Police, Crime, Sentencing and Courts Bill

Fair Trials' Committee Stage briefing

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About Fair Trials

Fair Trials is an international NGO that campaigns for fair and equal criminal justice systems. Our team of experts expose threats to justice and identify practical changes to fix them. We campaign to change laws, support strategic litigation, reform policy and develop international standards and best practice. We do this by supporting movements for reform and building partnerships with lawyers, activists, academics and other NGOs. We are the only international NGO that campaigns exclusively on the right to a fair trial, giving us a comparative perspective on how to tackle failings within criminal justice systems globally.[1]

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INTRODUCTION & SUMMARY

The fairness and equality of criminal justice in England and Wales, and its ability and capacity to deliver such justice in line with national and international human rights standards, is already seriously under threat. Criminal courts are under severe 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 waiting for a trial beyond legal limits, with many being held in cells for more than 23 hours a day, and discriminatory policing and criminal justice outcomes are rife.

However, the Police, Crime, Sentencing and Courts Bill ('the Bill') fails to address these urgent challenges. Instead, the Bill threatens yet more headline-grabbing "tough on crime" measures to distract from the real crisis in our justice system. Numerous provisions in the Bill also threaten to infringe established human rights standards including the right to a fair trial, and threaten to exacerbate the already widespread discrimination in policing and criminal justice. While Fair Trials

[1] https://www.fairtrials.org/

understands the need to tackle serious violence and offending, the solutions proposed by the Bill - centred on more policing, more arrests, more offences, and more imprisonment - are unlikely to deliver the desired results.

Significant concerns have already been raised regarding the impact of the Bill on the right to protest and disproportionate increases in maximum sentences for crimes deemed politically-sensitive. Fair Trials shares these concerns and supports the movement to remove these provisions from the Bill. However, in this submission we wish to draw the Committee's attention to other aspects of the Bill which we believe should be subject to equally intense scrutiny.

The Bill is incredibly lengthy, containing a significant number of provisions that have long-lasting, serious implications on human rights. It is essential its provisions are carefully scrutinised, and that the Bill is not rushed through Parliament.

This submission considers:

- The serious violence data-sharing duty and concerns about the impact of police involvement, the sensitivity of the data shared, and use of the data by police;
- Serious Violence Reduction Orders, which will extend criminalisation and give further discriminatory stop and search powers to police;
- Excessive extraction of data from mobile devices without safeguards;
- The criminalisation of Gypsy, Roma and Traveller people via provisions on 'unauthorised encampments';
- 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; and
- The removal of the presumption against pre-charge bail which undermines the presumption of innocence.

1. PART 2, CHAPTER 1 – FUNCTIONS RELATING TO SERIOUS VIOLENCE: DATA SHARING DUTY ON LOCAL, EDUCATION AND HEALTH AUTHORITIES

1.1 Imposing a legal duty on essential service providers such as the NHS, schools and local authorities to share information with the police can make people feel unable to safely access those essential services, resulting in significant harm. It is possible, and indeed likely, that the sharing of this information will engage and infringe data protection rights, as well as the Article 8 right to privacy.

1.2 This part of the Bill aims to 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]

1.3 The stated aim of 'reducing serious violence' set out in Clause 12 which sets the scope of this power is extremely broad, and defined vaguely as 'preventing people from becoming involved in serious violence', including becoming a victim of serious violence, and 'reducing instances of serious violence' in an area. The scope of this provision and the powers contained within it mean that people who are victims of crime, including their families, are likely to be caught by it.

1.4 Clause 15(4) contains a cynical provision that seeks to unacceptably influence and undermine data protection legislation, which is likely to be engaged and possibly infringed by actions under this section.

1.5 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.[3]

Harmful consequences of data-sharing between essential service providers and the police

1.6 The prevention of serious violence should be a multi-agency effort. However, this should not be the sole responsibility of the police. Providing the police with expansive powers to compel other authorities to share information can – and has – resulted in people afraid to access those essential services, such as healthcare and education, and has also resulted in policing strategies specifically targeted at denying people access to those services, such as housing, education and welfare.

[2] Clauses 7 – 21
[3] Clause 16(4)

1.7 When data is shared between essential service providers, such as healthcare providers, schools or local authorities, with the police, it results in people being afraid or unable to access those services for fear of being reported:

1.7.1 The government's data-sharing between the NHS and the Home Office has resulted in vulnerable people being deterred from seeking healthcare due to a fear of being arrested.[4]

1.7.2 Pregnant migrant women have been forced into the position of avoiding accessing essential antenatal healthcare because they feared being reported to immigration authorities.[5]

1.7.3 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.[6]

1.7.4 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.[7]

1.8 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.

Police use of shared information

1.9 There are significant risks not only in the collection and sharing of data with police but also in how that data could be used by police or drive quasi-punitive responses by other parts of the state. A recent example of this is data sharing between local, education and health authorities

[4] Weller SJ, Crosby LJ, Turnbull ER et al. The negative health effects of hostile environment policies on migrants: A cross-sectional service evaluation of humanitarian healthcare provision in the UK Wellcome Open Research. https://wellcomeopenresearch.org/articles/4-109

[5] 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

[6] 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

[7] 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

and the police as part of the police's strategy against 'gangs' and the creation and use of the Gangs Matrix database, which caused serious harm to affected communities.

1.10 Many innocent people, including victims of violence, were wrongly or unfairly implicated by indiscriminate and far-reaching data collection and sharing through the Gangs Matrix, which disproportionately targeted and criminalised friendships between young Black men.[8] Exclusion from education, eviction from housing and denial of welfare were all fundamental Gangs Matrix police tactics, aided and abetted by data sharing between these authorities and the police.[9]

1.11 The police 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.[10] The Information Commissioner's Office found that the police's use of information amounted to

> *"Serious breaches of data protection laws with the potential to cause damage and distress to the disproportionate number of young, black men on the Matrix".*[11]

It also found that the police carried out *"Excessive processing of data as a result of blanket sharing with third parties"*, *"An absence, over several years, of effective central governance, oversight or audit of data processed as part of the Gangs Matrix, resulting in risk of damage or distress to those on it"*, and it noted that the MPS failed to consider *"the issues of discrimination or equality of opportunity"*.[12]

1.12 In this context, the wording of clause 15(4)(a) in the Bill *"…(but in determining whether a disclosure would do so, the power conferred by this section is to be taken into account)*", which seeks to undermine data protection determinations where data has been shared pursuant to the Serious Violence data-sharing duty set out in clauses 15 and 16, is even more insidious and must be removed.

1.13 It seems likely, if not certain, that the data-sharing duty in the current Bill will be used to the same effect as the data-sharing as part of the Gangs Matrix strategy, leading to similar unjust and harmful denials of access to essential services, and is likely to result in similar data protection and fundamental rights breaches. Among the other aforementioned elements, the

[8] Peter Yeung, 'The grim reality of life under Gangs Matrix, London's controversial predictive policing tool' (2 April 2019) https://www.wired.co.uk/article/gangs-matrix-violence-london-predictive-policing
[9] Amnesty, 'Trapped in the Gangs Matrix', https://www.amnesty.org.uk/trapped-gangs-matrix
[10] 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/
[11] Ibid.
[12] Ibid.

'Serious Violence' data-sharing duty also shares the same intentions as the Gangs Matrix in its inclusion of victims of crime in its scope.[13]

1.14 These data-sharing measures are also likely to facilitate the increased use of automated profiling systems and data analytics, which have repeatedly resulted in discriminatory and unfair outcomes when used by police.[14]

1.15 Police in England and Wales are increasingly turning to predictive and risk assessment systems to assess and predict peoples 'risk' of criminality, using police and crime records, as well as data from local authorities, health authorities, education authorities, to justify 'pre-emptive interventions'.[15] A new flagship system, the National Data Analytics Solution (NDAS), developed over several years by police forces and funded by the Home Office,[16] seeks to make this an national operational capacity for all police forces.[17] The police have stated that the NDAS will *"create meaningful insight and identify value driving patterns which should ultimately lead to crime prediction and prevention",* enabling police to *"make early interventions"* and *"prevent criminality… by proactively addressing threats".*[18] The use of police data and these systems in policing and criminal justice to produce such 'profiles' and 'risk assessments' raise serious questions over the erosion of the presumption of innocence, and there is significant evidence that they lead to discriminatory outcomes.

1.16 The data-sharing duty must therefore be seen in this wider context of police collection and use of sensitive personal data (as under the Data Protection Act 2018) in data analytics, and predictive and profiling automated decision-making systems.

1.17 For these reasons, we believe it is clear that this data-sharing duty must be removed from the Bill.

2. PART 10, CHAPTER 1 – SERIOUS VIOLENCE REDUCTION ORDER: FURTHER CRIMINALISATION & ADDITIONAL STOP AND SEARCH POWERS

[13] Ibid.
[14] 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
[15] Police Transformation Fund – National Analytics Solution, Final Business Case v6.0. http://foi.west-midlands.police.uk/wp-content/uploads/2019/01/report1.pdf
[16] Police Transformation Fund, 2019-2020. https://www.gov.uk/government/publications/police-transformation-fund-investments-in-2019-to-2020
[17] Police Transformation Fund – National Analytics Solution, Final Business Case v6.0. http://foi.west-midlands.police.uk/wp-content/uploads/2019/01/report1.pdf
[18] Ibid

2.1 Clause 139 of the Bill proposes the power to make Serious Violence Reduction Orders (SVRO), which allow an extension of stop and search without reasonable suspicion in addition to the already extensive existing police powers of stop and search, the criminalisation of people by association, and an extensive array of potential avenues for criminalisation for those subject to them.

2.2 The government is proposing that an SVRO can be made on conviction for offences involving the possession or use of a knife or other offensive weapon, and the court has discretion whether to do so.[19]

2.3 There are no limits on the conditions that can imposed under an SVRO order, as long as the court sees fit, and "any requirement or prohibition" can be specified in regulations made by the Secretary of State.[20] This is an incredibly broad power which could have extremely far-reaching consequences. The use of Criminal Behaviour Orders against people conceived of as being part of 'gangs' – an inherently racialised term – includes punitive restrictions on associating with certain people and wearing certain clothing, as well as exclusion zones and curfews,[21] and the Bill gives complete discretion to the Home Secretary to make regulations to impose such conditions.

2.4 This wide extension of criminalised behaviour is compounded by clause 342A(4) which allows for an individual to be subjected to an SVRO even if they were not the one actually carrying a weapon, a crime-by-association strategy which has already been seen to cause the unjust criminalisation of entire groups of young black men in Joint Enterprise cases.[22]

2.5 The Bill would also criminalise non-compliance with the (potentially extremely restrictive) conditions under an SVRO. Clause 342B requires people subject to an SVRO to notify the police about their home address and any changes to it, via going to a police station. This has the potential to seriously impact people experiencing insecure housing or homelessness. Clause 342G makes not doing this, or anything under the SVRO an offence, including anything the police believe "obstructs" them. This creates further opportunities for criminalisation under an

[19] Home Office, Serious Violence Reduction Orders – summary of consultation and conclusion, 9 March 2021. https://www.gov.uk/government/consultations/serious-violence-reduction-orders/outcome/summary-of-consultation-responses-and-conclusion-accessible-version

[20] Clause 342(c)(1)

[21] Crown Prosecution Service, Criminal Behaviour Orders. https://www.cps.gov.uk/legal-guidance/criminal-behaviour-orders

[22] Patrick Williams and Becky Clarke (2016), 'Dangerous associations: Joint enterprise, gangs and racism'. https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Dangerous%20assocations%20Joint%20Enterprise%20gangs%20and%20racism.pdf; Patrick Williams and Becky Clarke (2020), '(Re)producing Guilt in Suspect Communities: The Centrality of Racialisation in Joint Enterprise Prosecutions'. https://www.crimejusticejournal.com/article/view/1268.

SVRO without actually committing the offence for which the SVRO is intended. The criminal penalties for a failure to adhere to the order have a maximum sentence of two years.[23]

2.6 The proposal to expand stop and search ignores the overwhelmingly evidence about its discriminatory impact and growing concerns about systemic racism in the police. 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. Rather than giving the police more powers, the priority should be to review and address the necessity, proportionality and discriminatory use of existing stop and search powers.

2.7 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.[24] In London, young Black men are 19 times more likely to be stopped and searched than white people.[25] Nationally, a total of 577,054 stops were carried out across England in 2019-20, the highest levels for 6 years.[26] However, 76% of these stops and searches led to no further action.[27]

2.8 Giving police further powers to stop and search individuals without reasonable suspicion and based merely on their offending history will only exacerbate the already appalling levels of discrimination shown in their discretionary actions.

2.9 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. Police stop and search disproportionality further worsens when reasonable police suspicion is not a requirement for the search, conducted under section 60 of the Criminal Justice and Public Order Act 1994, whereby Black people account for 48% of searches despite making up only 3% of the population in the UK.[28]

2.10 The Serious Violence Reduction Orders would label and stigmatise individuals as criminals, and would subject people to these restrictive conditions merely on "the balance of probabilities",

[23] Clause 139
[24] Home Office, 'Police powers and procedures, England and Wales, year ending 31 March 2020 second edition (27 October 2020)
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Discriminatory policing in the UK: How coronavirus made existing inequalities even worse (Liberty, 27 July 2020), https://www.libertyhumanrights.org.uk/issue/discriminatory-policing-in-the-uk-how-coronavirus-made-existing-inequalities-even-worse/

which leaves far too much discretion to judges. There is already a serious issue with politicians, prosecutors and judges justifying excessive criminal penalties against young Black men by the racialised narratives around 'gangs', often criminalising friendships between young Black men,[29] and it is apparent that the powers to make these orders will further compound this.

2.11 These orders, in conjunction with existing racist policing and discrimination in the criminal justice system, will fast-track the criminalisation of demographics already over-represented in the system, particularly Black, Asian, and other ethnic minority people. They will further criminalise individuals already subject to multiple and overlapping criminal penalties, criminalising by association and by failure to comply with the restrictive requirements set out in the SVROs, trapping people in a cycle of criminalisation, and frustrating rehabilitation efforts.

2.12 For these reasons, we believe these provisions must be removed from the Bill.

3. PART 2, CHAPTER 2 – EXTRACTION OF INFORMATION FROM ELECTRONIC DEVICES

3.1 This section of the Bill seeks to formalise the already existing and widespread practice of police accessing and extracting information from mobile devices during criminal investigations.[30] This will significantly extend police powers to extract information from devices which are handed over voluntarily and extraction is consented to by victims, witnesses, and suspects, without any safeguards or limits on this extraction. This has clear ramifications for the right to privacy and data protection rights.

3.2 In addition, the current operation of this practice leads to the excessive extraction of irrelevant data from mobile devices, causing huge and significant delays to criminal investigations and cases, delaying justice for victims and suspects alike.

Scale of police extractions

3.3 The scale and depth of the police's current mobile phone search practices are incredibly extensive, infinitely more so than existing legislative powers to carry out physical searches under the Police and Criminal Evidence (PACE) Act 1984, and the Bill contains no safeguards against excessive police data extractions.

[29] Patrick Williams and Becky Clarke (2016), 'Dangerous associations: Joint enterprise, gangs and racism'. https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Dangerous%20assocations%20Joint%20Enterprise%20gangs%20and%20racism.pdf; Patrick Williams and Becky Clarke (2020), '(Re)producing Guilt in Suspect Communities: The Centrality of Racialisation in Joint Enterprise Prosecutions'. https://www.crimejusticejournal.com/article/view/1268.

[30] Clause 36-42

3.4 Mobile phones can contain over 200,000 messages and over 100,000 photos, and this information can run to many thousands of pages. An average individual's mobile phone can contain the equivalent of 35,000 A4 pages of data.[31] Much of this information is incredibly personal and often legally sensitive. Information on a phone will often include private conversations with friends, family members and partners; personal and potentially sensitive photographs and videos; personal notes; financial information; and even legally sensitive work-related information such as in emails. As a result, most people's phones and communications contain sensitive information classed as 'special category data' under the Data Protection Act 2018: information about an individual's race, ethnic origin, politics, religious or philosophical beliefs, health, sex life or sexual orientation.

3.5 The powers being formalised under the Bill are even more extensive than the police searching someone's property and taking copies of all photographs, documents, letters, films, albums, books and files, such as under PACE 1984. However, PACE 1984 contains extensive safeguards against such intrusive or excessive police searches of physical property. Under PACE 1984 Code B, which relates to the search of a premises with consent, police must obtain the written consent of the individual for the search.[32] Police must also specify what they are looking for and where they will search:

> *"…the officer in charge of the search shall state the purpose of the proposed search and its extent. This information must be as specific as possible, particularly regarding the articles or persons being sought and the parts of the premises to be searched."*[33]

When a search has been carried out, police also have to provide *"a written notice: specifying what has been seized".*[34]

3.6 There are no such safeguards under the Bill. This must be rectified.

Relevance of the information taken

3.7 Much of the information taken has no relevance or bearing on the offence being investigated. This is due to police extraction tools which extract and/or copy the entire contents of the device or take large swathes of information via data type (e.g text, app data, photo or video).

[31] Office of the Police and Crime Commissioner Northumbria, 'Written evidence to the Justice Committee', 24 April 2018 (http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justicecommittee/disclosure-of-evidence-in-criminal-cases/written/80665.pdf)

[32] Police and Criminal Evidence Act 1985, Code B, paragraph 5.1

[33] Police and Criminal Evidence Act 1985, Code B, paragraph 5.2

[34] Police and Criminal Evidence Act 1985, Code B, paragraph 7.12

3.8 In the 'Digital Processing Notice' that police provide to individuals consenting to hand over their device for investigation, which can include victims, witnesses, and suspects, state:

> *"The data that can be extracted may vary by handset and the extraction software used. (...) Some technology will not be able to obtain material using parameters such as a specific time period, meaning even though we may only consider a limited number of messages relevant to the investigation, the tool may obtain all messages."*

3.9 The extraction and analysis of so much digital information causes huge delays to investigations, prosecutions, and the criminal justice system as a whole. An investigation by Big Brother Watch found that the these excessive searches and extraction of information from digital devices, the large majority of which is irrelevant, take the police on average 6 months to complete for a single device, much of which is due to a backlog of devices waiting to be examined.[35] It is estimated that excessive data collection and subsequent analysis by police and prosecutors causes overall delays of up to 18 months to the life cycle of a criminal case, with estimates in some parts of the country reaching 2 years, in addition to existing delays.[36]

3.10 There is a clear and urgent need to include safeguards to this currently harmful practice, including a requirement that digital extractions are conducted only when they are strictly necessary; clear, specific and stated limits on the data that police can extract during these voluntary extractions; and the use of more proportionate means other than digital extraction wherever possible.

4. PART 4 – 'UNAUTHORISED ENCAMPMENTS'

4.1 Fair Trials has serious concerns that new offences in the Bill which would criminalise "unauthorised encampments" will result in the over-criminalisation, and further over-representation of Gypsy, Roma and Traveller ('GRT') people in the criminal justice system.[37] We support the concerns raised by Friends, Families and Travellers.[38]

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[35] Big Brother Watch, 'Digital Strip Searches: The police's data investigations of victims', 2019. https://bigbrotherwatch.org.uk/wp-content/uploads/2019/07/Digital-Strip-Searches-Final.pdf

[36] End Violence Against Women Coalition, 'Written evidence to the Justice Committee Inquiry on Disclosure in criminal cases', March 2018. https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/EVAW-Coalition-Submission-to-Justice-Committee-Disclosure-Inquiry-March-2018-1.pdf

[37] Clauses 61 – 63

[38] Friends, Families and Travellers, Briefing on the PCSC Bill, March 2021. https://www.gypsy-traveller.org/wp-content/uploads/2021/03/Briefing-on-new-police-powers-PCSCBill-and-CJPOA-002.pdf

4.2 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.

4.3 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*",[39] 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.

4.4 GRT people already face some of the worst criminal justice outcomes amongst ethnic groups in the UK.[40] According to a survey HM Inspectorate of Prisons, roughly 5% of male prisoners, and 7% of female prisoners are from GRT communities[41] – 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. These provisions must be removed from the Bill.

5. PART 12: EXPANSION OF REMOTE JUSTICE PROCEEDINGS

5.1 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.[42] 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, and conflicts with international standards on the right to a fair trial.

5.2 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

[39] Home Office, 'Policy Paper – Police, Crime, Sentencing and Courts Bill 2021: unauthorised encampments factsheet' (10 March 2021)
[40] 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)
[41] HM Inspectorate of Prisons, Annual Report 2019-2020 (20 October 2020)
[42] Clauses 168 – 169 and Schedule 19

(Insanity) Act, and under the Mental Health Act.[43] The safeguards set out in Clause 168(4) and 168(6), considered below, are not sufficient.

5.3 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.

5.4 The right to be present at trial is also recognised European and international rights standards as a fundamental guarantee of the right to a fair trial,[44] and is closely connected to the right to a hearing.

5.5 Time and cost efficiency are frequently cited as benefits of remote hearings, however, there is no evidence that video and audio hearings will create cost efficiencies in the justice system. It may be that remote hearings can reduce the travel and wait time in courts for lawyers and suspects or accused persons, as well as cut the transfer costs for detained persons from prisons to courthouses. Time and cost efficiency may be legitimate public interests that may sometimes justify limitations of procedural restrictions (for example when the state sets time limits for appeals), but on its own, efficiency cannot justify limiting the most fundamental fair trial guarantees.

Vulnerable defendants

5.6 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.[45] 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."*[46]

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[43] Clause 168(3)
[44] Article 14(3)(d) ICCPR, Article 6(3)(c) ECHR
[45] 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
[46] 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

5.7 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"*,[47] significantly restricting vulnerable people's access to justice.

Disproportionately severe outcomes

5.8 Remote court proceedings can produce less favourable criminal justice outcomes for defendants. 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 concluded that individuals whose cases were handled remotely were more likely to receive a custodial sentence jailed and less likely to receive a community sentence than in a traditional court setting: *"The use of custodial sentences was more likely to be recorded in video court hearings… The use of community orders was also recorded more frequently in non-video court hearings".* The proportion of unrepresented defendants receiving custodial sentences was higher than the rate for represented defendants. [48]

5.9 A 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.[49]

Communication in remote proceedings

5.10 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 lawyers, and to seek advice before, during, and after court hearings. [50] Some of these difficulties are attributable to the poor quality or unreliability of the technology used to facilitate client-lawyer consultations.

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[47] 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

[48] 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

[49] 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>

[50] 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

5.11 The March 2020 report on 'video-enabled justice' 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."*[51]

The right to a fair trial: legal standards

5.12 Where an accused person is entitled to an oral hearing in criminal proceedings, they are also entitled to be present. The European Court of Human Rights (ECtHR) has determined that presence at the hearing is a necessary precondition for the effective exercise of the right to defend oneself in person, to examine or have witnesses examined and, where relevant, to have the free assistance of the interpreter.[52] The right to be present at court hearings can be waived by the person – but there is no such right contained in the Bill or the 'interests of justice test' in Clause 168(4). This right is particularly important at first appearances such as initial remand hearings, where the court can assess a physically present person in a way that it cannot via video or audio link.

5.13 The right to a public hearing with the presence of the suspect or accused person is of fundamental importance not only to the defence, but also to the public. This right allows the defence to present its case, in person, to a judge, and allows the public to exercise its scrutiny and therefore maintain trust in the justice system.

5.14 The ECtHR has found that suspects or accused persons' participation in proceedings by videoconference is not per se contrary to the ECHR, but resorting to a video hearing is a restriction of the right to be present. Therefore, in any given case, the use of remote proceedings must serve a legitimate aim, and the arrangements for giving evidence must comply with requirements for due process.[53]

5.15 The right to a fair trial also guarantees the right of a person to participate effectively in their criminal trial. This right has been defined to include the right to hear and follow the proceedings. The ECtHR has found in that regard that people appearing in the hearing through video-link

[51] 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
[52] ECtHR, Marcello Viola v. Italy (No.2), App. No. 45106/04, Judgment of 5 October 2006, para. 52.
[53] ECtHR, Marcello Viola v. Italy (No.2), App. No. 45106/04, Judgment of 5 October 2006, para. 67

"must be able to follow the proceedings and to be heard without technical impediments."[54] Remote hearings may be more complex for suspects or accused persons to navigate than in-person ones, especially if they are unrepresented or their lawyer is not with them in the same room. Understanding what is happening in the trial and being able to make interjections either him/herself or through the defence lawyer is vital for effective participation.

5.16 In any event, remote participation in criminal proceedings cannot be treated as equivalent to physical participation and must therefore remain an exception. As the extensive evidence above confirms, remote proceedings pose significant risks to the fairness of trials.

Safeguards

5.17 All defendants, including those remanded by the police, who wish to appear in person rather than on video or audio link, should be allowed to do so. They must be given the opportunity to request that they appear in person and this should be facilitated, and they should not appear by video or audio link unless they have given informed consent.

5.18 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.

5.19 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*,"[55] does not provide sufficient safeguards for vulnerable defendants. There is no requirement or mechanism within the Bill for the court to assess the defendants' right to access effective legal assistance, the needs of vulnerable defendants, the individual's ability to effectively participate in remote justice proceedings might be impacted, or the suggestion that that remote hearings disproportionately result in custodial sentences. These factors must all be *explicitly* taken into account.

5.20 Further to this, there is currently no reliable system or method within current video and audio link criminal proceedings to identify those who have mental health issues, neuro-diverse and/or cognitive impairment disabilities, particularly considering that these are often hidden and/or the defendant may be reluctant to disclose. This must be rectified to prevent the potential for unfair trials of vulnerable defendants.

[54] ECtHR, Sakhnovskiy v. Russia, App. No. 21272/03, Judgment of 2 November 2010, para. 98
[55] Section 168 (4) and (6)

5.21 While we recognise that these provisions will be accompanied by guidance and criminal procedure rules, we consider that the safeguards outlined above are so important to protect the right to a fair trial that they should be set out on the face of the legislation.

6. PART 2, CHAPTER 4 – PRE-CHARGE BAIL

6.1 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.

6.2 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).[56]

6.3 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.

6.4 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.

6.5 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

[56] Clause 43 and Schedule 4

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*."[57] This expectation seems misguided given that in some areas, the average length for which an individual can be released under investigation is 228 days.[58]

6.6 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 would 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.

[57] Home Office, 'Policy Paper – Police, Crime, Sentencing and Courts Bill 2021: pre-charge bail factsheet' (10 March 2021). https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-police-powers-factsheet

[58] The Law Society, 'Release under investigation' (October 2019)