

Police, Crime, Sentencing and Courts Bill

Equality and Human Rights Commission briefing

May 2021

Contents

Introduction	1
Equality and human rights considerations	2
Live link in criminal proceedings.....	2
Protest and public order	3
Unauthorised encampments	6
Further information	7

Introduction

The Equality and Human Rights Commission ('the Commission') has been given powers by Parliament to advise Government on the equality and human rights implications of laws and proposed laws and to publish information or provide advice, including to Parliament, on any matter related to equality, diversity and human rights.

We support the UK Government's commitment to tackle serious crime and promote a fair justice system.¹ The Commission's current strategic plan prioritises work to enhance access to justice for women and girls surviving violence and to improve fair trial protections in the criminal justice system.² We are pleased to see measures in the Police, Crime, Sentencing and Courts Bill ('the Bill') aimed at reducing the increased use of custodial remand for children, as well as measures to promote open justice and provide for the presence of a sign language interpreter during jury deliberations. This briefing will focus on three aspects of the Bill with particular equality and human rights implications.

We advise the Government to:

- Implement the recommendations of our Criminal Justice Inquiry before permanently expanding the use of live link in criminal proceedings.³
- Reconsider the expansion of powers to police peaceful protest, which we consider inconsistent with Articles 10 and 11 of the European Convention on Human Rights (ECHR).
- Reconsider measures expanding the criminalisation of trespass and accompanying police powers which could disproportionately interfere with the Article 8 and 14 (ECHR) rights of Gypsy, Roma and Traveller (GRT) communities.

¹ References to the government, ministers or departments refer to the UK Government unless otherwise specified.

² EHRC (2019), [Strategic Plan 2019-2022](#), [accessed 07/05/21]. The inquiry makes recommendations for the criminal justice systems in both England and Wales and Scotland.

³ EHRC (2020), [Does the criminal justice system treat disabled people fairly?](#), [accessed 07/05/21].

Equality and human rights considerations

Live link in criminal proceedings

The Bill places on a permanent footing measures in the Coronavirus Act 2020 which provide for the use of live link across a broad range of criminal proceedings in England and Wales. It would expand the law to allow juries to attend trials by live link and make provision to facilitate police station based video remand hearings.⁴ Before the pandemic, most police stations operated without video remand hearings⁵ and the use of live link in criminal proceedings was limited.⁶

The Commission supports the Government's intention to provide a more accessible and efficient court system. The use of live link in criminal proceedings has supported the criminal justice response to Covid-19, however we are concerned about plans to permanently expand its use without further interrogating its impact on disabled people, children in the youth justice system, and on access to justice more broadly.

The 2020 EHRC inquiry into the treatment of disabled defendants in the criminal justice system found that the court reform programme, including an increased reliance on live link, was not informed by sufficient evidence about the needs of defendants with cognitive impairments, mental health conditions and/ or neurodiverse conditions.⁷ We recommended that gaps in the collection, monitoring and analysis of disability data be addressed and advised the Courts and Tribunals Service (HMCTS) and the Ministry of Justice to establish a clear evidence base around the impact of court reforms on disabled defendants. We identified the need for early and effective screening and better information sharing on identified need and recommended adjustments. We recommended that these existing issues be addressed before further measures are introduced.

⁴ Clause 168, Clause 53.

⁵ MOJ and HMCTS (2021), [Impact Assessment: Police, Crime, Sentencing and Courts Bill 2021: increasing efficiency and accessibility in the courts and tribunals system](#), [accessed 07/05/21].

⁶ Although, for example, regularly used to allow individuals to appear from prison in interim and remand hearings. EHRC (2020), [Inclusive Justice: a system designed for all: Evidence base](#), [accessed 14/05/21]. There is provision to allow evidence provided by witnesses in some circumstances to be heard by live link (Criminal Justice Act 2003, section 51).

⁷ EHRC (2020), [Does the criminal justice system treat disabled people fairly?](#), [accessed 07/05/21].

The Ministry of Justice has responded positively to our recommendations and we understand that an overarching evaluation of the impact of the court reform programme has been commissioned. We further understand that HMCTS has commenced work on the collection of more consistent, higher quality data on the protected characteristics of defendants, including disability data.⁸ While we welcome these steps, which are central to the department's compliance with the PSED, we are concerned that the Bill provides for a significant and permanent expansion of live link before the impact of existing measures on disabled defendants is properly understood and an effective data collection programme implemented.

Beyond the experience of disabled defendants, recent evidence suggests issues may exist around the quality of live link equipment;⁹ the impact of its use on sentencing and levels of legal representation;¹⁰ and the effect of video appearances on defendants' ability to effectively participate in the criminal justice process.¹¹

The Commission advises the Government to implement the recommendations of our Criminal Justice Inquiry before permanently expanding the use of live link in criminal proceedings.

Protest and public order

Placing conditions on processions and assemblies

Under the Public Order Act 1986, conditions can already be imposed on public processions and static assemblies where a senior police officer reasonably believes that the procession "may result in serious public disorder, serious damage to

⁸ This work is taking place in the civil, family and tribunals jurisdictions, with the intention that lessons will be used to explore options for improving the data collection in the criminal jurisdiction.

⁹ Courts and Tribunals Judiciary (2021), Judicial Attitudes Survey, [accessed 07/05/21].

¹⁰ University of Surrey (2020), [Video Enabled Justice](#) [accessed 07/05/21]. The study suggests video remand hearings may reduce levels of legal representation and may increase the potential for a custodial sentence.

¹¹ Including by affecting their ability to follow processes and engage effectively with their legal representatives. Fair Trials International (2020), [Justice Under Lockdown \(England and Wales\)](#), The Law Society (2020), [Law under lockdown: the impact of COVID-19 measures on access to justice and vulnerable people](#) [accessed 07/05/21].

property, or serious disruption to the life of the community”, or where the purpose of organisers is the intimidation of others.¹²

The Bill would significantly lower this threshold and allow conditions to be imposed on processions and assemblies where the noise generated may result in serious disruption to the activities of a person or an organisation in the vicinity of the protest; or where the noise generated “may result in the intimidation or harassment of persons of reasonable firmness with the characteristics of persons likely to be in the vicinity”, or may cause such persons serious unease, alarm or distress.¹³ There is no requirement that the impacts prescribed by the Bill would occur, only that they “may” occur and “may” be “significant”.

This new threshold is broad enough to authorise the restriction of protected forms of protest, including noisy processions, undermining Article 10 and 11 rights to freedom of expression and assembly¹⁴ and the protection the courts have accorded to protest which may “disturb, shock or offend others”.¹⁵ The courts have recognised that the essence of a legitimate protest can be to create a nuisance.¹⁶

The Bill would also remove restrictions limiting the conditions that can be imposed on static protests to place, duration and maximum numbers. In a significant dilution of protection, police would be permitted to impose such conditions on an assembly in England and Wales “as appear to the officer necessary” to prevent disorder, damage, disruption, impact or intimidation, including disruptive noise. In Scotland

¹² Sections 12 and 14 of the Public Order Act 1986.

¹³ Clauses 54 and 55.

¹⁴ The fundamental role of freedom of expression and assembly as “one of the essential foundations” of a democratic society has been repeatedly underscored by the European Court of Human Rights (for example, *Handyside v United Kingdom* (1979-80) 1 EHRR 737). The Bill also raises concerns under Articles 19 and 21 of the International Covenant on Civil and Political Rights which protect the rights to freedom of expression and assembly.

¹⁵ The courts have further upheld the right of protesters to impede activities of which they disapprove (*DPP v Ziegler* [2019] EWHC 71 (Admin), paras.50-53; *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241), para.28, and confirmed that disruption entailed by the legitimate, peaceful exercise of expression and association rights may only be restricted where there is substantial justification, for example to prevent public disorder, or breach of the general law (*Tabernacle v SSD* [2009] EWCA Civ 23; *Rai, Allmond and Negotiate Now v UK*, App. No. 25522/94).

¹⁶ In this respect it is problematic that the bill contains a provision to place the common law offence of nuisance on a statutory footing within the context of protest provisions. In *Tabernacle v SSD* [2009] EWCA Civ 23 the Court of Appeal held that the “manner and form” of the protest was, in this case, part of the essence of the protest itself. The Court stated, “Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them...” (para. 43). The Secretary of State was therefore required to show a “substantial objective justification” for a substantial interference with the right to protest (para. 39).

restrictions would be limited to place, duration and numbers, resulting in different standards of protection for protest across the nations of the UK.

The broad range of circumstances that could result in the imposition of conditions, coupled with the absence of clear and defined limits on the exercise of these powers, risk compromising the requirement that interference with the right to freedom of expression or assembly be “prescribed by law”. There is further no express requirement on the face of the Bill for conditions placed on protest to be necessary and proportionate, only that conditions “appear to [the officer] necessary”. While the Human Rights Act 1998 requires these powers to be exercised only when necessary and proportionate, recent events demonstrate the importance of ensuring that the rights to protest and assembly are reflected and therefore protected on the face of legislation, to help the police, and protestors, understand how the law should be applied.¹⁷ Ahead of the Reclaim These Streets vigil on Clapham Common, the police considered that no protest could take place, because no explicit exception had been included in the coronavirus regulations relating to protest. It took an emergency application to the High Court to confirm that protest was not prohibited and the regulations had to be read subject to Human Rights Act requirements.¹⁸

Criminal offence

The Public Order Act includes an offence of knowingly failing to comply with a condition imposed on a procession or assembly. The Bill would expand the offence, in England and Wales, to include individuals who act contrary to police conditions in cases where they “ought to know” they have been imposed. In Scotland, it would remain a requirement that a person knows of the conditions, creating a further discrepancy in the law across the UK.

The proposal to impose criminal liability without the need for knowledge of wrongdoing creates a risk that a protester may unwittingly commit an offence¹⁹ and

¹⁷ Restrictions on protest must give sufficiently precise guidance to allow people to understand if their assembly will be permitted (*Mkrtchyan v Armenia*, App, 6562/03, para.30).

¹⁸ Protest was only prohibited insofar as it could legitimately be curtailed on public health grounds, which required a fact-specific inquiry (*Leigh & Ors v Commissioner of the police for the Metropolis* [2021] EWHC 661 (Admin)).

¹⁹ The defence to this offence places the burden on the accused protestor to prove that the failure arose from ‘circumstances beyond his control’. POA 1986, s.12(5).

so could have a chilling effect on the right to protest.²⁰ The risk is particularly high in a context where the law itself does not specify the conditions that may be imposed on a protest.

The Commission advises the Government to reconsider the expansion of powers to police peaceful protest, which we consider inconsistent with Articles 10 and 11 of the ECHR.

Unauthorised encampments

The civil law currently allows police to direct individuals residing on land with six or more vehicles to leave where damage has been caused or threatening or abusive words or behaviour used and where an officer “reasonably believes” the occupier has taken “reasonable steps” to ask those on the land to leave.²¹ Further powers are available to police where they consider the offence of aggravated trespass has been committed.²²

The Bill will create a criminal offence of trespass for those residing or intending to reside on land with a single vehicle without the consent of the occupier.²³ The new offence will apply if an individual has failed to comply with a request to leave land and their residence or intended residence has caused or is likely to cause significant damage, disruption or distress, substantially lowering the threshold for enforcement action. Requests to leave land may be made by occupiers in addition to police. The Bill provides for seizure of property, including vehicles which may act as a family home.²⁴ The period during which an individual may be banned from returning to land is extended from 3 to 12 months.

Part 4 of the Bill will have a profound effect on Gypsy, Roma and Traveller (GRT) communities who already face a shortage of authorised sites²⁵ and disadvantage

²⁰ A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction (*Kudrevičius v Lithuania* (2016) 62 EHRR 34, §146).

²¹ Criminal Justice and Public Order Act (CJPOA) 1994, section 61.

²² CJPOA 1994, section 69. Aggravated trespass occurs where a trespasser does something to intimidate a person engaging in lawful activity on the land or to disrupt or obstruct that activity.

²³ Clause 61. Provision restricted to England and Wales.

²⁴ If the individual fails to leave the land or, having left, re-enters it with the intention of residing there without the consent of the occupier of the land, he or she can be arrested and his or her vehicle can be impounded.

²⁵ Friends, Families and Travellers (2020), [No place to stop: Research on the five year supply of deliverable Gypsy and Traveller sites in the South East of England](#), [accessed 07/05/21].

across multiple areas of life, including difficulty accessing healthcare and often low standards of housing.²⁶ The Bill is likely to exacerbate these challenges. Research further suggests a lack of support for the measures proposed in Part 4 among police forces.²⁷

We welcome the consideration the Government has given to the human rights implications of Part 4 of the Bill,²⁸ but remain concerned that the new offence and accompanying powers represent a disproportionate interference with the right to respect for private and family life of members of the GRT community under Articles 8 and 14 of the ECHR. The courts have recognised and protected the right of the Gypsy and Traveller community to maintain a nomadic life style²⁹ and identified the lack of available alternative sites as relevant to the proportionality of injunctions to prevent unauthorised encampments.³⁰ The need to respect the rights of GRT communities is not reflected on the face of the bill.

The Commission advises the Government to reconsider plans to expand the criminalisation of trespass and broad accompanying powers to evict those occupying unauthorised sites and seize their vehicles. We advise the Government to increase the availability of authorised sites for the use of the GRT community.

Further information

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about the Commission's work on our [website](#). For more information, please contact:

Policy lead:

Rachel Robinson, Senior Principal, Policy
Rachel.Robinson@equalityhumanrights.com

²⁶ Equality and Human Rights Commission (2018), [Is Britain Fairer?](#), [accessed 07/05/21].

²⁷ Friends, Families and Travellers (2019), [Police oppose criminalising unauthorised encampments and call for more sites](#), [accessed 07/05/21].

²⁸ Home Office and Ministry of Justice (2021), [Memorandum for the Joint Committee on Human Rights](#), [accessed 07/05/21].

²⁹ *Chapman v UK* [2001] 33 EHRR 399; *London Borough of Bromley v Persons Unknown, London Gypsies and Travellers and Others* [2020] EWCA Civ 12.

³⁰ *London Borough of Bromley v Persons Unknown, London Gypsies and Travellers and Others* [2020] EWCA Civ 12.