The Criminal Justice Bill: Concerns about the delegated powers

11 December 2023

HANSARD SOCIETY

PROMOTING DEMOCRACY • STRENGTHENING PARLIAMENT

Acknowledgements

This paper was produced by Matthew England.

The research for this paper was supported by the Legal Education Foundation as part of the Hansard Society's ongoing research into delegated legislation and its parliamentary scrutiny.

For further information please contact:

Matthew England (Researcher) – matthew.england@hansardsociety.org.uk

Dr Ruth Fox (Director) - ruth.fox@hansardsociety.org.uk

The Hansard Society

1st Floor Millbank Tower
21-24 Millbank
London, SW1P 4QP

www.hansardsociety.org.uk

Contents

Introduction

The Criminal Justice Bill is scheduled for Committee stage consideration starting on 12 December 2023.

In this briefing, we make no comment on the Bill's legal or policy merits. None of our suggestions about ways in which the drafting of delegated powers could be improved or their parliamentary scrutiny strengthened would prevent the implementation of the Bill's intended policy.

Our conclusions are intended to buttress the role of Parliament in scrutinising future executive action and regulations arising from this Bill once it achieves Royal Assent.

MPs should be clear about the level of authority they are delegating to government Ministers and be confident that they will not regret forgoing their ability to fully scrutinise future government decisions.

Our analysis draws on 'legislative standards' which we have derived from reports of the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC). The DPRRC is an influential committee and provides the nearest thing to a form of 'jurisprudence' (or 'legisprudence') in the area of delegated powers. Last year we published a Compendium of Legislative Standards for Delegating Powers in Primary Legislation that distils standards for the delegation of powers from 101 DPRRC reports over recent sessions.[1] We have utilised this Compendium in producing this paper.

In this paper we do not exhaustively analyse every power in the Bill but restrict our comments to 3 areas of particular concern.

Clause 29: Powers to implement international arrangements to transfer prisoners abroad

Clauses 25 to 29 of the Bill make provision for the transfer of prisoners in England and Wales to cells hired in foreign prisons by the UK Government to relieve capacity pressures on the domestic prison estate. Some overarching details of the scheme – for example, allowing the Secretary of State to issue a warrant for the transfer of a person to an overseas prison, and deeming a person who is detained under this scheme to be in the legal custody of the Secretary of State – are on the face of the Bill. But much of the substantive detail will be provided later, specified first in the international agreements struck with recipient countries and then in legislation to implement those agreements.

[1] Hansard Society (April 2022), *Compendium of Legislative Standards for Delegating Powers in Primary Legislation* (London)

Clause 25(1) defines the kind of international "arrangement" to which the relevant clauses will apply: "any arrangement made between the United Kingdom and a foreign country which provides for prisoners (or any description of prisoners) to be detained, in the foreign country, for part or all of a period for which they are liable to be detained."

Clause 29(1) allows regulations to be made by the Secretary of State to make further provision in connection with an arrangement of a kind mentioned in clause 25(1). The regulations may apply (and modify) any enactment in relation to persons detained under the arrangement and may make any provision that could be made by an Act of Parliament, including amending primary legislation.

Regulations made under clause 29(1) would be subject to the draft affirmative procedure if they amend primary legislation, and the negative procedure in all other cases.

The acceptability to Parliament of any deal to transfer prisoners to another country will depend on the details of the deal(s): for example, to which country will the prisoners be sent, under what conditions, how will prisoners for transfer be selected, how will human rights provisions be respected and how will the prisoners be returned to the UK on completion of their sentence. The Bill as currently drafted invites parliamentarians to grant powers to Ministers to negotiate agreements to transfer prisoners abroad without knowing how the powers will be used in respect of any such matters.

It has been reported that no prisoner would be transferred under the scheme if they were "deemed unsuitable" due to being a "safety risk" or a "threat to national security" or because they suffer from health problems[2]. It has also been reported that if British prisoners are transferred, that would require family visits by Zoom[3].

However, such conditions do not appear in the Bill. Instead, these details would be established via the international agreement(s) and any implementing secondary legislation, both of which will be subject to limited, if any, parliamentary scrutiny.

The justification the Government gives in its Delegated Powers Memorandum for the delegation of power to Ministers in these clauses is that:

- "it would not be practicable, for there to be a delay whilst primary legislation was drawn up and Parliamentary time allocated for a further Bill to pass"[4] and that an Act of Parliament would "impact upon the Government's ability to swiftly give effect to these agreements."[5]

[2] C. Hymas, 'Prisoners will be sent to rented cells overseas amid overcrowding crisis', *The Telegraph*, 3 October 2023
[3] *Ibid.*
[4] Home Office and Ministry of Justice, *Criminal Justice Bill Delegated Powers Memorandum*, 15 November 2023 (DPM), para. 52.
[5] *Ibid.*, para. 59

- "it is challenging to say with specificity what legislative changes (if any) a future partner may require following negotiation and subsequent agreement".[6]
- "the specific terms of any future treaty on prison rental will be subject to further Parliamentary scrutiny when the treaty text is laid before Parliament as part of the Constitutional Reform and Governance Act 2010 ratification procedure."[7]

However, given that the Government controls the timetabling of business in the House of Commons, there is no reason why the primary legislative process for legislation that implements an international agreement should take materially longer than the 40-sitting day praying period for negative Statutory Instruments or the six weeks or so generally required for debate and approval of affirmative Statutory Instruments.

Furthermore, whilst the Government has indicated that any future treaty would be subject to the 21-sitting day scrutiny provisions of the Constitutional Reform and Governance Act 2010, the Bill does not explicitly require that any and all international agreements struck in relation to Clauses 25-29 must be made in the form of a Treaty. An international agreement made in the form of a Memorandum of Understanding (MoU), for example, may not be subject to active parliamentary scrutiny and approval. As the House of Lords International Agreements Committee noted at the time of the Memorandum of Understanding agreed with Rwanda in relation to illegal migration, "there is a substantial lacuna in the parliamentary scrutiny of international agreements as significant MoUs are not subject to any formal scrutiny processes"[8].

The Delegated Powers and Regulatory Reform Committee (DPRRC) has previously criticised the use of delegated powers, to which minimal parliamentary scrutiny attaches, to implement international agreements:

- in relation to the Northern Ireland Protocol Bill and the Government's desire to implement such an agreement quickly the Committee said that "Parliament can act very quickly to pass primary legislation. Given the significance and controversial nature of the subject matter, it is arguably inappropriate to provide for the implementation of the agreement, subject only to the negative procedure (when not containing retrospective or Henry VIII provision)"[9]. It then recommended the power be removed from the Bill[10].
- in relation to the Private International Law (Implementation of Agreements) Bill 2020 the Committee was critical of the Government's stance that the use of primary rather than secondary legislation "would cause unnecessary delay in stakeholders being able to enjoy the advantages of any agreement"[11]. In a robust response the DPRRC argued that:

---

[6] DPM, para. 50
[7] *Ibid.*, para. 54
[8] House of Lords International Agreement Committee (2022-23), *7th Report*, HL Paper 71, para. 44
[9] DPRRC (2022-23), *7th Report*, HL Paper 40, para. 72
[10] *Ibid.*, para. 73
[11] Ministry of Justice, *Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee*, 28 February 2020, para. 15

- the Ministry of Justice had "offered no evidence that the practice in the last 100 years (implementation by Act of Parliament) has led to untimeliness or unacceptable inconvenience."[12]
- the "argument from delay, apart from involving unsubstantiated assertion, might justify dispensing with Acts of Parliament in other areas where governments need to legislate quickly."[13]
- "the fact that a Minister negotiating an international agreement does so in the knowledge that it will need to be implemented via an Act of Parliament is likely to have a more potent effect on negotiations than the knowledge that it can be implemented by statutory instrument that will attract considerably less parliamentary scrutiny."[14]

Members may wish to press the Minister on whether primary legislation would be a more appropriate vehicle for implementing such an international arrangement and if not, what scrutiny safeguards should be put in place to avert the inherent risks posed to democratic accountability of Ministers for such arrangements if they are not given effect in the form of a treaty. The Justice Committee has suggested that a provision should be inserted in the Bill "to require that any agreement on prisoner transfer be laid before each House of Parliament and be approved by a resolution of the House of Commons before the power in Clause 29 can be used".[15] This would go some way to address the problem.

Clause 49: Powers to amend the definition of nuisance begging

Clauses 38 to 64 of the Bill introduce a range of new powers and offences designed to tackle "nuisance" begging and rough sleeping, replacing provisions in the Vagrancy Act 1824. Provision was initially made in the Police, Crime, Sentencing and Court Act 2022 to repeal the Vagrancy Act but they have not yet been brought into force. The Government has indicated that it will bring them into force, thereby bringing about the repeal of the 1824 Act, once new legislation to replace it is in place.

In particular, Clauses 38 to 48 of this Bill would:

- Allow police constables and local authorities to issue a written "move-on" direction to persons who appear to have engaged in (or to be likely to engage in) nuisance begging.
- Allow police constables or local authorities to issue "nuisance begging prevention notices" to persons believed to be engaging in, or to have previously engaged in, nuisance begging. Such a notice could specify

[12] DPRRC (2019-21), *8th Report*, HL Paper 40, para. 7.
[13] *Ibid.*, para. 12
[14] *Ibid.*, para. 14
[15] Letter from Sir Robert Neill MP, Chair of the House of Commons Justice Committee to the Rt Hon Alex Chalk MP, Lord Chancellor and Secretary of State for Justice, 29 November 2023

requirements to do or not to do certain things during a specified time, for the purpose of preventing the person from engaging in nuisance begging.
- Allow courts to impose "nuisance begging prevention orders", on application by a police constable or local authority, if a person has either engaged in nuisance begging, failed to comply with a move-on direction, or failed to comply with a nuisance begging prevention notice.
- Introduce new criminal offences for failing to comply with move-on directions, nuisance begging prevention notices, or nuisance begging prevention orders, each offence subject to up to one-month in prison or a level 4 (up to £2,500) fine.
- Introduce a new criminal offence of "engaging in nuisance begging", subject to up to one-month in prison or a level 4 (up to £2,500) fine.

The Government first intended to replace the Vagrancy Act with provisions in the Levelling Up and Regeneration Bill which was presented to Parliament on 11 May 2022. Clause 187 of the Bill as presented would have given the Secretary of State powers to replace sections 3 and 4 of the Vagrancy Act with a new framework set out entirely in regulations, including powers to create criminal offences or civil penalties. This was a broadly drawn power included in a placeholder clause and attracted much criticism during the passage of the Bill; the Government subsequently withdrew the provisions. The delegated powers in this Criminal Justice Bill are an improvement on those original powers in the Levelling Up legislation.

For the purposes of Clauses 38-48, a definition of "nuisance begging" is included on the face of the Bill. Clause 49 defines nuisance begging as begging that either (i) takes place in certain specified locations or (ii) meets certain conditions.

- Clause 49(2) lists the locations where a person would be deemed to be nuisance begging if they were to beg there, including on public transport, within or near the entrance to a station, in or within 5 metres of the entrance to a retail premises, within 10 metres of an ATM, and several other categories of location.
- Clause 49(3) establishes that begging would also be considered "nuisance begging" if it caused, or was likely to cause: harassment, alarm or distress; a person to reasonably believe that they will be harmed or that their property will be damaged; disorder; or a risk to the health and safety of others.
- Clause 49(4) defines certain terms in Clauses 49(2) and 49(3), including "retail premises", "carriageway", "cycle track", and, most substantively, sets out types of "distress" that would be covered by Clause 49(3).
- Clause 49(5) allows the Secretary of State to amend subsections (2) and (4) by regulations. In effect, this would allow the Secretary of State both to add, remove, or amend items on the list of locations where begging is deemed to be nuisance begging, and to amend the definition of "distress" for the purposes of sub-section (3).
- Regulations under Clause 49(5) would be subject to the draft affirmative procedure.

As Members will be aware, the criminalisation of nuisance begging and the creation of the related police powers are matters likely to attract considerable and ongoing

political and public debate, not least as they relate to human rights matters and may engage the provisions of the European Convention on Human Rights.[16]

The definition of "nuisance begging" underpinning the provisions is therefore likely to generate similar political interest, as are any regulations that expand or amend that definition.

The Bill places no limit on the kinds of locations that the Secretary of State can add to the list in Clause 49(2) where begging is deemed to be a "nuisance".

Nor are any constraints placed on Ministers – no conditions that must be satisfied or consultations that must be undertaken – before the list of locations is amended.

In practice, there is nothing to stop a Minister in the future amending the definition by regulations in a way that would mean begging is deemed to be nuisance begging in almost all public places. Any expansion of the list of locations or relevant definitions would have the important additional effect of widening the scope of several new and controversial criminal offences via secondary legislation. If this power is granted, it will be available to Ministers in future governments who may not use it in ways anticipated by the current administration.

The Government justifies the delegation of the power on the grounds that nuisance beggars "may change their behaviour as a result of this legislation and changing patterns of work and leisure may afford new opportunities and new locations for persons to engage in nuisance begging."[17] However, the need to keep the provisions up to date with new patterns of behaviour, both of nuisance beggars and of the potential victims of nuisance begging, need not in itself justify the delegation of power, unless the Government can demonstrate that the need to update the definition would be urgent.

Members may wish to question the Government about the kinds of behavioural changes that it envisages would justify an addition to the list and about why the Government believes a Statutory Instrument is the preferred vehicle for adjusting to any new patterns of behaviour rather than primary legislation.

Schedule 4: Power to amend section 35A(3) of the Proceeds of Crime Act 2002 regarding the default term of imprisonment or detention

Schedule 4 of the Bill amends the confiscation regime in Part 2 of the Proceeds of Crime Act 2002 (POCA). It introduces new sections 35A to 35D into POCA, replacing current section 35 relating to the enforcement of confiscation orders.

---

[16] Home Office and Ministry of Justice, *Criminal Justice Bill – European Convention on Human Rights Memorandum*, 22 November 2023, paras. 172 and 173
[17] DPM, para. 104

New section 35A(3) sets out the maximum default terms of imprisonment or detention that a court may impose for non-payment of a confiscation order. The maximum terms apply by reference to a four-tier sliding scale, based on the size of the confiscation order, with a larger confiscation order being subject to a higher maximum term for non-payment. There are no minimum terms for each threshold on the face of the Bill.

The table in new section 35A(3) replicates the provisions currently in section 35(2A) of POCA, with the same maximum terms and the same sliding scale.

New section 35A(5) also allows the Secretary of State to amend the table in new section 35A(3) to:

(i) Add or remove entries (e.g., to introduce a greater number of levels).
(ii) Alter or replace existing entries (e.g., to amend the maximum terms, or to amend the ranges for each level of the sliding scale).
(iii) Provide for minimum terms of imprisonment or detention.

This power replicates an equivalent delegated power in section 35(2C) of POCA, as the Government rightly notes in the Bill's Delegated Powers Memorandum[18].

However, the Memorandum fails to mention that section 35(2C) – which was inserted into POCA by the Serious Crime Act 2015 – drew criticism from the Delegated Powers and Regulatory Reform Committee when it was proposed. The DPRRC criticised the delegated power allowing the Secretary of State to introduce minimum terms in addition to the maximum terms on the face of the Bill, in part because it would enable secondary legislation that could significantly constrain judicial discretion[19]. The DPRRC criticised the Government's Delegated Powers Memorandum accompanying the 2015 Act for failing to set out the specific reasons why the power to introduce minimum terms was included and noted that, as far as the Committee was aware, there were no comparable precedents in existing legislation (and certainly none mentioned in the Memorandum)[20]. They concluded that "we do not believe the question of whether or not, or how, the legislation should provide for minimum terms is something which should be delegated to subordinate legislation."[21]

The Delegated Powers Memorandum for this new Bill repeats some of these mistakes. Indeed, it fails to even mention that the power allows the Secretary of State to add minimum terms to the table:

> "New section 35A(5) enables the Secretary of State to amend the table in section 35(3). Such amendments may vary the existing entries in the table to modify the amounts in the first column of the table or the maximum amount

[18] DPM, para. 83
[19] DPRRC (2014-15), 2nd Report, HL Paper 15, para. 10
[20] *Ibid.*
[21] *Ibid.*

of the default sentence in the second column. The power may also be used to add additional tiers to the table or to remove tiers."[22]

This Government offers no further justification of the power. In 2014, Ministers responded to the DPRRC's criticisms by suggesting that the tiered structure already points the court towards setting a sentence within a minimum and maximum term, with the minimum term being taken to be the maximum term for the preceding tier. However, it also suggested that the courts were not uniformly applying the tiered structure in that way and the Government might therefore wish to consider further strengthening the sentencing framework in future. The Government said that if the power were exercised to introduce minimum terms, there would still be significant latitude for the courts to determine the appropriate sentence in any given case and "the intention would be to set the minimum term for any given tier at the same level as the maximum term for the preceding tier"[23].

Does this remain the Government's position today? There is no requirement on the face of this Bill for the delegated power to be exercised in line with that "intention". The DPRRC has praised Delegated Powers Memoranda in the past for engaging with their known concerns about earlier legislation[24], so Ministers should clarify whether the Government's position is the same as in the 2014 response, and if not what justifies their change in approach.

[22] DPM, para. 82
[23] DPRRC (2014-15), *8th Report*, HL Paper 46, Appendix 4
[24] For example: DPRRC (2017-19), 39th Report, HL Paper 226, para. 4(f); DPRRC (2019-21), 1st Report, HL Paper 3, para. 3

Appendix I: The Hansard Society Delegated Legislation Review

The Hansard Society has long argued that the delegated legislation system – delegated powers in Bills and the resulting Statutory Instruments – is flawed and now represents one of the most significant constitutional challenges of our time.

With the support of the Legal Education Foundation, we have embarked on a Delegated Legislation Review. As part of the Review, we have been examining the delegation of powers in a range of Government Bills and drawing attention to some of the clauses of greatest concern.[25]

More information about the Review can be found at:
https://www.hansardsociety.org.uk/projects/delegated-legislation-review

[25] For example, Hansard Society (September 2021), *The Health and Care Bill: Delegated Powers* (London); Hansard Society (October 2021), *The Nationality and Borders Bill: Delegated Powers* (London); Hansard Society (March 2022), *The Economic Crime (Transparency and Enforcement) Bill: Delegated Powers* (London)

Appendix II: The role of MPs in the scrutiny of delegated powers

The scope and design of the delegation of power sought in any Bill raise important questions for MPs that go to the heart of their role as legislators. For example:

- To what extent are MPs willing to continue accepting the troubling arrogation of power by the executive (by successive governments) at the expense of Parliament?
- What scrutiny or other safeguards do MPs think are desirable or necessary to constrain the use of delegated powers? Given the inadequacy of scrutiny procedures that apply to delegated legislation in the House of Commons, can they really remedy a delegation of legislative power otherwise deemed unacceptable?
- If Parliament accepts controversial powers in a Bill, it creates a precedent that may be used by government to justify taking similar powers in other Bills in the future. However, if Parliament has reluctantly accepted a power in exceptional circumstances - for example, during the Brexit process when there was a need to legislate at speed - are MPs content for Ministers to rely on that precedent for the establishment of new powers?
- The inclusion of 'Henry VIII powers' enabling Ministers to amend or repeal primary legislation by Statutory Instrument challenges the constitutional principle that Parliament is sovereign; that it is the sole legislative authority with the power to create, amend or repeal any law. How content are MPs for such powers to continue to be a relatively common feature of the law?
- How much discretion do MPs think should be conferred on Ministers by the legislature? Ministers may use broadly defined and ambiguously worded powers in ways that that go beyond the original intention of the legislation. How content are MPs that such powers continue to be claimed by the executive, particularly when in many instances such powers will be available to Ministers in future governments of a different political stripe, possibly decades later, and may therefore be used by Ministers with radically different policy objectives from those who sought the powers in the first place?
- Do MPs think that government should be granted 'reserve' or 'holding' powers, the use of which is not fully explained or defined, simply because it is administratively convenient or because Ministers may desire freedom to act at a later date? Are MPs content that Ministerial claims of exigency and convenience should trump parliamentary scrutiny?
- When Ministers acknowledge that the relevant policy development process - particularly the consultation stage - is unfinished, should they nonetheless be granted powers to act in that area of policy?

If MPs are solicitous of the proper role and function of Parliament and their responsibilities as legislators, then the answers to these questions should inform the debate about the scope of, and safeguards applied to, each clause in a Bill that contains a proposed delegation of power. Changes which tighten the use of powers, limit the extent of discretion, incorporate scrutiny safeguards, or resist the gravitational pull of precedent, are designed to buttress the role of Parliament in

scrutinising future executive action and regulations; they need not interfere with or prevent the implementation of the intended policy.

Published by the Hansard Society

1.17, 1st Floor Millbank Tower,
21-24 Millbank,
London, SW1P 4QP

Tel: 0203 925 3979
Email: contact@hansardsociety.org.uk

The Hansard Society is an independent, non-partisan political research and education society dedicated to promoting knowledge and interest in parliamentary democracy.

For more information about other Hansard Society publications please visit our website at www.hansardsociety.org.uk