

## **WRITTEN EVIDENCE FROM EQUALITY AND HUMAN RIGHTS COMMISSION (CJB0014)**

### Introduction and Summary

1. The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. It operates independently to eliminate unlawful discrimination and harassment, and protect and promote equality and human rights. The Commission has powers to advise government on the equality and human rights implications of laws and proposed laws, and to publish information or provide advice, including to Parliament, on any matter related to equality and human rights.
2. We welcome the opportunity to respond to this call for evidence. Our response aims to highlight equality and human rights considerations relevant to two aspects of the Criminal Justice Bill. This includes provisions to enable the transfer of prisoners in England and Wales to prisons abroad (Clauses 25-29) and proposals to allow police and law enforcement bodies access to driver licence records (Clause 21).
3. Clauses 25-29 allow for the transfer of prisoners abroad subject to an international agreement to rent prison space and secondary legislation to implement the policy. We are concerned that there is a lack of detail on the face of the Bill about how the policy will operate in practice and its compliance with human rights laws. We draw particular attention to the potential implications for the rights of prisoners and members of their families under Article 3 (right to be free from torture and inhuman or degrading treatment), 6 (right to a fair trial) and 8 (right to private and family life) of the European Convention on Human Rights (ECHR).
4. Clause 21 would make it easier for police and law enforcement bodies to access people's driving licence records for a wider range of purposes, including for use with Facial Recognition Technology (FRT). This potential expansion of the use of biometric identification has significant implications for equality and human rights, in particular the right to privacy guaranteed by Article 8 (the right to a private and family life) and Article 14 (freedom from discrimination) of the ECHR.

### Consultation questions

**Do the clauses of the Bill that would allow for the transfer of prisoners to foreign prisons give rise to any human rights concern, including under Article 5 ECHR (the right to liberty) and Article 8 ECHR (the right to respect for private and family life)?**

**1.0 Clauses 25 – 29: Transfer of prisoners to foreign prisons**

- 1.1 Clauses 25 – 29 of the Bill would allow for the transfer of any prisoner detained in a prison in England and Wales to a foreign jurisdiction, whilst retaining UK Government responsibility for the enforcement of the sentence. This will be subject to an international agreement to rent prison space. There is provision for secondary legislation under the affirmative procedure to facilitate implementation, including by amending primary legislation.
- 1.2 The Home Secretary has stated that these provisions are intended to temporarily increase prison capacity in England in Wales, where demand for space is expected to increase and prisons are currently operating at near full capacity.<sup>1</sup>

**Parliamentary scrutiny on fundamental rights**

- 1.3 Clause 29 of the Bill creates a power for the Secretary of State to set out further detail on the prison transfer provisions through secondary legislation. The operation of any such arrangement will be dependent on the terms of an international agreement entered into by the UK Government to access prison space abroad. We are concerned that there is limited detail on the face of Bill about how any such arrangement would operate. There is also insufficient information to determine whether such arrangements would comply with human rights laws.
- 1.4 In its ECHR memorandum, the Government acknowledges that “any international agreement and the implementation of the agreement will engage Articles 2, 3, 5, 6, and 8 of the ECHR”, but states that the provisions of the Bill itself will not engage any rights except Article 5. While the ECHR memorandum sets out an intention to ensure compliance with Article 8 on any implementation of the policy, this has no legal effect.
- 1.5 It is the Commission’s view that legislation interfering with fundamental rights should be subject to full parliamentary scrutiny through primary legislation and should not be left to subsequent secondary legislation or guidance. Given the

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<sup>1</sup> See Hansard, Criminal Justice Bill Second Reading, [Statement of Right Hon James Cleverly MP Secretary of State for the Home Department](#), 28 November 2023; and House of Commons Library, [Research Briefing on the Criminal Justice Bill 2023-24](#), 24 November 2023, p56

potentially significant human rights implications of such an arrangement, in particular for the right to private and family life of prisoners and members of their families, as well as the UK's obligations on the prevention of torture and inhuman or degrading treatment in detention, we recommend that sufficient detail of the arrangements should be set out in primary legislation to allow Parliament to fully scrutinise their compliance with human rights obligations.

### **Risks to human rights protections**

- 1.6 The transfer of prisoners to prison space abroad raises human rights concerns, which are not addressed in the Bill or its accompanying ECHR memorandum. Findings from a review of similar arrangements between Norway and the Netherlands illustrate various human rights concerns which will be relevant to any similar arrangement entered into by the UK. These include the cost of family visits, access to healthcare in another language and under a different healthcare system, and use of body restraints in transport.<sup>2</sup>
- 1.7 We are particularly concerned about the potential impact of such an arrangement on Article 8 rights, due to the potential limitation to and cost implications of family visits if a prisoner is transferred abroad. Article 8 ECHR requires the state to ensure prisoners can maintain contact with family and any limitations on family visits must comply with the requirements of the Convention. The Government's impact assessments state that it has not been determined who would bear the cost of family visits.<sup>3</sup> Requiring families to cover the costs of visits abroad is likely to be prohibitive for many, and therefore would risk breaching Article 8 rights.
- 1.8 There is further uncertainty about how a prisoner's access to legal advice and participation in legal proceedings would be ensured while in prison abroad, with potential implications for Article 6.
- 1.9 Article 3 ECHR, as well as the UN Convention against Torture and its Optional Protocol (OPCAT) to which the UK is a state party, require the UK to prevent torture and inhuman and degrading treatment in places of detention. The conditions of transfer and conditions in rented prison space, including access to healthcare, could have implications for these rights.

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<sup>2</sup> Norwegian Parliamentary Ombudsmen National Preventative Mechanism, [Visit Report: Norgerhaven Prison](#), September 2016

<sup>3</sup> UK Government Ministry of Justice, [Impact Assessment: Criminal Justice Bill: Prisons and Offender Management](#), para 28

1.10 Under OPCAT, the UK is required to operate a national mechanism for the prevention of torture and cruel, inhuman or degrading treatment in detention. The Subcommittee on the Prevention of Torture, which is responsible for monitoring state obligations under OPCAT, has stated in the context of the transfer of prisoners abroad that it is the sending state's responsibility to ensure its national preventative mechanism (NPM)<sup>4</sup> has full access to detainees abroad.<sup>5</sup> The Bill provides for a "controller" role to be created for reviewing and reporting to the Secretary of State on the running of rented prison space and the power of HM Chief Inspector of Prisons is extended to inspect and report on conditions. However, it is unclear how the wider apparatus of the NPM and the role of the Inspector would operate in practice to comply with these obligations.

### **Equality considerations**

1.11 Clauses 25-29 have the potential to adversely impact individuals with certain protected characteristics, such as pregnant women and disabled prisoners, who may have particular mental or physical health needs. The equality impact assessment accompanying the Bill fails to properly address the possible impacts arising from the policy enabled by these provisions, instead stating these will be considered or addressed in any future rental agreement.<sup>6</sup> We would urge the Government to fully consider the potential equality impacts of the proposals relating to prisoner transfer and publish detail on these considerations as part of its equality impact assessment to facilitate scrutiny.

### **Does the Bill give rise to any other significant human rights concerns?**

#### **2.0 Clause 21: Access to driver licence records**

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<sup>4</sup> The UK National Preventative Mechanism, hosted by HM Inspectorate of Prisons (England and Wales), was set up to fulfil the UK's obligations under the optional protocol and consists of a group of statutory bodies responsible for monitoring places of detention. See <https://nationalpreventivemechanism.org.uk/>

<sup>5</sup> The Subcommittee stated it considers "that the sending State should ensure that such an agreement provides for its national preventive mechanism to have the legal and practical capacity to visit those detainees in accordance with the provisions of the Optional Protocol and the Subcommittee guidelines on national preventive mechanisms." Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4, March 2016, para 26

<sup>6</sup> UK Government, [Criminal Justice Bill: prisons and offender management equalities statement, November 2023](#), paras 61-73

2.1 Clause 21 would replace section 71 of the Criminal Justice and Court Services Act 2000 (CJCSA)<sup>7</sup> to amend the law around police and law enforcement bodies' access to information held by the Driver and Vehicle Licensing Agency (DVLA).

2.2 Currently, the CJCSA provides for constables and National Crime Agency officers to access driver licence records in limited circumstances related to road traffic offences. Clause 21 would provide for the Secretary of State to determine by regulation a much wider range of circumstances in which police and law enforcement bodies would be able to access personal information held by the DVLA. The Secretary of State would also have powers to issue a Code of Practice for access to and use of information held by the DVLA.

2.3 During Public Bill Committee scrutiny of the Bill, the Policing Minister stated that Clause 21 would be useful because it would enable police and law enforcement bodies to use Facial Recognition Technology (FRT) to review crime scene data against images held by the DVLA.<sup>8</sup>

### **Risks to human rights protections**

2.4 The Commission is concerned that Clause 21 provides for the Secretary of State to permit the police and law enforcement bodies, through regulations, unfettered access to DVLA records. Without clear restrictions, this could result in the conduct of unnecessary and disproportionate facial recognition checks on millions of innocent driving licence holders. As currently drafted, this provision could result in serious interferences with Article 8 (the right to privacy) and Article 14 (freedom from discrimination) of the ECHR.

### **Equality considerations**

2.5 FRT has shown lower accuracy rates for some protected characteristic groups due to inbuilt bias within the data, for example, ethnic minorities and women.<sup>9</sup> In addition, a recent study into the effectiveness of facial recognition found that the technology was accurate when tested on good, high-resolution photographs that were 1 – 2 days old, but that accuracy would decline with poorer quality and less recent images.<sup>10</sup> Driving licence images may be up to 10 years old. This raises concerns that conducting facial recognition searches may perpetuate and amplify discrimination against some groups due to inherent inaccuracy in the technology.

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<sup>7</sup> [Criminal Justice and Court Services Act 2000](#).

<sup>8</sup> UK Parliament (12 December 2023) [Public Bill Committee - Criminal Justice Bill](#).

<sup>9</sup> Big Brother Watch (May 2023), [Biometric Britain: The expansion of Facial Recognition Surveillance](#).

<sup>10</sup> National Physical Laboratory (March 2023), [Facial Recognition Technology in Law Enforcement Equitability Study](#).

## **Regulation making powers**

2.6 We are concerned that the proposals allow the Secretary of State, by regulation, to determine the offences for which police and law enforcement bodies would be able to access the DVLA database. The range of offences must be set out clearly in primary legislation for full transparency and democratic scrutiny and to ensure that all checks carried out are necessary and proportionate.

2.7 We note that the Government has indicated that certain bodies will be engaged prior to the exercise of regulation-making powers under Clause 21. This includes engagement with the Information Commissioner's Office, the Driver and Vehicle Licensing Agency and Department for Transport 'to ensure the new powers have the appropriate operational oversight'.<sup>11</sup> However, we are concerned that legislative change is being made before this engagement work is undertaken. We further suggest, as stated above, that full consideration of the potential equality and human rights implications of data sharing between the DVLA and police and other law enforcement bodies should be fully explored prior to legislating, to avoid breaches of the Human Rights Act 1998 and the Equality Act 2010.

## **Legal framework**

2.8 There is no specific legislation in England and Wales which regulates the use of FRT for surveillance and identification. The existing legislative and regulatory frameworks are not fit for purpose, patchy and complex and do not account for preventing all harms, such as discrimination and human rights infringements. Across police and law enforcement bodies there is a lack of clarity about who has overall oversight of police deployment of biometric technologies, which is further complicated by multiple pieces of non-statutory guidance.

2.9 This is further compounded by proposals in the draft Data Protection and Digital Information Bill,<sup>12</sup> which would abolish the office of the Commissioner for the Retention of Biometric Material and Surveillance Camera Commissioner (BSCC). The Bill would also repeal the statutory Surveillance Camera Code of Practice, which is the only statutory code on the appropriate use of surveillance camera systems by public authorities and the police in England and Wales. General oversight of biometrics and surveillance will fall solely to the Information Commissioners Office as the primary body whose core remit is data protection

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<sup>11</sup> Home Office and Ministry of Justice policy paper, (1 December 2023), [Criminal Justice Bill: Police Powers](#).

<sup>12</sup> [Data Protection and Digital Information Bill](#).

and freedom of information. We have raised concerns that these measures create significant gaps in the independent oversight of existing uses of surveillance cameras and biometric materials. This includes the full consideration of equality and human rights concerns beyond data protection legislation, which could lead to breaches of the Human Rights Act 1998 and the Equality Act 2010. <sup>13</sup>[\[OB\]](#)

2.10 These concerns are echoed in an independent report<sup>14</sup> commissioned by the BSCC, which found that abolishing the role of the Commissioner will ‘create significant gaps in the oversight of existing uses of surveillance cameras and biometric materials’ and will ‘create, rather than remove, regulatory complexity.’ The report calls for oversight policies and codes to be strengthened ‘so they become legally binding and include provision for meaningful enforcement.’

2.11 We have urged the UK Government to bring forward proposals for a dedicated, robust legal and regulatory framework which sets out the strict rules for the deployment of biometric surveillance and identification technologies, including FRT. Such a legal framework should set out clear procedural safeguards to protect rights under Article 8 (privacy), Article 10 (freedom of expression), Article 11 (freedom of assembly) and Article 14 (freedom from discrimination) of the ECHR and ensure compliance with the Public Sector Equality Duty (PSED) of the Equality Act 2010.

**(22 January 2024)**

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<sup>13</sup> Equality and Human Rights Commission (15 December 2023), [Parliamentary briefing on the Data Protection and Digital Information Bill Second Reading](#).

<sup>14</sup> Biometrics and Surveillance Camera Commissioner (6 October 2023) [Changes to the functions of the BSCC: independent report](#).