Police, Crime, Sentencing and Courts Bill

House of Commons

Committee Stage

Briefing

May 2021

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. From overcrowded prisons to endemic racial disproportionality, there are many pressing issues across the criminal justice system ("CJS") which need comprehensive, urgent redress. The Police, Crime, Sentencing and Courts Bill (the "Bill") purports to empower "*the police and courts to take more effective action against crime and lead [to] a fair justice system*." While some of the aspects of the Bill are welcome, such as the expansion of the use of video technology in hearings, the explicit reference to the best interests of the child with respect to remand hearings, and the raising of the threshold for children to be remanded in custody,[1] JUSTICE considers that the Bill would not meet this aim.

3. On the contrary, it could serve to actively deepen pre-existing issues within the CJS, and present significant human rights violations. JUSTICE considers that several of the Bill's core proposals pose a significant threat to the UK's adherence to its domestic and international human rights obligations, while also lacking an evidential basis to justify their introduction. In particular, our main concerns relate to:

    - **Amendments to pre-charge bail**, which would increase the time limits for when authorisation or an extension for pre-charge bail must be sought and change which officials approve these extensions. These changes would lead to lengthier investigations which are damaging to victims and those accused of committing offences.

    - **Increased powers for police to respond to non-violent protests**, which would expand the circumstances in which police can impose conditions on

[1] Clause 168 of the Bill would expand the use of remote participants by video link in criminal proceedings. JUSTICE has piloted fully virtual jury trials. Independent academic analysis concluded that with careful consideration and adaptation, these can be fair and may have some benefits over short and straightforward, traditional jury trials, such as improved sightlines for jury members. JUSTICE also welcomes the explicit reference to the best interests of the child in clause 131(2) when considering remand decisions. This is in keeping with the UK's international obligations under article 3 of the UN Convention on the Rights of the Child and a 'child-centred' approach to the Youth Justice System. JUSTICE also welcomes the reforms to reduce custodial remand, for instance by raising, at clause 131(3)-(4), the threshold for children to be remanded in custody.

protests, remove the need to knowingly breach conditions in order to commit an offence and introduce a broad statutory offence of public nuisance with a maximum sentence of 10 years in prison. These changes risk breaching protesters' rights to freedom of expression and assembly and the requirement for legal certainty.

- **Increased powers for police to respond to 'unauthorised encampments'**, which would criminalise trespass, increase the existing period of time in which trespassers directed from land would be unable to return from three to 12 months, and grant private landowners' significant powers to trigger a criminal offence with respect to what is ordinarily a civil dispute. These measures would likely indirectly discriminate against Gypsy, Roma and Traveller people, breach their rights to privacy and the home and be in breach of the public sector equality duty.

- **Blanket changes to early release and increased tariffs**, which would increase the amount of time those detained must spend in prison before being released on license to serve the rest of their sentence in the community for certain offences. These changes would disproportionally impact Black, Asian, and Minority Ethnic ("BAME") people,[2] undermine the rehabilitation of those detained, and incur significant financial costs through unduly extended periods of imprisonment.

- **Greater powers for the Secretary of State for Justice to determine which prisoners can and cannot be automatically released**, which would put pressure on the capacity of the Parole Board and risk breaching prisoner's right to liberty under Article 5 of the European Convention on Human Rights ("ECHR"), Article 6 ECHR right to a fair trial, and Article 7 ECHR right against retrospective punishment.

- **Serious Violence Reduction Orders** ("SVROs"), which would give the police the power to stop and search anybody subject to this order without the need for reasonable grounds to suspect them of having committed a crime. Like all other types of stop and search power, it is likely that SVROs would be used disproportionally against ethnic minorities – especially Black men. This would

[2] Noting that the term 'BAME' includes Gypsy, Roma and Traveller people, who are a White minority ethnic group.

further damage police relations with minority communities and risk violating an individual's Article 8 ECHR rights to privacy.

4. Equally, the Bill's creation of a new 'diversionary caution', at clause 76, is confusing given that this measure appears simply to be a renamed conditional caution, which would require an admission of guilt. Diversion, by contrast, is a process of directing an individual away from the CJS and towards sources of support or rehabilitation. This proposal does the opposite, and could potentially incur disproportionate and damaging consequences for BAME individuals, who are less likely to be willing to admit to guilt due to the chronic lack of confidence that such communities have in the CJS.[3]

5. Moreover, JUSTICE is concerned that this Bill is being passed without adequate opportunities for scrutiny. The Bill is an incredibly lengthy piece of legislation. Its Second Reading in the House of Commons took place just six days after its publication. While the Government consulted on some of the Bill's individual measures, for many, it did not. Likewise, there has not been a proper assessment of the Bill's impact on racial or gender equality, nor a clear evidential basis offered for many of the key measures. The Government must provide Parliament with ample time and sufficient evidence before progressing this Bill any further.

6. JUSTICE also notes the worrying context in which this Bill arises, with this Parliament seeing several concerning pieces of legislation that have served to undermine the rule of law.[4] This Bill actively deepens these anxieties, especially at a time of great political and constitutional uncertainty. **JUSTICE urges Parliament to remove the Bill's abovementioned offending provisions, in the interests of ensuring the UK meets its domestic and international human rights obligations.**

[3] This phenomenon is repeatedly identified in the Lammy Review, which notes that "*schemes that divert non-violent offenders away from custody should not rely on the traditional requirement for an admission of guilt – that way, more BAME individuals will benefit from the opportunity to turn their lives around*". *See* D. Lammy, 'The Lammy Review, An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System', (2017), p.70.

[4] The recent granting of Royal Assent to the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which creates a mechanism by which covert operatives, who can be members of the public, seasoned criminals, or even children, will benefit from a broad immunity, signals a worrying disregard for the UK's commitment to human rights standards. This risk is equally present with respect to the Overseas Operations (Service Personnel and Veterans) Act 2021, which affords effective impunity of the UK's overseas military operations for a number of offences while also restricting the ability of service people to bring claims for personal injury and death during the course of overseas actions.

Pre-charge Bail – Part 2, Clause 43

7. An individual who has been arrested by the police but not yet charged can be released on pre-charge bail. This is used to manage the arrested individual while the police continue their investigation. A person granted bail is periodically required to re-attend the police station. They may also be subject to additional conditions if they are deemed necessary. For example, to mitigate against further potential offending or contacting a witness.

8. Clause 43 and Schedule 4, Part 1 of the Bill would remove the perceived presumption against pre-charge bail introduced by the Policing and Crime Act 2017 (the "2017 Act"). The Bill then sets out the factors which should be taken into account in deciding whether to grant pre-charge bail, along with further provisions relating to time limits.

9. The use of pre-charge bail has fallen significantly as the number of individuals released without bail, commonly known as 'release under investigation' or 'RUI', has increased. The Government states that this "*gives rise to a number of issues as conditions cannot be placed on the suspect and police officers using RUI are not subject to the same level of accountability around decision-making, timescales, notification to the suspect, victims and witnesses.*"[5] JUSTICE agrees that pre-charge bail is not always being used appropriately under the current regime, and has, as we were concerned would happen, led to even longer periods before charge or discontinuation of an investigation.[6] However, the changes to pre-charge bail proposed in the Bill would not change decision-making practices and will still not shorten the length of investigations. Only limiting the investigation period would resolve the problem of being under suspicion for overly long periods.[7]

10. The rise in the use of RUI is also the result of a lack of funding, which the measures proposed in the Bill would not change. In 2018, the National Audit Office found that police funding had been significantly cut, with central government funding to police and crime commissioners falling by 30% in real terms since 2010-11.[8] There has also been a marked reduction in officers; some 45,000 jobs with the police force have been lost. The police are faced with the difficult task of being able to effectively and efficiently respond to crimes

[5] Home Office, 'Police Powers: Pre-charge Bail – Government Reponses', January 2021, p.7.

[6] JUSTICE, 'Police Powers: Pre-charge Bail, Government Consultation', May 2020, p.2.

[7] For further discussion of this proposal see JUSTICE, 'Policing and Crime Bill: House of Lords Second Reading' 2016.

[8] National Audit Office, 'Financial sustainability of police forces in England and Wales 2018', 2018, p.7.

and manage their investigations whilst working within ever tightening resources and dwindling financial support.

Removing the 'perceived' presumption

11. Removing the perceived presumption against the use of pre-charge bail is unnecessary and would have no material effect on police practices or the decision-making process. The explanatory notes to the Bill describe the presumption against the use of pre-charge bail as a 'perceived' presumption.[9] This is because the 2017 Act did not introduce an actual presumption against pre-charge bail and did not intend to create one. The proposed changes in Schedule 4, Part 1 of the Bill make no substantive change to the current regime and are therefore unlikely to have any effect on police practices.

Extending time limits and authorisation

12. Extending the time limits for when authorisation or an extension must be sought will not re-incentivise the use of bail but will instead lead to lengthier investigations. In the Government's response to the consultation on these proposed changes, it noted that feedback from policing stakeholders was that the current regime disincentivises officers from using bail in complex cases that are difficult to progress and/or conclude within 28 days.[10] However, this is not convincing. Currently, if an inspector cannot complete their investigation within the 28-day initial bail period, they must seek authorisation from a superintendent to extend the bail for a further two months, allowing for a total of three months to investigate. At present, 71% of cases reach an outcome within the 28 days. Therefore, having a period of three months for investigation should be sufficient to complete the investigation in the majority of cases.

13. Extending the initial bail period to three months is unnecessary and fails to recognise the harmful effects on suspects, and victims, of longer delay – the main mischief that the introduction of these provisions was intended to reduce, but has in fact extended. It would also have the effect of disincentivising speedy investigations.

14. Authorisation above the rank of inspector (i.e. superintendent) would not be required until an extension after six months. Currently their authorisation is required after 28 days. Under the current proposals, a magistrate would not become involved until a *third* extension beyond *nine* months. Currently a magistrate has to approve a second extension beyond

[9] Home Office, Ministry of Justice and Department for Transport, 'Police, Crime, Sentencing and Court Bill Explanatory Notes', March 2020, p. 59.

[10] Home Office, 'Police Powers: Pre-charge Bail – Government Reponses', January 2021, p. 11.

three months. These changes would represent a significant reduction and delay in independent oversight of decisions affecting liberty and are therefore inadequate.

15. As such, we see no convincing reason or evidence that the proposed changes are necessary or useful. Moreover, we have concerns that prolonged periods of bail may create supervision problems, with resources being expended on supervising bail conditions rather than investigating crimes.

Non-violent Protests – Part 3, Clauses 54 - 60

16. The Bill proposes serious restrictions on the right to protest in England and Wales by expanding the reasons the police may rely on to impose conditions. At present, under sections 12 and 14 of the Public Order Act 1986 ("POA"), a senior police officer can impose conditions on public processions and assemblies if they reasonably believe they may result in serious public disorder, serious damage to property or serious disruption to the life of the community. Clauses 54 and 55 of the Bill adds to this list "*noise which may result in serious disruption to an organisation in the vicinity*" and "*noise which will have a relevant and significant impact on persons in the vicinity*". Under the proposed measures, noise may be judged to have a significant impact on a person in the vicinity if it may cause persons of reasonable firmness to, amongst other things, suffer serious unease.

17. Clause 56 would remove the requirement that conditions imposed on a public procession or assembly need to be knowingly breached. This would also increase the maximum sanction following a conviction for breaching a condition from three months to 51 weeks of imprisonment.

Concerns

18. JUSTICE agrees with the Home Secretary that the "*right to protest peacefully is a cornerstone of our democracy*." It is surprising, then that this proposal has been introduced to supposedly respond "*to a significant change in protest tactics*."[11] She alleges that these changes have resulted in the hinderance of the work of emergency services and disruption of deliveries of newspapers from the printing press.

19. This is not convincing. Existing laws, such as the POA which was introduced following the Southall riot in 1979, the Brixton riot in 1981, and the miners strikes of 1984-85, already provide the police with a range of significant powers to deal with "*serious disruption*". As

[11] Parliament, 'Hansard, Volume 691: debated on Monday 15 March 2021', column 64.

such, the introduction of additional factors which can trigger the imposition of conditions on protests are unnecessary.

20. Even if the Home Secretary's claim were accepted, it still would not justify the measures in clause 54-56 of the Bill, which risk breaching Article 10 ECHR (freedom of expression), and Article 11 ECHR (freedom of assembly and association). Conditions which are imposed because they may cause a person serious unease risk breaching Article 10 ECHR. This is because Article 10 ECHR protects not only popular ideas and opinions but also those which, "*offend, shock or disturb the State or any sector of the population.*"[12]

21. In relation to Article 11 ECHR, the European Court of Human Rights ("ECtHR") has held that the "*freedom to take part in a peaceful assembly… is of such importance that it cannot be restricted in any way, so long as the person concerned does not himself commit any reprehensible act*".[13] Reprehensible acts are generally acts of violence or inciting others to violence. Intentionally causing serious disruption has been considered a reprehensible act but only when it disrupts to a more significant extent than that caused by the normal exercise of the right of peaceful assembly in a public place.[14] Generating noise, even when it causes disruption, is a normal exercise of the right to peacefully assemble.[15] Indeed, it is the essence of many protests because it is the method by which a message is communicated, both to those gathered as well as to the wider public. Focusing on the noise generated by a protest is likely to be overinclusive and apply to most protests. Protests tend to be noisy and are often meant to be challenging. People who disagree with the cause of a protest may well feel serious unease by the noise generated by it. In a democracy, this unease must be tolerated.

22. Specifically in relation to noise generated by protests, the ECtHR has suggested where such noise does not involve obscenity or incitements to violence, it will be difficult for a State to satisfy the requirement that restrictions on Article 11 ECHR are necessary in a democratic society.[16] The Government should bear in mind the words of Lord Denning, when he noted that protest "*is often the only means by which grievances can be brought*

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[12] *Handyside v United Kingdom* (App. no. 5493/72) (Judgment of 7 December 1976) ECtHR, para 49.

[13] *Ezelin v France* (App. No. 11800/85) (Judgment of 26 April 1991) ECtHR, paras 51-53.

[14] *Kudrevičius and Others v. Lithuania* (App. No. 37553/05) (Judgment of 15 October 2015) ECtHR (GC), para 173.

[15] As suggested in *Galstyan v Armenia* (App. No. 26986/03) (Judgment of 15 November 2007) ECtHR, para 116, where the court noted that it was, *"hard to imagine a huge political demonstration, at which people express their opinion, not generating a certain amount of noise."*

[16] *Galstyan v Armenia* (App. No. 26986/03) (Judgment of 15 November 2007) ECtHR, para 116-177; *Ashughyan v Armenia* (App. No. 33268/03) (Judgment of 17 July 2008) ECtHR, para 75-77.

to the knowledge of those in authority—at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights."[17]

The use of Henry VIII clauses

23. Clauses 54(4) and 55(6) would give the Secretary of State the power to make provisions about the meaning of serious disruption to the activities of an organisation or to the life of the community by way of secondary legislation.

24. JUSTICE is concerned that the Home Secretary would have the power to define the meaning of broad and vague terms with limited parliamentary oversight. We are alarmed at another example, which forms part of an increasing trend, of using Henry VIII clauses in important pieces of legislation.[18] The Government must be clear and upfront in defining the scope of such powers, and fully engage Parliament for their future expansion. Given the proposed incursion into the fundamental freedom of speech, if included in the Bill, such powers should be limited in temporal scope by way of a sunset clause and be subject to Parliamentary review.

Public Nuisance

25. Clause 59 of the Bill replaces the common law offence of public nuisance with a new statutory offence. A person will commit an offence if they cause serious harm to the public or a section of the public. Serious harm is broadly defined and includes any damage to property, serious annoyance, or serious inconvenience. A person convicted of this new offence is liable to a term of imprisonment not exceeding 10 years, a fine, or both.

Concerns

26. JUSTICE has two main concerns about clause 59 of the Bill. First, the context in which the offence is being introduced. Public nuisance as a common law offence is a broad offence which deals with a range of acts and omissions that relate to interferences with the rights of members of the public to enjoy public spaces and use public rights. It is not specifically targeted at policing protests. However, in the explanatory notes accompanying the Bill, clause 59 is introduced under the heading "*Police powers to tackle non-violent protests*".[19]

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[17] *Hubbard v Pitt* [1976] Q.B. 142, at 148.

[18] For more information, see the Public Law Project's report on the executive's extensive use of delegated legislation, and the concerns with its lack of scrutiny: Alexandra Sinclair and Joe Tomlinson 'Plus ça change? Brexit and the flaws of the delegated legislation system' (2020) Public Law Project.

[19] Home Office, Ministry of Justice and Department for Transport, 'Police, Crime, Sentencing and Court Bill Explanatory Notes', March 2020, p. 16.

27. JUSTICE is concerned that the Government will use this new statutory offence, which is intentionally broad, to target a range of protest activity. This is not the mischief the Law Commission envisaged the new statutory offence would address,[20] nor what the offence is aimed at. Examples of the common law offence in practice include quarry blasting near a built-up area, the emission of noxious smells form a chicken-processing factory, mooring boats and pontoons so as to obstruct river navigation, and allowing droppings from pigeons roosting under a railway bridge to accumulate on the highway below.[21]

28. By expanding the use of public nuisance offences, the Government appears to create a 'catch all' so as to criminalise protestors in the absence of a relevant direction under existing or proposed public order measures. This is clear from the approach taken with respect to previous Extinction Rebellion protests,[22] where the police attempted to prosecute protestors through an unlawful exercise of the POA. Clause 59 would, therefore, represent the potential criminalisation of every single protest undertaken. This would undoubtedly incur serious violations of Articles 10 and 11 ECHR. It is unacceptable that peaceful protests should be captured by any new, broad, public nuisance offence.

29. Second, while the common law offence of public nuisance has been used in relation to protests, this is rare. Where charges of public nuisance have arisen, it is rarer still for custodial sentences to be imposed. Indeed, in the case of *Roberts*, the court quashed the use of a custodial sentence due to it being "manifestly excessive". The court went on to note that the "*underlying circumstances of peaceful protest are at the heart of the sentencing exercise. There are no bright lines, but particular caution attaches to immediate custodial sentences*."[23]

30. The Bill, by contrast, would introduce a 10 year maximum sentence for the offence. JUSTICE is concerned that introduction of a relatively high maximum sentence would lead to a change in sentencing practices which would result in more protesters receiving a

[20] The Law Commission said in discussing whether a defendant's conduct was an exercise of their Article 10 or 11 rights under the ECHR that it was, "*somewhat difficult to imagine examples in which this point arises in connection to Public Nuisance*." The Law Commission clearly did not envisage Public Nuisance being used to respond to non-violent protest as this is an example which clearly engages a defendant's rights pursuant to Article 10 and 11 ECHR. See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*, 2015, para 3.61 and note 122.

[21] See *Attorney General v PYA Quarries Ltd (No.1)* [1957] 2 Q.B. 169; *Shoreham by Sea Urban DC v Dolphin Canadian Proteins 71* (1972) L.G.R. 261; *Couper v Albion Properties Ltd* [2013] EWHC 2993 (Ch); and *Wandsworth LBC v Railtrack Plc* [2001] EWCA Civ 1236; [2002] Q.B. 756.

[22] *R v The Commissioner of Police for the Metropolis* [2019] EWHC 2957 (Admin).

[23] Ibid, para 43.

custodial sentence when they are charged with public nuisance. Not only would these measures be problematic with respect to the UK's compliance with the ECHR, they would also risk significantly impacting and further criminalising a disproportionate number of ethnic minority individuals, who are often at the forefront of such movements.

31. The right to protest is fundamental. As such, the Government should clarify the aim of the statutory public nuisance offence, how it is intended to be used alongside other existing policing powers, whether participation in a protest would be considered a reasonable defence, and how any sentences relating to public nuisance offences, which should be limited to circumstances involving serious harm and damage, would operate in practice.

Unauthorised Encampments – Part 4, Clauses 61 - 63

32. Clause 61 of the Bill would create a new criminal offence of residing or intending to reside on land without consent of the occupier, in or with a vehicle. This criminalises trespass when setting up an unauthorised encampment. Existing powers under sections 61-62E of the Criminal Justice and Public Order Act 1994 provide that the landowner must make a request to the police for the trespasser's removal. Depending on the number of vehicles on the site, there are additional duties for the landowner to take reasonable steps to ask them to leave, as well as for police officers to work with the local authority to provide a suitable pitch for the caravans within the area. An offence only occurs where an individual disobeys a direction of the police. In addition, the Bill would increase the existing period of time in which trespassers directed from land would be unable to return from three to 12 months.

33. It is unacceptable that the new section 60C would empower landowners (or their representatives), as well as the police, to trigger a criminal offence with respect to what is ordinarily a civil dispute. The Bill would also not require that any such request be made in writing. This means that a criminal offence could be committed before (and without the need for) the issuance of a police direction. JUSTICE considers that the privatization of such powers is deeply concerning and would lead to private individuals exercising significant powers without the need to consider the welfare consequences of the individuals they wish to evict.

34. These measures would directly target GRT people and risk incurring serious breaches of human rights and equality law.[24] The proposed measures risk further breaching GRT

[24] The term unauthorised encampments is associated with GRT people (see J. Brown, 'Police powers: unauthorised encampments' December 2020) and the Government explicitly references Traveller

people's rights under Article 8 ECHR, which proactively obliges the Government to take steps to facilitate GRT people's way of life.[25] The proposed measures would not only fail to do this, but instead seek to criminalise further an already marginalised community.[26] The Court of Appeal recently held, "*that there is an inescapable tension between the article 8 rights of the Gypsy and Traveller community . . . and the common law of trespass.*"[27] It is likely that this tension will be more pronounced if this new criminal offence is introduced. Given that these powers appear unnecessary, as discussed below, it will be difficult for the Government to justify that the proposed measures are a proportionate interference with Article 8 ECHR.

35. The proposed measures are also likely to indirectly discriminate against GRT people in contravention of sections 19 and 29(6) of the Equality Act 2010. There is a chronic lack of provision of authorised sites for GRT people to use[28] and they would therefore be put at a particular disadvantage by the criminalisation of trespass as there is little option open to them if they want to enjoy their "*enshrined freedom not to stay in one place but to move from one place to another*".[29] The Equality and Human Rights Commission ("EHRC") considered that this indirect discrimination could not be justified in their response to the Government consultation on this issue in 2018.[30] The EHRC were also of the opinion that criminalisation of trespass would breach the public sector equality duty in section 149(1) of the Equality Act.[31] No equalities statement has been issued in relation to the new offence proposed in clause 61 of the Bill.

36. The police currently have extraordinarily strong powers, which, as noted above, presently incur significant damage to GRT communities. Section 61 of the CJPO provides that the police can remove trespassers who set up an unauthorised encampment from a property,

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caravans in the background briefing to the Queen's speech, p74. The Government has also made it clear it is not criminalising trespass generally, see Parliament, 'Government response to: Don't criminalise trespass'.

[25] *Chapman v United Kingdom* (App. No. 27328/95) (Judgment of 18 January 2001) ECtHR, para 96.

[26] Case law suggests the UK will be afforded a narrower margin of appreciation in cases where a particular lifestyle is criminalised than in cases involving social and economic policy such as planning, the subject of most of the cases on this issue to date see *Connors v United Kingdom* (App. No. 66746/01) (Judgment of 27 May 2004) ECtHR, para 82.

[27] *London Borough of Bromley v Person Unknown and Others* [2020] EWCA Civ 12, para 100.

[28] Friends, Families and Travellers, 'New research shows huge unmet need for pitches on Traveller sites in England' January 2021.

[29] *London Borough of Bromley v Person Unknown and Others* [2020] EWCA Civ 12, para 109.

[30] EHRC, 'Response of the Equality and Human Rights Commission to the Consultation: *"Powers for dealing with unauthorised development and encampments"*', 2018.

[31] *Ibid*.

and section 62C details the power to seize their vehicles. These new powers are, therefore, unnecessary. Indeed, in response to a government consultation on this issue in 2018, 75% of police responses said current police powers were sufficient and 85% of police responses did not support the criminalisation of unauthorised encampments.[32]

Early Release and Increased Tariffs – Part 7, Clauses 100 - 114

37. The Bill proposes changes to the proportion of the sentence that an individual spends in prison before being released on license, where they serve the rest of their sentence in the community. In the Ministry of Justice's White Paper, 'A Smarter Approach to Sentencing' (the "White Paper"), the Government said these changes were needed to ensure the public has confidence in the CJS.[33] JUSTICE understand the CJS often fails victims of crime.

38. However, JUSTICE opposes these changes as they would actively hinder the rehabilitation of those detained, while also neglect to tackle the real problem preventing victims from securing a just outcome – namely, the significant backlog of cases in the court system.[34] A third of courts have closed since 2010[35] and the backlog this has led to has been compounded by the COVID-19 pandemic. Addressing this issue is crucial to achieving the Government's aim of improving public confidence in the CJS.

Discretionary Life Sentences

39. Discretionary life sentences are life sentences for offences other than murder. The minimum term, or 'tariff', is the time an individual must serve in prison before being considered for release by the Parole Board. Clause 105 of the Bill would move the point at which an individual is considered for release by the Parole Board from the mid-way point of the notional sentence the court would have given if they had not given a life sentence to two-thirds of the way through that notional sentence.

Changes to certain Standard Determinate Sentences

40. Currently under the Criminal Justice Act 2003 ("CJA"), an individual who is given a standard determinate sentence ("SDS") will be released on license at the halfway point of their sentence if their sentence is less than seven years. Clause 106 of the Bill changes this so an individual will instead be released on license after serving two-thirds of their

[32] Friends, Families and Travellers, 'Police oppose criminalising unauthorised encampments and call for more sites', 2019.

[33] Ministry of Justice, 'A Smarter Approach to Sentencing', September 2020, p. 25.

[34] Ministry of Justice, 'Criminal court statistics quarterly: July to September 2020', December 2020.

[35] J. Ames and R. Ellis 'Courts in crisis: Third of courthouses sold off' *The Times*, 31 January 2020.

sentence if they have committed certain violent and sexual offences and the term of their sentence is four years or more.[36] Clause 106 also moves the release point for children who are sentenced to a term of imprisonment of seven years or more from half-way to two-thirds of the way through their sentence.

Concerns

41. These changes would have a disproportionate impact on young BAME people. BAME people are overrepresented at every stage of the CJS.[37] In the equality statement relating to this aspect of the Bill, the Government accepts this fact.[38] In relation to children, the equality statement only states, "*we recognise that there may be indirect impacts on children with certain protected characteristics*". This fails to adequately acknowledge the disproportionality that exists in the youth justice system. Of all the children in custody, 53% are BAME,[39] despite making up only 18% of the general child population.[40]

42. Bizarrely, the equality statement, in relation to SDSs, states that it does not consider the proposed changes would "*result in a particular disadvantage for offenders in these cohorts*".[41] It should be obvious that spending longer in prison is disadvantageous. In any event, the Government says any indirect discrimination is a proportionate means of achieving a legitimate aim of protecting the public. JUSTICE disagrees. First, the measure represents a blanket, indiscriminate increase in sentence regardless of the individual's own specific circumstances, and whether they are assessed as "dangerous" to the public or what rehabilitation programmes they have completed. Second, there are already alternative sentences that can be given if a court considers an individual is "dangerous" and poses a risk to the public if released on license.[42] Third, for the reasons set out below, the proposed measures undermine rehabilitation, which significantly increases the

[36] The violent offences are manslaughter, soliciting murder, wounding with intent to cause grievous bodily harm, certain ancillary offences related to these offences and inchoate offences relating to murder. The sexual offences are those in Schedule 15, Part 2 CJA for which a sentence of life imprisonment may be imposed.

[37] B. Yasin and G Sturge, *Ethnicity and the criminal justice system: What does recent data say on over-representation?*, (House of Commons, October 2020).

[38] Home Office and Ministry of Justice, 'Overarching equality statement: sentencing, release, probation and youth justice measures', March 2021.

[39] Her Majesty's Prison and Probation Service and Youth Custody Service, '*Youth custody data*',12 February 2021.

[40] Youth Justice Board and Ministry of Justice, 'Youth Justice Statistics 2016/17: England & Wales, January 2018', p. 2.

[41] Home Office and Ministry of Justice, 'Overarching equality statement: sentencing, release, probation and youth justice measures' March 2021.

[42] Section 224A and 225 CJA.

chances that an individual will not reoffend when their sentence ends. This could make the public less – not more - safe.

43. The purpose of releasing an individual into the community on license is so that they can be better rehabilitated through a period of support and supervision from the probation service. Shortening that period risks undermining this rehabilitation and therefore the safety of the public. This bears out in many studies that have found effective rehabilitation and/or diversion programmes as being key to reducing rates of reoffending.[43] Further, the Impact Assessment of the Bill admits that there is a, "*risk of having offenders spend longer in prison and a larger population may compound overcrowding (if there is not enough prison capacity), while reducing access to rehabilitative resources and increasing instability, self-harm and violence*."[44] The proposed changes to release points therefore risk undermining the rehabilitation services that individuals can access in prison whilst shortening the supervised period of rehabilitation once they leave prison. The result would be that such individuals are less likely to be rehabilitated.

44. JUSTICE is particularly concerned that these changes will apply to children sentenced to offences of seven years or more. Children have a greater capacity to change as they are still developing. The Sentencing Council guidelines for children and young people state that sentences should focus on rehabilitation.[45] The proposed punitive shift in sentencing undermines children's rehabilitation and their greater capacity to change.

45. Moreover, the Bill would require financial investment to increase the number of prison cells needed to house the longer time prisoners will be detained. This money should be spent on preventative and rehabilitative programmes, shown to have far greater impact on recidivism than our creaking and overcrowded prisons can provide.

Referring Cases to the Parole Board – Part 7, Clause 108

46. The Terrorist Offenders (Restriction on Early Release) Act 2020 ("TORER") introduced new provisions which require that a prisoner who has been convicted of a terrorism offence specified in Schedule 19ZA, or any other offence in the schedule which the court deems

[43] See, for example: Ministry of Justice, 'Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders', 2010; Ministry of Justice, 'Transforming Rehabilitation: a summary of the evidence on reducing reoffending', 2013; and Scottish Government, 'What works to reduce reoffending: a summary of the evidence', 2015.

[44] Ministry of Justice and the Home Office, 'Impact Assessment: Police, Crime, Sentencing and Courts Bill: Sentencing, Release, Probation and Youth Justice Measures', para 43.

[45] Sentencing Council, 'Sentencing Children and Young People', June 2017, section 1.2.

to have a terrorist connection, may only be released from the two-thirds point of the custodial period upon direction by the Parole Board instead of being entitled to automatic release at the mid-point of their sentence.

47. Clause 108 of the Bill builds on this approach and would give the Secretary of State the power to prevent any prisoner sentenced to a fixed term sentence being automatically released by referring them to the parole board, "*if the Secretary of State believes on reasonable grounds that the prisoner would, if released, pose a significant risk to members of the public of serious harm occasioned by the commission*" of a range of specified violent, sexual or terrorist offences.[46] An individual would then only be released following a decision of the Parole Board.

Concerns

48. Clause 108 significantly increases the power of the Secretary of State to determine which prisoners can and cannot be automatically released. In the White Paper, this power was said to only be intended for a small number of individuals.[47] However, the criteria for the power are broad and apply to a significant number of prisoners. The drafting of clause 108 creates the danger that the power could be used more widely than envisaged in the White Paper. This would undoubtedly put pressure on the Parole Board. Although it has reduced its backlog, the Parole Board still has issues with cases being significantly delayed.[48]

49. In addition, clause 108 would also incur serious inadvertent consequences. By potentially requiring that a SDS prisoner serve additional time in prison, the amount of time that they would spend in the community under supervision from the probation service, would correspondingly decrease. This means less time for rehabilitation and reintegration into society, thereby risking increased rates of reoffending. This not only has negative consequences for the prisoner, but also for the general public at large, as noted above.

50. JUSTICE is also concerned that clause 108 risks violating Article 5 ECHR.[49] Prisoners would only be released at the direction of the Parole Board. The Parole Board's October 2019 guidance suggests that the three parameters used for this decision making are:

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[46] These offences are set out in Schedule 18, Part 1, 2 and 3 of the Sentencing Act 2020.

[47] Ministry of Justice, 'A Smarter Approach to Sentencing', September 2020, para 64.

[48] Ministry of Justice, *Tailored Review*, (The Parole Board of England and Wales, October 2020) para 42.

[49] These are the same concerns to those raised by JUSTICE in relation to TORER Act see JUSTICE, 'Terrorist Offenders (Restriction of Early Release) Bill, House of Lords Second Reading Briefing' (2020).

"*analysis of offending behaviour (the past); analysis of the evidence of change (the present); and analysis of the manageability of risk (the future)*".[50] The guidance also provides that "*evidence of change*" includes "*engagement with programmes/therapy and other opportunities, educational and vocational achievements, and use of new skills*"[51].

51. This requirement is similar to Imprisonment for Public Protection ("IPP") sentences. These sentences required that a prisoner remained in custody indefinitely beyond their tariff until they had undertaken certain courses to demonstrate that they were not dangerous. In *James, Wells and Lee v United Kingdom*[52], these sentences were held to be in breach of the Article 5 ECHR right to liberty. This was due to the considerable length prisoners served over their tariff due to relevant courses being unavailable.

52. Following the judgment in *James*, IPPs were repealed, but this change was not applied retrospectively. As such, many are still in prison on IPP sentences, having not been able to demonstrate to the Parole Board that they are suitable for release. The Prison Reform Trust and University of Southampton[53] found that current IPP prisoners are still reporting difficulties accessing required courses, with one prisoner quoted as stating:

> "*Prisoners are told they have got to do these courses. But either they are not available because they are full up, or they don't run them, or you have got to wait years for them … How are they supposed to achieve the unachievable?*"[54]

53. Given the current strains on prisons, JUSTICE considers that there is a serious risk that the proposals in this Bill will violate Article 5 ECHR by unlawfully extending custody due to a lack of appropriate rehabilitative courses. Prisoners must be provided with appropriate courses so that they may meet the requirements of the Parole Board.

54. JUSTICE is also concerned that clause 108 risks violating Article 7 ECHR.[55] This Article entrenches the prohibition on retrospective punishment. The power in clause 108 could be

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[50] RADAR, 'The Parole Board Decision-Making Framework', 2019, p. 17.

[51] *Ibid*, p. 18.

[52] James, Wells and Lee v United Kingdom (App. No. 25119/09, 57715/09 and 57877/09) (Judgment of 18 September 2012) ECtHR.

[53] Annison, & Straub, *A Helping Hand: Supporting Families in the Resettlement of People Serving IPPs*, 2019.

[54] *Ibid*, p. 13.

[55] These are similar to the concerns JUSTICE raised in relation to TORER Act see JUSTICE, 'Terrorist Offenders (Restriction of Early Release) Bill, House of Lords Second Reading Briefing' (2020).

used for prisoners sentenced before the Bill became law. Although the clause does not change the legal penalty that a prisoner will receive, it does change when they are released from prison. We therefore consider that this redefines the scope of the penalty imposed, which would breach Article 7 ECHR.[56]

55. Clause 108 would also give the Secretary of State the power to retrospectively modify the SDS imposed by the sentencing judge into a sentence more akin to Extended Determinate Sentences ("EDS"). Currently prisoners given an SDS are entitled to automatic early release. Those convicted who are considered 'dangerous' can be given an EDS. One aspect of these sentences is that release during the custodial period of the sentence is at the discretion of the Parole Board. The White Paper stated that the purpose of the new power was for prisoners, "*whose offending behaviour and assessment of dangerousness at the point of sentencing did not meet the threshold for imposition of a sentence with Parole Board oversight*".[57] It appears clause 108 was designed to give the Secretary of State the power to impose restrictions found in an EDS when a sentencing judge at the point of sentencing could not assess the person convicted as 'dangerous'.

56. Clause 108 would therefore go beyond just a change to the arrangement of early release and would instead be a change to the sentences imposed by the sentencing judge. This change would redefine the scope of the penalty imposed in a way that was not reasonably foreseeable by the person convicted and therefore risks breaching their rights under Article 7 ECHR.

57. It is equally concerning that the Bill would empower the Secretary of State to, in effect, impose a sentence different (and indeed more severe) than that already determined by the original judge. Both Article 6 ECHR, which safeguards the right to a fair hearing, and the principles of procedural fairness demand that the imposition of a sentence must be made by an independent and impartial tribunal. In *Findlay v United Kingdom,*[58] the ECtHR held that the power to give a binding decision which may not be altered by a non-judicial

[56] See *Del Rio Prada v Spain* (App. No. 42759/09) (Judgment of 21 October 2013) ECtHR. This argument was considered and rejected by the High Court in *R (Khan) v Secretary of State for Justice* [2020] EWHC 2084. In this case, Garham J held, that the changes introduced by TORER did not violate Article 7 ECHR because they, "*were changes in the arrangement for early release; they were not changes to the sentence imposed by the sentencing judge.*" For the reasons given above, JUSTICE considers that even if this is correct (which JUSTICE doubts), this cannot be said about the power in clause 108 of the Bill.

[57] Ministry of Justice, 'A Smarter Approach to Sentencing' September 2020, para 64.

[58] *Findlay v United Kingdom* (App. No. 22107/03) (Judgment of 25 February 1997) ECtHR.

authority is inherent in the very notion of a "tribunal".[59] As a result, conferring a power to the Secretary of State that allows them to alter the sentence handed down by a judge risks violating Article 6(1). Furthermore, any decision taken by administrative authorities which themselves do not satisfy these requirements must be subject to subsequent review before a tribunal that does.[60] Finally, in light of the emphasis placed on the importance of the independence of the judiciary from the executive in the ECtHR's jurisprudence on Article 6 ECHR, it is likely that granting judicial powers to a member of the executive would risk a serious violation.[61]

Serious Violence Reduction Orders – Part 10, Clauses 139 - 140

58. The Bill introduces a new civil order into the Sentencing Code, called 'Serious Violence Reduction Orders' or 'SVROs'. A person subject to an SVRO could be stopped and searched whenever they are in a public space without the need for the police to have reasonable suspicion for suspecting they will find stolen or prohibited articles on the person.

59. An SVRO could be given to a person over the age of 18, who has been convicted of an offence and used a blade or offensive weapon in the commission of the offense, had a blade or offensive weapon with them when the offence was committed, or another person used or had with them a blade or offensive weapon and the individual knew or ought to have known that would be the case. An SVRO can be given for a minimum of six months and a maximum of two years. A person who breaches the conditions of their SVRO, for example, by intentionally obstructing a police officer's search of them, will commit an offence which is liable for a term of imprisonment of up to two years, or a fine, or both.

60. The Government maintains that stop and search is a vital tool for responding to violent crime. It argues that a personalised power to search such individuals would reduce knife crime.[62] JUSTICE appreciates the importance of tackling knife crime. However, this must be done in a fair, proportionate, and evidence-based manner. SVROs are none of these things.

[59] *Ibid*, para 77.

[60] *Öztürk v Germany* (App. No. 8544/79) (Judgment of 23 October 1984) ECtHR, para 56.

[61] *Ninn-Hansen v Denmark* (App. No. 28972/95) (Judgment of 18 May 1999) ECtHR; *Henryk Urban and Ryszard Urban v Poland* (App. No. 23614/08) (Judgment of 30 November 2010) ECtHR, para 46.

[62] Home Office, 'Serious Violence Reduction Orders: A new court order to target known knife carriers' November 2020, p. 2.

61. The Home Office's own data indicate that stop and search is ineffective at tackling crime,[63] with its application to knife-related offences suggesting no statistically significant crime reduction effects.[64] At best, stop and search shifts violence from one area to another.[65] JUSTICE notes that under clause 140 of the Bill, SVROs could be implemented following a report of their piloting being laid before Parliament. This should be following a *successful* pilot, with clear measures of success. JUSTICE expects this report would show that SVROs are ineffective. Any effectiveness that is found must be balanced against the harmful effects of giving the police greater stop and search powers, as set out below.

62. SVROs would disproportionally target ethnic minorities, especially Black men and boys.[66] By the Home Office's own admission, SVROs would likely impact a considerable number of BAME individuals, given "*adults from some ethnic minority backgrounds are disproportionately more likely to be sentenced for a knife or offensive weapon offence*" and "*it may be that a disproportionate number of Black people are impacted, Black males in particular*".[67]

63. By permitting searches without reasonable suspicion, there is a clear risk that BAME individuals will be unduly targeted. Three quarters of BAME children and young adults already think that they and their communities are targeted unfairly by stop and search powers.[68] During a round table discussion held by the Home Affairs Committee a black child said, "*we know the police treat Black people differently...it means that we do not feel*

[63] By their own statistics, of all the stops and searches undertaken in the year ending March 2020, 76% resulted in no further action. See, Home Office, 'Police powers and procedures, England and Wales, year ending 31 March 2020', p. 1.

[64] R. McCandless, A. Feist, J. Allan, and N. Morgan, 'Do Initiatives Involving Substantial Increases in Stop and Search Reduce Crime? Assessing the Impact of Operation BLUNT 2', Home Office, 2016.

[65] Tiratelli, M., Quinton, P., & Bradford, B. '*Does Stop and Search Deter Crime? Evidence From Ten Years of London-wide Data*', The British Journal of Criminology, Volume 58(5), September 2018, p. 1212–1231.

[66] All existing stop and search powers already disproportionally target BAME, particularly Black, communities. People from ethnic minorities are 4.1 times more likely to be stopped by the police, rising to 8.9 times with respect to Black people, see Home Office, 'Police powers and procedures, England and Wales, year ending 31 March 2020', p.18. Under section 60, between March 2019 and March 2020, Black people were 18 times more likely to be stopped and searched than White people, see V. Dodd, 'Black people nine times more likely to face stop and search than white people' *The Guardian*, 27 October 2020.

[67] Home Office, 'Serious Violence Reduction Orders: A new court order to target known knife carriers – Government Consultation' November 2020, p.15.

[68] P. Keeling, 'No Respect: Young BAME men, the police and stop and search' (Criminal Justice Alliance, 2017), p. 20.

safe ever."[69] JUSTICE is therefore deeply concerned that introducing SVROs could weaken the confidence BAME communities have in the police.

64. Even though SVROs would focus solely on those with previous convictions, it would undoubtedly be damaging for the community to see others subject to searches for no apparent reason. In the words of Detective Sergeant Janet Hills, Chair of the Metropolitan Black Police Association, *"[s]top and search can have a negative effect on young BAME people's trust in the police. But to tackle violent crime, communities need to have confidence to contact the police and share information*".[70] As a result of damaging community relations, victims, witnesses and those suspected of committing crimes in BAME communities are understandably likely to be more reluctant to co-operate with the police. This risks crime going unreported, and unaddressed, resulting in increasing damage to communities alongside associated increase in policing costs.

65. The use of SVROs would risk breaching Article 8 ECHR – the right to respect for private and family life, home and correspondence. In *Gillan and Quinton v United Kingdom*[71], the ECtHR found that the stopping and searching of a person in a public place without reasonable suspicion of wrongdoing could violate Article 8 ECHR, where such powers are not sufficiently circumscribed and contain inadequate legal safeguards to be in accordance with the law. In particular, the ECtHR determined that the lack of reasonable suspicion rendered an individual "*extremely vulnerable to an arbitrary exercise of power*" and represented a lack "*of any practical and effective safeguards*".[10] JUSTICE considers that the proposed framework could therefore risk violating Article 8 ECHR and be open to challenge in the courts.

66. More concerningly, SVROs could risk further criminalising women who may have been pressured into carrying knives. There has been a 73% increase in the last 5 years in the number of knife possession offences involving women.[72] Behind this statistic, JUSTICE found in its recent report on discrimination in the youth justice system[73] that domestic

[69] Home Affairs Select Committee, Serious youth violence, Sixteenth report of session 2017-2019, 18 July 2019.

[70] K. Kalyan & P. Keeling, *Stop & Scrutinise: How to improve community scrutiny of stop and search*, (Criminal Justice Alliance, 2019), p. 1.

[71] Gillan and Quinton v United Kingdom (App. No. 4158/03) (Judgment of 12 January 2010) ECtHR.

[72] S. Kirker, 'Sharp rise in women caught carrying knives', *BBC*, 8 August 2019.

[73] JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice*, (February, 2021)

abuse, sexual violence and exploitation are just a number of factors that put girls at risk of becoming involved in serious violence, with limited support available to those affected.[74]

67. In sum, individuals subject to SVROs, including those who are highly vulnerable, would be treated as perpetual criminals upon release from prison because they would be indiscriminately deemed "*likely to go on to commit more violence*" when in the community, simply on the basis of a previous, specific conviction.[75] This approach would offer nothing by way of rehabilitation, and instead represent the extension of punishment from prisons into communities that are already excessively targeted by the CJS.

Conclusion

68. There are serious problems with this Bill. While certain measures might present positive reforms to the CJS, the overall package is highly concerning. As detailed above, many of the proposals would dilute the UK's commitment and adherence to international human rights laws and norms. They represent a more punitive approach to policing society that is deeply divisive and problematic.

69. For the reasons set out in this briefing, JUSTICE strongly urges Parliament to remove the Bill's abovementioned offending provisions, in the interests of those communities likely to be impacted by these measures and the UK's reputation as a country governed by the rule of law.

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[74] See further, C. Firmin, '*To stop women and girls carrying knives, tackle the abuse and violence they face*', *The Guardian*, 9 August 2019.

[75] Home Office, 'Serious Violence Reduction Orders: A new court order to target know knife carriers', September 2020, p.18.