BINGHAM CENTRE FOR THE RULE OF LAW

# The Police, Crime, Sentencing and Courts Bill: A Rule of Law Analysis

Katie Lines, 13 September 2021

BICL
British Institute of International and Comparative Law

## Executive Summary

This report provides a Rule of Law analysis of the Police, Crime, Sentencing and Courts Bill. To avoid duplication with briefing reports published by the Joint Committee on Human Rights and Liberty, we have not addressed the human rights implications of the Bill in this report, although we note that there are valid concerns around the proportionality and necessity of provisions within the Bill, and whether the restrictions it contains can be said to be prescribed by law.

This report is intended to provide Peers with a targeted Rule of Law analysis, mostly focussing on concerns around unnecessary delegation, fair trial rights, and the clarity and foreseeability of the law in Parts 3, 10 and 12 of the Bill.

It concludes that:

**Part 3 – Public Order**

- Clauses 55, 56 and 61 introduce a new noise trigger, which allows a senior police officer to impose conditions on protests based on the level of noise they generate. The drafting of this new trigger is not sufficiently clear and leaves too much discretion to individual police officers, making the law on protests more unpredictable and increasing the risk of the arbitrary exercise of police power. It is difficult to identify a proposed amendment that would address our concerns, other than removing the new noise trigger from the Bill.
- Clauses 55, 56 and 61 empower the Secretary of State to use regulations to further define the expressions "serious disruption to the life of the community" and "serious disruption to the activities of an organisation which are carried on in the vicinity". This level of delegation is unnecessary. Both phrases should be defined within the Bill itself, and we have not seen a convincing explanation as to why this is not possible.
- Sections 12 and 14 of the Public Order Act 1984 make it an offence to knowingly fail to comply with a condition that the police have imposed on a protest. Clause 57 would reduce the level of knowledge required, so that it will be an offence for a protestor to breach a police condition that they "ought to know" exists. A fault test of "ought to know" is inherently less clear and predictable than a test of "knowingly", and goes further than is necessary to address the problem that clause 57 seeks to resolve. Clause 57 should be amended to remove the "ought to know" threshold. Instead, the Bill should provide that an individual commits an offence if they (1) knowingly breach a police condition, or (2) breach a condition in circumstances where they took active steps to prevent the condition being communicated to them, and would have known of the condition had those steps not been taken.

**Part 10 – Management of Offenders**

- Part 10 of the Bill would introduce Serious Violence Reduction Orders (SVROs). Clause 140 grants a police officer an incredibly broad discretion to stop and search an individual subject to a SVRO for the purpose of ascertaining whether they have a bladed article or an offensive weapon. A police officer does not need to have reasonable grounds for carrying out the search, and does not need prior authorisation. Clause 140 should be amended to remove this stop and search power. Alternatively, additional safeguards should be inserted into section 342E, such as providing that a stop and search can only take place if a police officer has specified reasonable grounds.
- A SVRO can be imposed by a court where it is satisfied on a balance of probabilities that an offender knew or ought to have known that a bladed article or offensive weapon was going to be used by another person in the commission of the offence; or knew or ought to have known that another person who committed the offence had a bladed article or offensive weapon with them. Again, an "ought to have known" test introduces legal uncertainty. However, we recognise that there may be legitimate policy concerns that can only be achieved by introducing an "ought to have known" test. The Government should explain exactly what

concerns the test is designed to address, and why it is a necessary means of tackling those concerns. If the Government's policy aims can still be met by without the "ought to have known" threshold, then clause 140 should be amended to remove the "ought to have known" test.

**Part 12 – Procedures in Courts and Tribunals**

- Clause 165 inserts a new provision into the Juries Act 1974 to enable a "13th person" to be brought into the jury deliberation room where a deaf juror requires a British Sign Language interpreter. It is commendable that the Bill enables profoundly deaf people who speak British Sign Language to serve as jurors. However, no provision is made for other individuals with disabilities who require the assistance of a third party in order to serve as a juror. If there is no objective justification for excluding other disabled people who require assistance, then Clause 165 should be amended to empower judges to appoint a third party to provide assistance to any disabled juror in the jury deliberation room.
- The Coronavirus Act 2020 expanded the use of live links in criminal proceedings. Clause 169 makes permanent, and in some cases expands, these temporary provisions. However, the impact of digital hearings on a defendant's right to a fair trial has not been properly assessed. Clause 169 should be amended so that the provisions in the Bill which expand the use of live links cannot be brought into force until a review has been carried out of their impact on access to justice and the right to a fair trial.

## About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society -too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

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## Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. Previous Reports have been on the EU (Withdrawal Agreement) Bill and the Terrorist Offenders (Restriction of Early Release) Bill as well as on various coronavirus laws. Dr Ronan Cormacain is leading this Project.

The Report has been prepared by Katie Lines.

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## Introduction

1. This report provides a Rule of Law analysis of the Police, Crime, Sentencing and Courts Bill.

*The scope of this report*

2. The Rule of Law requires the effective protection of human rights, including ensuring that public authorities comply with their positive obligations under human rights law.[1] The human rights implications of the Bill have already been extensively analysed. The Joint Committee on Human Rights has published legislative scrutiny reports on the Bill looking at the public order provisions in Part 3, the criminalisation of unauthorised encampments in Part 4, and a proposed amendment to the Bill relating to the children of mothers in prison.[2] Liberty has also produced multiple briefing reports considering the human rights implications of the provisions in part 10 of the Bill, which concern the management of offenders.[3]

3. To avoid duplication, we have not addressed the human rights implications of the Bill in this report, although we note that there are valid concerns around the proportionality and necessity of provisions within the Bill, and whether the restrictions it contains can be said to be prescribed law. In particular, we endorse the findings that:

    a. The new trigger for imposing conditions on processions and assemblies based on the noise they generate (clauses 55 and 56) does not appear to be a necessary or proportionate interference with the rights of freedom of expression and freedom of assembly protected by Articles 10 and 11 of the European Convention on Human Rights (ECHR). The only types of behaviour covered by the new noise trigger that the police do not already have powers to deal with are "at the very bottom of the scale, such as peaceful changing, singing and shouting that has a relatively minor impact";[4]

    b. Similarly, the new power to grant conditions on a one-person protest based on the noise it generates (clause 61) does not appear to be a necessary or proportionate interference with the right to freedom of expression protected by Article 10 ECHR;[5]

    c. It is concerning that clause 57 would increase the maximum sentence for breaching a condition imposed on a protest from 3 months to 51 weeks. Violent behaviour at a protest is already criminalised by other offences. Clause 57 will catch peaceful protesters.[6]

    d. The reasonable excuse defence in the statutory public nuisance offence (clause 60) should apply where an individual is exercising their right to freedom of expression and/or assembly under Articles 10 and 11 ECHR.[7]

    e. Part 4 of the Bill criminalises unauthorised encampments. If local authorities do not provide a sufficient number of authorised caravan sites then there are concerns around Gypsy, Roma and Travellers' right to respect for private and family life under Article 8 ECHR.[8]

[1] Venice Commission, "The Rule of Law Checklist", Benchmark A2 (Council of Europe 2016), available at < https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf>
[2] All three reports can be accessed at: https://committees.parliament.uk/work/1109/legislative-scrutiny-police-crime-sentencing-and-courts-bill/publications/reports-responses/
[3] See: https://www.libertyhumanrights.org.uk/issue/2827/
[4] Joint Committee on Human Rights, 'Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)' (2021-22) HC 331 HL Paper 23, pp. 19 and 40
[5] Ibid.,, p.40
[6] Ibid,. pp. 25-26.
[7] Ibid., p. 32
[8] Joint Committee on Human Rights, 'Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Part 4): The criminalization of unauthorized encampments' (2021-22) HC 478 HL Paper 37, p. 21

4. The rest of this report is intended to provide Peers with a targeted Rule of Law analysis, mostly focussing on concerns around unnecessary delegation, fair trial rights, and the clarity and foreseeability of the law in Parts 3, 10 and 12 of the Bill.

## Part 3 – Public Order

5. The Rule of Law requires legislation to be clear, predictable and consistently applied.[9] Individuals cannot claim rights to which they are entitled, or perform their legal obligations, if they cannot reasonably discover what those rights and obligations are. It is of particular importance that legislation creating criminal offences is clear and predictable, so that people know what they must or must not do in order to avoid criminal penalty.[10]

6. The law will not be clear or predictable if it confers a discretion so broad that its scope is unclear, and dependent upon the subjective interpretation of those exercising the discretion. Where Parliament grants a discretionary power, the objectives, contents and scope of that discretion must be narrowly defined in primary legislation, in order to ensure legislative supremacy and protect against the arbitrary exercise of power.[11]

7. The main Rule of Law concerns with the public order provisions in Part 3 of the Bill are (1) a lack of legal clarity and foreseeability caused by widely drafted clauses with vague terminology, and (2) the significant amount of discretion that has been left to police forces and the Secretary of State to decide when protests can be restricted. Any restrictions on the right to protest should be clearly and narrowly defined. The greater the discretion left to individual police forces, the harder it is for the police to determine whether they should impose conditions on a protest. Granting the police a broad discretionary power also opens the door for the over-policing of protests on an arbitrary basis, including the risk that protests will be restricted due to the conscious or unconscious biases of individual officers. In addition, the law needs to be sufficiently clear so that individuals are not deterred from exercising their fundamental right to protest due to uncertainty as to whether they may be breaching the law.

8. The police have already expressed dissatisfaction with the clarity of the existing law, with Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services reporting that "many police officers find the laws that apply to protest unclear and overly complex."[12] The Bill should seek to improve, not compound, this lack of clarity.

## Clauses 55, 56 and 61 - Lack of Clarity and Foreseeability

*The current law*

9. The Bill amends police powers found in the Public Order Act 1986. Sections 12 and 14 of the Public Order Act currently allow a senior police officer to impose conditions on a moving or static protest, or any other form of public assembly comprising two or more people. Conditions can only be imposed where the police officer reasonably believes that:

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[9] Venice Commission "Checklist", Benchmark B3
[10] Tom Bingham, *The Rule of Law* (Penguin, 2011), p. 37
[11] Venice Commission "Checklist", Benchmarks A2, A4 and C
[12] Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, 'Getting the balance right? An inspection of how effectively the police deal with protests' (March 2021), p. 119 < https://www.justiceinspectorates.gov.uk/hmicfrs/publications/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests/>

i. the protest "may result in serious public disorder, serious damage to property or serious disruption to the life of the community", or
ii. the purpose of the persons organising the protest is "the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do."

10. The type of conditions that can be imposed differ between moving and static protests. Where the protest is moving, a police officer can impose any conditions that he or she considers "necessary to prevent such disorder, damage, disruption or intimidation" that the protest may cause.[13] The police have more limited powers when it comes to static assemblies, and can only impose conditions "as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to [the police officer] necessary to prevent such disorder, damage, disruption or intimidation."[14] This distinction arose because the Government that introduced the Public Order Act in 1986 wanted to "prevent the imposition of conditions" on static assembles "whose effect would be tantamount to a ban".[15]

*Changes made by the Bill*

11. The Bill would add two additional circumstances in which a senior police officer can impose conditions on moving or static assemblies in England and Wales. Clauses 55 and 56 allow conditions to be imposed where a senior police officer reasonably believes that:

> "(aa) in the case of [a procession or assembly] in England and Wales, the noise generated by persons taking part in the [procession or assembly] may result in serious disruption to the activities of an organisation which are carried on in the vicinity", and
>
> "(ab) in the case of an assembly in England and Wales—
> (i) the noise generated by persons taking part in the [procession or assembly] may have a relevant impact on persons in the vicinity of the [procession or assembly], and
> (ii) that impact may be significant"

12. Noise from a protest may have a "relevant impact" if it "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 to suffer serious unease, alarm or distress". When considering whether a noisy protest will have a "relevant impact", a police officer must consider the likely numbers of persons in the vicinity who will be impacted, and the likely duration and intensity of the impact on those persons.

13. We note that these provisions are not restricted to protests, and apply to any processions or assemblies. This means that the Bill would in theory grant the police the power to impose conditions on, for example, noisy religious gatherings, children's play groups, and local sporting events.

14. Clause 56 of the Bill also expands the types of conditions that the police can impose on static protests to match the conditions that can be imposed on moving protests. Clause 55 and 56 empower a senior police officer to impose on moving or static assemblies any conditions that the officer considers necessary to prevent the "disorder, damage, disruption, impact or intimidation" that the protest may cause.

15. In addition, clause 61 allows the police to impose conditions on a one-person protest. Currently, protests must involve at least two people to engage police powers. Clause 61 allows a senior police officer to impose the same conditions relating to noise on one-person protests as to other forms of protests. This means that, where noise from a one-person protest may result in serious disruption to the activities of a nearby organisation, or have a significant impact on persons in

[13] Section 12 Public Order Act 1986
[14] Section 14 Public Order Act 1986
[15] HMICFRS, 'Getting the balance right?', p. 112

the vicinity, then a senior police officer "may give directions imposing on the person organising or carrying on the protest such conditions as appear to the officer necessary to prevent such disruption or impact". If the one-person protest is moving, the police officer may impose conditions on its route, including prohibiting the protestor from entering any public place.

*Lack of clarity and foreseeability*

16. None of these provisions improve the clarity of the existing law governing protests. To the contrary, the clauses are widely drafted and leave much discretion to individual police officers, making the law on protests more unpredictable and increasing the risk of the arbitrary exercise of police power. The Bar Council has noted that "in their current form, the amendments, if passed, will require almost immediate interpretation by the senior courts before the precise meaning to the law becomes settled."[16]

17. The new noise trigger is overly complex and subjective. A police officer first has to consider whether the noise generated by persons taking part in a protest may result in serious disruption to the activities of an organisation in the vicinity. It is difficult for police officers and protestors to assess with any degree of certainty whether the noise caused by a protest "may result" in "serious disruption" to a nearby organisation. "May result" is a low threshold, and the phrase "serious disruption" is vague and open to interpretation.

18. A police officer also has to assess whether the noise caused by a protest may have a relevant impact on nearby people, and whether that impact may be significant. In order to make that assessment, the officer has to make multiple, subjective judgments. They first need to consider whether the noise from a protest may cause people of "reasonable firmness with the characteristics of people" who are likely to be in the vicinity to suffer intimidation, harassment, serious unease, alarm or distress. The officer then has to determine whether any of these impacts may be "significant", taking into account the duration and intensity of the impact, and the number of people affected.

19. This test is convoluted, and it will be hard to predict the decision a police officer is likely to reach when applying it. Many of the terms used are open to multiple interpretations. In particular, "serious unease" is a very vague and subjective concept. There is no definition of this phrase within the Bill, but the Cambridge English Dictionary defines "unease" as "a feeling of being worried about something". The extent to which noise from a protest causes someone to feel worried is likely to vary significantly from person to person, even when considering an average person of "reasonable firmness".

20. "Intimidation", "harassment", "alarm" and "distress" already appear in the Public Order Act 1986 without definition, and are commonly used in other legislation dealing with anti-social behaviour.[17] However, these are still subjective terms, and different people are likely to have different opinions as to when the threshold of intimidation, harassment, alarm or distress is reached. The Bill also requires officers to make an additional judgment call about whether the level of intimidation, harassment, alarm or distress is "significant" taking into account the "intensity" of the noise. Again, different police officers are likely to hold different views on this point. The Joint Committee on Human Rights also notes that a police officer's assessment "could easily be swayed, consciously or otherwise, by their feelings towards the protest's subject matter."[18] It will surely be nearly impossible for a police officer to stop themselves being influenced at all by the subject matter of a protest.

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[16] The Bar Council, 'Police, Crime, Sentencing and Courts Bill Briefing for MPs – Committee Stage' (June 2021) <https://www.barcouncil.org.uk/uploads/assets/d0a4526e-4a9a-444c-92e7924db127930e/Bar-Council-Long-Briefing-Police-Crime-Sentencing-and-Courts-Bill-June-2021.pdf>

[17] See, for example, the provisions in s.1 of the Protection from Harassment Act 1997 and s.2(1) of the Anti-Social Behaviour Crime and Policing Act 2014

[18] Joint Committee on Human Rights, 'Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3', p.15

21. The police will face additional problems when they are considering whether conditions need to be imposed on a protest that is already taking place. Members of the public in the vicinity of the protest will almost certainly have different opinions on how the noise is impacting them. How should an officer determine which person's opinion most accurately reflects that of "persons of reasonable firmness with the characteristics of persons likely to be in the vicinity" (the test contained in the Bill)? Again, the subject matter of a protest is very likely to influence people's perception of the impact caused by noise from the protest. But the right to freedom of speech includes speech that offends, shocks or disturbs.[19] It will be hard for a police officer to assess the extent to which the subject matter of a protest has coloured people's assessment of the noise generated.

*Proposed amendments*

22. We note that the Joint Committee on Human Rights concluded that the new noise trigger should be removed from the Bill entirely, as they found that it is not a justified interference with the rights to freedom of expression and assembly protected by Articles 10 and 11 ECHR.[20] It is difficult to identify a proposed amendment that would address our additional concerns around the lack of clarity in the new noise trigger, other than removing the trigger from the Bill.

23. Noise is capable of objective measurement, and the Joint Committee on Human Rights notes that the "law around noise normally sets clear, objective criteria concerning decibel levels, time, location, and specific types of equipment causing the noise."[21] For example, section 5 of the Noise Act 1996 empowers the Secretary of State to set a maximum level of noise that may be emitted from a dwelling during the night. That level is currently set at 34 dBA (decibels adjusted) if the underlying level of noise is no more than 24 dBA, and 10 dBA above the underlying level of noise if this is more than 24 dBA.[22]

24. However, it is likely to be difficult in practice to set a noise level above which conditions can be imposed on a protest. It is difficult to predict in advance of a protest whether the noise generated may exceed a certain level of decibels. This reflects the inherent difficulty in predicting how noisy a protest is likely to be. In addition, it hard to envisage it being practicable to measure the noise from a protest while it is taking place. Noise measurements are usually carried out by environmental health officers, not the police, and the noise generated by a protest is likely to vary significantly from minute to minute. Should the maximum level of noise generated by the protest be used to assess whether conditions need to be imposed? Should multiple noise readings be taken and then averaged? Using an objective test does not seem to be a feasible work-around.

25. In addition, adding further safeguards to the noise trigger to make the law clearer and more predictable is likely to negate any purpose that the new noise trigger would serve. The Joint Committee on Human Rights notes that the police already have many powers to deal with a protest that is sufficiently noisy to cause significantly detrimental impacts to businesses or people in the locality, or which is abusive or threatening.[23] The only new behaviour that the noise trigger catches is that which causes a vague and relatively minor impact on people, and is difficult to define in precise terms, like the concept of "serious unease". Therefore, it is our view that the new noise trigger in clauses 55, 56 and 61 should be removed from the Bill.

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[19] *R. v Central Independent Television* [1994] Fam. 192, per Hoffman L at 532–3
[20] JCHR, 'Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill', p. 19.
[21] Evidence given by Dr Jonathan Havercroft to the Joint Committee on Human Rights, cited in 'Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3', at page 14.
[22] UK Government, 'Noise nuisances: how councils deal with complaints' (last updated 21 December 2017) < https://www.gov.uk/guidance/noise-nuisances-how-councils-deal-with-complaints>
[23] JCHR, 'Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill', pp. 18-19.

## Clauses 55, 56 and 61 – Unnecessary Delegation

26. Clauses 55, 56 and 61 empower the Secretary of State to use regulations to "make provision about the meaning" of the expressions "serious disruption to the life of the community" and "serious disruption to the activities of an organisation which are carried on in the vicinity". Regulations may "define any aspect" of either expression, and give examples of cases in which a protest is or is not to be treated as resulting in serious disruption to the activities of an organisation or to the life of the community. Before such regulations can be made, a draft must be laid before and approved by each House of Parliament (the draft affirmative procedure).

27. The phrase "serious disruption to the life of the community" is part of the existing law governing protests. It is found in sections 12, 14 and 14A of the Public Order Act 1986, which empower a police officer to impose conditions on a protest that may cause "serious disruption to the life of the community".

28. The phrase "serious disruption to the activities of an organisation which are carried on in the vicinity" is a new phrase introduced by the Bill. It is taken from the new noise trigger found in clauses 55, 56 and 61, which allow a police officer to impose conditions on a protest where the noise generated by persons taking part "may result in serious disruption to the activities of an organisation which are carried on in the vicinity".

29. From a Rule of Law perspective, it is positive that the Bill seeks to clarify both expressions, as they are broadly drafted and could have multiple meanings. However, it is not clear why a discretionary power to define these expressions has been delegated to the Secretary of State, when the Bill itself could have easily contained a definition on its face. The Rule of Law protects the supremacy of the legislature, and requires questions of legal right and liability to ordinarily be resolved by application of the law and not the exercise of discretion.[24] It is for Parliament to make the law and for judges to interpret it, not for Parliament to make the law and the Secretary of State to give her own interpretation of key legal terms.

30. Parliament's ability to approve or reject any regulations that the Secretary of State may propose is not a sufficient safeguard. Parliament's ability to scrutinise delegated legislation is inherently limited. Delegated legislation cannot be amended by Parliament except in exceptionally rare circumstances.[25] This means that MPs and Peers are almost always presented with an all-or-nothing choice when scrutinising statutory instruments: either approve or reject the instrument in its entirety. Either House would be making a significant political statement if it rejects a statutory instrument, and this rarely happens in practice. Therefore, there is little scope for Parliament to push for changes to be made to the detail of proposed statutory instruments, and little incentive for the Government to compromise in response to Parliamentary pressure.[26] In addition, Parliament spends far less time debating secondary legislation than it spends debating primary legislation.

31. "Serious disruption to the life of the community" and "serious disruption to the activities of an organisation which are carried on in the vicinity" are important phrases within the Bill and the Public Order Act 1986. Their interpretation governs the extent to which the police can impose conditions on protests. These phrases should be defined within the Bill itself, and we have not seen a convincing explanation as to why this is not possible. The Delegated Powers Memorandum explains that "Protesters have become adept at rapidly changing their tactics to avoid the use of police powers, so the flexibility of a statutory instrument is needed rather than instead looking to provide this clarity on the face of the Bill, which could soon become out of date." But a change in tactics should not alter the meaning of any of the

[24] Bingham, *The Rule of Law*, p.48
[25] There are a very small number of parent Acts that allow for amendments to be made, for example the Civil Contingencies Act 2004 s.27(3) and Census Act 1920 s.1(2).
[26] This point was made by the Constitution Committee in 'Delegated Legislation and Parliament: A response to the Strathclyde Review (2015-2016, HL 116), at paragraph 25.

phrases that the Secretary of State has been empowered to define – "serious disruption"; "life of the community"; "activities of an organisation"; "carried out in the vicinity".

*Proposed amendments*

32. The Bill should be amended to remove the Secretary of State's power to define the phrases "serious disruption to the life of the community" and "serious disruption to the activities of an organisation which are carried on in the vicinity". "Serious disruption" should be defined within the Bill itself, so as to improve the clarity of the existing provisions in the Public Health Act 1986 and, if it remains in the Bill, the new noise trigger in clauses 55, 56 and 61.

33. The Government has already published a draft of the Regulations, which contain reasonable definitions of both "serious disruption to the life of the community" and "serious disruption to the activities of an organisation which are carried on in the vicinity".[27] These definitions could simply be inserted into the Bill itself.

## Clause 57- Lack of Clarity and Foreseeability

34. Sections 12 and 14 of the Public Order Act 1984 make it an offence to fail to comply with a condition that the police have imposed on a protest. Currently, an individual only commits this offence if they "knowingly" disobey a police condition. Clause 57 would reduce the level of knowledge required, so that it will be an offence for someone to breach a police condition that they "ought to know" exists. However, it will still be a defence for that person to prove that the breach "arose from circumstances beyond their control".

35. Clause 57 is designed to close a legal loophole. The police have reported that protestors are deliberately frustrating the police's attempts to communicate conditions so that the protestors can claim they did not know a condition had been imposed. Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services describes 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."[28]

36. A fault test of "ought to know" is inherently less clear and predictable than a test of "knowingly". In what circumstances will it be found that a protester ought to have known about the conditions imposed? Ought a protestor to have known about conditions that were publicised on a website? Or displayed on a sign that the protestor walked past while talking with a friend?

37. We recognise that an "ought to know" test is not novel. The law already contains offences that criminalise behaviour where an individual ought to know about a certain state of affairs. For example, the offence of gross negligence manslaughter applies to someone who has created a state of affairs which they ought reasonably to know has become life threatening. However, the law should be as clear as possible, and it is our view that the "ought to know" test creates more legal uncertainty than is necessary to resolve the legal loophole in the current law.

[27] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/998628/Public_order_SI.pdf

[28] HMICFRS, 'Getting the balance right?', p. 114

*Suggested amendment*

38. Clause 57 should be amended to remove the "ought to know" threshold. Instead, the Bill should provide that an individual commits an offence if they (1) knowingly breach a police condition, or (2) breach a condition in circumstances where they took active steps to prevent the condition being communicated to them, and would have known of the condition had those steps not been taken.

## Part 10 – Management of Offenders

39. Part 10 of the Bill would introduce Serious Violence Reduction Orders (SVROs). These are a new civil order that can be imposed on individuals convicted of an offence where a court is satisfied on the balance of probabilities that –

    (a) a bladed article or offensive weapon was used by the offender in the commission of the offence;

    (b) the offender had a bladed article or offensive weapon with them when the offence was committed;

    (c) a bladed article or offensive weapon was used by another person in the commission of the offence and the offender knew or ought to have known that this would be the case;

    (d) another person who committed the offence had a bladed article or offensive weapon with them when the offence was committed and the offender knew or ought to have known that this would be the case.

40. A court also has to be satisfied that it is necessary to make the SVRO in order to protect the public from the risk of harm involving a bladed article or offensive weapon, or to prevent the offender from committing an offence involving a bladed article or offensive weapon.

41. A SVRO can be in force for between 6 months to 2 years, and may impose requirements or prohibitions on the offender. Where an individual is subject to a SVRO, a police officer can stop and search them without needing to have reasonable grounds to carry out the search.

42. Before the provisions relating to SVROs can be brought into force across the whole of England and Wales for all purposes, SVROs must be piloted and the Secretary of State must lay a report before Parliament on the operation of the pilot.

43. Liberty's briefing on the Bill discusses the possible discriminatory impact of SVROs and their potential to breach Article 8 of the European Convention on Human Rights.[29]

## Clause 140 – Excessive Discretion Granted to the Police

44. The Rule of Law requires there to be clear legal restrictions to discretionary power, in order to protect against its arbitrary application and the abuse of power.[30]

[29] 'Liberty's Briefing on the Police, Crime, Sentencing and Courts Bill for Report Stage in the House of Commons' (July 2021), pp. 28-29 <https://www.libertyhumanrights.org.uk/wp-content/uploads/2020/04/Libertys-briefing-on-the-Police-Crime-Sentencing-and-Courts-Bill-Report-Stage-HoC-July-2021.pdf>
[30] Venice Commission, 'Checklist', Benchmark C

45. Clause 140 empowers a police officer to use reasonable force to stop and search an individual subject to a SVRO for the purpose of ascertaining whether the offender has a bladed article or an offensive weapon. A police officer does not need to have reasonable grounds for carrying out the search, and does not need prior authorisation. The only safeguard that needs to be satisfied before the officer can carry out the search is that the person being searched is subject to a SVRO.

46. Clause 140 grants the police an incredibly broad discretion to carry out intrusive searches using force, with minimal safeguards to prevent the arbitrary or abusive exercise of that discretion. There is no other stop and search power which authorises an officer to search someone without reasonable grounds or prior authorisation.

*Suggested amendment*

47. Clause 140 should be amended to remove sections 342E and 342F, which empower a police officer to stop and search an individual subject to a SVRO without reasonable grounds or prior authorisation. Alternatively, additional safeguards should be inserted into section 342E, such as providing that a search can only take place if a police officer has specified reasonable grounds for carrying out the search.

## Clause 140 – Lack of Clarity and Foreseeability

48. A SVRO can be imposed by a court where it is satisfied on a balance of probabilities that an offender knew or ought to have known that a bladed article or offensive weapon was going to be used by another person in the commission of the offence; or knew or ought to have known that another person who committed the offence had a bladed article or offensive weapon with them.

49. As discussed above, "ought to know" is a low threshold which introduces a lack of clarity and foreseeability into the law. In what circumstances should an individual ought to have known that another person had a bladed article or offensive weapon with them when committing an offence? Is it sufficient that the person had alluded to carrying knives in the past? Or had previous convictions where a knife had been used?

50. This test also seems at odds with the recent Supreme Court case of *R v Jogee* [2016] UKSC 8. *Jogee* reversed a series of cases that had considered a situation where a person participates in crime A, and foresees the possibility of crime B occurring. Prior to *Jogee*, the courts had treated the person's continued participation in crime A as an automatic authorisation of crime B taking place. The Supreme Court reversed these cases, stating that the law had taken a "wrong turn". Instead, the Supreme Court established that an individual should not be taken to have intended to encourage or assist with the commission of a crime simply because they foresaw that the crime might occur.

*Suggested amendment*

51. There may be legitimate policy concerns that can only be achieved by introducing an element of legal uncertainty via the "ought to have known" test. The Government should explain exactly what concerns the test is designed to address, and why it is a necessary means of tackling those concerns. If the Government's policy aims can still be met by without the "ought to have known" threshold, then clause 140 should be amended to provide that a SVRO can be imposed where a court is satisfied on the balance of probabilities that –

    (a) a bladed article or offensive weapon was used by another person in the commission of the offence and the offender knew that this would be the case;

(b) another person who committed the offence had a bladed article or offensive weapon with them when the offence was committed and the offender knew that this would be the case.

## Part 12 – Procedures in Courts and Tribunals

## Clause 165 – Lack of Equality in Law

52. The Rule of Law requires legislation to respect the principle of equality. This means that the law should "guarantee equality with respect to any ground of potential discrimination."[31] Where structural inequalities exist in society, the law should include positive measures to address these inequalities.

53. Clause 165 goes some way to addressing structural inequalities in the selection of jury members. Currently, a person who receives a jury summons will be prevented from acting as a juror if they are unable to perform jury service without the assistance of a third party, unless another jury member is able to provide that assistance. This is because the common law has established that jury consists of 12 persons, and no additional "13th person" can be brought into the jury deliberation room.

54. Clause 165 inserts a new provision into the Juries Act 1974 to enable a "13th person" to be brought into the jury deliberation room where a deaf juror requires a British Sign Language interpreter. The clause allows a judge to "appoint one or more interpreters" to provide assistance to the juror where the judge "considers that the assistance of a British Sign Language interpreter would enable the person to be capable of acting effectively as a juror". The interpreter "may remain with the jury in the course of their deliberations".

55. It is commendable that the Bill enables profoundly deaf people who speak British Sign Language to serve as jurors. However, no provision is made for other individuals with disabilities who require the assistance of a third party in order to serve as a juror. The Government's Equality Impact Assessment recognises the issue, and states that the Government "intend to keep this under review in respect of all individuals with disabilities who, in order to serve as jurors effectively, would require the assistance of a third party in the deliberation room."[32] No explanation is given as to why clause 165 has been drafted so as to apply only to jurors who require British Sign Language interpreters.

*Suggested amendment*

56. The Government should explain why clause 165 only makes provision for British Sign Language interpreters. If there is no objective justification for excluding other disabled people who require assistance, then Clause 165 should be amended to empower judges to appoint a third party to provide assistance to any disabled juror in the jury deliberation room.

## Clause 169 – Interference with the Right to a Fair Trial

57. A "cardinal requirement" of the Rule of Law is the protection of fair trial rights, especially for defendants in criminal trials.[33] It is "'axiomatic that a person charged with having committed a

[31] Venice Commission, *Checklist*, Benchmark D3.
[32] Home Office and Ministry of Justice, 'Policy paper Equality impact statement: courts' (updated 14 July 2021) < https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-overarching-documents/equality-impact-statement-courts>
[33] Bingham, *Rule of Law*, p.90

criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all".[34] The Rule of Law also requires proposed legislation to be adequately justified.[35]

58. The use of video and audio live links in criminal proceedings was expanded during the coronavirus pandemic, using temporary provisions in the Coronavirus Act 2020. Clause 169 of the Bill repeals the temporary provisions in the Coronavirus Act, and replaces them with a permanent expansion of the use of live links in criminal proceedings.

*Summary of changes made by the Coronavirus Act 2020*

59. Before the Coronavirus Act 2020 was enacted, live links could be used in criminal proceedings to enable:

    a. Witnesses (other than the defendant) to give evidence in certain proceedings.[36] A defendant was only able to give evidence via live link if (1) their ability to participate was comprised either by "his or her level of intellectual ability or social functioning" (for under 18s) or a "mental disorder" or "significant impairment of intelligence and social function" (for adults); and (2) the use of a live link would enable the defendant to participate more effectively.[37]

    b. Individuals convicted of an offence who were being held in custody to attend appeal proceedings;[38]

    c. Defendants in custody (and, in some cases, on bail) to attend certain preliminary, sentencing and enforcement proceedings.[39]

60. Live links had to include both video and audio.[40] Telephones could not be used.

61. The Coronavirus Act 2020 expanded the use of live links in criminal proceedings to enable more parties to attend a wider range of hearings.[41] The schedules enable:

    a. All participants (except a juror, but including a judge or justice) to take part in eligible criminal proceedings. The list of proceedings in which a live link can be used was expanded to include, for example, all Crown Court trials, proceedings after a defendant has been found unfit to plead by reasons of insanity,[42] and any of the proceedings under Part 3 of the Mental Health Act 1983, including where a defendant is ordered to be detained in a mental health hospital.

    b. All participants to attend appeal proceedings;

    c. All participants to attend certain preliminary, sentencing and enforcement hearings;

    d. Audio links to be used;

    e. Some hearings to take place wholly via audio or video link.

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[34] *R v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42, 68, repeated in *Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, 85, para. 13
[35] Venice Commission, 'Checklist', Benchmark A5
[36] Section 51 of the Criminal Justice Act 2003
[37] Section 33A of the Youth Justice and Criminal Evidence Act 1999
[38] Sections 22 and 23 of the Criminal Appeals Act 1968
[39] Part 3A of the Crime and Disorder Act 1998
[40] CrimPR 2.2(1)
[41] CPS guidance fully outlines the changes made by the Coronavirus Act 2020, see: https://www.cps.gov.uk/legal-guidance/coronavirus-act-2020
[42] ss..4A and 5 of the Criminal Procedure (Insanity Act) 1964

*Summary of changes made by Clause 169*

62. Clause 169 makes permanent, and in some cases expands, the temporary provisions relating to live links in the Coronavirus Act 2020. Most significantly, the Bill extends the use of live links to jury members; so long as all members of the jury can "take part through a live video link while present at the same place."

63. A criminal court would only be permitted to use live links if satisfied that it is in the interests of justice to do so and the parties have been given the opportunity to make representations. The court would also be required consider any guidance given by the Lord Chief Justice, and all the circumstances of the case. These circumstances include "the suitability of the facilities at the place where [the person using the live link] would take part in the proceedings"; "whether that person would be able to take part in the proceedings effectively"; and where the person using a live link is a witness, "the importance of the witness's evidence to the proceedings, and whether the [use of a live link] might tend to inhibit any party to the proceedings from effectively testing the witness's evidence".

64. In principle, there is nothing objectionable about extending the use of technology in criminal proceedings. However, the impact of digital hearings on a defendant's right to a fair trial has not been properly assessed. The Impact Assessment produced for part 12 of the Bill contains a very brief and cursory analysis. It explains that "It is not anticipated that there would be any costs to court users who are unable to participate in video/audio hearings as the judiciary will have the power to direct the extent to which a hearing is heard physically or remotely based on the circumstances." The Impact Assessment also describes the temporary provisions within the Coronavirus Act 2020 as having "helped to ensure that the criminal courts can continue to operate as efficiently as possible under challenging circumstances and enable hearings to continue whilst travel restrictions, social distancing, and quarantine requirements remain in place."

65. However, significant concerns have been raised about the impact of the temporary live link provisions in the Coronavirus Act 2020. The Equality and Human Rights Commission published a report in June 2020, in which they reviewed the use of live links and found that "almost all the criminal justice professionals in England and Wales who we interviewed felt that use of video hearings does not enable defendants or accused people to participate effectively, and reduces opportunities to identify if they have a cognitive impairment, mental health condition and / or neuro-diverse condition."[43] The House of Lords Select Committee on the Constitution recently reviewed the operation of the court system during the pandemic. The Committee discussed how "the shift to remote hearings may have undermined litigants' ability to engage appropriately with courts and tribunals, potentially to the detriment of their own case," and created difficulties for effective communication between court users and their legal advisers which could be "undermining access to justice"[44] Transform Justice has also highlighted that there is "growing evidence of a correlation between defendants appearing on video and receiving more punitive criminal justice outcomes."[45]

66. Part of the problem is the IT system used by courts and tribunals, which has been described as being "antiquated" and "virtually below sea level".[46] The Legal Education Foundation carried out a review of the operation of the court system at the start of the pandemic, and found that

[43] Equality and Human Rights Commission, *Inclusive justice: a system designed for all* (June 2020), available at <https://www.equalityhumanrights.com/sites/default/files/ehrc_inclusive_justice_a_system_designed_for_all_june_2020.pdf>

[44] House of Lords Select Committee on the Constitution, 'COVID-19 and the Courts' (2019-2021) HL Paper 257, p. 28

[45] Ibid., p.64

[46] Ibid, p. 24

nearly half of all remote hearings sampled were "beset by technical difficulties."[47] Similarly, the House of Lords Select Committee found that remote hearings presented "real challenges for litigants with low levels of literacy and those with limited access to technology", but also caused difficulties even for those "furnished with the latest IT and quiet place to work", due to issues like the difficulty of managing electronic documents.[48]

67. Multiple commentators within and outside of Parliament have emphasised that a full evaluation of the impact of virtual proceedings is needed before they are rolled out further or on a permanent basis. The House of Commons Justice Committee has recommended that "the Ministry of Justice reviews how well remote hearings have worked for all participants in all jurisdictions before rolling them out further".[49] Similarly, the House of Lords Select Committee on the Constitution concluded that "Research suggests that the format of a hearing may have a substantive impact on the case outcome. If that is true, the shift to remote hearings in response to the pandemic must be scrutinised closely. It is vital that sufficient data are collected to assess the impact of remote hearings on outcomes… There are real concerns that remote hearings are disadvantaging vulnerable and non-professional court users, as well as those with protected characteristics. But the requisite data to assess and address these concerns are not available."[50]

68. From a Rule of Law perspective, it is deeply concerning that the Bill extends and makes permanent the use of live links in criminal proceedings, without a proper assessment of the impact that this will have on access to justice and the right to a fair trial.

*Suggested Amendment*

69. Clause 169 should be amended so that the provisions in the Bill which expand the use of live links cannot be brought into force until a review has been carried out of their impact on access to justice and the right to a fair trial. This review should take into account the impact caused by the temporary live link provisions in the Coronavirus Act 2020.

[47] Ibid., p. 22.
[48] Ibid., pp. 27-28.
[49] House of Commons Justice Committee, 'Coronavirus (COVID-19): the impact on the legal professions in England and Wales (2019-2021) HC 520, p. 6.
[50] House of Lords Select Committee on the Constitution, 'COVID-19 and the Courts', p. 5 and 64

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