Police, Crime, Sentencing and Courts Bill

House of Lords

Second Reading

Briefing

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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 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 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 criminal justice system, 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:

    - **Part 2: Serious violence duty**, which would allow the police to demand information about individuals (including victims and children) from a range of public bodies. Despite purporting to be a 'public health' approach to the issue of violence, it represents a new iteration of enforcement driven policy akin to the Gangs Violence Matrix and the PREVENT programme. Moreover, the duty would weaken important data protection principles and confidentiality obligations.

    - **Part 3: Increased powers for police to impose restrictions on peaceful procession, assembly, and protest**, which would expand the circumstances in which police can impose conditions on a range of activities. For example,

[1] 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.

religious festivals, community gatherings (from Notting Hill Carnival to firework nights, such as those in Lewes), football matches, LGBT+ Pride marches, vigils/remembrance ceremonies, and so on. The Bill also removes the need to knowingly breach police-imposed conditions in order to commit an offence and introduces a broad statutory offence of public nuisance with a maximum sentence of 10 years in prison. These changes risk breaching rights to freedom of expression and assembly and the requirement for legal certainty.

- **Part 4: Increased powers for police to respond to 'unauthorised encampments'**, which would create a new offence of residing or intending to reside on land with a vehicle where it causes, or is likely to cause "s*ignificant disruption, damage, or distress*". It also increases 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.

- **Part 7: 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.

- **Part 7: 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.

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

- **Part 10: Serious Violence Reduction Orders**, 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 further damage police relations with minority communities and risk violating an individual's Article 8 ECHR rights to privacy.

4. JUSTICE welcomes the increased use of technology as part of the solution to dealing with a number of issues which currently plague the system, including the court backlog and ageing court estate. Clause 169, for example, would enable courts to require or permit persons to take part in criminal proceedings either by audio or video link. JUSTICE has piloted fully virtual jury trials.[3] 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. However, whilst we support the principle of the increased use of technology in the form of remote hearings and proceedings, we also appreciate that this must be implemented with caution and with appropriate safeguards. We therefore agree with the concerns of the House of Lords' Constitution Committee and echo its calls for greater safeguards: the introduction of a requirement for defendants' consent, physical/mental health assessments, and the need for a comprehensive pilot prior to their implementation more widely.[4] We would add that any such pilot must be rigorously and independently evaluated. At present, JUSTICE considers that it simply would not be workable for these measures to be introduced without greater investment in the necessary technology and addressing pre-existing barriers to effective participation.

5. JUSTICE is equally 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.

[3] JUSTICE, 'JUSTICE COVID-19 response', 2020.

[4] House of Lords Select Committee on the Constitution, 7th Report of the Session 2021-22, 'Police, Crime, Sentencing and Courts Bill', 9 September 2020, pp.8-9.

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.[5] 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.**

[5] 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.

Serious Violence Duty – Part 2, Clauses 7 - 22

7. The Bill at clause 7(1) to (2) would create a new 'serious violence duty' requiring "*specified authorities*" - a range of public bodies, including, *inter alia*, local government, the NHS, schools, prisons, the probation services, youth offending teams, and the police[6] - to "*collaborate with each other to prevent and reduce serious violence*" in their respective areas. The Government claims that this is introduced as a part of a 'public health approach' to tackling serious violence on a multi-agency basis.[7] Clause 7(3) requires these specified authorities to identify the kinds of serious violence that occur in the area, their causes (so far as it is possible to do), and prepare and implementing a strategy to prevent and reduce such violence. The application of the duty in practice is set out in draft guidance.[8]

8. Clause 12 provides for a broad definition of "*preventing serious violence*". It means preventing people from becoming involved in serious violence and instances thereof. This also includes becoming a victim of serious violence. "Violence" includes violence against property and threats of violence.[9] Subsection (4) provides each specified authority with the discretion to determine what amounts to serious violence in their local area, so long as they take into account the factors provided in the Bill.[10]

9. The Bill also makes significant changes to the data protection framework. Clause 9 would allow the Secretary of State, through regulations, to confer powers on any of the specified authorities to collaborate with prescribed persons or bodies (including public, voluntary, or private sectors). Sub-clauses 9(2) to (4) allow the Secretary of State to make regulations authorising disclosures of information by a prescribed person to a range of bodies, including the police or prison authority, that breach "*any obligation of confidence owed by the person making the disclosure*" or "*any other restriction on the disclosure of information (however imposed)*". While clause 9(5) states that any such regulations must provide that they do not authorise disclosures that would contravene data protection legislation, the determination of any such breach must take into account these powers. Similar provisions dealing with the way data is shared between specified authorities are set out in Clause 15,

[6] For a full list of the 'specified authorities', see Schedule 1 of the Bill.

[7] Police, Crime, Sentencing and Courts Bill, 'Explanatory Notes', 6 July 2021, p.13.

[8] Home Office, 'Serious Violence Duty Preventing and reducing serious violence Draft Guidance for responsible authorities', May 2021.

[9] Clause 12(3).

[10] The following factors must be considered: the maximum penalty that could be imposed for any offence involved in the violence; the impact of the violence on any victim; the prevalence of the violence in the area; and the impact of the violence on the community in the area.

allowing for the disclosure of information notwithstanding obligations of confidence or any other restrictions save for relevant data protection legislation or the Investigatory Powers Act 2016 (so long as the requirements of the duty are considered).

10. JUSTICE fully agrees that the underlying drivers of serious violence must be addressed. At present, victims and communities across the country are let down by multiple issues within the criminal justice system. Too many crimes remain uninvestigated, compounded by increased court backlogs and a lack of suitable, comprehensive diversion programmes that aid individuals to move away from crime. Greater coordination among public bodies to address these underlying causes, such as poverty, homelessness, addiction, and poor education, is clearly desirable.

Concerns

11. JUSTICE considers that the Bill represents a continuation of a failed approach that invokes greater enforcement and over-policing to the detriment of evidence-based solutions while dismantling a range of pre-existing confidentiality obligations. JUSTICE notes four key concerns with the duty.

12. First, the duty would exacerbate racial inequalities in the criminal justice system. While the guidance notes that there is no specific 'lead' organisation or person,[11] the Bill privileges the police with a convening role. Clause 13 in particular provides that the police may monitor the exercise of the serious violence duty, with subsection 6 noting that specified authorities must cooperate with any requests for information that they make. This would, in effect, place policing priorities above other public bodies from which information is requested. Taken together with the disclosure provisions under clauses 9 and 15, the police would have the ability to undertake risk profiling of individuals, regardless of whether they have been convicted or not. Moreover, by defining "*becoming involved in serious violence*" to include "*becoming a victim*",[12] the Bill conflates the position of a victim and alleged offender. There is equally a risk that information pertaining to their families may also be shared between specified authorities and the police, especially where children are concerned.

13. While the concerns of victims must be taken into account for any comprehensive, multi-agency strategy which addresses serious violence, JUSTICE considers that the police and

[11] Home Office, 'Serious Violence Duty Preventing and reducing serious violence Draft Guidance for responsible authorities', May 2021, p.6.

[12] Clause 12(2).

enforcement led approach here risks stigmatization for individuals whose data is shared. This concern is not hypothetical, as it echoes the exact problems that exist with the Gangs Violence Matrix,[13] through which the Metropolitan Police Service ("MPS") can share the names of individuals (including victims and children) with other public bodies such as job centres, social services, and schools. As a result, many of those named, as well as their families, have been denied housing, excluded from school (pursuant to 'zero tolerance policies', which may even impact their close friends)[14] and refused job opportunities.[15] There are equally potent parallels with the PREVENT programme.[16]

14. The draft guidance for the duty notes the obligations of public bodies that exist under the Equality Act 2010, stating "*[s]pecified authorities should also monitor the impact of their local strategies on those with protected characteristics*."[17] However, ethnic minorities are already vastly overrepresented at all levels of the criminal justice system,[18] and discrimination is rife. Indeed, this has consequently resulted in a profound lack of trust in the police, who would take a lead role in the implementation of the duty. There is limited value in retrospectively monitoring the duty's entirely foreseeable disproportionate impact on ethnic minorities without addressing the underlying causes of discrimination.

[13] The Gangs Violence Matrix is an intelligence tool the MPS use to identify and risk-assess individuals – often children and young adults – across London who are allegedly involved in 'gang' violence. It also seeks to identify those at risk of victimisation, and can include individuals who have simply been victims of serious violence themselves, with no prior convictions. Recent demographic breakdowns shows approximately 90% of individuals on the list being non-White.

[14] Amnesty International, Trapped in the Matrix, (2018), p. 25.

[15] For instance, in 2017, Tower Hamlets Council and the MPS established Operation Continuum. This programme aims to create a hostile environment for those suspected of drug dealing, which includes the denial of housing. See also A. Mistlin, 'Hundreds of charges in 'Operation Continuum' drug dealer crackdown', East London Times, 15 November 2019.

[16] PREVENT is one of four elements of CONTEST, the government's counter-terrorism strategy. While guidance is clear that this is not a police programme, we understand that they take a leading role. There is a significant and disproportionate representation of Muslim children and young adults referred to PREVENT, relative to their proportion in the school and college-age population. In 2016, Muslim children made up to 60% of referrals. For further discussion of the negative impact that PREVENT has on Muslim communities, *see* JUSTICE's recent report, 'Tackling Racial Injustice: Children and the Youth Justice System' (February 2021).

[17] *Ibid*, p.15.

[18] For example, recent data shows the number of ethnic minority children in custody standing at 52%, despite making up only 18% of the child population. With respect to adults, ethnic minority prisoners made up 27% of the custodial population, while making up approximately 14% of the population overall. (See Youth Justice Board for England and Wales, Ethnic disproportionality in remand and sentencing in the youth justice system, January 2021; Ministry of Justice, 'Her Majesty's Prison and Probation Service Offender Equalities Annual Report 2019/20', 26 November 2020; and UK Government, 'Population of England and Wales', last updated 7 August 2020.

15. Second, data sharing between public bodies (such as the NHS) and the Home Office are likely to further deter individuals, such as migrants, from accessing essential services. Indeed, this is already the case, with research showing the impact that the hostile environment had in making vulnerable individuals afraid to access healthcare services.[19] The duty would make this worse through enhancing data sharing arrangements and placing enforcement bodies at the forefront. In this respect, JUSTICE agrees with the public health charity Medact, who note that this measure would "*worsen racial discrimination in health services*".[20] This stands in contrast with true public health approaches to serious violence, which "*by contrast, emphasise the need to reduce inequalities (including health, gender, racial and economic inequalities), based on studies that show high levels of inequality create conditions that allow violence to flourish*."[21] Overall, both the Gangs Violence Matrix and PREVENT disproportionately target ethnic minorities, and engender a culture of suspicion on the part of state bodies to the communities that the police are supposed to serve. It is clear that there is a material risk this new duty would operate no differently.

16. Third, it is unclear how the Government proposes to ensure compliance with its Article 8 ECHR obligations. At Committee Stage, the Government claimed that "*information sharing between agencies is not always as full and as timely as we would like, because of concerns that they are not allowed to share information*."[22] For this reason, the Bill would allow specified authorities, and in certain cases third parties, to disclose information about individuals notwithstanding any existing obligations or safeguards. JUSTICE agrees that information sharing between public bodies is crucial, and we would welcome improvements in this respect. However, due consideration must be given to the risk of discrimination, stigmatization, and individual's existing rights to privacy and data protection. As the Bill stands, we consider that the Government fails to appreciate fully the importance of confidentiality, which is vital in many contexts, including medical and educational, or where children are concerned.[23] At present, there already exist a number

[19] 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' [version 1; peer review: 2 approved, 1 approved with reservations]. Wellcome Open Res 2019, 4:109.

[20] Medact, 'Serious violence measures in the Police, Crime, Sentencing and Courts (PCSC) Bill undermine public health', Briefing – September 2021.

[21] *Ibid*, p.2. *See also* Conaglen, P. and Gallimore, A., Violence Prevention: A Public Health Priority, 2014, Scottish Public Health Network, p. 16.

[22] HC Deb (25 May 2021), vol 696. col 254. Available here.

[23] See, for example, *Lambeth v A.M.* [2021] EWHC 186 (QB), [23] - [25]; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [136].

of information sharing programmes to which the police and other public bodies have access.[24] These reflect the delicate balance between the rights of individuals, safeguarding obligations, and wider public policy needs. The Government has failed to fully account for why present information sharing programmes are insufficient. It is, therefore, difficult to understand not only why the new duty is necessary, but also how it can remain consistent with pre-existing duties.[25]

17. Finally, JUSTICE is concerned by the potential for public bodies to use the duty in gathering evidence so as to impose court orders, such as the existing Knife Crime Prevention Orders ("KCPOs"),[26] or the Bill's proposed Serious Violence Reduction Orders ("SVROs"). Both can be imposed on the lower civil standard of proof (balance of probabilities), yet have serious criminal consequences when breached. An individual may also be subject to an SVRO where the individual knew, or ought to have known, that a knife was used by another person. This would clearly risk breaching an individual's right to privacy (Article 8 ECHR) (discussed in more detail below).

18. In sum, JUSTICE considers that the duty would do nothing to address the underlying causes of serious violence. Rather, it risks incurring further damage to already overpoliced communities, promoting a culture of mistrust with respect to essential services, and stigmatizing individuals whose data is shared between organisations, not least children, victims, and other vulnerable individuals.

Restrictions on processions and assemblies – Part 3, Clauses 55 - 61

19. The Bill proposes serious restrictions on the right to process and assemble peacefully 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 55 and 56 of the Bill adds to this list "*noise which may result in serious disruption to an organisation in the vicinity*" and "*noise which*

[24] See, for example, sections 17 and 115 of the Crime and Disorder Act 1998; section 82 of the National Health Service Act 2006; sections 27 and 47 of the Children Act 1989; sections 10 and 11 of the Children Act 2004; and section 175 of the Education Act 2002.

[25] For example, contractual restrictions, restrictions under the General Data Protection Regulation or Data Protection Act 2018, and so forth).

[26] A KCPO is a type of court order imposed on individuals as young as 12 who are believed to have been involved in knife crime. Conditions of KCPOs can include curfews, restrictions on social media use, travel within or between geographical areas, and prohibition on carrying a knife.

will have a relevant and significant impact on persons in the vicinity". Under the proposed measures, noise may be judged to have a relevant impact on a person in the vicinity if it may cause persons of reasonable firmness to, amongst other things, suffer serious unease, alarm, or distress. When considering such noise, and whether there is a 'significant' impact, the police must have regard to the number of people "*of reasonable firmness*" who might feel such unease, the likely duration of the impact, and the likely "*intensity*" on such people.[27]

20. Clause 57 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

21. 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*."[28] 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.

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

23. Even if the Home Secretary's claim were accepted, it still would not justify the measures in clause 55-57 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.*"[29]

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[27] *See* Clauses 55(3), 56(5), and 61(6)-(7).

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

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

24. 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*".[30] 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.[31] Generating noise, even when it causes disruption, is a normal exercise of the right to peacefully assemble.[32] 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.

25. 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.[33] 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 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*."[34]

26. It is equally important to note that the broad scope of the proposed powers would allow the police to place restrictions on processions and assemblies beyond those cited in recent debates (such as calls for greater racial and environmental justice). Where the criteria is so vague (e.g., "*noise*" which will have a "*relevant and significant impact*"), the police would have the discretion to place restrictions on a range of activities. This could include religious festivals and activities, community gatherings (from Notting Hill Carnival to firework nights,

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

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

[32] 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."*

[33] *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.

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

such as those in Lewes), football matches, LGBT+ Pride marches, vigils/remembrance ceremonies, and so on. While the Government might claim the powers are tightly defined, this is clearly not the case given the wide range of activities that could be covered. As Theresa May MP, the former Prime Minister and Home Secretary, noted during the Commons' second reading debate:

> "*it is tempting when Home Secretary to think that giving powers to the Home Secretary is very reasonable, because we all think we are reasonable, but future Home Secretaries may not be so reasonable […] I would urge the Government to consider carefully the need to walk a fine line between being popular and populist. Our freedoms depend on it.*"[35]

27. JUSTICE echoes this concern, and finds it all the more palpable when considered in conjunction with the poor safeguards that exist for the use of the new restrictions. During the Bill's Committee Stage in the Commons, the Government admitted that there is no minimum rank of officer necessary to invoke the powers. This could allow severe restrictions to be placed at the behest of one individual at the scene of a gathering based on an incredibly vague standard of 'noise'. As the Joint Committee on Human Rights noted,

> "*The proposed new noise trigger involves uncertain standards that place considerable judgment in the hands of the police officer responsible for the decision whether to impose conditions...What one person considers to be noise sufficiently "intense" to be likely to cause "serious unease, alarm or distress" may be very different to what another person would believe meets this threshold*."[36]

28. It is therefore unsurprising that many police forces and representative bodies have shown little appetite for the powers. Neither Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services nor the National Police Chiefs Counsel reference or advocate for the 'noise' provision.[37] Similarly, a group of six former senior officers, chairs of police authority associations and serving police officers have written to the Home Secretary expressing

[35] HC Deb (15 March 2021). vol 691, col 78. Available here.

[36] Joint Committee on Human Rights, 'Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)', Second Report of Session 2021–22, 16 June 2021, at p. 14.

[37] Joint Committee on Human Rights, 'Oral evidence: Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill', HC 1324 Wednesday 28 April 2021.

their concerns that the Bill "*contains dangerously oppressive components that will increase the politicisation of the police, pile even more pressure on front-line officers and put at risk the democratic legitimacy of British policing*".[38]

The use of Henry VIII clauses

29. Clauses 55(4) and 56(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.

30. 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.[39] 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

31. Clause 60 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

32. JUSTICE has two main concerns about clause 60 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

[38] O. West, 'The Policing Bill will leave officers in an impossible position', The Times, 7 July 2021.

[39] 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.

targeted at policing protests. However, in the explanatory notes accompanying the Bill, clause 60 is introduced under the heading "*Police powers to tackle non-violent protests*".[40]

33. 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,[41] 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.[42]

34. 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,[43] where the police attempted to prosecute protestors through an unlawful exercise of the POA. Clause 60 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.

35. 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*

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

[41] 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.

[42] 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.

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

sentencing exercise. There are no bright lines, but particular caution attaches to immediate custodial sentences."[44]

36. 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 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.

37. 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 62 - 64

38. Clause 62 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.

39. 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. Indeed, the offence can be triggered even before an individual has done anything at all. Pursuant to subsection (1)(a), all that is required is for the private landowner to perceive that the individual "is *residing, or intending to reside, on land without*

[44] *Ibid*, para 43.

the consent of the occupier of the land". As the Joint Committee on Human Rights noted in its report,

> "*Gypsies, Roma and Travellers would… be in the position of potentially committing a criminal offence without having done anything at all, merely having given the impression to another private citizen that they intended to do something. This is very dangerous territory, which risks creating offences whose elements could largely be based on the prejudice of the accuser and, perhaps, the justice system*."[45]

40. 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.

41. These measures would directly target GRT people and risk incurring serious breaches of human rights and equality law.[46] The proposed measures risk further breaching GRT people's rights under Article 8 ECHR, which proactively obliges the Government to take steps to facilitate GRT people's way of life.[47] The proposed measures would not only fail to do this, but instead seek to criminalise further an already marginalised community.[48] 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.*"[49] 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

[45] Joint Committee on Human Rights, 'Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4: The criminalisation of unauthorised encampments', Fourth Report of Session 2021–22, 2 July 2021, page 3.

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

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

[48] 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.

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

the Government to justify that the proposed measures are a proportionate interference with Article 8 ECHR.

42. 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[50] 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*".[51] 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.[52] 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.[53] No equalities statement has been issued in relation to the new offence proposed in clause 62 of the Bill. Indeed, JUSTICE recalls statements made by other groups, such as the Muslim Council of Britain[54] and the Board of Deputies of British Jews,[55] who share concerns at the potential for further discrimination and criminalisation of an already deeply marginalised community.

43. 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, 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.[56]

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

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

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

[53] *Ibid*.

[54]Muslim Council of Britain, 'Muslim Council of Britain expresses deep concern over the Police, Crime, Sentencing & Courts Bill', (8 September 2021).

[55] Board of Deputies of British Jews, 'Board of Deputies President reacts to new legislation on unauthorised encampments', (18 March 2021).

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

Early Release and Increased Tariffs – Part 7, Clauses 101 - 115

44. 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 criminal justice system.[57] JUSTICE understand the system often fails victims of crime.

45. 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.[58] A third of courts have closed since 2010[59] 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 criminal justice system.

Discretionary Life Sentences

46. 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 106 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

47. 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 107 of the Bill changes this so an individual will instead be released on license after serving two-thirds of their sentence if they have committed certain violent and sexual offences and the term of their sentence is four years or more.[60] Clause 107 also moves the release point for children

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

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

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

[60] 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

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

48. These changes would have a disproportionate impact on young BAME people. BAME people are overrepresented at every stage of the criminal justice system.[61] In the equality statement relating to this aspect of the Bill, the Government accepts this fact.[62] 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,[63] despite making up only 18% of the general child population.[64]

49. 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*".[65] 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.[66] Third, for the reasons set out below, the proposed measures undermine rehabilitation, which significantly increases the

murder. The sexual offences are those in Schedule 15, Part 2 CJA for which a sentence of life imprisonment may be imposed.

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

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

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

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

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

[66] 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.

50. 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.[67] 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*."[68] 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.

51. 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.[69] The proposed punitive shift in sentencing undermines children's rehabilitation and their greater capacity to change.

52. 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 109

53. 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

[67] 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.

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

[69] 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.

54. Clause 109 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.[70] An individual would then only be released following a decision of the Parole Board.

Concerns

55. Clause 109 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.[71] However, the criteria for the power are broad and apply to a significant number of prisoners. The drafting of clause 109 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.[72]

56. In addition, clause 109 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.

57. JUSTICE is also concerned that clause 109 risks violating Article 5 ECHR.[73] 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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[70] These offences are set out in Schedule 18, Part 1, 2 and 3 of the Sentencing Act 2020.

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

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

[73] 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)*".[74] 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*"[75].

58. 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*[76], 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.

59. 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[77] 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?*"[78]

60. 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.

61. JUSTICE is also concerned that clause 109 risks violating Article 7 ECHR.[79] This Article entrenches the prohibition on retrospective punishment. The power in clause 109 could be

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

[75] *Ibid*, p. 18.

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

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

[78] *Ibid*, p. 13.

[79] 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.[80]

62. Clause 109 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*".[81] It appears clause 109 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'.

63. Clause 109 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.

64. 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,*[82] the ECtHR held that the power to give a binding decision which may not be altered by a non-judicial

[80] 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 109 of the Bill.

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

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

authority is inherent in the very notion of a "tribunal".[83] 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.[84] 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.[85]

Serious Violence Reduction Orders – Part 10, Clauses 140 - 141

65. 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.

66. 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.

67. 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.[86] 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.

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[83] *Ibid*, para 77.

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

[85] *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.

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

68. The Home Office's own data indicate that stop and search is ineffective at tackling crime,[87] with its application to knife-related offences suggesting no statistically significant crime reduction effects.[88] At best, stop and search shifts violence from one area to another.[89] JUSTICE notes that under clause 141 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.

69. SVROs would disproportionally target ethnic minorities, especially Black men and boys.[90] 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*".[91]

70. 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.[92] 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*

[87] 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.

[88] 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.

[89] 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.

[90] 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.

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

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

safe ever."[93] JUSTICE is therefore deeply concerned that introducing SVROs could weaken the confidence BAME communities have in the police.

71. 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*".[94] 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.

72. 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*[95], 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.

73. 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.[96] Behind this statistic, JUSTICE found in its recent report on discrimination in the youth justice system[97] that domestic

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

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

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

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

[97] 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.[98]

74. 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.[99] 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 criminal justice system.

Conclusion

75. There are serious problems with this Bill. While certain measures might present positive reforms to the criminal justice system, 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.

76. 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.

JUSTICE

10th September 2021

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

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