

**MEND Submission:
The Joint Committee
on Human Rights
inquiry into the
Police, Crime,
Sentencing and
Courts Bill**



The Joint Committee on Human Rights inquiry into the Police, Crime, Sentencing and Courts Bill

A Submission from Muslim Engagement and Development (MEND)

May 2021

1. MEND's contribution to the inquiry

1.1 This submission from Muslim Engagement and Development (MEND) to the Joint Committee on Human Rights (JCHR) inquiry into the Police, Crime, Sentencing and Courts Bill (the Bill) explores the human rights implications of the Bill, specifically regarding the right to privacy and the right to freedom of expression and protest, with respect to powers to extract information from electronic devices and curb protests.

1.2 MEND is a community-funded organisation that seeks to encourage political, civic, and social engagement within British Muslim communities through empowering British Muslims to interact with political and media institutions effectively. Our approach to achieving this involves a combination of community engagement (through education, community events, local campaigns to encourage voting etc.) and advocacy work (involving victim support, submissions to parliamentary inquiries, media analysis, election resources, briefings etc.).

1.3 Considering MEND's expertise in the protection of human rights and minority rights, we feel that we can provide valuable insights into concerns surrounding the encroachment of certain provisions within the Bill on human rights. MEND hopes that these recommendations may provide guidance to the JCHR in areas the Bill can be amended to address human rights issues and ensure the relevant oversight mechanisms are adopted.

1.4 This submission by MEND responds to the JCHR call for evidence on the following questions:

- Does the power to extract information from electronic devices set out in Chapter 3 of Part 2 of the Bill comply with the right to respect for private life (Article 8 ECHR)?
- Are the proposed changes to the law governing public assemblies, processions and one-person protests necessary to protect those adversely affected by such activities? Do the proposals in Part 3 of the Bill adequately protect the right to peaceful assembly (Article 11 ECHR) and the right to free expression (Article 10 ECHR)?

2. Abbreviations

- Police, Crime, Sentencing and Courts Bill (**the Bill**)
- The Data Protection Act 2018 (**DPA**)
- The European Convention on Human Rights (**ECHR**)
- The Human Rights Act 1998 (**HRA**)

- Information Commissioner’s Office (**ICO**)
- The Joint Committee on Human Rights (**JCHR**)
- Universal Declaration of Human Rights (**UDHR**)

3. Key conclusions

- 3.1 Considering the complexities surrounding issues of consent, combined with existing trends of excessive use of data extraction and the failure of the Bill to address safeguarding concerns, MEND believes there to be a heightened risk of the bill giving rise to further invasive practices which are likely to infringe upon data protection and privacy rights protected by the DPA and the HRA. We thus believe that Chapter 3 of the Bill must be amended to include clear provisions outlining measures to protect privacy rights in compliance with data protection laws.
- 3.2 MEND further calls for a community-wide consultation regarding the proposed Code of Practice to ensure that the experiences and concerns of communities are recognised within its development.
- 3.3 The Bill’s enactment in its current form would impose excessive and unnecessary measures, with the current restrictions set out via Article 11 and other domestic legislation already providing sufficient scope for state action when required. MEND thus believes that the Government must reconsider the Bill’s impact on Articles 10 and 11 of the ECHR with a view to curbing the encroachment of proposed draconian measures on essential human rights protections.
- 3.4 The severe risk of transgressions of human rights and fundamental freedoms necessitates an ongoing assessment of the Bill’s impacts should it be passed into law. As such the Bill must include an explicit timeline for reviewing the impact of these powers, particularly with regards to issues surrounding consent and the limiting of fundamental freedoms of assembly and expression.

4. Does the power to extract information from electronic devices set out in Chapter 3 of Part 2 of the Bill comply with the right to respect for private life (Article 8 ECHR)?

- 4.1 There are various issues surrounding the use of data extraction, including concerns around consent, the lack of a legal basis and the absence of safeguards and oversight mechanisms. Section 36 of the Bill stipulates that an authorised person, such as police officer, can extract data from an electronic device if its user has:¹
- voluntarily provided the device, and;
 - agreed to the extraction of data from the device by an authorised person.
- 4.2 Whilst the extraction of data relies upon consent, concerns arise that the prospect of withholding consent may generate undue suspicion, particularly given the probable uneven power relations between an individual and police officer. Against a backdrop of concern over police overstepping powers and instances of racialised biases and discriminatory treatment of ethnic minorities, questions should be raised as to whether individuals are able to refuse consent without fear of repercussions. Although the requirement to consent exists, this may be manifested in several different ways. Under the Data Protection Act (DPA), consent must be “freely given, specific, informed and unambiguous”.² Yet research into digital strip searches has highlighted the tendency

¹ “Police, Crime, Sentencing and Courts Bill Police, Crime, Sentencing and Courts Bill” (2021), <https://publications.parliament.uk/pa/bills/cbill/58-01/0268/200268.pdf>.

² “Data Protection Act 2018,” Legislation.gov.uk, 2018, <https://www.legislation.gov.uk/ukpga/2018/12/section/84#text%3D%22freely%20given%22>.

for consent to be “coerced blanket, ambiguous and cannot be withdrawn once given”,³ underlining the possibility of intentional or unintentional police overreach. As explained by the Information Commissioner’s Office (ICO), if an individual feels that they do not have the choice to refuse, consent cannot be considered to be freely given.⁴ Such concerns over refusal to consent can hinder a case’s progression in the courts, as evidenced in cases regarding victims of rape and sexual assault.⁵ As such, and particularly when victims, witnesses, and vulnerable individuals are involved, the compulsion to choose between access to justice and protection of privacy is a choice they should not have to make.⁶

4.3 Furthermore, the fact that an individual can consent does not protect against the invasive nature of the procedure and the unfettered access to broad swathes of personal data. The Bill claims to ensure sufficient safeguards are implemented,⁷ that only relevant information is gathered, and that its extraction is necessary and proportionate.⁸ However, the subjectivities surrounding all three of these points leaves clear potential for the excessive extraction of data. Meanwhile, the Bill fails to explain how it would mitigate against this excessive extraction of information, only stating that guidance will be sought from the Code of Practice once published.⁹

4.4 As such, while the Bill currently offers little provision to prevent this excessive data harvesting, caution should be drawn from evidence demonstrating that there is a broad tendency to retrieve more data than necessary in the absence of specific guidance; with one example revealing that a rape victim’s phone was searched for information from three years prior to the rape, a time frame which “did not appear to be based on any guidelines and appeared arbitrary.”¹⁰ The ICO report on mobile data extraction by police forces reflects these concerns of unrestricted extraction of electronic data and the absence of safeguards to prevent this – issues which fail to be addressed in the current Bill.¹¹ The absence of clear outlines (such as limiting the data obtained to strictly defined lines of enquiry) may ultimately act as a blank cheque for officers to retrieve excessive personal information. This is particularly crucial in light of the Bill’s failure to address the protection of sensitive data such as ethnicity, religion, political opinions, or sexual orientation,¹² which in the context of documented racial and religious profiling,¹³ may compound the discrimination certain groups face.

4.5 Moreover, this information not only concerns the individual but personal data related to family and friends on behalf of whom the owner of the device cannot provide consent, under Section 35(2) of the DPA.¹⁴

4.6 The Bill also fails to mention whether an individual is able to withdraw consent to the collection and retention of data at any point, nor does it specify a period or specific time limits for the storage of data, suggesting that data can be held indefinitely.

4.7 Where misuse of powers may occur, the Bill makes no reference to mechanisms to remedy misconduct. Section 40(7) of the Bill states that “a failure to act in accordance

³ “The Police’s Data Investigations of Victims,” *Big Brother Watch* (2019), <https://bigbrotherwatch.org.uk/wp-content/uploads/2019/07/Digital-Strip-Searches-Final.pdf>.

“Data Protection Act 2018,” Legislation.gov.uk, 2018, <https://www.legislation.gov.uk/ukpga/2018/12/section/84#text%3D%22freely%20given%22>.

⁴ Information Commissioners Office, “What is valid consent?” (<https://ico.org.uk/for-organisations/guide-to-dataprotection/guide-to-the-general-data-protection-regulation-gdpr/consent/what-is-valid-consent/>)

⁵ Owen Bowcott, “Rape Cases ‘Could Fail’ If Victims Refuse to Give Police Access to Phones,” *The Guardian* (The Guardian, April 29, 2019), <https://www.theguardian.com/society/2019/apr/29/new-police-disclosure-consent-forms-could-free-rape-suspects>.

⁶ “The Police’s Data Investigations of Victims,” *Big Brother Watch* (2019), <https://bigbrotherwatch.org.uk/wp-content/uploads/2019/07/Digital-Strip-Searches-Final.pdf>.

⁷ Home Office, “Police, Crime, Sentencing and Courts Bill 2021: Data Extraction Factsheet,” GOV.UK (GOV.UK, March 10, 2021), <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-data-extraction-factsheet>.

⁸ *Ibid*

⁹ *Ibid*

¹⁰ Rape Crisis England and Wales written evidence to the Justice Committee Inquiry on Disclosure of evidence in criminal cases, March 2018 (<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/disclosure-of-evidence-in-criminal-cases/written/80748.html>)

¹¹ “Mobile Phone Data Extraction by Police Forces in Information Commissioner’s Office” (2020), https://ico.org.uk/media/about-the-ico/documents/2617838/ico-report-on-mpe-in-england-and-wales-v1_1.pdf.

¹² *Ibid*

¹³ Vikram Dodd, “Cases That Highlight Claims of Police Racial Profiling in England,” *The Guardian* (The Guardian, July 9, 2020), <https://www.theguardian.com/uk-news/2020/jul/09/cases-that-highlight-claims-of-police-racial-profiling-in-england>.

¹⁴ “Data Protection Act 2018,” Legislation.gov.uk, 2018, <https://www.legislation.gov.uk/ukpga/2018/12/section/35/enacted>.

with the Code does not by itself render the person liable to any criminal or civil proceedings".¹⁵ This poses a worrying prospect particularly in light of evidence contained within the ICO report which listed various security and privacy concerns such as the unauthorised access or unintentional disclosure of extracted data.¹⁶

4.8 Considering the complexities surrounding issues of consent, combined with existing trends of excessive use of data extraction and the failure of the Bill to address safeguarding concerns, MEND believes there to be a heightened risk of the bill giving rise to further invasive practices which are likely to infringe upon data protection and privacy rights protected by the DPA and the HRA. We thus believe that Chapter 3 of the Bill must be amended to include clear provisions outlining measures to protect privacy rights in compliance with data protection laws. We further call for a community-wide consultation regarding the proposed Code of Practice to ensure that the experiences and concerns of communities are recognised within its development.

5 Are the proposed changes to the law governing public assemblies, processions, and one-person protests necessary to protect those adversely affected by such activities? Do the proposals in Part 3 of the Bill adequately protect the right to peaceful assembly (Article 11 ECHR) and the right to free expression (Article 10 ECHR)?

5.1 Prior to the proposed changes, it would have been justifiable to limit public demonstrations, processions, and marches, via the restrictions set out in Article 11 of the European Court of Human Rights (ECHR) in order to shield those whom they may harm if they become violent. Indeed, Article 11 does not protect violent public assemblies and processions or those organised with the intent of causing violence.¹⁷ Consequently, sufficient provisions already exist, and the proposed changes to the law are not only excessive but may be redundant to shield those that public assemblies, processions and protests might affect.

5.2 Meanwhile, Part 3 of the Bill (clauses 54 to 60) would bring significant changes to the way demonstrations are policed in England and Wales.¹⁸ This will likely have a detrimental effect on the right to peaceful assembly and freedom of expression.

5.3 Article 11 of the ECHR stipulates freedom of assembly and association as a fundamental human right. It states that "[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests".¹⁹ There must be no limitations on the exercise of these rights other than those imposed by law and required in a democratic state for the purposes of protecting national security, public welfare, the preventing of disorder or violence, the preservation of health or morality, or the preservation of others' rights and liberties. The Bill, in its present form, undermines this essential right as the police would have the power to deploy a host of draconian measures. Police would be able to impose conditions, decide the start and finish times, regulate conduct and decide how and where individuals can assemble and have their voices heard. Failure to obey such restrictions would give the police increased power to give out fines of up to £2,500 to protestors, regardless of whether they were aware of rules and limits.²⁰

¹⁵ "Police, Crime, Sentencing and Courts Bill Police, Crime, Sentencing and Courts Bill" (, 2021), <https://publications.parliament.uk/pa/bills/cbill/58-01/0268/200268.pdf>.

¹⁶ "Mobile Phone Data Extraction by Police Forces in Information Commissioner's Office" (, 2020), https://ico.org.uk/media/about-the-ico/documents/2617838/ico-report-on-mpe-in-england-and-wales-v1_1.pdf.

¹⁷ House of Commons and House of Lords, Joint Committee on Human Rights, *The Government Response to Covid-19: Freedom of Assembly and the Right to Protest*, Thirteenth Report of Session 2019-21 (Joint Committee on Human Rights), accessed April 23, 2021, <https://committees.parliament.uk/publications/5153/documents/50935/default/>.

¹⁸ Jennifer Brown and Sally Lipscombe, "Police, Crime, Sentencing and Courts Bill 2019-21: Part 3 and 4- Public Order and Unauthorised Encampments," House of Commons Library, March 12, 2021, accessed April 22, 2021, <https://commonslibrary.parliament.uk/research-briefings/cbp-9164/>.

¹⁹ "Article 11: Freedom of Assembly and Association," Article 11: Freedom of Assembly and Association | Equality and Human Rights Commission, November 15, 2018, accessed April 22, 2021, <https://www.equalityhumanrights.com/en/human-rights-act/article-11-freedom-assembly-and-association#:~:text=L,the protection of his interests>

²⁰ Dominic Casciani, "What Is the Police, Crime, Sentencing and Courts Bill and How Will It Change Protests?" BBC News, March 22, 2021, accessed April 22, 2021, <https://www.bbc.co.uk/news/uk-56400751>.

5.4 Threatening the right to protest limits core fundamental rights and freedoms that individuals in a democratic country should be entitled to. An individual's rights to freedom of expression would be curtailed under current plans. Indeed, article 10 of the ECHR²¹ and article 19 of the Universal Declaration of Human Rights (UDHR)²² perceives freedom of expression to be a fundamental human right stating, "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice".²³ Currently, in the absence of the Bill, as per the restrictions set out by the ECHR, authorities are allowed to curtail freedom of expression if, for example, views that inspire ethnic or religious hatred are propagated or include ideologies which pose a national security threat – issues which are further covered by a host of existing domestic legislation. Nevertheless, the relevant public authority must show that any containment is "proportionate," or that it is reasonable and appropriate to resolve the problem at hand.²⁴ Thus, the Bill unnecessarily threatens peaceful protests, where individuals are freely expressing themselves in a manner which pose no risk of inciting racial or religious hatred or provoking a national security threat.

5.5 Ultimately, the Bill's enactment in its current form would impose excessive and unnecessary measures, with the current restrictions set out via Article 11 and other domestic legislation already providing sufficient scope for state action when required. MEND thus believes that the Government must reconsider the Bill's impact on Articles 10 and 11 of the ECHR with a view to curbing the encroachment of draconian measures on essential human rights protections. Moreover, the severe risk of transgressions of human rights and fundamental freedoms necessitates an ongoing assessment of the Bill's impacts should it be passed into law. As such the Bill must include an explicit timeline for reviewing the impact of these powers, particularly with regards to issues surrounding consent and the limiting of fundamental freedoms of assembly and expression.

6 Recommendations

- 6.1 Chapter 3 of the Bill must be amended to include clear provisions outlining measures to protect privacy rights in compliance with data protection laws.
- 6.2 The proposed Code of Practice must be developed in broad consultation with representative community organisations to ensure that the experiences and concerns of communities are recognised within its development.
- 6.3 Due consideration must be given to the Bill's impact on Articles 10 and 11 of the ECHR with a view to curbing the encroachment of proposed draconian measures on essential human rights protections.
- 6.4 The Bill must include an explicit timeline for reviewing the impact of the powers contained therein, particularly with regards to issues surrounding consent and the limiting of fundamental freedoms of assembly and expression.

²¹ "Article 10: Freedom of Expression," Article 10: Freedom of Expression | Equality and Human Rights Commission, June 12, 2020, accessed April 22, 2021, <https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression#:~:text=Article 10 of the Human Rights Act: Freedom of expression&text=Everyone has the right to authority and regardless of frontiers>

²² "Universal Declaration of Human Rights," United Nations, accessed April 22, 2021, <https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article 19,media and regardless of frontiers>

²³ "Article 10: Freedom of Expression," Article 10: Freedom of Expression | Equality and Human Rights Commission, June 12, 2020, accessed April 22, 2021, <https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression#:~:text=Article 10 of the Human Rights Act: Freedom of expression&text=Everyone has the right to authority and regardless of frontiers>

²⁴ Ibid.

How MEND can assist parliamentarians, policymakers, and community stakeholders

- Providing briefings, information, analysis, and expertise on issues impacting Muslim communities.
- Arranging opportunities for parliamentarians, policymakers, and community stakeholders to engage with their local Muslim communities.
- Conducting research within Muslim communities.
- Connecting parliamentarians, policymakers, and community stakeholders to other local stakeholders.

If MEND can be of any assistance to your work, please feel free to contact info@mend.org.uk