

Commons Justice Select Committee
Inquiry into Covid-19 and the Criminal Law

Written evidence submitted by:

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Executive summary

- Best practice in the monitoring of crime and enforcement trends at the local level should be disseminated and adopted nationally, allowing for better identification of disproportionality in the enforcement response to the pandemic;
- Omissions in datasets can themselves tell a story relating to 'hidden crimes' such as domestic abuse and child abuse given difficulties of reporting during the pandemic;
- New guidance around policing of protests and public gatherings during public health restrictions should be developed, with input from a range of voices, including those with human rights experience, representatives of particular communities and interest groups and representatives of police forces nationally to ensure diversity of opinion;
- The Memorandum of Understanding between the Department of Health and Social Care and the National Police Chiefs' Council should be published to enable further scrutiny of the use of public health and testing data by the police and its use in the context of policing pandemic restrictions, protest and public meetings, and other current or future policing activities such as possible enforcement of the use of 'vaccine passports.'

Introduction

1. This response is submitted on behalf of the AHRC-funded 'Observatory for Monitoring Data-Driven Approaches to COVID-19' (OMDDAC). OMDDAC is a collaboration between Northumbria University and the Royal United Services Institute, researching the data-driven approaches to Covid-19, with a focus upon legal, ethical, policy and operational challenges. OMDDAC analyses key data-driven responses to Covid-19 and collates lessons learned throughout the pandemic by way of stakeholder interviews, case study analysis, representative public surveys, and practitioner-focussed guidelines.

2. The evidence presented in this contribution has been collected primarily through interviews with key stakeholders from a range of sectors (including policing) for the purposes of OMDDAC's research. In this response, we use this interview data to identify lessons learned by stakeholders during the pandemic, particularly focused upon policing of offences and enforcement, and issues of disproportionality.

Monitoring of enforcement of Covid-19 criminal offences

3. The issue of enforcement has been raised a number of times most particularly by our stakeholders from the policing sector. Our research indicates that enforcement was generally seen as a last resort. Interviewees focused on the 'four Es' strategy (engage, explain, encourage, enforce) with a success metric around effecting behaviour change, rather than punishing those who have breached. Thus, enforcement was seen as a final step. Having said that, interviewees acknowledged that there have been differences in the approach nationally, with some forces in large cities tending not to be so focused on enforcement, compared with areas containing tourist hotspots. There have also been differences observed over time, with a relatively stronger emphasis on enforcement and issuance of Fixed Penalty Notices in the early-2021 phase of the pandemic.

4. Most of the law enforcement stakeholders interviewed highlighted the proactive monitoring of the consistency in approaches to enforcement across the police force in order to identify any areas of disproportionality. Data analysis techniques have been developed in some forces to assist such monitoring. This would enable an assessment of whether enforcement action was disproportionately affecting a certain group, such as young people. In at least one force area, an app, based on the technology of an existing stop and search app, has been developed for this purpose.

5. Police Scotland has created a Coronavirus Intervention System (CVI) to record police activity in relation to Covid-19 powers, including dispersal, fines and arrests, and wider policing practice in relation to the first three Es (engagement, explanation and encouragement). The data in CVI has allowed a new independent advisory group to scrutinise police activity, and academic input into assessing how best to respond to the data.

6. Interviewees highlighted that CVI allows attention to be paid to Fixed Penalty Notices which ordinarily would not warrant much attention but in the current circumstances, and assessment of whether the most appropriate sanction for social distancing

breaches was being implemented. It was claimed that the system enabled improved assessment of trends over categories such as age, gender, ethnicity and location, feeding into particular areas of concerns or community impact.

Data quality and hidden crimes

7. Our stakeholders across many sectors and disciplines were concerned that underlying datasets, on which key decisions are being based, often contain errors, out-dated information, and omissions which can have serious implications for the results of any analysis. Indeed, the omissions themselves often ‘tell a story’: one participant was particularly concerned about ‘hidden crimes’ for instance, in relation to domestic abuse and child abuse given the difficulties of reporting during the pandemic (in line with the closure of schools and the lack of access by social services).

8. Systems such as CVI have been created as an urgent response to the pandemic and may include data which has not necessarily gone through the usual quality assurance processes. Accordingly, interviewees cautioned that they were not suitable as a replacement for validated public data or official statistics. Furthermore, it was pointed out that qualitative analysis and intelligence was of equal importance to increase understanding of threats and risks to the public.

Access by the police to public health data

9. The amendment to the Health Protection Regulations to allow NHS Test and Trace to disclose information to the police for the purpose of prevention, investigation, detection or prosecution of offences¹ has been the subject of some concern. It is understood that the police will not receive direct access to the Test and Trace database. However, as at the date of writing, the Memorandum of Understanding between the Department of Health and Social Care and the National Police Chiefs’ Council (MOU) relating to the details of this data access has not yet been published. Therefore, issues of how health information may be linked to other police-held datasets and systems, and used for other policing purposes, have not been wholly clarified, nor considered in a public forum, despite some limited assurance offered by ministers. Is it proposed, for instance, that police forces would be involved in enforcing the use of any national vaccine certification or ‘passport’ for access to certain public venues?

10. As the country moves out of lockdown (with situations requiring individual, group or family isolation likely to increase), the police’s role in enforcement requires further public scrutiny and debate. In particular, the impact of the above data access measure on compliance and willingness to be tested should be examined.

11. At the same time, urgent clarification is needed in respect of the access and use of public health and testing data in the context of policing of protest and public meetings, and other policing activities such as enforcement of the use of ‘vaccine passports’. Disclosure of the MOU as mentioned above should occur as a priority.

Public protest

12. The recent legal challenge to the cancellation of the planned vigil on Clapham Common in memory of Sarah Everard has highlighted differences of opinion, even within the police themselves,² over the role of police forces in enforcing restrictions on outside public gatherings for the purposes of protest or expression, including the use of fixed penalty notices and arrest for public order or other offences. The High Court in *Leigh* stated that the ‘reasonable excuse’ exception to the restrictions ‘is the means by which effect is given to Article 10 and 11’ (freedoms of expression and assembly/association).³ A case by case approach should be taken when applying the relevant tests in relation to Articles 10 and 11 as to whether a particular protest or demonstration should (not) go ahead: ‘it is inappropriate to treat the 2020 Regulations as if they give rise to a blanket prohibition on gatherings for protest’.⁴ However, some police forces have continued to assert that there is no exception from restrictions for protest activity.⁵ As HMICFRS point out, police officers have to make finely-balanced decisions in difficult circumstances⁶ and additional guidance is therefore needed. The development of such guidance should involve a range of voices, including those with human rights experience, representatives of affected communities and interest groups and representatives of police forces nationally to ensure diversity of opinion.

30.03.21

¹ The Health Protection (Coronavirus, Restrictions) (All Tiers and Self-Isolation) (England) (Amendment) Regulations 2021 amended Regulation 14 of The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020.

² <https://www.bbc.co.uk/news/uk-england-birmingham-56416663>.

³ [2021] EWHC 661 (Admin), para 16 <https://www.judiciary.uk/wp-content/uploads/2021/03/Leigh-Ors-v-The-Commissioner-of-the-Police-of-the-Metropolis-12.03.21JUD-1.pdf>.

⁴ *Ibid*, para 17.

⁵ HMICFRS’s inspection report into the Sarah Everard Vigil confirmed that ‘[a]ny policy which adopts a blanket approach to protests, by treating them as automatically unlawful under the All Tiers Regulations, is incompatible with human rights’ p42 <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/inspection-of-mps-policing-vigil-commemoration-sarah-everard-clapham-common.pdf>.

⁶ *Ibid*, p46.