Police, Crime, Sentencing and Courts Bill
Briefing for MPs – Committee Stage

About us

The Bar Council is the representative body for the Bar of England and Wales, representing approximately 17,000 barristers. The independent Bar plays a crucial role in upholding and realising the constitutional principles of government accountability under law and vindication of legal rights through the courts. It provides a pool of talent, from increasingly diverse backgrounds, from which a significant proportion of the judiciary is drawn, and on whose independence the rule of law and our democratic way of life depends.

Executive Summary

The Bar Council has concerns surrounding various provisions in this Bill. We set out below our thoughts on aspects of the Bill that we believe would merit further scrutiny. Where we have not made comment on clauses, it is sufficient to assume that we broadly agree with those provisions in the Bill. We are not fundamentally opposed to the Bill but believe that some proposals are contrary to the interests of access to justice, the rule of law, and, in some cases, fundamental common sense. We have responded to the following:

- Increase in penalty for assaults on emergency workers;
- Criminal damage to memorials;
- Public Order powers;
- Causing serious injury through careless driving;
- Cautions;
- Sentencing proposals;
- Youth justice provisions;
- Secure children's homes;
- Serious Violence Reduction Orders;
- Rehabilitation of offenders;
- Procedures in courts and tribunals, including remote jury and remote hearing provisions;
- Harassment in a public place.

Part 1 – Protection of the police etc

Clause 2: Increase in penalty for assaults on emergency workers

Clause 2 of the Bill proposes an increase in the maximum sentence for assault on an emergency worker from 12 months' imprisonment to two years.

This proposal was subject to a consultation in the summer of 2020, to which the Bar Council Law Reform Committee (LRC) responded on 6 August 2020. In summary, we agreed with the recognition of the enormous contribution made by emergency service workers but questioned whether it was best recognised through increasing the maximum penalty for assaults upon them and whether the increase was in fact necessary. Concern was also raised about the usefulness of the limited statistics that were offered in support of the proposal.

The Committee also raised the inevitable distortion of the sentencing spectrum for offences of violence, given that the maximum sentence for assault occasioning actual bodily harm (and more serious offences) would remain the same for offences against all individuals, with the commission of an offence against an emergency worker simply being an aggravating factor, whilst for common assault the maximum sentence would be four times as much.

Perhaps more importantly, we raised that the substantial disparity that would exist between assaults on emergency workers and other members of the public (which would include children, the elderly, teachers, social workers, etc) also introduces a potentially problematic distortion.

The latter concern is reflected in the Sentencing Council's 2020 consultation on its proposed guideline for the offence, in which it noted in relation to the proposed culpability factors:

> *"As the offence is essentially common assault, the factors included are the same as for the common assault offence relevant to non-emergency workers. The exception is the culpability factor relating to vulnerable victims, which is not included in the emergency workers guideline. For the non-aggravated common assault offence the factor captures vulnerable victims such as the elderly and children, and homeless individuals who are exposed to attacks by reason of their circumstances. The Council considers that the vulnerability and special status of emergency workers is already reflected in the higher statutory maximum sentence where an offence is committed against them, and to include vulnerability as a factor in this guideline would 'double count' this factor. However, the Council does believe that there are circumstances where emergency workers may be more vulnerable to assaults and have provided for specific situations where emergency workers are at greater risk of attack and their vulnerability may be increased as an aggravating factor, which is discussed below in the aggravating factors section."*[1]

This illustrates that whilst for more serious categories of offences, sentencers are able to maintain some degree of parity between serious violence against emergency workers and that

[1] https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-Offences-Consultation-final-web.doc.pdf

against the elderly or very young, for the offence of common assault a very wide differential is being created by the proposed gulf in maximum sentence.

It is therefore clear that the concerns raised in the initial Government consultation were being addressed in the Sentencing Council's proposal, and that it would have been sensible to await the implementation of that guideline and analyse the statistics in the period thereafter before concluding that the maximum sentence was insufficient. The concerns raised by the LRC in August 2020 therefore remain valid.

Furthermore, there is a risk that these new provisions will needlessly clog the crown court with many cases that would not result in a crown court trial if they were charged as a straightforward assault – because the status of the complainant can be taken account of as an aggravating feature for purposes of sentence.

Part 2 – Prevention, investigation and prosecution of crime

Chapter 4, Clause 46: Criminal damage to memorials: mode of trial

The proposed amendment affects where offences of criminal damage involving a memorial can be tried. The value of the damage would have no bearing and such offences could be tried in either the magistrates court or the Crown Court. Clause 46 includes any "moveable thing" in the definition of "memorial". This means that the removal of a bunch of flowers could result in proceedings in the Crown Court. Putting aside questions of whether one would need to get permission to remove old bunches of flowers, such an allegation could be sent to the Crown Court if either a magistrates' court considered the offence to be particularly serious and beyond their maximum sentencing powers of six months imprisonment, or if the defendant elected trial. As noted above, there is again a risk that these new provisions will unnecessarily send cases to the crown court at a time when the backlog in the criminal courts is rising. This would be counterproductive.

Part 3 – Public order

Clauses 54 to 60

The Bill proposes amendments to the Public Order Act 1986. The amendments would give the police the powers to manage public protests in a way that, in the words of the explanatory notes, would counter protestors' recently changed tactics. Examples of the new tactics are provided and are specific. They can be traced back to the activities of the group known as Extinction Rebellion.

As we observe below, the Bill runs contrary to freedom of protest, and expression, leaves too much to the discretion of the police, and is potentially repressive and draconian in spirit. Except where the executive in Parliament is adopting the considered proposals of the Law Commission (Clause 59), the Bill is loosely drafted, and thus (with one exception) the range of each proposed offence is likely to drift towards an expansive interpretation.

Under clauses 54, 55, and 60, the Bill would expand powers contained within sections 12 and 14 of the 1986 Act to impose unlimited conditions ("as appear to [a police officer] to be necessary") upon public processions, assemblies and "one-person protests". The previous

differentiation within the 1986 Act between conditions to be imposed upon static protests and moving processions is intended largely to disappear.

The Bill would expand the reasons for the police to impose conditions upon a protest. If there is a level of noise that could cause "serious disruption to the activities of an organisation which are carried on in the vicinity of the procession" or if the noise may have a "relevant" or "significant" impact on persons in the vicinity, the police may regulate the protests by imposing conditions. It is difficult to imagine any peaceful protest, which may not fall foul of these provisions – an improbable exception being a procession of Trappist Monks.

These clauses, enlarging police powers in a way that lacks a sufficient degree of drafting precision, offend the second limb of Article 11 of the European Convention on Human Rights (ECHR) and decisions of the senior courts in England. In their current form, the amendments, if passed, will require almost immediate interpretation by the senior courts before the precise meaning of the law becomes settled. But, as the Bill does not provide a legal definition of what constitutes "serious disruption" and instead proposes that the Secretary of State may define the term using a regulation laid by statutory instrument (SI), the extent of these powers may never be satisfactorily settled. The use of regulations via SI, in respect of such fundamental freedoms, is to be deprecated.

The new powers also allow police to impose conditions on public processions and assemblies where 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, and that impact may be significant. It is important to note the substitution of "impact" for "disruption". The clause states that the noise generated by persons taking part in a public procession may have a relevant impact on persons in the vicinity of the procession 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 it may cause such persons to suffer serious unease, alarm or distress. Consider the following:

What is meant by significant? In law it means noticeable, or more than trivial. Almost every demonstration involves the creation of significant noise and by removing the need for it to be even "disruptive" but merely to have an impact almost every demonstration is potentially criminalised, provided only that it may result in "harassment" of persons of reasonable firmness. Harassment is defined by the Cambridge Online Dictionary as "behaviour that annoys or upsets someone".

Who is to decide that? For example, it would give a police officer power to ban or limit a Gay Pride demonstration on the grounds that it would cause harassment to persons of a certain religious persuasion who were "harassed" (that is to say, annoyed or upset) by the sentiments being expressed.

Breaching protest conditions imposed by the police is a summary-only criminal offence. The Bill proposes to increase the maximum sentence from three months to six months and proposes to reduce the level of culpability required to establish this offence. The proposed mens rea necessary for a person to be guilty of breaching a condition is that they "ought to have known" of the condition's existence. It follows that a protestor, exercising their democratic right, may face incarceration, even though they had no intention to commit the offence.

Clause 57 of the Bill proposes amendments to the Police Reform and Social Responsibility Act 2011 to expand the geographical area around Parliament where certain activities, such as protests, must not take place. The amendments seek to place the Palace of Westminster (and, under Clause 58, any area defined by the Secretary of State were Parliament to move location in the future) inside a quiet, protest-free, bubble. This development, from an historic, socio-political, and legal perspective is a matter of concern.

Clause 59 of the Bill proposes that the common law offence of causing a public nuisance be put onto a statutory footing. The proposed statutory offence is consistent with the Law Commission's 2015 recommendation ('Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency'). The Bill would increase the level of knowledge required to establish the offence from "ought reasonably to have foreseen" to recklessness. This is to be commended. However, the proposed maximum sentence of ten years' imprisonment goes further than the Law Commission's proposals.

It is important to note that the Law Commission report dwelt upon the current use of the common law offence of public nuisance, saying[2]:

"The offence of public nuisance was traditionally used to deal with obstructing the public highway (including rivers) and activities causing a loss of amenity in the neighbourhood (for example by noises and smells). Today, however, these activities are largely covered by other offences and procedures. Obstructing the highway is an offence under section 137 of the Highways Act 1980. Other local nuisances are largely covered by a very comprehensive and detailed regime of "statutory nuisance" procedures operated by local authorities; local authorities also have the power to make bye-laws to suppress nuisances. In current practice the offence of public nuisance is mainly used for various forms of misbehaviour in public. Anecdotal evidence from the College of Policing gives, as typical examples, obstructing the highway, hanging from bridges, lighting flares or fireworks at football matches, extinguishing floodlights at matches, littering forests with excrement and hosting acid house parties.' The history of public nuisance is set out in detail in an article by Professor John Spencer. This article was frequently referred to in R v Rimmington & Goldstein [2005] UKHL 63, [2006] 1 AC 459 and in the Law Commission's Consultation Paper. Professor Spencer argued that the offence of public nuisance was so vague, and covered so many different kinds of actions, that it could not be considered a coherent offence. He further argued that it could be abolished without loss, as all or most instances were covered by specific offences."

The Law Commission argued[3] that there remained a place for the offence for three good reasons:

i. Since the decision in *Rimmington*, the offence can no longer be criticised as formless and indefinite.

ii. It is desirable to have a general offence for culpable acts that injure the public but do not fall within any of the specialised offences.

iii. The penalties for the specialised offences are limited, and there are cases of serious deliberate or irresponsible misbehaviour where higher sentencing powers are required.

[2] At paragraph 2.21
[3] At paragraph 3.11

They then analysed a number of recent prosecutions[4] and explained why it was desirable to retain the offence and to make it statutory. At no point in the report is there any suggestion that the common law offence or its statutory replacement is a necessary or desirable measure to control or limit political protest.

It is somewhat disingenuous therefore to state that the intention behind creating the statutory offence is to "cover the same conduct as the existing common law offence of public nuisance" for the following reason.

The Law Commission report upon which it is based makes clear that the defence of reasonableness:

"Would include cases where the defendant's conduct is in exercise of a right under Article 10 (freedom of expression) or 11 (freedom of assembly and association) of the European Convention on Human Rights. Under section 3 of the Human Rights Act 1998, legislation must be read and given effect in a way which is compatible with the Convention rights; accordingly, references to reasonableness would be read as including the exercise of Convention rights."[5]

In other words, the Law Commission's report specifically exempts the kind of 'reasonable' conduct which the Bill seeks to criminalise i.e. acts constituting freedom of expression or freedom of assembly and association.

Part 5 – Road traffic

Clause 65: Causing serious injury through careless driving

Drivers who cause serious (but non-fatal) injury can presently only be charged with either:

A. "Causing serious injury by dangerous driving"; or

B. "Careless driving".

The offence of "causing serious injury by dangerous driving" currently carries a maximum sentence of five years' imprisonment and mandatory disqualification) whereas the offence of careless driving carries a fine and penalty points with disqualification being discretionary.

As things stand, under the current legislation, drivers who cause serious injury but whose driving is simply "careless" – as opposed to "dangerous" – do not face the prospect of imprisonment.

"Careless" driving is treated substantially differently by law enforcement. An alleged "dangerous" driver, or a driver suspected of even more serious offences, would be arrested at the roadside, or scene of the collision; a driver suspected of "careless" driving would be voluntarily interviewed at a later date.

The test for dangerous driving is markedly different than that for careless driving. Dangerous driving is driving which falls far below that which would be expected of a competent and careful driver, in situations where it would be obvious that driving in that manner would be dangerous. Careless driving, in contrast, is that which simply falls below the standard of a competent and careful driver. "Driving without due care and attention" has been interpreted

[4] At paragraph 3.8

[5] At paragraph 3.61

as driving "below the standard of a reasonable and prudent driver", DPP v Cox (1993) 157 JP 1044, Clarke J at p. 1047.

Careless driving, accordingly, does not require any mental element: a careless driver is judged only according to whether their conduct reached the required standard. Their state of mind is irrelevant. They may, therefore, neither have chosen either to drive poorly or to risk doing so. The question that then arises is whether it is just and proportionate to imprison people for such fleeting departures from the norm – for mere negligence.

The Bar Council would argue that the appropriate sanction should primarily be determined by the fault involved, with the harm caused being a secondary consideration. The reason for this is that careless driving causing consequential injury is sometimes arguably a matter of bad luck, which should not be considered when it comes to handing down a sentence – particularly when the possible sentence is imprisonment.

This new offence may encourage courts to sentence disproportionately more severely because of the injury caused – rather than assessing the actual culpability of the driver. Take, for example, the unfortunate driver, a parent, who commits an unintended but serious error resulting in injury, because they were momentarily distracted by their crying baby. The collision was unintentional. There was no intention to cause serious injury. Examples such as this illustrate why the new provisions should be reconsidered.

Part 6 – Cautions

Clauses 76 to 99

Part 6 would replace most existing out of court disposals (OOCDs) with two new ones: the diversionary caution and the community caution.

Currently there are the following types of OOCDs (invariably involving an admission or acceptance of guilt/culpability):

i. *Simple caution*: a formal warning that creates no further action (albeit it recorded on the Police National Computer antecedent record and may need to be disclosed).

ii. *Conditional condition*: as per the above but comes with conditions with which the offender must comply or face prosecution, including a fine up to £250.

iii. *Community resolutions*: a contract between police and offender setting out specified activities that must be performed.

iv. *Penalty Notices for Disorder* (PND)/*Fixed Penalty Notices* (FPN): FPNs are not to be abolished by this Bill, but PNDs will be.

v. Cannabis/khat warning

A third of all forces in England and Wales have committed to no longer using 'simple cautions', and instead only using community resolutions or conditional cautions (the choice as whether to do so is based on whether a lower or higher score on a national 'gravity matrix' is achieved (1 for CR, 2 for CC, 3 for normally charge, 4 for always charge).

The legislation seeks to replace the entirety of the previous system with two new types of caution: "diversionary caution" and "community caution". Effectively they are the same concept, but failure to comply with the conditions of a 'diversionary caution' may result in prosecution for the index offence whereas failure to comply with the conditions of a community caution will result in a fine. As a result, a community caution will only be available for less serious offences, whereas a diversionary caution may, in theory, be issued for any offence, including indictable-only offences.

The following is a short explanation of the proposed new forms of caution:

Diversionary cautions (cl.76-85) are for more serious offences. They can be used for indictable-only offences but only in exceptional circumstances and with consent of DPP. Conditions may include preventative conditions (e.g., geographic restrictions), positive conditions (e.g., attendance at alcohol misuse centre, unpaid work), financial penalty (no max fine value in the legislation itself, the limit is to be set by secondary legislation), foreign offender condition requiring them to return to home country. Failure to comply with conditions may result in prosecution for the original offence.

Community cautions (ss.76, 86-93) are for less serious offences. They cannot be used for indictable-only offences. Conditions may include preventative conditions (e.g. geographic restrictions), positive conditions (e.g. attendance at alcohol misuse centre, unpaid work), or financial penalty (no max fine value, the limit is to be set by secondary legislation). Failure to comply may result in police-issued fine (enforced by Magistrates' Court).

Data in a 2014 pilot suggests that this new system will not result in any particular reduction in reoffending, or in victim satisfaction. The "two-tier" system is "appreciably more expensive" – up to 70 per cent more expensive in areas where it has been taken up against other areas.

The conclusion of the House of Commons briefing paper is that the proposed system:

i. "*may* result in a further decline in the use of OOCDs.

ii. *is likely* to cost more – the Government estimates the proposed system will cost the criminal justice system an extra £15.58m a year to administer.

iii. *is unlikely* to have a major impact on the reoffending rates of offenders; and

iv. *may* improve victim satisfaction but is unlikely to have a major impact."

The Bar Council agrees. There is real benefit to the existence of a simple warning (without the resource implication of conditions) for the most minor of offences, and in particular one that does not get disclosed as part of the criminal record.

i. But to insist that conditions are imposed in all cases does not give sufficient flexibility, and unnecessarily increases costs and resource implication. This does not align with the advantage of OOCD as identified in the Government's own paper 'A Smarter Approach to Sentencing' (dated September 2020), namely that "*they can maximise the use of officer time – achieving a satisfactory outcome for the public while allowing officers to spend more time on frontline duties tackling more serious crime*" (para 161). Insisting on conditions which (at least) have to be monitored for compliance for all OOCD defeats that benefit.

ii. There is advantage to resolutions which do not then need to be disclosed as part of a Disclosure and Barring Service check or similar background check. It does not always assist the process of rehabilitation to criminalise very minor offenders, particularly young people, in ways which may prevent them gaining employment and training. Again, this is not consistent with the approach in the Governments 'A Smarter Approach to Sentencing' September 2020 paper which stated in respect of community cautions that "*receiving this would not form part of a criminal record*." (para 163).

There is undoubtedly value however in a consistent national approach and framework for the imposition of OOCD, and room for simplification of the system, which the current approach provides. However, it is not flexible enough to enable appropriate levels of police intervention for more minor offending.

Part 7 – Sentencing and release

Chapter 1, Clauses 100 to 114: Sentencing proposals

Part 7 of the Bill includes various sentencing law amendments. These are designed to affect the length of custodial sentences by:

i. Increasing the likelihood of some offenders receiving a sentence of immediate custody (Clause 100) and

ii. Increasing the length of time that some offenders spend in custody before release (Clauses 101-114).

Many of the proposals were contained in the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 and are to be put onto primary statutory footing by amending the Sentencing Code.

None of the proposals would see a reduction in the length of custodial sentences handed down in England.

The effect of the proposals will certainly be an increase in public expenditure on prisons, and the proposals are likely to reduce (?) the number of guilty pleas offered by defendants facing a harsher sentencing regime.

Part 7 also includes proposals to affect non-custodial sentences and ancillary orders.

Clause 100 establishes a pattern in Part 7 of identifying sentencing principles that are inconsistent across different offences and achieving consistency by upwardly adjusting to the level of the existing provision that produces the most severe sentencing outcomes. In the case of Clause 100 this is to apply the principle that currently applies to the minimum five-year sentences for firearms offences to other minimum terms (e.g. third-strike domestic burglary). Specifically, this means that the safety valve by which a judge could exercise their discretion not to impose the mandatory minimum is tightened from *particular* circumstances which relate to the offence or to the offender that would make it unjust to do so in all the circumstances, to *exceptional* circumstances which relate to the offence or to the offender and justify not doing so.

Mandatory minimum sentences are a distortion to the sentencing process in that that they fetter a judge's discretion to impose a sentence that is commensurate to the offence, the effect of this provision will be to increase the number of sentences imposed that are

disproportionate, for public policy reasons. It will therefore, over time, increase the prison population.

Clauses 101 and 102 relate to whole life orders and will affect a very small number of cases. While they fall within the overall pattern of increasing sentences, they will have a marginal effect on issues such as prisoner numbers. No observation is made as to the merits of the proposals.

Clauses 103 and 104 relate to starting points for murder and review of minimum terms for offenders under 18. They again fall within the overarching pattern of increasing time spent in prison and that this is the position for children is a matter of concern.

Clauses 105 to 107, much like clause 100, identify an inconsistency and remove it by upwardly adjusting the minimum term for discretionary life sentences, certain early release provisions, and the minimum term for certain offenders of particular concern, to two-thirds of the determinate sentence (or notional determinate sentence in the case of life sentences). In one sense these changes are welcome in that the inconsistency in this area gives rise to confusion and, arguably, a degree of unfairness (e.g. that a prisoner serving a discretionary life sentence could theoretically be released earlier than if they had received an equivalent determinate sentence). On the other hand, the overall effect will be to significantly increase the prison population.

Part 8 – Youth Justice

Key points

Youth justice requires wide ranging reform, but this is not offered in these proposals. Rather than being "a radical new approach to sentencing", the Bill represents missed opportunities for youth justice reform.

We welcome Clause 131, which introduces further safeguards to ensure that custody is only used when necessary.

Changes to the length in Detention and Training Orders (DTO) are to be welcomed but do not create meaningful reform aside from increased flexibility.

Time spent on remand or bail subject to a qualifying curfew condition and an electronic monitoring condition is counted as time served and credited against the custodial part of the DTO is to be welcomed as consistent with another custodial sentence.

These measures make allowances for the Government to pilot provisions and to restrict their use, if necessary, in light of evidence of use in practice. Rather than consultation, this is an experiment with the lives of vulnerable young people. It therefore should not be welcomed.

Issues the Bar Council feels it would have been beneficial to address:

i. *Age threshold*: Children who have committed an offence but reach the age of 18 before being prosecuted, tried and/or sentenced, which is particularly relevant following the Covid-19 pandemic and increased sentencing for young adults.

ii. *Child exploitation*: The Bill does not introduce any provisions to deal with child victims of exploitation.

Clause 131: Youth Remand

Background:

i. The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 introduced current youth remand provisions.

ii. In 2019, the Independent Inquiry into Child Sexual Abuse (IICSA) noted a significant increase in the use of custodial remand for children.

iii. In 2018/19, only a third of children remanded to custody or local authority accommodation (LAA) later received a custodial sentence.

Clause 131:

i. Introduces a statutory duty which states that courts "must consider the interests and welfare of the child" before deciding whether to remand a child to youth detention accommodation.

ii. Amends the test courts must apply to determine whether to remand a child into custody (including a substitution of a "real prospect" of remand to whether remand is "very likely").

iii. Remand in Youth Detention Accommodation can only be imposed for the most serious cases, where a custodial sentence appears the only option and the risk posed by the child cannot be safely managed in the community.

iv. Imposes a statutory requirement for the courts to record the reasons for their decision (aimed to reinforce the existing presumption of non-custodial remand by ensuring the courts consider remand to LAA as a first step).

Significance: This is a welcome provision. It aims to reduce the use of custodial remand. The introduction of the statutory duty to consider the welfare and best interests of the child is to be welcomed.

Clause 132: Detention and Training Orders: directions as to length of term

Current position: A Detention and Training Order (DTO) is a youth custodial sentence that can be imposed for a fixed period of time (four, six, eight, ten, 12, 18 or 24 months). No other youth sentences are fixed in length.

Amendment under the Bill: This clause removes fixed lengths so that a DTO of any length (between the minimum four months and maximum 24 months) can be imposed.

Clause 133: Detention and Training Orders: Consecutive detention and training order and sentence of detention: effect of early release decision

When a DTO and another sentence of detention are served consecutively, the order in which the sentences are given impacts on the amount of early release available. Clause 133 removes this issue.

Where an offender is given two or more sentences (one of which is a DTO), those sentences are to be treated as a single term for the purposes of crediting days spent in custody or on qualifying bail.

Time spent on remand or bail subject to a qualifying curfew condition and an electronic monitoring condition is counted as time served and credited against the custodial part of the DTO.

Time spent on remand or bail (where it is subject to a qualifying curfew condition and an electronic monitoring condition) is currently taken into account by the court in their sentence calculation when deciding which of the fixed lengths to impose. Schedule 15 amends the Code so that so that time spent on remand or on qualifying bail is to count as time served under sections 240ZA and 240A of the CJA 2003.

Clause 134: Detention and Training Orders: time to count as served

Schedule 15 makes provision in relation to the treatment of time spent remanded in custody or on bail as time served in relation to detention and training orders.

Clause 135: Youth Rehabilitation Orders

Current position: Youth Rehabilitation Orders (YRO) permit courts to impose a choice of 18 requirements from which a sentence can be designed. The YRO also provides for two high-intensity requirements (Intensive Supervision and Surveillance [ISS] or Intensive Fostering) as alternatives to custody.

The Bill proposes the following changes to Youth Rehabilitation Orders (YROs):

i. Increases maximum daily curfew (to 20 hours from 16 hours) while retaining a weekly maximum of 112 hours.

ii. Introduces location monitoring as a standalone requirement that can be imposed in YROs (to be piloted).

iii. Makes youth offending teams or probation staff the Responsible Officers in cases where electronic monitoring requirements are imposed.

iv. Increases the maximum length of an extended activity requirement of a YRO with ISS to 12 months and add a location monitoring requirement as a mandatory element of the ISS (to be piloted).

v. Raises the age limit of the education requirement so that it is the same as the age of compulsory education and training, rather than compulsory school age.

vi. Increases the maximum length of the extended activity requirement of a YRO with ISS from 180 days to one year. A mandatory location monitoring requirement will be added to YROs with ISS.

Clause 136: Abolition of Reparation Orders

***Background*:** A Reparation Order requires an offender to make reparation to the victim(s) of the offence or to the community at large. The orders were intended to prevent children committing further offences by helping the child understand the effect of the crime on the victims. It is a non-financial from of reparation. The abolition of the reparation order removes

the opportunity to divert some crime from the criminal justice system and to reduce crime by educating children as to the effects of their conduct.

Part 10 – Management of offenders

Chapter 1, Clauses 139 and 140: Serious Violence Reduction Orders (SVRO)

These provisions create a new s.342A of the Sentencing Code. They provide the court with a power to make a SVRO in relation to adults only. The application for an SVRO can be made to either the Crown or a Magistrates' Court. An SVRO can be made following a conviction for any offence, provided that other criteria are met.

Observations on SVROs

The inclusion of the underlined words above may be legally controversial. Typically, the formulation "ought to have known" is only used in two circumstances: in relation to general standards of conduct to which individuals are held (e.g. s.1 of the Protection from Harassment Act 1997) or in relation to specific facts, where the individual whose conduct is under consideration owes someone else a duty of care – for example under health and safety legislation.

This provision would effectively impose a duty of care on individuals to ensure that those with whom they commit criminal offences do not carry knives. While as a question of policy that is a matter on which opinion can legitimately diverge, as a question of law this is would appear to be a significant extension to the way which liability for the conduct of others can result in a sanction the individual.

The imposition of an SVRO can trigger some relatively onerous requirements, including the provision of accommodation details (updated as necessary) and being required to submit to stop and search in circumstances in which there would be no other grounds for such a power to be exercised.

Breach of any condition imposed under a SVRO would be a criminal offence punishable with up to two years' imprisonment.

It is noteworthy that SVROs must be piloted before being brought into force generally. If these provisions do make it on to the statute book and a pilot is activated, it would in our view be important to monitor the extent to which any orders made are based on the "ought to have known" test rather than proven use/knowledge of a weapon on the part of the individual who is made subject to the order.

Part 11 – Rehabilitation of offenders

Clause 163: Rehabilitation of offenders

The proposed amendment to the Rehabilitation of Offenders Act (ROA) 1974 would permit custodial sentences of over four years in length to become spent – at present such sentences are excluded from rehabilitation. That would be subject to an exception relating to certain violent, sexual or terrorist offences. There is not much to be said about this, save that as a liberalising provision this is broadly to be welcomed. That said, the effect of the ROA 1974 in

practice is extremely limited, so this amendment is likely to have very little practical impact on offenders.

Part 12 – Procedures in courts and tribunals

Clause 164: British Sign Language interpreters for deaf jurors

Any steps towards inclusion of differently abled citizens in the criminal justice system are to be welcomed, although with two qualifications. Differently abled people must not be discriminated against in different ways and any reasonable adjustments must be proportionate and not significantly interfere with the administration of justice.

The Bar Council has reservations about Clause 164 on both grounds. Jury trials are fundamentally oral proceedings: evidence is given orally, although it is commonplace for some documents to be exhibited.

At present any juror who would be unable to fully follow and comprehend the proceedings is excused. This includes jurors whose comprehension of English is insufficient to fully comprehend the proceedings, those literacy is inadequate to read any documents which may be exhibited (for whatever reason, including aphasia, dyslexia etc), whose eyesight may be inadequate to fully comprehend any document as well as those whose hearing is impaired.

If reasonable adjustments are to be made for jurors such as these who are otherwise disqualified, then adjustments should be made for all, otherwise a potential juror who is not able to understand British Sign Language (BSL) may feel discriminated against, as may a juror whose disability of disadvantage is not catered for by Clause 164.

The second reservation concerns the unique position of a juror in retirement. Our jury system jealously guards the collective process of jury deliberations to the extent that their deliberations are confidential, and nothing is allowed to influence those deliberations, consciously or unconsciously. The jury system is based upon the propositions that only the 12 jurors, and no one else, have any input into or influence upon their decision-making process.

Clause 164(3) contains a number of provisions relating to this, including putting the interpreter under the same restrictions as a juror as regards carrying out research and disclosing deliberations. It expressly states that the interpreter "must not interfere in or influence the deliberations of the jury" and also makes it an offence for the interpreter "intentionally to interfere in or influence the deliberations of the jury".

However, as soon as a thirteenth person is introduced into the jury, particularly during deliberations, the equilibrium of that jury is disturbed. All the input the hearing-impaired juror receives is via the interpretation – and the emphasis is on interpretation – of the thirteenth person, the interpreter.

That interpreter will have to control the deliberations so that they can interpret everything to the one juror. Any asides, cross-speaking or remarks which are not properly heard will not be transmitted and so the interpreter will become a sort of de facto second foreperson, controlling discussions. Inevitably their conduct will influence how the deliberations proceed.

Because a jury is kept private, any misconduct by any juror can only be reported by the other jurors. Although this does not happen frequently, it is not a rare occurrence; human nature being what it is. At present, anything amiss that occurs during deliberations is inevitably

witnessed by the rest of the jury, and if any single juror misconducts themselves the rest of the jury are obliged to report it. This is impossible in the case of the private communications between an interpreter and a deaf juror. Should either or both misconduct themselves, the whole premise upon which the integrity of the jury is based – that all witness the behaviour of each other – would break down and no one would know. For example, should an interpreter fail to interpret properly, no one would ever know. This is not to say that one should assume this will happen and that it is a reason not to permit interpreters. The fundamental objection is that the jury system can only work because it is the jury collectively which polices itself. That safeguard is removed if two people in retirement – the interpreter and the deaf juror – are participating in the deliberations in a way which the rest of the jury are excluded from and so cannot monitor.

Clause 166: Remote observation and recording of court and tribunal proceedings (open justice – public access to remote hearings)

While this provision is said to replace the Coronavirus Act 2020 provisions, it goes much further. It covers criminal and civil proceedings and tribunals and does not provide open justice as default but instead has a two-stage process for providing access. This process is not transparent.

The first stage requires the Lord Chancellor, by regulations made with the concurrence of the Lord Chief Justice, to approve the proceedings and conditions for access, including who may watch the proceedings. The second stage applies only to proceedings which are approved under the first stage. This provides discretion for a judge to order that proceedings can be viewed or listened to. The exercise of this discretion is unlimited.

The Bar Council does not see any objection to being able to control access where necessary, but the burden should be reversed – the default position should be that all proceedings should be accessible unless there is a justifiable reason to exclude them, such as proceedings normally held in private or where an order has been made to protect a witness or confidential information. That mirrors the position with physical access to hearings.

Given the number of remote hearings which are currently ongoing, this places an additional burden on the judiciary and tribunals, with no guidance as to how the discretion is to be exercised. A positive step to grant permission would be required in each case. There is nobody to represent the interests of the public in seeking to challenge the situation where the judge/tribunal makes no order.

There is also no support for the decision makers in determining the best way to afford public access. There is no technical consistency across the jurisdictions, which means that different procedures may be required, such as implementing a ten-minute delay, as happens with the Manchester Arena Inquiry.

Currently, access is randomly available to the public in civil cases and controlled by ushers/court clerks. There is no access in criminal cases. The position with tribunals is not known. Some inquiries are providing access with a ten-minute delay and have provided dedicated YouTube channels.

Furthermore, the regulations introduced to limit movement and association during the Covid-19 pandemic have had an inevitable effect upon the administration of justice, ranging from completely shutting down courts until adequate social distancing and hygiene measures

could be introduced, to limiting the numbers of people who could physically attend in a limited physical space.

One significant misunderstanding of the regulations was that they meant people could not travel to attend court: this was, and is, incorrect. The regulations always allowed travel and attendance if there was a good reason, and they set out a number of specific but non-exclusive examples of what were good reasons, including the need to fulfil a legal obligation. That covered the need for all active participants in any court proceedings to physically attend. The general exemption allowing anyone to leave their home for good reason has generally been held to include the right of anyone to attend court proceedings in the public gallery provided they had a legitimate interest in the proceedings, such as being family members of a witness or defendant. The only limitation was on numbers, as a result of the need to socially distance. Of course, this did not permit members of the public who were unconnected but merely interested to attend.

However, courts have accepted that, if it were possible for participants to attend remotely, that was to be encouraged, as it reduced the footfall in court buildings and thus reduced the risk of spreading the disease. The pandemic has thus resulted in the increased use of technology to allow people to participate in court proceedings when in remote locations. The term 'participate' should be qualified by the observation that any remote attendance inevitably creates a dissociative effect, so that the remote party generally feels that their participation is less effective than that of people 'in the room'.

One important limitation on the use of technology to allow remote attendance is that the law currently forbids juries from being in attendance remotely. The complications and important limitations attending the use of technology to facilitate the remote attendance of defendants are best appreciated by reading the judgment of Mr Justice Edis in *R v A, B & C* at the Central Criminal Court on 22 June 2020. To put it simply, remote attendance by a participant in a trial is second-best.

The other effect of the pandemic has been to highlight that attendance at proceedings, being affected by the need to socially distance, has meant that fewer people could physically occupy the same space.

Clause 166 is primarily aimed at improving access to justice where current public galleries (which exist in all courts) are inadequate for the task. There is no proposal to start live-streaming or broadcasting proceedings more widely, but this clause makes it simpler to transmit them to an "overflow" facility for the public to observe. There is an option in clause 166(3)(b) for wider transmission, but only where recipients have identified themselves to the court.

Clause 167 sets out the terms of the offence of unlawfully recording remote proceedings, which can easily be done by anyone who has remote access. Although this is and remains an offence, unless the court closely controls and restricts remote access this law will be unenforceable, and the risk that unauthorised recordings, which may have been digitally edited, altered or manipulated, appear on the internet on servers outside the jurisdiction of the court is a very real one.

Clause 168 gives the power to authorise the remote attendance of any participant, although with strict conditions attached. This is a useful power but, for the reasons set out above, it is to be hoped it is not generally adopted. The effect of the testimony of a remote witness is

generally accepted to be reduced except in certain specific instances, such as the evidence of expert witnesses, and the absence of a remote defendant is undesirable in almost all circumstances. Such a defendant inevitably feels remote and cut off from their own trial, to the extent that it becomes an experience in which they usually feel they are not a real participant.

Clause 168: Remote juries

The Bar Council recognises that there are many hearings, primarily those of an administrative nature, that can be undertaken more efficiently and swiftly when remote. We would invite a review of the nature of the type of hearing to which this is best suited so that a national framework with a consistent approach can be adopted. This is a low-cost solution that is likely to free up courtroom space for trials and have no adverse impact on the interests of justice.

Accordingly, the proposed extension to the temporary amendments to s.51 CJA 2003 which were introduced as a result of the pandemic is in general terms to be approved of.

That general approval does not, however, extend to remote juries (the proposed s.51(2) CJA 2003), which the Bar Council cannot support. The reasons for this are based on (i) legal analysis of the provision, (ii) policy considerations and (iii) practicalities.

First, the factors to which the court's attention are directed when considering whether to make an order for remote participation are difficult to reconcile with the idea that all of the jury would need to participate remotely together. It is outlined in the Bill as follows:

"(5) In deciding whether to give a direction under this section, the court must consider—

(a) any guidance given by the Lord Chief Justice, and

(b) all the circumstances of the case.

(6) Those circumstances include in particular—

(a) the availability of the person to whom the direction would relate,

(b) any need for that person to attend in person,

(c) the views of that person,

(d) the suitability of the facilities at the place where that person would take part in the proceedings in accordance with the direction,

(e) whether that person would be able to take part in the proceedings effectively if the person took part in accordance with the direction,

(f) in the case of a direction relating to a witness—

(i) the importance of the witness's evidence to the proceedings, and

(ii) whether the direction might tend to inhibit any party to the proceedings from effectively testing the witness's evidence, and

(g) the arrangements that would or could be put in place for members of the public to see or hear the proceedings as conducted in accordance with the direction."

As a matter of law, it is difficult to imagine any of the above criteria being called into play to support an order that a jury collectively participate remotely (from the same place as each other), save perhaps for s.51(6)(d).

That brings us to the policy aspect. The arrangement for remote juries risks alienating defendants and witnesses from the jury in the same way as might happen if the witnesses were required to participate remotely. The latter is an attempt to make the best of an imperfect situation on a case-by-case basis, but the same reasoning cannot sensibly be applied to remote juries. When could it be in the interests of justice for a jury to be remote rather than in the courtroom? Only when the available space would not permit all to be together in the room in which the trial is taking place. The position of the Bar Council is that the answer to this problem should be an increase in funding for the court estate, rather than a radical reimagining of the way in which a jury engages with proceedings.

Finally, as to the practicality of this provision, there is understood to be little if any research on the viability and effectiveness of this proposal, but on any view the cost would be significant. In order to establish the security of proceedings, what would be required is not only a room in which the jury could participate in the trial (which admittedly could double as their retiring room) but also an usher, present, in that room for the duration of the proceedings (less retirement). In addition, if the jury were all required to be on screen at all times, visible to the judge and defendant(s) and vice versa, this would then require an extra screen in the court room. That would further add to the cost, and also increase the risk of broken links causing frustration and delay to the proceedings. There are also likely to be challenges surrounding producing copies of the evidence for the jury to view remotely. Moreover, if this evidence is physical as opposed to documentary, and needs to be seen or even handled by members of the jury, questions around how to transport such evidence, where to store it, and how to handle it would need to be answered.

There are also subtler but nonetheless significant points to be made about the dynamic of a criminal trial and the way in which the mood of the room is an important ingredient in the experience, or about the interest in being able to easily observe and interact with the jury, e.g. by facilitating jury notes (a regular feature of a modern criminal trial) to the judge without undue disruption to the flow of the proceedings. A more fundamental issue is the current absence of any evidence as to whether a jury hearing a case remotely may interact differently, both with each other and with the key participants in the trial. It is simply not known whether removing the jury from the courtroom will change the way in which they reach their verdicts and whether this may impact on the interests of justice.

For these reasons, the Bar Council's view is that legislation to enable the use of remote juries is not desirable. Such legislation is also not necessary – if remote juries could be a solution to any problem, it is a problem which has a better solution: provide appropriate facilities to enable criminal trials to take place in one properly equipped room.

Notices of amendments given up to 29 April 2021

The first notified amendment creates the new offence of "harassment in a public place."

The Bar Council has reservations about this proposal. The proposal makes it an offence to engage in any conduct in a public place which amounts to harassment of another, and which knows or ought to know amounts to harassment of the other.

Section 5 of the Public Order Act 1986 was enacted precisely to deal with conduct which fell short of being likely to cause a breach of the peace, but which was (a) disorderly and (b) likely to cause harassment alarm or distress. It is, if properly applied, more than adequate to deal with anti-social behaviour which causes harassment alarm or distress: that is the definition of the offence. If behaviour which constitutes this offence is not being properly policed so as to protect the public, the solution is not to introduce yet another offence which significantly lowers the bar concerning what is and what is not criminal conduct.

This proposal goes much further than the current law. As we have already noted, harassment means no more and no less than to upset or annoy. As the proposed definition makes clear, it includes (but is not limited to) speech that is causing the person alarm or distress. The present laws on preventing harassment require a course of conduct before the offence is made out, precisely to avoid one instance of being annoying making one liable to prosecution.

The proposal renders conduct, including speech, which is merely annoying a criminal offence; this would appear to go well beyond what has hitherto been regarded as conduct which should be criminalised.

It is true that the proposed definition includes a defence that, in the particular circumstances, the conduct was reasonable. But placing an onus upon a defendant to prove a defence to such a potentially wide-ranging offence is, we believe, contrary to the generally recognised principles governing what behaviours should be criminalised and when a burden of proving a defence should be placed upon the defendant.

The Bar Council
June 2021