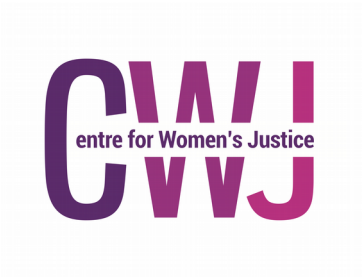
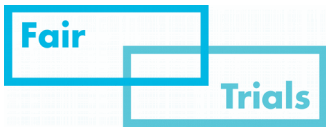
Report Stage Briefing on digital extraction powers in the Police, Crime, Sentencing and Courts Bill for the House of Lords





Big Brother Watch, Amnesty International UK, Centre for Women's Justice, defenddigitalme, End Violence Against Women, Fair Trials, JUSTICE, Liberty, Privacy International, Rape Crisis England & Wales, The Survivors' Trust

December 2021

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1st December 2021

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Introduction

This Report Stage briefing for the House of Lords concerns Part 2, Chapter 3 of the Police, Crime, Sentencing and Courts Bill: "Extraction of information from electronic devices".

The 11 NGOs behind this amendment briefing span expertise on human rights, privacy, and women's and victims' rights. We are concerned that this Chapter of the Bill significantly underserves vital data, privacy and equality protections our groups have fought to be put in place to better uphold the rights of complainants of rape and sexual offences who report offences to police.

On the whole, this Bill presents some of the most profound and varied threats to human rights in the UK of any Bill introduced for decades, from the right to privacy to the right to freedom of expression and freedom of assembly. We support calls for the Bill to be revoked or voted against in its entirety. However, in this briefing we make a series of vital recommendations for amendments to protect rights and justice, should Part 2 Chapter 3 of the Bill proceed through Report Stage.

Background

The widespread use of mobile phones and other digital devices in people's everyday lives means we increasingly leave a data trail everywhere we go. Our digital footprints can reveal where we have been and when, who we have spoken to, the content of our private conversations and, via our internet history, even some of our innermost thoughts.

More and more, such data is being sought in criminal investigations. Clearly, data from devices can be highly relevant to investigations, particularly if the offence involves digital communications. But police and the CPS are seeking masses of personal data by default that is not relevant to an investigation at all, and may not be lawful. Our groups have found that this practice is used almost exclusively in relation to complainants of rape, sexual offences and domestic violence, who are overwhelmingly women. Further, an investigation by Big Brother Watch found that female victims of rape and sexual offences also face demands for digital strip searches more often than male victims.[1]

The scale and depth of the police's mobile phone searches are incomparable with the police's legislative powers to carry out physical searches. It would amount to police searching someone's property and taking copies of all photographs, documents, letters, films, albums, books and files. Some phones can contain over 200,000 messages and over 100,000 photos.[2] This information can run to many thousands of pages. An average individual's mobile phone can contain the equivalent of 35,000 A4 pages of data.[3]

1 Rape cases dropped over digital strip search refusals – Big Brother Watch, 18 June 2020: https://bigbrotherwatch.org.uk/2020/06/rape-cases-dropped-over-digital-strip-search-refusals/

2 NPCC and CPS evidence to the Justice Committee Inquiry into Disclosure in Criminal Cases: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/disclosure-of-evidence-in- criminal-cases/written/80778.pdf

3 Office of the Police and Crime Commissioner Northumbria, Written evidence to the Justice Committee, 24 April 2018: data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/

Much of this information is incredibly personal, including private conversations with friends, family members and partners; personal and potentially sensitive photographs and videos; personal notes; financial information; and even legally sensitive work-related information such as in emails. Most people's phones and communications contain sensitive information classed as 'special category data' under data protection law: information about an individual's race, ethnic origin, politics, religious or philosophical beliefs, health, sex life or sexual orientation, and as such data extraction from phones requires robust safeguards.

These would be intrusive searches even for most suspects of crime. But now, police are carrying out these intrusive digital searches against victims of crime.

In recent years police, pressured by the Crown Prosecution Service, have been demanding victims give blank cheque "consent" allowing access to their digital lives, warning them that the investigation will likely be discontinued if they refuse. The National Police Chiefs' Council (NPCC) formalised a policy for digital extractions in April 2019 in the form of a 'Digital Processing Notice' to be used across England and Wales, and given to individuals where a digital extraction was sought.[4] The Notice specifically stated that more data than necessary may be extracted from the device: "even though we may only consider a limited number of messages relevant to the investigation, the [extraction] tool may obtain all messages." The Notice also stated that, to the extent that the extraction would be specified, it would be specified according to entire categories of data to be extracted from devices: "In order to investigate the crime you are involved in, the police intend to extract the following data categories from the device e.g. call data, messages, email, contacts, applications (apps), internet browsing history etc." Big Brother Watch subsequently published a report in July 2019 titled "Digital Strip Searches: The police's data investigations of victims".[5]

In our experience, these demands are often made in absence of any strong necessity or sometimes even relevance of data that may be on the device. The police use mobile phone extraction tools to download the contents of victims' mobile phones and digital devices. These digital strip searches are not only cruel, invasive and causing major delays to investigations - they breach victims' fundamental rights and obstruct justice. These invasive practices are highly likely to infringe victims' data protection and privacy rights protected by the Data Protection Act and the Human Rights Act.

The searches appear to be driven by a generalised suspicion of complainants, and mobile data trails are increasingly being seen as character references. By analysing victims' digital lives, police attempt to infer "evidence" from information spanning years, analysing what kind of person they are, examining who they have relationships with, and even speculating about their state of mind.

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disclosure-of-evidence-in-criminal-cases/written/80665.pdf

4 NPCC 'Digital device extraction – information for complainants and witnesses', published 29 April 2019 [no longer available online]

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

Victims are faced with an impossible choice – the pursuit of justice or the protection of their privacy. No one should be faced with such a choice.

This creeping norm of using data trawls to treat victims like suspects marks a disturbing, radical change within our criminal justice system. Anyone of us could become a victim of a crime and suddenly find our private lives subject to intense digital scrutiny. Those who refuse will be exempt from justice.

Campaign for change

Big Brother Watch initiated a coalition of women's, victims' and rights groups to call for change, namely: Big Brother Watch, Amnesty International, Centre for Women's Justice, End Violence Against Women Coalition, Fawcett Society, JUSTICE, Liberty, Privacy International, Rape Crisis England and Wales, Southall Black Sisters and The Survivors Trust. We called for urgent reform that:

- Protects victims' consent to proportionate data requests and doesn't require a choice between privacy and justice;
- Brings police tech up to date to support proportionate investigations;
- Rejects police fishing expeditions through private data, including by using artificial intelligence.

Over 37,000 people signed Big Brother Watch's petition calling on the police and the Crown Prosecution Service to stop forcing sexual assault survivors to hand in their phones in investigations. 15,000 signatories also sent emails in protest to the NPCC and Minister for Policing.

The Centre for Women's Justice represented two survivors of rape to initiate a legal challenge against the NPCC's April 2019 digital extraction policy, which our groups supported. On our analysis, the digital strip search policy breached the right to privacy protected by Article 8 of the European Convention on Human Rights; the Data Protection Act 2018; and since an equality assessment was not conducted (and women are adversely affected), it failed to uphold the public sector equality duty as required by the Equality Act 2010, and Article 14 (read together with Article 3). The parties engaged in pre-action correspondence and entered Alternative Dispute Resolution.

Bater-James & Anor v R.

In June 2020, the Court of Appeal handed down a judgment in another case involving digital extraction, Bater-James & Anor v R., which was clear that the increasingly default practice of bulk digital extraction is disproportionate and unjustified. The judgment was the first to closely analyse digital extraction practices and therefore we quote it here at length.

The judgment said that digital extraction must not be the default or assumed approach:

> "There is no presumption that a complainant's mobile telephone or other devices should be inspected, retained or downloaded, any more than there is a presumption that investigators will attempt to look through material held in hard copy." (77)

And that lines of inquiry must be specified:

> "There must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation." (77)

And that if there are reasonable lines of inquiry regarding data stored on a device, less intrusive methods than looking at, taking possession of, or extracting data from a device should be considered:

> "Furthermore, as developed below, if there is a reasonable line of enquiry, the investigators should consider whether there are ways of readily accessing the information that do not involve looking at or taking possession of the complainant's mobile telephone or other digital device." (77)

The judgment expanded on alternative methods to digital extraction, including examination of the suspect's phone:

> "If a reasonable line of inquiry is established to examine, for example, communications between a witness and a suspect, there may be a number of ways this can be achieved without the witness having to surrender their electronic device. The loss of such a device for any period of time may itself be an intrusion into their private life, even apart from considerations of privacy with respect to the contents. Thus the investigator will need to consider whether, depending on the apparent live issues, it may be possible to obtain all the relevant communications from the suspect's own mobile telephone or other devices without the need to inspect or download digital items held by the complainant. (...) Consideration should, therefore, be given to whether all the relevant messages or other communications in this context are available on the suspect's digital devices, within the witness's social media accounts or elsewhere, thereby potentially avoiding altogether the need for recourse to the witness's mobile telephone etc." (78, emphasis in original)

> "(...) Instead, putting focussed questions to the witness together with viewing any relevant digitally recorded information, and taking screen shots or making some other suitable record, may meet the needs of the case." (79)

The judgment concluded with a relatively prescriptive set of recommendations about the requirements for a digital extraction policy to be in accordance with the law:

"In conclusion on the second issue and answering the question: "how should the review of the witness's electronic communications be conducted?", investigators will need to adopt an incremental approach. First, to consider with care the nature and detail of any review that is required, the particular areas that need to be looked at and whether this can happen without recourse to the complainant's mobile telephone or other device. Second, and only if it is necessary to look at the complainant's digital device or devices, a critical question is whether it is sufficient simply to view limited areas (e.g. an identified string of messages/emails or particular postings on social media). In some cases, this will be achieved by simply looking at the relevant material and taking screenshots or making some other record, without taking possession of, or copying, the device. Third, if a more extensive enquiry is necessary, the contents of the device should be downloaded with the minimum inconvenience to the complainant and, if possible, it should be returned without any unnecessary delay. If the material is voluminous, consideration should be given to appropriately focussed enquiries using search terms, a process in which the defendant should participate. It may be possible to apply data parameters to any search. Finally, appropriate redactions should be made to any disclosed material to avoid revealing irrelevant personal information."

As well as recommendations about the information that should be provided to the complainant:

"(...) in particular, there needs to be clarity as to i) the length of time the witness will be without their digital device; and ii) what areas will be looked at following the copying of the contents of the device." (91)

"In conclusion on the third issue and answering the question: "what reassurance should be provided to the complainant?", the complainant should be told i) that the prosecution will keep him or her informed as to any decisions that are made as to disclosure, including how long the investigators will keep the device; what it is planned to be "extracted" from it by copying; and what thereafter is to be "examined", potentially leading to disclosure; ii) that in any event, any content within the mobile telephone or other device will only be copied or inspected if there is no other appropriate method of discharging the prosecution's disclosure obligations; and iii) material will only be provided to the defence if it meets the strict test for disclosure and it will be served in a suitably redacted form to ensure that personal details or other irrelevant information are not unnecessarily revealed (e.g. photographs, addresses or full telephone numbers)." (92)

Revocation of the NPCC's digital extraction policy

The NPCC's Digital Processing Notice, encapsulating the policy set for digital extractions in England and Wales, was revoked in July 2020. As a result, the two survivors represented by Centre for Women's Justice were able to bring their legal challenge to a resolution.

An interim Digital Processing Notice that, whilst not perfect, better respects complainants' data protection and privacy rights was introduced in September 2020 and remains in place. The forms require far more specificity and necessity of data requested from victims and witnesses and are clearer about their rights in relation to their data. However, the revised policy is not being put into practice effectively by police forces. Many of our groups are still being contacted by distressed complainants of rape and sexual offences who tell us they have been told to hand over their mobile phones for full data extraction after making a report, in absence of any clear necessity, or police will not investigate the offences.

It is clear that a robust, legally binding policy needs to be put in place to protect the rights of victims and survivors of rape, sexual offences and domestic violence, to ensure there are no unnecessary and harmful obstructions to justice, and to enable offenders to be held to account.

Many of our groups have been involved in an ongoing consultation regarding a permanent replacement policy with the Attorney General's Office, the Home Office, NPCC, and the CPS. However, we are disturbed to find that our recommendations and expertise shared in that process is not reflected in the relevant provisions in this Bill.

Survivors' accounts

Due to the sensitivity of the crimes to which this issue primarily applies, victims and survivors whose lives have been affected by excessive digital extraction are rarely heard. However, we believe it is vital that parliamentarians hear their voices in order to understand the seriousness of inadequate rights protections in relation to digital extraction. We include three cases here.

Anonymous

A woman who reported being violently sexually assaulted had her case dropped because she refused to hand over the entire contents of her mobile phone.

"A few years ago I was violently sexually assaulted by a "friend" on a night out. It was a sustained and sadistic attack that in no way began with consent. I made the incredibly difficult decision to report it to the police because I needed to take power back.

"Even though some time had elapsed between the assault and my reporting of it, there was evidence that the police acknowledged as compelling. Despite this, my case was dropped not because of an unlikely prospect of conviction, but because I refused to hand over my mobile phone to be downloaded in its entirety.

"I consider that request to be a gross violation of my human rights. What is on my phone is private and irrelevant to the crime that was committed."

"The way I have been treated by the Crown Prosecution Service has affected me deeply. In the years of dealing with intrusive requests from the police, such as asking for my counselling or medical records, I have been a shadow of my former self. They would tell me I had to supply this information or they wouldn't pursue my case. I was diagnosed with PTSD, not from the assault but from how I was treated by the authorities after reporting it. Over the course of the investigation, when a new request for deeply personal information would come in, I had panic attacks that resulted in 999 calls.

"Unable to think properly or function for months at a time, I felt betrayed by the people who should have been there to help."

"Imagine your most private thoughts and feelings from counselling held in your phone being seen by anyone, let alone your rapist."

"And imagine having no guarantee about how in the future this data may be used or stored. The decision to have my case dropped was a no-brainer for self-preservation, but I now feel that the requirement to surrender one's data is the same as being raped with impunity.

"The optimism I had at the beginning of this process of "taking power back" has been replaced with a feeling of absolute helplessness. Why would other victims of rape or sexual assault come forward to make complaints knowing all their past emails, messages and photographs, however irrelevant to the case, would be subjected to similar scrutiny under this policy? "[6]

Jane*

Police demanded Jane's mobile phone and personal records after she was raped by a stranger eight years ago, even after identifying the attacker using DNA evidence. She told police she had no contact with the man other than when she was raped, but she was told that unless she gave over her mobile phone, the Crown Prosecution Service might refuse to charge.

"I literally had no idea who the suspect was and it was DNA that linked him to me.

"They asked me at one point whether I had the same mobile phone that I had at the time and I said no. Otherwise they said they would have asked for my phone and wanted my messages.

"I'm sure this is a pretty standard experience. As a victim, you are the one under suspicion. You are the one who has to prove your good character."[7]

6 https://www.theguardian.com/commentisfree/2019/apr/29/sexual-assault-case-dropped-refused-police-phone-rape

7 https://www.independent.co.uk/news/uk/crime/rape-victims-phones-medical-records-met-police- cps-a8949636.html

Olivia*

Olivia* reported being drugged and then attacked by a group of strangers. Despite being willing to hand over relevant information, police asked for 7 years worth of phone data, and her case was then dropped after she refused.

"The data on my phone stretches back seven years and the police want to download it and keep it on file for a century. My phone documents many of the most personal moments in my life and the thought of strangers combing through it, to try to use it against me, makes me feel like I'm being violated once again."

"This isn't about trying to stop the police from putting together the facts of the case. This isn't about objecting to the police downloading information from the time that it happened. This is about objecting to the police downloading seven years of information that pre- dates the event and therefore has zero relevance."

"I kept trying to ask them if the data that they took could be restricted just to the period of time of relevance to what actually happened, and they said no."

"They told me that if I didn't consent that they may just drop the case and may not proceed with it. They have now dropped the case citing one of the reasons being that I have not handed over seven years of my personal life which is of complete and utter irrelevance to that one night.

"I am willing to hand over the information that is relevant to what happened - I'm not willing to hand over seven years worth of information that is totally and utterly irrelevant."[8]

8 https://www.lbc.co.uk/radio/presenters/eddie-mair/rape-victim-says-complaint-dropped-phone-data/

AMENDMENTS

Amendments to define "agreement"

Amendments:

Clause 38, page 33, line 39, insert

and

(f) an explanation of what less intrusive methods to obtain the information referred to in paragraph (a) were considered before the request for extraction was made and why no less intrusive means are possible,

(g) the length of time for which the device may need to be in the possession of the authorised person, and

(h) information about the user's ability to obtain a review of the request for the extraction or information.

Effect:

These additions would require that a user is informed of why less intrusive methods are unavailable, the length of time for which they may lose possession of their device, and information about their ability to seek a review of the request, in order for an agreement to be made.

Briefing:

An authorised person can extract information from an electronic device if the user of the device has (a) voluntarily provided it and (b) "agreed to the extraction of information from the device by an authorised person" (Clause 36 (1)). The language used in this clause deliberately avoids use of the word "consent" to evade the legal rights afforded by the consent process as provided by the Data Protection Act 2018, including the ability to give specified and limited consent to data use and the ability to withdraw consent at any time.

The term "agreed" is now defined by the new Clause 38, following the Government's amendment at Committee Stage in the House of Lords.

Information about the less intrusive methods that may or may not be available, and an explanation of why that is so, is vital for an informed, genuine agreement to be made. Such information is central to the necessity and proportionality of the request.

Information about the length of time for which the device may be out of the user's possession is also important to enable an informed agreement, and to address a common obstruction to rape investigations.

Information about the ability to review the request for digital extraction is important to ensure the agreement is made in a genuinely voluntary manner. At the moment, this may involve an internal police complaint or contact with the Information Commissioner's Office. We strongly believe a review process will support rape investigations and ensure requests are made lawfully, and we are aware such a process is being piloted within Thames Valley Police. Whether an internal review process is available or not, it is important individuals are informed of their ability to query an extraction request in order to give informed, voluntary agreement.

Each of these three areas are addressed further in this briefing.

Amendment to ensure digital extraction is only permitted where strictly necessary

Amendment:

Clause 36, page 29, line 44, after 'power is' insert 'strictly'

Effect:

This amendment would make clear that the necessity test to extract digital information is one of strict necessity.

Briefing:

It is important to make clear on the face of the Bill that the threshold to justify a digital extraction is one of strict necessity.

There are a range of alternatives to the extraction of material from a device, which should be considered first. The Supreme Court in *Elgizouli v SSHD [2020] UKSC 10*, and the Court of Appeal in *Johnson v Secretary of State for the Home Department [2020] EWCA Civ 1032*, confirmed that in this type of context necessity means strict necessity. Moreover, by its very nature, extraction in a criminal context is likely to involve in most instances the processing of special category data, to which primary legislation makes clear the strict necessity test applies.

Home Office Minister Baroness Williams acknowledged in Committee Stage in the House of Lords that "strict necessity" *is* the appropriate test, but refused to accept an amendment to put such a test on the face of the Bill. She said:

> "In every case where authorised persons are extracting sensitive personal information from a device under these powers for a law enforcement purpose, such as preventing, detecting, investigating or prosecuting crime, they must continue to meet the strict necessity threshold in the Data Protection Act. It is therefore not necessary to duplicate that existing legal requirement in the Bill; it is there."[9]

Indeed, every purpose for digital extraction in the Bill is a law enforcement purpose. Furthermore, whether for the purpose of investigations of serious crime or investigations of missing persons, the strict necessity test is the appropriate test to undertake a digital extraction.

However, in light of confusion around the material difference between a necessity and strict necessary test, such clarity on the face of the Bill is needed in order to ensure that the stricter test is indeed followed.

In Committee Stage in the House of Commons, Minister Victoria Atkins rejected calls for the "strict" necessity threshold to be clarified, claiming "I am not persuaded that adopting the

9 Police, Crime, Sentencing and Courts Bill, Committee Stage, House of Lords, 27 October 2021, vol. 815, col. 883

phrase, 'strictly necessary and proportionate', instead of 'necessary and proportionate', will make a material difference";[10] and "(...) I am not sure what difference it would make. I am trying to put myself in the boots of a police officer. Would a police officer ask for data if they read the words, 'strictly necessary', but not if they read the word, 'necessary'?"[11] The distinction between necessity and strict necessity is a common one in privacy law, that is not merely rhetorical. In fact, the draft Code of Practice that accompanies this power states that 'strictly necessary' sets a threshold "that will not be met if you can achieve the purpose by some other reasonable means."[12]

Victoria Atkins was right to anticipate that police officers may need training on the distinction between necessity and strict necessity, but this lack of training is not a reason to lower the legal standard required to protect privacy rights in the Bill – quite the opposite. Strict necessity is the appropriate threshold and the Bill must make clear that a test of strict necessity applies to digital extraction.

"Duplication", as Baroness Williams put it, will only make the test clearer – there is no risk from including it on the face of the Bill, but an increased risk of a lower threshold being used in practice if the strict necessity test is not explicitly included.

10 Police, Crime, Sentencing and Courts Bill (Seventh sitting) Debated HoC, 27 May 2021, col. 290: https://hansard.parliament.uk/commons/2021-05-27/debates/93c1ff1c-8328-4039-9e47-f7f2181af4d7/PoliceCrimeSentencingAndCourtsBill(SeventhSitting)

11 Police, Crime, Sentencing and Courts Bill (Seventh sitting) Debated HoC, 27 May 2021, col. 291

12 Extraction of information from electronic devices: Draft Code of Practice, October 2021, p.9, para. 23: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1026902/Extraction_of_Information_Draft_Code_of_Practice.pdf

Amendment to ensure less proportionate means than digital extraction are used where possible

Amendment:

Clause 36, page 30, line 12, leave out paragraph (b)

Effect:

This amendment would prevent excessive, disproportionate digital extractions where other more proportionate means are possible.

Briefing:

An authorised person may only extract digital information if the person "reasonably believes that information stored on the electronic device is relevant" to the purpose for which the device is being examined (Cl. 36(5)(a)) and if they are "satisfied" that it is "necessary and proportionate" to achieve that purpose.

If there is a risk of obtaining information other than that which is necessary to achieve the purpose, an explicit proportionality test is set out, creating a threshold that there are no other means of obtaining the information sought which avoid that risk, or that there are such means but it is not "reasonably practicable" to use them. This could mean that the entire contents of a victim's phone could be downloaded if an officer reasonably believes there is information on the device relevant to their investigation of the allegation – a very low and vague bar – if, for example, the police force does not have software capable of specifying and limiting the data extraction, although it may exist (i.e. if it is not reasonably practicable to use more proportionate means). This risks a continuation of the types of practices and justifications around digital strip searches that campaigners have fought to end, and that have been found to be unlawful.

On our analysis, paragraph (b) is highly likely to be incompatible with the right to privacy protected by Article 8 of the European Convention on Human Rights or with the Data Protection Act 2018. We are not aware of any legal basis for allowing processing to take place, even though a less intrusive alternative is available, because it is judged not to be 'reasonably practicable'. Practicability is not and has never been an appropriate test on which to balance individuals' privacy rights. If less intrusive means are available to obtain data, they should be adopted to meet the requirement that processing is strictly necessary and proportionate, protecting privacy rights and also ensuring access to justice.

The use of less proportionate means was explored at length in the *Bater-James & Anor v. R* judgment, and nowhere in this judgment was 'practicability' set out as a legitimate reason for excessive privacy intrusion:

> " (...) if there is a reasonable line of enquiry, the investigators should consider whether there are ways of readily accessing the information that do not involve looking at or taking possession of the complainant's mobile telephone or other digital device." (77)

This point is critical to protect complainants' privacy and data rights and maintain confidence that their rights are appropriately valued.

Home Office Minister Victoria Atkins resisted this amendment at Committee Stage in the House of Commons on the basis that intrusive requests, despite more proportionate means being available, might be justified if "the time it would take to gather the information might affect the investigation or increase the risk of harm to an individual, or because those methods would mean intruding on the privacy of a wider number of people".[13] The three reasons Atkins points to are a) the time associated with the least intrusive method could negatively affect the investigation; b) the time associated with the least intrusive method could risk harm to an individual; c) the least intrusive method would mean intruding on the privacy of a wider number of people. However, the Bill does not reference any of these reasons, nor are they obviously captured by the actual test in the Bill that "it is not reasonably practicable" to use less intrusive methods.

The first point, that a less intrusive method could harm the investigation, is not substantiated – except for the suggestion that less intrusive methods could take more time. Time may be a factor in the context of an urgent investigation, which we address in the following paragraph. However, in general, time is not an appropriate factor to mitigate an individual's Article 8 right to a private life and in fact balancing an individual's rights in this way puts them at risk of privacy invasion. Furthermore, it is important to note that excessively intrusive digital investigations have been associated with lengthy delays to investigations – in some cases, of up to two years.

To support urgent investigations, it would be more appropriate to include a subparagraph to deal with an urgent data extraction procedure which may permit an intrusive method to be used, though less intrusive methods are available, if doing so is necessary to prevent an imminent threat of injury or harm to a person. In such cases – for example, missing persons cases involving highly vulnerable or at-risk individuals – it is possible that such a request could be deemed necessary and proportionate, and a specific safeguard in the Bill could easily provide for such a process, whilst protecting privacy rights in non-urgent circumstances.

Finally, the Minister's claim that the least intrusive extraction method could incur intrusion on the privacy of a wider number of people is inherently contradictory. The legality and proportionately of digital extraction necessarily requires an assessment of the privacy intrusion on individuals affected by that method. Therefore, "a less intrusive method" could not be one that incurs intrusion for a wide number of people, where such intrusion is disproportionate. In fact, the draft Code of Practice that corresponds to the digital extraction power explicitly states that "Key considerations when deciding if the use of the powers is necessary and proportionate are the impact on privacy of the device user and collateral

13 Police, Crime, Sentencing and Courts Bill (Seventh sitting) Debated HoC, 27 May 2021, col. 292

intrusion on privacy of third parties whose information may also be extracted."[14] It would be wrong for the Minister to suggest that only a practicality consideration would incur a consideration of privacy intrusion on third parties. The only guidance provided by the draft Code of Practice as to the 'reasonably practical' test is that, "The authorised person must assess whether the other means available would be unreasonable in the circumstances."[15] This is vague and leaves intrusive methods prone to inappropriate use.

If less intrusive means of obtaining data are available, they must be used, or the extraction is unlikely to meet the test of strict necessity and proportionality.

14 Extraction of information from electronic devices: Draft Code of Practice, October 2021, p.14, para. 49
15 Extraction of information from electronic devices: Draft Code of Practice, October 2021, p.14, para. 51

Amendment to permit a user to obtain a review of the request for digital extraction

Amendment:

Clause 36, page 30, line 14, insert subsections (8A) to (8D) -

(8A) A user may obtain a review of the strict necessity and proportionality of a proposed agreement referred to in section 36(1).

(8B) A review of a proposed agreement referred to in section 36(1) must be conducted by a Detective Chief Inspector or individual of more senior rank listed in Schedule 3 who is independent of the investigation (the 'Reviewer') and a decision returned in writing to the user and authorised person within 5 working days.

(8C) In conducting a review of a proposed agreement, the Reviewer must consider the views of
(a) the user, which may include representatives appointed by the user,
(b) the authorised person, and
(c) the Crown Prosecution Service.

(8D) In conducting a review of a proposed agreement, the Reviewer must take account of guidance provided by
(d) the Information Commissioner's Office and
(e) the Commissioner for Victims and Witnesses.

Effect:

The effect of these amendments is to create a mechanism by which reviews of digital extraction requests can be initiated.

Briefing:

This is a probing amendment intended to draw the House's attention to the vital need for a digital extraction review process. We believe a review mechanism is an important process to ensure that the requesting individual has correctly analysed the complex factors of strict necessity and proportionality, accounting for multiple factors such as less intrusive methods, technical capabilities and the user's legal rights.

At present, if a complainant is met with an unreasonable or excessive request for digital information they have no recourse – they can only comply or refuse, and in the latter case, the investigation is invariably dropped.[16] Further, there is a significant culture change needed in police forces as demonstrated by the continuation of excessive digital extraction requests even after the revocation of the April 2019 Digital Processing Notice and the introduction of

16 Rape cases dropped over digital strip search refusals – Big Brother Watch, 18 June 2020: https://bigbrotherwatch.org.uk/2020/06/rape-cases-dropped-over-digital-strip-search-refusals/

the interim policy in September 2020. In order to ensure complainants' rights are protected, they must be able to obtain a review of the request for digital extraction.

A process by which complainants can request a review of personal data requests is soon to be trialled by Thames Valley Police in conjunction with the Ministry of Justice. This was an action that emerged from the Government's end-to-end rape review, published in June 2021.[17] We welcome this pilot and believe it is vital that this legislative opportunity is taken to ensure that the commitment to giving victims a right to a review is upheld.

17 The end-to-end rape review report on findings and actions – HM Government, June 2021, p.13: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001417/end-to-end-rape-review-report-with-correction-slip.pdf

Amendments to limit police possession of a device

Amendments:

Clause 36, page 29, line 27, insert subclause 4A -

(4A) The user may choose to be in the presence of the authorised person during the extraction unless either the user or the authorised person deems it impracticable or inappropriate, in which case an explanation must be set out in writing in the agreement referred to in subsection (1).

Clause 36, page 29, line 27, insert subclause 4B -

(4B) If it is necessary for the authorised person to take possession of the device and extract data in absence of the user, the authorised person must
(a) explain why possession of the device is necessary in the agreement referred to in subsection (1),
(b) retain the device no longer than is strictly necessary,
(c) return the device to the user within 30 working days.

Effects:

These amendments would permit the user to choose whether to be present during the digital extraction, unless deemed impracticable or inappropriate; and create a statutory time limit for the authorised person's retention of the device in the event that it is necessary to take possession of it. If the time frame elapsed without extraction taking place, a new agreement would need to be sought.

Briefing:

It has been common for police digital extractions to result in lengthy delays to investigations, and for complainants to be left without their phones for months and even years. In recognition of the harm this can inflict on victims and the obstruction of justice, the Government's end-to-end rape review committed to ensuring "no victim will be left without a phone for more than 24 hours, in any circumstances, and our priority is that victims have their own phones returned within this period"[18] and that this goal would be met by the end of this Parliament.[19] If this legislation is intended to last, it is imperative that a legislative commitment is made in this Bill to deal with this serious, recurring issue.

A Freedom of Information investigation by Big Brother Watch in 2019 found that average wait times for devices to be examined varied across forces from 3 weeks to 5 months.[20] However,

18 The end-to-end rape review report on findings and actions – HM Government, June 2021, p.8
19 The end-to-end rape review report on findings and actions – HM Government, June 2021, p.25
20 Digital Strip Searches: The police's data investigations of victims – Big Brother Watch, July 2019, p.18: https://bigbrotherwatch.org.uk/wp-content/uploads/2019/07/Digital-Strip-Searches-Final.pdf

our groups are also aware of cases where a phone has been retained for over 2 years, as in some cases devices may be retained until the end of criminal proceedings or when the case is closed.

This lengthy retention of devices can take away a lifeline from complainants, who may be in a state or trauma and are likely to be in particular need of social support. It particularly disadvantages poorer complainants who may be unable to replace the device and be made unable to easily communicate, socialise or even work without an electronic device such as a phone or laptop. It could also disadvantage complainants who are reporting an offence without the knowledge of their friends or family as it may be difficult to explain why they no longer have a device such as a phone. As such, the risk of losing possession of a device for a prolonged period of time will prevent many individuals from pursuing the complaint or even reporting an offence in the first place.

The digital extraction technology available today, including mobile extraction kiosks which are now commonly possessed by police forces, mean that these delays and lengthy retention of devices are not strictly necessary and therefore cannot be justified. It is possible for specified data to be extracted rapidly and we believe that it is paramount that police forces are given the right funding and training to make this capability possible nationwide.

Further, to give complainants reassurance and foster trust, they should be given the option of being present during the digital extraction in the same way that an individual reporting a home invasion or burglary would be present during a search of their home. It is important to remember that complainants agreeing to a digital extraction are assisting police with an investigation of a crime – they are not suspects, in which case the use of an agreement would be unlikely to be appropriate. Police possession of a device constitutes a serious privacy intrusion and must be limited to that which is strictly necessary.