Police, Crime, Sentencing and Courts Bill

House of Lords

Committee Stage and Endorsed Amendments

Briefing

October 2021

For further information contact

Tyrone Steele, Criminal Justice Lawyer
email: tsteele@justice.org.uk

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

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 and endorsed amendments 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 **(see endorsed amendments at paragraph 5)**.

    - **Part 3: Increased powers for police to impose restrictions on peaceful procession, assembly, and protest**, which would expand the circumstances

[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.

in which police can impose conditions on a range of activities. For example, 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 **(see endorsed amendments from paragraph 6 onwards)**.

- **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 **(see endorsed amendments from paragraph 28 onwards)**.

- **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 **(see endorsed amendments at paragraph 37)**.

- **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

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

retrospective punishment **(see endorsed amendments from paragraph 47 onwards)**.

- **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 **(see endorsed amendments at paragraph 5)**.

4. **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.** In the alternative, we have also endorsed additional amendments for Peers consideration which seek to mitigate some of the Bill's most damaging aspects. For more information on JUSTICE's position and concerns, we refer to our previous briefings.[3]

[3] JUSTICE, 'Briefings on the Police, Crime, Sentencing and Courts Bill', (May – October 2021).

Part 2 – Serious Violence Duty; Part 10 – Serious Violence Reduction Orders

5. JUSTICE opposes Parts 2 and 10 of the Bill in their entirety. For JUSTICE's position, and endorsed amendments, we refer to our previous briefing and joint briefings with StopWatch, Liberty, Unjust, Amnesty International, Fair Trials, defend digital me, Big Brother Watch, the Alliance for Youth Justice, Medact, and the Criminal Justice Alliance.[4]

Part 3, Clauses 55 - 61- Restrictions on processions, assemblies, and one-person protests

6. **JUSTICE opposes Part 3 of the Bill in its entirety and recommends that Peers give notice of their intention that clauses 55 to 61 not stand part of the Bill.**

7. In the alternative, should the deletion of Part 3 not succeed, JUSTICE endorses the following amendments which would mitigate some of its most damaging aspects.

Clauses 55 and 56 – Noise as a trigger for imposing conditions

8. 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 will have a relevant and significant impact on persons in the vicinity*". Clause 61 would impose similar conditions with respect to one-person protests.

9. 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.[5]

---

[4] JUSTICE, 'Joint Briefing for House of Lords' Committee Stage on Part 2 (Serious Violence Duty)', October 2021; JUSTICE, 'Joint Briefing for House of Lords' Committee Stage on Part 10 (Serious Violence Reduction Orders)', October 2021.

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

Removal of 'noise' as trigger for imposing conditions on processions and assemblies

Amendment 294

Page 47, line 1, leave out subsections (2) and (3)

Member's explanatory statement

This is based on a JCHR recommendation. This amendment would remove the proposed new trigger for imposing conditions on public processions based on noise in England and Wales.

Amendment 299

Page 48, line 12, leave out subsection (2)

Member's explanatory statement

This is part of a group of amendments based on JCHR recommendations. This and other amendments to this Clause would remove the proposed new trigger for imposing conditions on public assemblies based on noise in England and Wales.

Amendment 300

Page 48, line 14, leave out paragraph (b)

Member's explanatory statement

This amendment would remove the proposed new trigger for imposing conditions on public assemblies based on noise in England and Wales.

Amendment 303

Page 48, line 31, leave out "impact"

Member's explanatory statement

This is part of a group of amendments based on JCHR recommendations. This and other amendments to this Clause would remove the proposed new trigger for imposing conditions on public assemblies based on noise in England and Wales.

Amendment 305

Page 48, line 40, leave out subsection (5)

Member's explanatory statement

This is part of a group of amendments based on JCHR recommendations. This and other amendments to this Clause would remove the proposed new trigger for imposing conditions on public assemblies based on noise in England and Wales.

Concerns

10. 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*."[6] 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.

11. 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.

12. 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.*"[7]

13. 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*".[8] 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.[9] Generating noise, even when it causes disruption, is a normal exercise of the right to peacefully assemble.[10] 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

---

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

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

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

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

[10] 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."*

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.

14. 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.[11] 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*."[12]

15. 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 are so vague (e.g., "*noise*" which will have a "*relevant and significant impact*"), the police would have the discretion to place restrictions on a vast range of activities, including but not limited to:

    i. religious festivals and activities, such as street preaching, chanting, singing, prayer vigils, public acts of worship, and community events. For example, faith leaders have highlighted "*a number of severe consequences*", which would "*have a chilling effect on the practices of millions of those putting their faith or belief into practice across the country*";[13]

    ii. community gatherings (from Notting Hill Carnival and LGBT+ Pride marches to firework nights, such as those in Lewes);

    iii. football matches;[14] and

[11] *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.

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

[13] *See* joint statement of representatives from the Church of England, Muslim Council of Britain, Board of Deputies of British Jews and other religious groups, Independent, 'Faith leaders urge Priti Patel to scrap planned protest crackdown and warn of 'chilling effect' on religious expression', 26 October 2021.

[14] *See* the Football Supporters' Association's briefing, which analyses the impact on football fans, noting that "the new powers will accidentally, and without justification, capture and limit peaceful,

iv. vigils/remembrance ceremonies.[15]

16. 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 the Rt. Hon. 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.*"[16]

17. 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*."[17]

18. 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

---

traditional, and culturally-significant fan behaviour". Football Supporters Association, 'Call for Evidence – Legislative Scrutiny, Police, Crime, Sentencing and Courts Bill, Submission from the Football Supporters Association', 1 June 2021.

[15] For example, the Bill would permit the police to place restrictions similar to those imposed on the Sarah Everard vigil pursuant to the Coronavirus Act 2020. *See* BBC News, 'Sarah Everard vigil: Woman preparing legal action against Met Police over arrest', 25 June 2021.

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

[17] 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.

'noise' provision.[18] Similarly, a group of six former senior officers, chairs of police authority associations and serving police officers have written to the Home Secretary expressing 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*".[19]

19. The above amendments would remedy these issues by removing 'noise' as a criterion for the imposition of conditions on processions and assemblies. As a result, the provision would benefit from much greater legal certainty, reduce potential issues that would result from a wider police discretion, and mitigate against potential unintended consequences in terms of wide range of events that would be captured.

Clauses 57 and 61(9) - Knowledge Requirement and Accidental Breach of Conditions

20. Clause 57 would remove the requirement that conditions imposed on a public procession or assembly need to be knowingly breached. Rather, the standard would be that the person "*knows or ought to know that a condition has been imposed*". This clause would also increase the maximum sanction following a conviction for breaching a condition from three months to 51 weeks of imprisonment. Clause 61(9) would provision the same knowledge test for one-person protests. In each case, there would be a defence where the person could "*prove that the failure arose from circumstances beyond the person's control*".

Amendment to the knowledge requirement for breach of conditions

Amendment 309

***(We refer also to amendments* 310 and 312, which would have a similar effect).**

Page 50, leave out line 5 and insert—

"(i) knows that the condition has been imposed or has deliberately or recklessly avoided gaining knowledge that the condition has been imposed; and

(ii) knows or ought to know that their action or inaction amounts to a failure to comply with the condition;"

Member's explanatory statement

This is based on a JCHR recommendation. It would provide that a person who breaches a condition after deliberately or recklessly avoiding knowledge of the relevant condition

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

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

can face criminal liability, without extending the criminal offence to cover persons who breach conditions accidentally.

21. JUSTICE is deeply concerned by this test, as it would result in the potential criminalisation of people who accidentally breach conditions through no fault of their own. The Government's stated intention is to "*close a loophole which some protesters exploit*" as some "*will cover their ears and tear up written conditions handed to them by the police*".[20]

22. However, first, there is no evidence that this is significant issue. The Government relies on the assessment of HM Inspectorate of Constabulary and Fire & Rescue Services, which states that "[*w]e heard how some protest groups are training protesters to put their fingers, headphones or earplugs in their ears when the police impose conditions. Some protesters try to drown them out by chanting or singing. Others simply walk away when the police try to speak to them*".[21] One high-profile case is referenced in support of this claim.[22]. JUSTICE notes that this test, under the Public Order Act 1986, has been in use to police processions and assemblies for 35 years. In the absence of clear evidence, we remain unconvinced that such a drastic shift is necessary or desirable.

23. Furthermore, the Government's proposed remedy is clearly disproportionate. By creating a strict liability test, a huge swathe of individuals risk prosecution. This would include many more than the allegedly small group of protesters that "put their fingers" in their ears to avoid learning about conditions. For example, members of the public who happen to be in an area on which conditions are imposed risk being in accidental breach through no fault of their own. Moreover, and most importantly, the new test significantly shifts the responsibility from the police to inform participants in processions, assemblies, and one-person protests of conditions, to individuals.

24. This is clearly unacceptable and would represent a disproportionate interference with Article 11 ECHR, the right to freedom of assembly and association, as well as the requirement for legal certainty. The above amendments would help tighten the offence to ensure that those who are in accidental breach are not captured, while addressing the 'loophole' that presently exists.

[20] Home Office, 'Police, Crime, Sentencing and Courts Bill 2021: protest powers factsheet', May 2021, part 3.

[21] HM Inspectorate of Constabulary and Fire & Rescue Services, 'Getting the Balance Right? An inspection of how effectively the police deal with protests', (March 2021), p.114.

[22] *See* BBC News, 'Green MP Caroline Lucas cleared over fracking protest', 17 April 2014.

Clauses 55(4) and 56(6) - The Use of Henry VIII Clauses

25. 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.

Amendment to ensure that "serious disruption to the activities of an organisation" and "serious disruption to the life of the community" are defined on the face of the Bill

Amendment 298

Page 47, line 33, leave out subsection (4)

Member's explanatory statement

This is based on a DPRRC recommendation. It removes the ability of the Secretary of State to make regulations defining "serious disruption to the activities of an organisation" and "serious disruption to the life of the community", thereby requiring these terms to be defined on the face of the Bill.

Amendment 308

Page 49, line 12, leave out subsection (6)

Member's explanatory statement

Deleting this provision would leave "serious disruption" to carry its natural meaning, or to be defined on the face of the Bill.

Amendment 319

Page 56, leave out lines 15 to 32

Member's explanatory statement

This is based on a DPRRC recommendation. It removes the ability of the Secretary of State to make regulations defining "serious disruption to the activities of an organisation" and "serious disruption to the life of the community", thereby requiring these terms to be defined on the face of the Bill.

Concerns

26. 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.[23] The Government must be clear and upfront in defining the scope of such powers. The above amendments would ensure that such definitions either carry their natural meaning, or are defined explicitly on the face of the Bill.

Unauthorised Encampments – Part 4, Clauses 62 - 64

27. 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. Currently, 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.

28. **JUSTICE opposes Part 4 of the Bill in its entirety, recommends that Peers give notice of their intention that clauses 62 to 64 not stand part of the Bill.**

29. In the alternative, should the removal of Part 4 not succeed, JUSTICE endorses the following amendments which would mitigate some of its most damaging aspects. We also refer Peers to the briefing of Friends, Families and Travellers for further analysis of the provision and additional suggested amendments.[24]

Amendment 133

Page 57, leave out line 7 and insert—

"(d) a constable, following a request of the occupier or a representative of the occupier,"

Member's explanatory statement

This is a JCHR recommendation. This amendment would provide that, as part of the conditions for the new offence of criminal trespass only a police officer could request a person to leave land and only following a request by the occupier of the land.

[23] 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.

[24] Friends, Families & Travellers, 'House of Lords briefing: Part 4 Police, Crime, Sentencing and Courts Bill and Gypsies and Travellers', (October 2021); Friends, Families & Travellers, 'Amendments to Part 4 Police, Crime, Sentencing and Courts Bill: Encampments', (October 2021).

Amendment 147

Page 59, line 20, at end insert

", but does not include any property that is, or forms part of, P's principal residence."

Member's explanatory statement

This is based on a JCHR recommendation. This amendment would provide that a police officer does not have the power to seize a vehicle that is a person's home.

Concerns

30. 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 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*."[25]

31. 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 privatisation 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.

32. These measures would directly target GRT people and risk incurring serious breaches of human rights and equality law.[26] The proposed measures risk further breaching GRT

[25] 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.

[26] 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, p.74. The Government has also made it clear it is not criminalising trespass generally, see Parliament, 'Government response to: Don't criminalise trespass'.

people's rights under Article 8 ECHR, which proactively obliges the Government to take steps to facilitate GRT people's way of life.[27] The proposed measures would not only fail to do this, but instead seek to criminalise further an already marginalised community.[28] 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.*"[29] 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.

33. 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[30] 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*".[31] 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.[32] 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.[33] 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[34] and the Board of Deputies of British Jews,[35]

---

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

[28] 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.

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

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

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

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

[33] *Ibid*.

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

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

who share concerns at the potential for further discrimination and criminalisation of an already deeply marginalised community.

34. 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.[36]

35. The above amendments would help mitigate against some of the most damaging aspects of the Bill.

    i. First, Amendment 133 would remove the ability for a private citizen to trigger a criminal offence. Instead, an offence would only occur where an individual disobeyed an instruction from a police officer.

    ii. Second, Amendment 147 would prevent the police from seizing a vehicle where it is someone's home. This seeks to prevent the grave risk of individuals and their children becoming homeless if they are directed from the land.

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

36. The Bill would make the following changes to the minimum term, or 'tariff' - 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:

    i. **Discretionary life sentences:** 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.

    ii. **Standard Determinate Sentence:** Currently, an individual who is given a standard determinate sentence ("SDS") will be released on license at the

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

halfway point of their sentence if their sentence is less than seven years.[37] 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 and less than seven.[38]

iii. **Children:** Clause 107 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.

37. **JUSTICE opposes these measures as contained in Part 7. We therefore recommend that Peers give notice of their intention that clauses 101-115 not stand part of the Bill.**

Concerns

38. 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.[39]

39. JUSTICE understands the system often fails victims of crime. However, JUSTICE opposes these changes as they would actively hinder the rehabilitation of those detained, while also neglecting to tackle the real problem preventing victims from securing a just outcome – namely, the significant backlog of cases in the court system.[40] A third of courts have closed since 2010[41] 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.

---

[37] Criminal Justice Act 2003, s.244(3). The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 changed the automatic release point from halfway to two-thirds of their sentence for offenders who are: a) convicted of a specified offence listed in Parts 1 and 2 of Schedule 15 of the 2003 Act for which the maximum penalty is life; and b) sentenced to an SDS of 7 years or more.

[38] 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.

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

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

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

40. These changes would have a disproportionate impact on young BAME people. BAME people are overrepresented at every stage of the criminal justice system.[42] In the equality statement relating to this aspect of the Bill, the Government accepts this fact.[43] 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,[44] despite making up only 18% of the general child population.[45]

41. 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*".[46] 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.[47] Third, for the reasons set out below, the proposed measures undermine rehabilitation, which significantly increases the chances that an individual will not reoffend when their sentence ends. This could make the public less – not more - safe.

42. 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

---

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

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

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

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

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

[47] Section 224A and 225 CJA.

and/or diversion programmes as being key to reducing rates of reoffending.[48] 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*."[49] 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.

43. 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.[50] The proposed punitive shift in sentencing undermines children's rehabilitation and their greater capacity to change.

44. 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

45. 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 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.

46. Clause 109 of the Bill 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*

[48] 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.

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

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

would, if released, pose a significant risk to members of the public of serious harm occasioned by the commission" of a range of specified offences of a violent, sexual, or terrorist nature.[51] An individual would then only be released following a decision of the Parole Board.

47. **JUSTICE opposes Part 7, clause 109 of the Bill in its entirety, recommends that Peers give notice of their intention that it not stand part of the Bill.**

48. In the alternative, should the removal of clause 109 not succeed, JUSTICE endorses the following amendment which would mitigate some of its most damaging aspects by removing the discretion for the Secretary of State to vary an individual's sentence. Instead, it would allow the Secretary of State to make an application to the High Court for its consideration as to whether automatic released should be halted and the case referred to the Parole Board.

Amendment 208

Leave out Clause 109 and insert the following new Clause—

"**109 Power to refer high-risk offenders to High Court for consideration of referral to Parole Board in place of automatic release**

(1) The Criminal Justice Act 2003 is amended in accordance with subsections (2) to (10).

(2) In section 243A (release of prisoners serving sentences of less than 12 months), after subsection (2) insert—

"(2A) Subsection (2) does not apply if—

(a) the prisoner's case has been referred to the High Court or the Board under section 244ZB, or

(b) a notice given to the prisoner under subsection (4) of that section is in force."

(3) In section 244 (general duty to release prisoners), after subsection (1) insert—

"(1ZA) Subsection (1) does not apply if—

(a) the prisoner's case has been referred to the High Court or the Board under section 244ZB, or

(b) a notice given to the prisoner under subsection (4) of that section is in force."

(4) After section 244 insert—

"**244ZB Referral of high-risk offenders to High Court in place of automatic release**

[51] These offences include murder and those specified within the meaning of section 306 of the Sentencing Code.

(1) This section applies to a prisoner who—
(a) would (but for anything done under this section and ignoring any possibility of release under section 246 or 248) be, or become, entitled to be released on licence under section 243A(2), 244(1) or 244ZA(1), and (b) is (or will be) aged 18 or over on the first day on which the prisoner would be so entitled.
(2) For the purposes of this section, the Secretary of State is of the requisite opinion 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 any of the following offences—
(a) murder;
(b) specified offences, within the meaning of section 306 of the Sentencing Code.
(3) If the Secretary of State is of the requisite opinion, the Secretary of State may refer the prisoner's case to the High Court.
(4) Before referring the prisoner's case to the High Court, the Secretary of State must notify the prisoner in writing of the Secretary of State's intention to do so (and the reference may be made only if the notice is in force).
(5) A notice given under subsection (4) must take effect before the prisoner becomes entitled as mentioned in subsection (1)(a).
(6) A notice given under subsection (4) must explain—
(a) the effect of the notice (including its effect under section 243A(2A), 244(1ZA) or 244ZA(3)),
(b) why the Secretary of State is of the requisite opinion, and
(c) the prisoner's right to make representations (see subsection (12)).
(7) A notice given under subsection (4)—
(a) takes effect at whichever is the earlier of—
(i) the time when it is received by the prisoner, and
(ii) the time when it would ordinarily be received by the prisoner, and (b) remains in force until—
(i) the Secretary of State refers the prisoner's case to the High Court under this section, or (ii) the notice is revoked.
(8) The Secretary of State—
(a) may revoke a notice given under subsection (4), and
(b) must do so if the Secretary of State is no longer of the requisite opinion.
(9) If a notice given under subsection (4) is in force and the prisoner would but for the notice have become entitled as mentioned in subsection (1)(a)—
(a) the prisoner may apply to the High Court on the ground that the prisoner's release has been delayed by the notice for longer than is reasonably necessary in order for the

Secretary of State to complete the referral of the prisoner's case to the High Court, and (b) the High Court, if satisfied that that ground is made out, must by order revoke the notice.

(10) At any time before the High Court disposes of a reference under this section, the Secretary of State—

(a) may rescind the reference, and

(b) must do so if the Secretary of State is no longer of the requisite opinion.

(11) If the reference is rescinded, the prisoner is no longer to be treated as one whose case has been referred to the High Court under this section (but this does not have the effect of reviving the notice under subsection (4)).

(12) The prisoner may make representations to the Secretary of State about the referral, or proposed referral, of the prisoner's case at any time after being notified under subsection (4) and before the High Court disposes of any ensuing reference under this section. But the Secretary of State is not required to delay the referral of the prisoner's case in order to give an opportunity for such representations to be made.

(13) Upon hearing a reference, the High Court must determine whether the prisoner would, if released, pose a significant risk to members of the public of serious harm occasioned by the commission of an offence under subsection (2) and either—

(a) allow the Secretary of State's reference, or

(b) dismiss the Secretary of State's reference.

(14) If the High Court allows the Secretary of State's reference, the Secretary of State must refer the prisoner's case to the Parole Board.

(15) If the High Court dismisses the Secretary of State's reference, section 243A(2), 244(1) or 244ZA(1), as applicable, of the Criminal Justice Act 2003 applies to the prisoner.

244ZC Proceedings following reference under section 244ZB

(1) This section applies to a prisoner whose case has been referred to the Parole Board under section 244ZB.

(2) If, in disposing of that reference or any subsequent reference of the prisoner's case to the Board under this subsection, the Board does not direct the prisoner's release, it is the duty of the Secretary of State to refer the prisoner's case to the Board again no later than the first anniversary of the disposal.

(3) It is the duty of the Secretary of State to release the prisoner on licence as soon as— (a) the prisoner has served the requisite custodial period, and

(b) the Board has directed the release of the prisoner under this section.

(4) The Board must not give a direction under subsection (3) in disposing of the

reference under section 244ZB unless the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.
(5) The Board must not subsequently give a direction under subsection (3) unless— (a) the Secretary of State has referred the prisoner's case to the Board under subsection (2), and (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.
(6) For the purposes of this section, the "requisite custodial period" means the period ending with the day on which the prisoner would have become entitled as mentioned in section 244ZB(1)(a)."
(5) In section 246(4) (exceptions from power to release early subject to curfew), after paragraph (f) insert—
"(fa) the prisoner's case has been referred to the Board under section 244ZB,
(fb) a notice given to the prisoner under subsection (4) of that section is in force,".
(6) In section 255A(2) (duty to consider suitability for automatic release following recall of certain prisoners) (as amended by the Counter-Terrorism and Sentencing Act 2021), for "or a serious terrorism prisoner" substitute ", a serious terrorism prisoner or a prisoner whose case was referred to the Board under section 244ZB".
(7) In section 255C(1) (prisoners whose release after recall is not automatic), for the words from "who" to the end substitute "— (a) whose suitability for automatic release does not have to be considered under section 255A(2), or (b) who is not considered suitable for automatic release."
(8) In section 260(5) (powers and duties of Secretary of State that continue to apply to prisoner removed from prison pending deportation), after "244," insert "244ZB,".
(9) In section 261(5)(b) (application of release provisions to returning deported prisoner), after "244," insert "244ZC,".
(10) In section 268(1A) (meaning of "requisite custodial period" in Chapter 6 of Part 12), after paragraph (c) insert— "(ca) in relation to a prisoner whose case has been referred to the Parole Board under section 244ZB, the requisite custodial period for the purposes of section 244ZC;".
(11) In Schedule 1 to the Crime (Sentences) Act 1997—
(a) in paragraph 8(2)(a) (provisions relating to release continuing to apply to prisoner transferred from England and Wales to Scotland), for ", 244," substitute "to";
(b) in paragraph 9(2)(a) (provisions relating to release continuing to apply to prisoner transferred from England and Wales to Northern Ireland), for ", 244," substitute "to". (12) In section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (power to alter test for release on licence at direction of Parole Board)—
(a) in subsection (2), after paragraph (b) insert— "(bza) a prisoner whose case has been

referred to the Parole Board under section 244ZB of the Criminal Justice Act 2003 (power to refer to Parole Board in place of automatic release),";
(b) in subsection (3), before paragraph (ab) insert— "(aaa) amend section 244ZC of the Criminal Justice Act 2003 (proceedings following reference under section 244ZB of that Act),"."

Concerns

49. Clause 109 would create a new power for 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.[52] 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.[53]

50. 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.

51. JUSTICE is also concerned that clause 109 risks violating Article 5 ECHR.[54] 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: "*analysis of offending behaviour (the past); analysis of the evidence of change (the present); and analysis of the manageability of risk (the future)*".[55] 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*".[56]

---

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

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

[54] 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).

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

[56] *Ibid*, p. 18.

52. 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*[57], 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.

53. 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[58] 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?*"[59]

54. 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.

55. JUSTICE is also concerned that clause 109 risks violating Article 7 ECHR.[60] This Article entrenches the prohibition on retrospective punishment. The power in clause 109 could be 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.[61]

---

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

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

[59] *Ibid*, p.13.

[60] 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).

[61] 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

56. 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 by the court. 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*".[62] 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'.

57. 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. Moreover, it would infringe on the separation of powers between the executive and the judiciary by allowing the Secretary of State to retroactively modify a sentence. This is clearly inappropriate and would risk undermining the independence of the judiciary.

58. 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,*[63] the ECtHR held that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of a "tribunal".[64] As a result, conferring a power to the Secretary of State that allows them to alter the sentence handed down by a judge would risk violating Article 6(1). Furthermore, any decision taken by administrative authorities which themselves do not satisfy these requirements must be subject to

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.

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

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

[64] *Ibid*, para 77.

subsequent review before a tribunal that does.[65] 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.[66]

59. JUSTICE considers that the amendment set out above would preserve the independence of the judiciary and ensure that the executive does not infringe on the doctrine of the separation of powers between Government and the judiciary, as enshrined in the Constitutional Reform Act 2005. Moreover, the amendment would still afford the Secretary of State with a new power to make a referral subject to judicial oversight and approval. Any alteration of a sentence would therefore remain a judicial decision, mitigating against potential violations of the ECHR or the UK's constitutional framework.

Conclusion

60. 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.

61. 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

26th October 2021

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

[66] *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.