

Children in the Police, Crime, Sentencing and Courts Bill

defenddigitalme summary briefing as regards data and digital rights

defenddigitalme is a call to action to protect children's rights to privacy. We are teachers and parents who campaign for safe, fair and transparent data processing in education, in England, and beyond. We advocate for children's data and digital rights, in response to concerns about increasingly invasive uses of children's personal information. Funded by the Joseph Rowntree Reform Trust.

A. Summary of six proposed amendments

1. Remove the new powers in Part 2, Chapter 1, Clause 15¹ Disclosure of information and Clause 16 Supply of information to local policing bodies. These powers are unnecessary given existing UK data protection law written explicitly for Law Enforcement in 2018. If permitted, then safeguards in law are required.
2. Amend Part 2, clauses 36-42 and Schedule 3 relating to the extraction of information from electronic devices. If unchanged, combined with increased powers on Stop-and-Search these powers on mobile phone data extraction will inevitably be detrimental to children. Amendment is needed so that a child must only be able to consent in the presence and with the support of a known, trusted adult, not a stranger, when consent is the lawful basis used for mobile phone data extraction.
3. Recommend a review of the drafting to address inconsistencies in the definition of a child, and align it with the UNCRC definition as anyone under the age of 18, except where provided for with safeguards in law, or the age of majority is reached earlier in law.
4. Create a new clause to make the age of criminal responsibility consistent across the UK, raising it from 10 in England. The UNCRC defines a child as anyone under 18. A compromise proposed by civil society would be age 14.
5. Create a duty on the Minister to commission, publish and respect the recommendations of an independent Child Rights Impact Assessment (CRIA) of the Bill, before the Bill could enter into effect. This would create a framework to protect, respect and provide remedy for children's rights, affected by the Bill.
6. Create a new clause to protect families from the abuse of deceased children's identities and personal data by (undercover) police (banning the practice).

B. Summary background

7. If the UK government starts criminalising 'nuisance' noise, children will be caught up in such definitions by exercising their right to peaceful protest such as Fridays-for-Future, or exam protests outside the DfE in the summer holiday of 2020. The unusually low age of criminal responsibility in England in the UK compared with our peers, will see children overly-policed or brought into the criminal justice system who are still of school age.

8. The proposed powers on non-consensual digital extractions from children's mobile phones, are excessive as they do not take into account the power imbalance between police and children, whereas adults are permitted to decline so-called "digital strip searches" wherever the police are using consent as its lawful basis (not applicable for

¹ The Police Crime Sentencing and Courts Bill <https://bills.parliament.uk/bills/2839/publications>

suspects in criminal investigation for example, when a consent basis would not be relevant). The Bill will expand existing discriminations through its expansions of powers on Stop-and-Search, the Prevent Programme, and measures targeted at the Traveller community. This has impact on discrimination and equality rights, and a wide range of children's rights such as the Right to freedom of speech, thought conscience and religion, the Right to Participation, and the Right to be Heard. Considering the nature and scope of these effects, a child rights impact assessment is necessary.

9. Who "the police" includes, is changing rapidly with the collaboration across private providers and access by police to tools such as Amazon Ring, or to supermarket loyalty card records, commercial data brokers, and surveillance of social media and wider data sources. There is direct police presence in schools, and there is widespread use of equipment for the indirect policing of behaviour that may be shared with law enforcement, such as [CCTV, bodycams](#), biometrics and digital monitoring in schools. Law enforcement is increasingly seen as applying to immigration enforcement with data access and repurposing of school records for the purposes of the Hostile Environment. "How" the police operates is changing rapidly with technology and with too little scrutiny and oversight. The National Law Enforcement Data Service (NLEDS)² is running late, but the "mega-database" is grown from the combination of the Police National Computer (PNC) and the Police National Database (PND), as well as the DVLA, and immigration databases and biometric systems. All to be joined up through a common interface. Even though intelligence data may not be very smart, the police are looking to add more Artificial Intelligence powers to their portfolio by adopting live facial recognition technology.(The consultation closes on 27 June 2021.)³

10. The children of today are growing up in a policing environment that is ever more datafied, quantified, and seen through the lens of a computer analysis, out of context. Police actions are guided by Codes of Practice that are out of date and unfit for purpose in the digital environment. Our March 2021 submission⁴ to the [Police consultation](#) on a Code of Practice for Information and Records Management highlights some of our reasoning why. If we fail to make our laws underpinned by human rights and compassion, then children will be deeply disadvantaged in the world that is ever more mechanistic and automated and that fails to take into account the nature of human beings, in particular children developing into adulthood, and the safeguards needed due to their vulnerability.

11. The Bill should offer an opportunity to make better law for children where they come into contact with the criminal justice system, but this does not do that. Instead, the Bill takes a more punitive approach to processes for children. The Bill fails to address children in the digital environment and the changing nature of policing. The Bill fails to address children as rights' holders who will be significantly affected by new legislation. This is a step backwards for children's rights, not forward, and needs to be corrected.

² Privacy group warns of Home Office 'mega-database' on the horizon | New Statesman (2020) <https://tech.newstatesman.com/public-sector/privacy-group-warns-of-home-office-mega-database-on-the-horizon>

³ College of Policing consultation closing June 27, 2021 on Live Facial Recognition <https://www.college.police.uk/article/police-use-live-facial-recognition-technology-have-your-say>

⁴ Our submission to the March 2021 Police consultation on a Code of Practice for Information and Records Management <https://defenddigitalme.org/wp-content/uploads/2021/03/Consultation-PCOC-2021-DDM-v1.0.pdf>

12. C. Explanatory paragraphs

(1) Remove the new powers in Part 2, Chapter 1, Clause 15 Disclosure of information and Clause 16 Supply of information to local policing bodies

13. Clauses 15 and 16 are unnecessary, as existing functions and law are compatible. The question to ask is: What does this aim to do that is not already lawful today? These clauses require public bodies to supply police with personal data on demand.

14. If a request would contravene data protection law, the new duty is to be taken into account. *“16(6) But subsection (4) does not require a disclosure of information that— (a) would contravene the data protection legislation (but in determining whether a disclosure would do so, the duty imposed by that subsection is to be taken into account)”*

15. This is tantamount to saying that this clause is a get-out-of-jail-free-card for police to breach data protection law. The Law Enforcement Part 3 of UK Data Protection Law⁵ only came into effect in 2018, designed with ample permissions specifically for law enforcement. This Bill should not create workarounds to avoid that. The rule of law applies to the police and their partners. New powers to avoid accountability or data protection law compliance are incompatible with existing laws, and therefore unnecessary. If permitted, then set out safeguards in law such as oversight and publication in a transparency register of data use.

16. (2) Amend Part 2, clauses 36-42 and Schedule 3 relating to the extraction of information from electronic devices. Clauses for mobile phone extraction

17. The Bill contains duties akin to the Prevent powers to report suspicions of knife crime and increased powers on Stop-and-Search. Mobile phone inspection has become routine in such stops. These powers will inevitably disproportionately discriminate against black teens and create risk for girls.

18. As the Rt Hon Theresa May commented on the Bill in the House:⁶

“I worry that there could be unintended consequences of the measures being brought forward by the Government. ...The first is in stop-and-search, an important tool, but it must be used lawfully and it must not be used disproportionately against certain communities. My concern is that we do not go backwards on improvements that have been made... and that we ensure that we do not see this being used disproportionately and a disproportionate increase taking place.” “I do not want to see the position of girls being further exacerbated, unintentionally, as a result of these orders.”

19. Very often police will not be using consent as the lawful basis for a mobile phone data extraction. For example, it would not apply to investigation of anyone accused of crime. But where police have no other lawful basis, they will ask to download mobile phone data from an adult with their permission. Adults may choose whether or not to consent to a mobile phone search where consent is the lawful basis being used by police. But for a child, the power imbalance between them and the police is more significant. The Bill is written in such a way that an adult stranger may "consent on their behalf". This is nonsense since consent would be invalid, because it could be neither informed nor freely given (a) by the data subject (the child) and (b) by any other data subjects who may be involved (about whom

⁵ Part 3 of UK Data Protection Law 2018 <https://www.legislation.gov.uk/ukpga/2018/12/part/3/enacted>

⁶ Hansard (March 15, 2021) col.78 <https://hansard.parliament.uk/commons/2021-03-15/debates/3F59B66E-E7A1-484B-86E3-E78E71D0FE0F/PoliceCrimeSentencingAndCourtsBill#contribution-BCA82DA8-CBDE-4992-A08F-187E8A20C038>

data is on the child's phone). Therefore, while we also believe consent at all in such a power imbalance is very difficult to navigate, it should, if at all, only be able to be given with the support of a known and trusted adult, such as a relative or guardian.⁷

20. Furthermore, with reference to accompanying notes to the Bill: Phone data extraction factsheets⁸ and the concerns set out by Privacy International in their own words:⁹

21. "The list of 'authorised persons' in Schedule 3 of the PCSC Bill who can collect devices is very broad." "Despite promising to provide sufficient safeguards and ensure that only relevant information is gathered, the new PCSC Bill fails to do so. Section 36(6) and (7) simply provide that if there is a risk of obtaining more information than necessary (which will exist every time a device is taken) the police forces will only need to consider if there are other ways to gather this information and if this would be practical to pursue."

22. "This falls short of providing sufficient safeguards to ensure that police officers and others do not simply grab all the data that is available on the device. The Information Commissioner's Office (ICO) 2020 report was critical of this aspect and stated that the police cannot seize phones to go on fishing expeditions, but must focus any extraction on clear lines of enquiry."

23. The ICO 2020 report¹⁰ found that managing mobile phone data extraction was ineffective. "*In its report of its 2019 rape review, HM Crown Prosecution Service Inspectorate 'saw requests for forensic examination of phones taking up to 11 months to complete.'*" and "*an approach that does not seek [this] engagement risks dissuading citizens from reporting crime, and victims may be deterred from assisting police.'*"

24. (3) Recommend a review of drafting to address inconsistencies in the Bill in the age definitions of a child, to be aligned with the UNCRC definition of anyone under age 18, except where provided for with safeguards in law, or the age of majority is reached earlier in law.¹¹

25. (4) Create and raise a UK-wide consistent age of criminal responsibility.

26. England is an outlier with an exceptionally low age of criminal responsibility at age 10.¹² The age of criminal responsibility is 12 in Scotland, since the Age of Criminal Responsibility (Scotland) Act 2019. This should be consistent across the UK and raised in both. England and Wales coming into line with Scotland would be progress, but both should be raised to be in line with best practice elsewhere in the world. This issue has been raised in the current UNCRC¹³ Review of the UK underway by the UN Committee on the Rights of the Child. In line with the UNCRC review proposal the suggested revision from civil society is to age 14. Reference Section 2, I (31). Even fourteen does not take into account that for

⁷ Dowty, T. (2009) Protecting the virtual child [research commissioned by the Nuffield Foundation] <https://mk0nuffieldfounpg9ee.kinstacdn.com/wp-content/uploads/2019/11/Protecting20the20virtual20child.pdf>

⁸ Police, Crime, Sentencing and Courts Bill 2021: data extraction factsheet <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-data-extraction-factsheet>

⁹ Policing Bill fails to provide sufficient safeguards around extraction of victims' data. (2021) <https://privacyinternational.org/news-analysis/4465/new-policing-bill-fails-provide-sufficient-safeguards-around-extraction-victims>

¹⁰ Investigation report: Mobile phone data extraction by police forces in England and Wales (The Information Commissioner's Office) 2020 <https://ico.org.uk/about-the-ico/what-we-do/mobile-phone-data-extraction-by-police-forces-in-england-and-wales/>

¹¹ UNCRC art. 1. a child means every human being below 18 **unless under the law majority is attained earlier.**

¹² Juvenile Justice: Stop Making Children Criminals (Child Rights International Network) <https://archive.crin.org/en/library/publications/juvenile-justice-stop-making-children-criminals.html>

¹³ UK Civil Society submission to the United Nations Committee on the Rights of the Child (2020) <http://www.crae.org.uk/publications-resources/civil-society-loipr-submission-to-the-un-committee-on-the-rights-of-the-child/>

almost anything else, a child is defined as any person up to the age of eighteen except where the age is younger, set in law. See *Criminalising children*: Child Rights International.

27.(5) Create a duty on the Minister to commission, publish and action the recommendations of an independent Child Rights Impact Assessment¹⁴ (CRIA) of the Bill, before the legislation could enter into effect.

28. *“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”* (Article 3, The UNCRC)¹⁵

29. Scotland became the first country in the UK to directly incorporate the UN Convention on the Rights of the Child into domestic law on March 16th, 2021. (Five days after the Bill *Memorandum on Human Rights* omitted to mention this fact in para 270¹⁶). Obligations include making assessment of the impact on children in developing new public policy.

30. Part 2, clauses 36-42 and Schedule 3 relating to the extraction of information from electronic devices will affect children including those in Scotland. The proposed process overrules children’s consent and the adult that can “consent” if left unchanged in the Bill would not need to be someone acting *in the child’s best interests* or to be known to them.

31. The Bill will have significant implications for children’s right to protest, and for Travellers. A great deal in the Bill is so problematic that we would, if given a free choice, rather not have it passed at all. And we are not alone. It is important to note that Martin Hewitt, chair of the National Police Chiefs’ Council (NPCC), told the parliamentary committee police leaders had not requested a change to the law as regards Travellers and believed current powers to be sufficient.¹⁷

32. However, if the government chooses to proceed, it should do so only in ways that respect children as rights’ holders. The legislation must ensure recognition of the role of police as duty bearers towards children and a CRIA offers a framework to ensure the protection, respect and to provide remedy for children’s rights affected by the changes.

33. (6) Protection from abuse of deceased children’s personal data and identities by (undercover) police officers.

34. Children’s identity data has been misused by police.¹⁸ UK Data Protection law only applies to **living** persons, so the practice of using dead children’s identities without the knowledge or permission of parents might continue unless explicitly made unlawful. This practice causes harm and distress to relatives affected by data processed about a deceased child and must end. In a rapidly changing digital environment of emerging technology,¹⁹ families need the protection of deceased children’s identity from police misuse, put into law. A ban on such practice is required. ###

¹⁴ 5Rights (2021) Realising a better digital environment for children: Child Rights Impact Assessment as a tool <https://digitalfuturescommission.org.uk/blog/realising-a-better-digital-environment-for-children-child-rights-impact-assessment-cria-as-a-tool/>

¹⁵ The United Nations Convention on the Rights of the Child (Children’s Commissioner Scotland website copy) ref: Article 3 <https://cypcs.org.uk/rights/uncrc/full-uncrc/>

¹⁶ Memorandum for the Joint Committee on Human Rights (March 11, 2021) <https://bills.parliament.uk/bills/2839/publications>

¹⁷ [https://hansard.parliament.uk/commons/2021-05-18/debates/4a680cae-4b28-4fd0-8dd2-f9d3a1ee04e8/PoliceCrimeSentencingAndCourtsBill\(FirstSitting\)#contribution-B8FFC3E4-8C51-46A3-AB6B-983C29EC4A2C](https://hansard.parliament.uk/commons/2021-05-18/debates/4a680cae-4b28-4fd0-8dd2-f9d3a1ee04e8/PoliceCrimeSentencingAndCourtsBill(FirstSitting)#contribution-B8FFC3E4-8C51-46A3-AB6B-983C29EC4A2C)

¹⁸ Met faces legal action over spies’ use of dead children’s identities (The Guardian) December 2020 <https://www.theguardian.com/uk-news/2020/dec/07/met-police-legal-action-spies-use-dead-childrens-identities>

¹⁹ Defenddigitalme submission to the consultation on a Police Code of Practice for Information and Records Management (March 2021) <https://defenddigitalme.org/wp-content/uploads/2021/03/Consultation-PCOC-2021-DDM-v1.0.pdf>