Police, Crime, Sentencing and Courts Bill 2021
Briefing for Peers – Bar Council Summary

About us

The Bar Council is the representative body for approximately 17,000 barristers in England and Wales. 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 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 some concerns and observations to make about various provisions in this Bill. We set out below our thoughts on aspects of the Bill that would merit being scrutinised further. Where we have not made comment, we are broadly in agreement with those provisions or take a neutral stance. We are not fundamentally opposed to the Bill but believe that some proposals raise issues in relation to access to justice and the rule of law. In some cases, they also appear contrary to 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;
- 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

The Bar Council questions whether increasing the maximum penalty for assaults upon emergency workers is necessary or commensurate with the offence. It is also concerned about the usefulness of the limited statistics that were offered in support of the proposal. It may distort the sentencing spectrum for offences of violence given comparative penalties for more serious offences. It may also create a disparity between penalties for assaults on emergency workers and other members of the public. The offence, which is still common assault, is a very broad one and to differentiate on a

category basis (emergency workers) rather than simply identifying such assaults as involving an aggravating feature may therefore be unhelpful.

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 raises the prospect 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.

Part 3 – Public order

Clauses 54 to 60:

There are clear tensions between this section and the freedom of protest and expression (both protected under the European Convention on Human Rights). It gives expansive powers to the police, which encompass the arrest of one individual who is independently protesting. There are legitimate concerns that it would allow the Government to prevent protests with which it does not agree. The present drafting is also vague and will require interpretation by the senior courts before the precise meaning of the law becomes settled. We consider this to be undesirable in legislation which limits fundamental civic rights.

Part 5 – Road traffic

Clause 65: Causing serious injury through careless driving

We have concerns regarding this clause, as it may mean sentencing and imprisoning for negligence. Careless driving arises out of a negligent act, whereas dangerous driving involves conduct which falls far below that which would be expected of a competent and careful driver. This new offence may therefore lead to disproportionate, and more severe, sentences because of the injury caused – rather than a sentence which involves an assessment of individual culpability.

Part 6 – Cautions

Clauses 76 to 99

The Bar Council is concerned at attempts to amend the current system, which uses several out of court disposals (OOCDs), by introducing two new cautions: 'diversionary' and 'community'. The existence of a simple warning, which the Bill proposes to abolish, is useful in many ways, not least because it requires fewer resources from police forces. To insist that conditions
are imposed in all cases does not give sufficient flexibility to the judiciary; a national framework that is too rigid is likely to be unworkable in a courtroom.

Part 7 – Sentencing and release

Chapter 1, Clauses 100 to 114: sentencing proposals

We believe that the proposed amendments to sentencing laws will necessitate an increase in public expenditure on prisons. The proposals are also likely to affect the number of guilty pleas offered by defendants facing a harsher sentencing regime. None of the proposals would see a reduction in the length of custodial sentences handed down in England. Mandatory minimum sentences will prevent judges from being able to exercise the necessary discretion to hand down a sentence based on the circumstances of the case. They are also likely to increase the prison population, which is already under significant strain.

Part 8 – Youth justice

The Bar Council welcomes a number of the proposals in this Bill that relate to youth justice, particularly those that attempt to reduce the use of custodial remand. However, youth justice requires wide ranging system reform, which the Bill does not consider. The Bill is a missed opportunity for youth justice reform and includes some changes that may be detrimental for youth justice and rehabilitation. These include a mandatory requirement to monitor under intensive supervision and surveillance (ISS) (which has not been the subject of any consultation) and the extension of daily curfew hours for vulnerable children. The proper objective should be to sentence children using an individualistic approach. The Bill also represents a missed opportunity to make provision for children who are alleged to have committed an offence when they are under the age of 18 but are then prosecuted as adults, to be dealt with in the Youth Court. We also note the absence of any provision for victims of child exploitation. These measures make provision for the Government to pilot some proposals. One of them, the use of location monitoring, has not been subject to consultation and involves a high level of intrusive monitoring of children. This is experimentation with the lives of vulnerable young people and should not be embarked upon without detailed consideration. Most significantly, the Bill does not consider raising the age of criminal responsibility from the current age of 10.

Part 10 – Management of offenders

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

These proposals place onerous obligations on individuals and may generate significant questions of law in regard to liability for the conduct of others. For example, do the proposals impose a duty of care on individuals to ensure that those with whom they commit criminal offences do not carry knives? How this would be determined as a question of law is unknown. Any such measures ought to be subject to consultation or piloted before being brought into force – it would 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 made subject to the order.

Part 12 – Procedures in courts and tribunals

Clause 164: British Sign Language interpreters for deaf jurors

Improving participation in civic duty is important. In principle, this is a positive measure. However, any change of this sort needs to be balanced against the right to a fair trial. We would have thought this is a paradigm example of a reform that requires proper consultation before legislation is proposed. If reasonable adjustments are to be made for jurors such as those who use sign language, then consideration should be given to making adjustments for all those presently

excluded. We also consider that the introduction of an interpreter during the process of jury deliberation needs careful thought.

Clause 166: Remote observation and recording of court and tribunal proceedings (open justice – public access to remote hearings)
The Bar Council supports remote observation and recording of court and tribunal proceedings where necessary. However, we feel the burden should be reversed – the general 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 and would promote public access to justice.

Clause 167: Offence of recording or transmission in relation to remote proceedings
Although the recording or transmission of remote proceedings is and remains an offence, unless the court closely controls and restricts remote access, this law will be unenforceable. There is a risk that a number of unauthorised recordings may appear on social media, the internet or on servers outside the jurisdiction of the court and lead to an increase of individuals being in contempt of court.

Clause 168: Expansion of use of video and audio links in criminal proceedings
The Bar Council does not support legislation allowing for remote juries. The Bar Council echoes the comments made by the Lord Chief Justice that remote juries would make the jury spectators rather than participants in a trial. For these reasons, it is our belief that this measure should not become law without thorough research, evaluation and consideration of the impact on the administration of justice and justice outcomes. The implementation of this measure at this time seems odd, since the issue which it seeks to address is now moot. At the height of the pandemic, when remote proceedings were almost the only way of ensuring the justice system could continue to hear cases, such a measure may have been more understandable. The situation was addressed in other ways, so the measure now seems unnecessary. If such a measure were required in future, it could and should be introduced then at a point at which the need for such a fundamental change to the jury trial process could be properly considered by Parliament in the particular circumstances of a new emergency.

Notices of amendments given up to 29 April 2021
We have reservations about the proposals for 'Harassment in a public place'. Legislation already exists in Section 5 of the Public Order Act to deal with conduct which falls short of conduct likely to cause a breach of the peace, but which is (a) disorderly and (b) is likely to cause harassment alarm or distress. This proposal goes much further than the current law. The proposal renders conduct, including speech which is merely annoying, a criminal offence; this would appear contrary to the generally recognised principles governing both what behaviour should be criminalised and when the burden of proving a defence should be placed upon a defendant.

The Bar Council
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