</sup> It is entirely correct that these prosecutions have been reviewed and indeed it has uncovered numerous unlawful prosecutions, as considered below. However, it is contradictory

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<sup>3</sup> Update on Coronavirus FPNs issued by police – National Police Chief’s Council, 25<sup>th</sup> February 2021 <https://news.npcc.police.uk/releases/update-on-coronavirus-fpns-issued-by-police>

<sup>4</sup> Big Brother Watch, Fair Trials and Ors letter to the NPCC, June 2020 <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/07/Reply-from-Big-Brother-Watch-Ors-to-Police-Chiefs-June-2020.pdf> and Big Brother Watch ‘Emergency Powers and Civil Liberties Report’, February 2021’ <https://bigbrotherwatch.org.uk/wp-content/uploads/2021/03/Emergency-Powers-and-Civil-Liberties-Report-FEB-2021.pdf>

<sup>5</sup> The Independent, ‘Police wrongly fining children under coronavirus law’, 15 April 2020 <https://www.independent.co.uk/news/uk/crime/coronavirus-lockdown-uk-children-fine-police-latest-a9466541.html>

<sup>6</sup> The Telegraph, ‘Nine in ten police officers question the clarity of Covid rules’, 22 February 2021 <https://www.telegraph.co.uk/news/2021/02/22/nine-ten-police-officers-question-clarity-covid-rules/>

<sup>7</sup> The Guardian, ‘UK police reissued with guidance on enforcing coronavirus lockdown’, 1 April 2020 <https://www.theguardian.com/world/2020/mar/31/uk-police-reissued-with-guidance-on-enforcing-coronavirus-lockdown>

<sup>8</sup> The Guardian, ‘BAME people fined more than white population under coronavirus laws’, 26 May 2020 <https://www.theguardian.com/world/2020/may/26/bame-people-fined-more-than-white-population-under-coronavirus-laws>

<sup>9</sup> Big Brother Watch, Fair Trials and Ors letter to the NPCC, May 2020 <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/05/Letter-to-Martin-Hewitt-from-Big-Brother-Watch-Ors.pdf>

<sup>10</sup> Fixed penalty notices issued under COVID-19 emergency health regulations by police forces in England and Wales – NPCC Data Pack <https://cdn.prgloo.com/media/c1cd9d23512643b28d36a2b5f0eabc3e.pdf>

<sup>11</sup> CPS Review, May 2020 <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

to accept this without taking action to address the problems with the unlawful issuing of FPNs by police.

- 2.5 Given the 12% rate of unlawful charges brought under the regulations as found by the Crown Prosecutions review, discussed in more detail below, if at a conservative estimate 10% of the 68,952 FPNs recorded in England and Wales were unlawfully issued, this would account for 6,800 unlawfully issued FPNs. This represents serious injustice during the pandemic that must be investigated and remedied. FPNs do not have the safeguards of subsequent review by prosecutions lawyers and/or magistrates, and even then there have been continued failings.
- 2.6 Fair Trials, along with numerous other civil society organisations, MPs and members of the House of Lords,<sup>12</sup> believe that a significant number of FPNs have been wrongly issued. In addition, in light of the fact that repeatedly amended Regulations will present ongoing enforcement challenges, there is also a continued risk of FPNs being wrongly issued.
- 2.7 **An urgent national review of all FPNs issued under coronavirus regulations is required, and going forward, it should be considered whether criminal penalties and fines are the right way to deal with a public health issue.**

### 3. WRONGFUL CHARGES AND PROSECUTIONS

- 3.1 There have been significant and unusually high rates of wrongful prosecutions and convictions under the Coronavirus Act and the Health Protection Regulations throughout the pandemic. This is a serious cause of concern and completely undermines the rule of law and trust in the system.
- 3.2 An ongoing review by the CPS has found that 359 of 1,252 charges made last year under Coronavirus Regulations and laws were later withdrawn or quashed in court.<sup>13</sup> So far, every single one of the 232 prosecutions under the Coronavirus Act have been unlawful. 127 wrongful charges were made under the Regulations, which amounts to 12% of all charges under the Regulations.<sup>14</sup>

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<sup>12</sup> Big Brother Watch, Fair Trials and Ors letter to the NPCC, June 2020 <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/07/Reply-from-Big-Brother-Watch-Ors-to-Police-Chiefs-June-2020.pdf>

<sup>13</sup> Independent, 'Almost a third of prosecutions under coronavirus laws dropped, review shows', 6 February 2021 <https://www.independent.co.uk/news/uk/home-news/coronavirus-laws-prosecutions-wrongful-court-review-b1798423.html>

<sup>14</sup> Independent, 'Almost a third of prosecutions under coronavirus laws dropped, review shows', 6 February 2021 <https://www.independent.co.uk/news/uk/home-news/coronavirus-laws-prosecutions-wrongful-court-review-b1798423.html>

- 3.3 Prosecutions have been brought against people experiencing homelessness, despite the Regulations at the time specifically excluding homeless people.<sup>15</sup> Repeatedly, prosecutions have been brought in England under Welsh coronavirus regulations.<sup>16</sup>
- 3.4 This is an unacceptably high rate of unlawful prosecutions. These systemic failings are putting fundamental rights and justice at risk in this crisis and threatening trust in the criminal justice system. **The Crown Prosecution Service must continue to review all cases under the Coronavirus Act and Health Protection Regulations, and the entire strategy of using new criminal offences to police a public health issue should also be reviewed.**

#### 4. TRIAL WAIVERS: SINGLE JUSTICE PROCEDURE

- 4.1 We are very concerned about the use of the Single Justice Procedure (SP) in relation to coronavirus charges and prosecutions, under both the Regulations and the Coronavirus Act.
- 4.2 The SJP is a process which is utilised by the police to bring applicable criminal cases into the Court system without reference to the Crown Prosecution Service. It is available for summary only, non-imprisonable cases, provided the accused is 18 or over. Where a suspect pleads guilty or does not respond to the Single Justice Procedure Notice, the case is dealt with 'on the papers' by a single Magistrate. Conviction results in a fine and a criminal record.<sup>17</sup> There is a blanket assumption under the SJP that anyone accused of an offence has a weekly income of at least £440 (based on the current national median income for pre-tax earnings), and unless the court receives evidence to the contrary, that income level is used to assess the ability to pay fines.<sup>18</sup>
- 4.3 **It has been confirmed that hundreds of people, and possibly thousands, have been convicted of coronavirus offences behind closed doors via the Single Justice Procedure – and many of these may be unlawful.** In only the first three months of cases brought under the Single Justice Procedure, between July 2020 and September 2020, 2 charges were brought under the Coronavirus Act and 1,084 were brought under the Regulations.<sup>19</sup> These are the most recent figures available, but given the trajectory of cases in those first three months - 23 cases in July, 132 in August, and 929 in September – it is likely there have been several thousand coronavirus cases brought under the procedure by now.

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<sup>15</sup> CPS Review, June 2020 <https://www.cps.gov.uk/cps/news/cps-review-finds-improvements-coronavirus-charging-compliance> and Manchester Evening News, 'Charge of breaching coronavirus lockdown law against drunk man withdrawn after court told it doesn't apply to the homeless', April 2020 <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/charge-breaching-coronavirus-lockdown-law-18063383>

<sup>16</sup> CPS Review, May 2020 <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

<sup>17</sup> Gov.uk, 'Single justice procedure notices' <https://www.gov.uk/single-justice-procedure-notice>

<sup>18</sup> Can't Pay My Fine, 'Understanding the single justice procedure' <https://www.cantpaymyfine.co.uk/understanding-the-single-justice-procedure/>

<sup>19</sup> Parliamentary Question 143756 tabled by Alex Cunningham MP on 26 January 2021 <https://questions-statements.parliament.uk/written-questions/detail/2021-01-26/143756>

- 4.4 **The two cases brought under the Coronavirus Act are both unlawful, as they were brought under Schedule 22 which has not yet been activated.** Despite this, one individual pleaded guilty to the Schedule 22 charge, and so pleaded guilty to an offence they should not have been charged with, leading to a wrongful conviction. Due to a lack of disaggregated information on the offences charged under the Regulations via the Single Justice Procedure, it is not clear what offences have been charged and so it is not possible to assess the lawfulness of these.
- 4.5 **However, in more than 88% of coronavirus cases brought under the Single Justice Procedure, no plea was received.**<sup>20</sup> This raises the prospect that many people receiving the Single Justice Procedure Notice in the post do not fully understand them or their seriousness, do not know how or what to respond. People may not even receive the Single Justice Procedure Notice in the first place, as they are considered to be ‘served’ as soon as they have been posted, and there is not record of whether they arrived at the correct address, or within sufficient time for an individual to respond, especially during the pandemic when post has been delayed (Single Justice Procedure Notices require people to respond 21 days from the date of *posting* not the date of receipt).<sup>21</sup>
- 4.6 **In addition, given the rate of unlawful coronavirus charges and prosecutions caught by the CPS review, considered above, there is likely to be a similar, if not even higher rate of wrongful charges under the Single Justice Procedure,** due to lack of checks and balances. Under the Single Justice Procedure, there is no CPS involvement, and Magistrates deal with charges in a short space of time, working alongside a legal advisor, with many working from home.
- 4.7 **The CPS has confirmed that their review of coronavirus cases does not include cases charged under the Single Justice Procedure, unless a Not Guilty plea is entered.** In a letter to Fair Trials dated 17 February 2021, the Head of Legal Services at the CPS told us:
- “The CPS is not involved in that [SJP] process and does not have access to or conduct of those cases. Accordingly, they will not be subject to our finalised Review. However, if a Not Guilty plea is entered the case cannot be dealt with under SJP and the case will pass to the CPS to take over conduct of the prosecution.”*
- 4.8 In a further letter dated 25 February 2021, the Head of Legal Services told us that:
- “I understand that the NPCC have been working with police forces to ensure supervisory processes are in place to review cases before the SJP notices are issued to ensure cases are being correctly instituted and to identify and rectify any errors as they arise. They are currently considering ways to strengthen this process.”*
- 4.9 After our first attempt to contact the NPCC to clarify this was ignored, we received a reply dated 17 March 2021 that described the NPCC’s efforts as *“an ongoing piece of work to provide cross*

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<sup>20</sup> Parliamentary Question 143756 tabled by Alex Cunningham MP on 26 January 2021 <https://questions-statements.parliament.uk/written-questions/detail/2021-01-26/143756>

<sup>21</sup> Gov.uk, ‘Single justice procedure notices’ <https://www.gov.uk/single-justice-procedure-notices>

*partnership scrutiny process, and direct engagement with all forces to provide an enhanced level of quality assurance” without any further details.*

- 4.10 **The charges and prosecutions being brought via the Single Justice Procedure are done so without any meaningful oversight, without any meaningful review process, and is resulting in guilty pleas for offences people have not committed, and convictions for offences they may not have convicted, in a process which they may also not even be aware of in the first place.** With such a significant number of charges and prosecutions under the Act and Regulations found to be unlawful (as considered above), it is highly likely that a similar number, if not more (due to the lack of safeguards) under the Single Justice Procedure may also be unlawful. Given how many charges and prosecutions brought by the police have been caught by the CPS review of non-Single Justice Procedure cases, it is clear that the police, in this case the NPCC, cannot be trusted to safeguard this process.
- 4.11 **Fair Trials believes there is a serious and urgent need for the CPS to include all historic Single Justice Procedure cases within their ongoing review, and on the basis of the reasons given, the Single Justice Procedure should not be used for coronavirus related cases (under the Coronavirus Act and the Regulations).**

## **5. CUSTODY TIME LIMITS AND EXCESSIVE REMAND IN CUSTODY**

- 5.1 A critical issue at the heart of Covid-19 and the criminal law is the situation faced by people held on remand during the pandemic. Defendants are facing prolonged pre-trial detention as custody time limits are extended repeatedly, with Covid-19 now given as a common reason for such extensions. People are being held for excessive periods of time due partly to the government’s inaction on pre-trial detention and its repeated failures to get trials heard in a reasonable time.
- 5.2 **A record number of people are being held in pre-trial detention, and thousands of these people have been held beyond the legal custody time limit.** There are currently over 12,000 legally innocent people (12,274) in prison waiting for their trial, the highest figure for six years. The average length of time people were remanded in custody was 14.3 weeks in Q3 2020, the highest since 2016, and this is likely a significant underestimate of the current reality, given that was the position more than 6 months ago.<sup>22</sup>
- 5.3 **More than 3,600 people have been held in prison awaiting trial for longer than six months, Fair Trials uncovered via Freedom of Information requests in March 2021.**<sup>23</sup> The figures provided by the Ministry of Justice show that 3,608 people had been held for six months, and 2,551 people

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<sup>22</sup> Gov.uk, ‘Criminal court statistics quarterly: July to September 2020’, 17 December 2020

<https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-july-to-september-2020--2>

<sup>23</sup> Fair Trials, ‘Thousands held in prison for longer than legal time limit while awaiting trial’, 17 March 2021

<https://www.fairtrials.org/news/uk-thousands-held-prison-longer-legal-time-limit-while-awaiting-trial>

have been held for eight months or longer as of December 2020. This amounts to almost a third of the entire remand population.

5.4 **Many of those held will be found not guilty at trial, and will have served time in prison for offences they may have not committed, or will be held in prison far beyond any sentence.** In 2019, nearly 3000 people and 1 in 10 of those remanded in prison awaiting trial were acquitted in the Crown Court at trial. Overall, a quarter of those held on remand awaiting trial were not sent to prison following their trial.<sup>24</sup>

5.5 **Lawyers have reported to Fair Trials that Custody Time Limits “may as well not exist” and are extended “as a matter of routine”.**<sup>25</sup> The ‘routine’ nature of this usually exceptional approach was publicly confirmed by Chris Philp MP in response to a written question.

*“CTL extensions are being routinely granted amongst those who were remanded before the SI came into force.”<sup>26</sup>*

5.6 It is apparent that the government is seeking to hold defendants in custody for completely unacceptable lengths of time awaiting trials. In a judgment given in September 2020 in the unreported case of *R v Tesfa Young-Williams*,<sup>27</sup> HHJ Raynor refused to grant a CTL extension for a 19-year-old defendant, who was arrested in October 2019 and charged with drugs offences. At that point, the defendant had already been held in custody for 321 days – 139 days longer than the usual 182-day limit – and even 83 days longer than the extended 238-day limit.

5.7 **Remand conditions are especially punitive due to the pandemic.** Many prisoners are being held in their cells for more than 23 hours a day during lockdowns and have been for much of the time since March 2020. The Criminal Justice Chief Inspectors found that between July and December 2020,

*“78% of prisoners reported that they had less than two hours out of cell, including 42% who said that they had less than one hour”<sup>28</sup>*

and they reported that:

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<sup>24</sup> Ministry of Justice, ‘Criminal justice system statistics quarterly: December 2019, Remands: Crown Court data tool’, 21 May 2020. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/888657/remands-crown-court-tool-2019.xlsx](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888657/remands-crown-court-tool-2019.xlsx)

<sup>25</sup> Fair Trials, ‘Justice Under Lockdown’, June 2020 [https://www.fairtrials.org/sites/default/files/publication\\_pdf/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf](https://www.fairtrials.org/sites/default/files/publication_pdf/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf)

<sup>26</sup> Parliamentary Question Q114863 tabled by Alex Cunningham MP 12 November 2020 <https://questions-statements.parliament.uk/written-questions/detail/2020-11-12/114863>

<sup>27</sup> Judgement in *R v Tesfa Young-Williams*, Woolwich Crown Court, 8 September 2020. [https://www.25bedfordrow.com/cms/document/8sep20\\_hhj-raynor\\_yw\\_ctl-ruling-1.pdf](https://www.25bedfordrow.com/cms/document/8sep20_hhj-raynor_yw_ctl-ruling-1.pdf)

<sup>28</sup> Criminal Justice Joint Inspection, Impact of the pandemic on the Criminal Justice System, January 2021, p16, <https://www.justiceinspectorates.gov.uk/cji/inspections/impact-of-the-pandemic-on-the-criminal-justice-system/>



*“Some prisoners were held in conditions which effectively amounted to solitary confinement, which was sometimes prolonged and/or indefinite.”<sup>29</sup>*

- 5.8 In addition, remand prisoners do not have access to the support, educational and training services as convicted prisoners do, acknowledged by the Chief Inspector of HM Inspectorate of Probation to the Justice Committee.<sup>30</sup> Remand prisoners are also usually entitled to an unlimited number of visits compared to convicted prisoners – but are currently allowed none. These factors add significantly to the already punitive nature of remand during the pandemic.
- 5.9 **Those remanded in custody awaiting trial are disproportionately Black, Asian and from other ethnic minorities.** In 2019, BAME individuals made up 20.2% of the 31,680 people who were remanded in custody - a clearly disproportionate amount. Since 2015, BAME people have consistently made up at least 20% of those remanded in custody awaiting trial.<sup>31</sup> Despite Black defendants and defendants from other ethnic minorities being more likely to be remanded in custody at Crown Court, they are *less* likely than White defendants to go on to receive an immediate custodial sentence.<sup>32</sup>
- 5.10 The Equality Impact Assessment for the Custody Time Limit increase was only published in October 2020, after the extended time limit had already come into force in late September.<sup>33</sup> The government knew that its actions would directly lead to more unconvicted Black people being held in custody for longer, despite being more likely to be released after a trial, and it went ahead regardless. **The increasing use of extended pre-trial detention will directly lead to a disproportionate amount of BAME people being held for longer on remand awaiting trials.**
- 5.11 **Fair Trials has been contacted by defendants held on remand who have reported people pleading guilty so they didn’t have to stay in prison “until 2022” awaiting a trial.** One defendant told Fair Trials that they were “aware of at least four other people who pleaded guilty just so they didn’t have to stay” in prison “potentially until 2022 just to have a trial”, and that they were also “willing to plead guilty to get out of there... due to the conditions, time locked up” and not being able to get proper access to legal support. They called it “totally wrong and unjust”.<sup>34</sup> Another defendant told Fair Trials of how they had been on remand since October 2019, accused of drugs offences. They spoke about how during the pandemic they were held in their cell for 23 hours a

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<sup>29</sup> Ibid

<sup>30</sup> Justice Committee inquiry evidence (<https://parliamentlive.tv/event/index/cc4fa6fe-627f-45ac-9cf9-08a337ff7c4d>) at 15.10.30

<sup>31</sup> Ibid

<sup>32</sup> Government ‘Equality Impact Statement’, [https://www.legislation.gov.uk/uksi/2020/953/pdfs/uksipes\\_20200953\\_en.pdf](https://www.legislation.gov.uk/uksi/2020/953/pdfs/uksipes_20200953_en.pdf)

<sup>33</sup> Parliamentary Question 101042 tabled by Tulip Siddiq on 8 October 2020 <https://questions-statements.parliament.uk/written-questions/detail/2020-10-08/101042>

<sup>34</sup> Fair Trials, ‘Thousands held in prison for longer than legal time limit while awaiting trial’, 17 March 2021 <https://www.fairtrials.org/news/uk-thousands-held-prison-longer-legal-time-limit-while-awaiting-trial>

day, and that they have “really struggled with the isolation”. This compounds previous reports of people pleading guilty to avoid extensive pre-trial detention in pandemic prison conditions.<sup>35</sup>

- 5.12 **In a significant criticism of the current situation, Sir Tom Winsor, HM Inspectorate of Constabulary recommended in January 2021 that the CTL in England and Wales be reduced to below pre-pandemic limits to match that in Scotland:**

*“In Scotland, we have had the 110-day rule, which can be extended to 140 days. It is to be recommended in England because it concentrates the mind enormously, but it requires investment.”<sup>36</sup>*

- 5.13 In April 2020, the government announced that 4,000 ‘low-risk’ prisoners would be temporarily released to control the spread of COVID-19,<sup>37</sup> but this did not appear to include any of the legally innocent defendants in prison awaiting trial. Instead, later that year on 6<sup>th</sup> September the government announced that it would amend the current Custody Time Limit (‘CTL’), from 182 days to 238 days, by way of regulation made under the Prosecution of Offences Act 1985. The Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020 took effect from Monday 28<sup>th</sup> September and will have effect until 28<sup>th</sup> June 2021.<sup>38</sup> This raises the prospect that someone, if subject to a CTL on the final day of operation of this Regulation, could be imprisoned with the excuse that the Coronavirus pandemic, which began in March 2020, is a sufficient reason for the delay, until February 2022.

- 5.14 **This increase of the Custody Time Limit is a counter-productive response to the current challenges faced by the criminal justice system in England and Wales.** It gives legal legitimacy to the failings of the criminal justice system, normalises excessive deprivations of liberty, and further undermines the presumption of innocence. Legalising lengthy pre-trial detention ignores its underlying causes, and it is only likely to worsen delays in criminal proceedings, given that this is likely to reduce incentives for courts to prioritise and expedite cases of defendants in custody. Although described as a ‘temporary’ measure, court capacity challenges are likely to be a long-term challenge, and we are extremely concerned that lengthier criminal proceedings, and therefore lengthy periods of pre-trial detention, could quickly become a norm that is difficult to reverse.

- 5.15 During the lockdown, the CPS announced that it would bring fewer prosecutions, prioritising the most serious cases, putting on hold ‘lower priority’ cases and using out of court disposals

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<sup>35</sup> The Mirror, ‘Suspects awaiting trial pleading guilty to escape 22-hour Covid prison lockdowns’, 20 February 2021 <https://www.mirror.co.uk/news/uk-news/suspects-awaiting-trial-pleading-guilty-23536529>

<sup>36</sup> Sir Tom Winsor speaking at a Justice Committee evidence session (<https://parliamentlive.tv/event/index/cc4fa6fe-627f-45ac-9cf9-08a337ff7c4d>) at 15.23.30

<sup>37</sup> The Guardian, ‘Up to 4,000 inmates to be temporarily released in England and Wales’, 4 April 2020. <https://www.theguardian.com/society/2020/apr/04/up-to-4000-inmates-to-be-temporarily-released-in-england-and-wales>

<sup>38</sup> Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020. <https://www.legislation.gov.uk/uksi/2020/953/contents/made>

(cautions).<sup>39</sup> This approach to prosecutions, if implemented effectively, will no doubt play a crucial role in reducing the backlog. However, it should be also be considered as a part of a longer-term plan for criminal justice which will continue beyond the duration of the pandemic, that will prevent court capacity challenges in the future.

- 5.16 **CTLs should be reduced as soon as possible to pre-pandemic limits (at the very least), and there should be no extension of the Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020 beyond its expiry on 28<sup>th</sup> June 2021.**
- 5.17 **Specific measures aimed at reducing the use of pre-trial detention are needed, including through proactive efforts to release defendants from pre-trial detention, more stringent judicial reviews of detention, and greater use of alternatives to pre-trial detention.**
- 5.18 **The government must increase funding to the justice system, and in particular, the courts, as a matter of emergency to reduce the backlog of cases.**

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<sup>39</sup> Crown Prosecution Service, 'Prosecutors to prioritise serious cases to manage impact of coronavirus pandemic', 14 April 2020. <<https://www.cps.gov.uk/cps/news/prosecutors-prioritise-serious-cases-manage-impact-coronavirus-pandemic>>