

Long criminal trials - a brave new world?

In the last few weeks significant changes have been introduced to the practice, the procedure and the rules which apply to criminal cases. The most significant change was brought about with the introduction of the Criminal Procedure Rules ["Crim PR"]. They came in to force on 4th April 2005. The Crim PR apply to all cases in the Magistrates Court, the Crown Court and the Court of Appeal. However, the effect of the Crim PR will be felt most strongly in the preparation of, and during, long criminal trials, particularly fraud trials.

The Crim PR should not be looked at in isolation but have to be considered together with the Lord Chief Justice's Protocol for the 'Control and Management of Heavy Fraud and Other Complex Criminal Cases' ["the Protocol"] which was issued on 22nd March 2005.

This article considers seven of the changes which are likely to occur in relation to long and complex criminal cases and warns practitioners of some potential problems which they may face.

1. Acquitting the innocent and convicting the guilty

The overriding objective of criminal cases under the Crim PR is to deal with them 'justly'. The Crim PR sets out a number of ways to deal with cases justly. The first is to acquit the innocent and convict the guilty. This sounds uncontroversial but in fact represents an important development as it codifies the idea that a criminal trial is not a game, as it arguably used to be, where a guilty Defendant is given a sporting chance of being acquitted. Defence practitioners should expect the Prosecution to rely heavily on this provision especially in complex and technical cases.

This bulletin provides guidance on a number of significant changes to the substantive law and the procedural rules which apply to Criminal Cases. In the last month a raft of those changes were introduced which will impact on the preparation and conduct of Criminal Trials. It has not been possible to deal with all of the changes, as to do so would involve a bulletin stretching to hundreds of pages. However, we have attempted to provide here an outline of the main changes, we hope, in a helpful way.

The reality is that the Criminal Law seems to change more quickly than any other area of the law at present. At 9 Gough Square we believe it is our responsibility, as part of providing a quality service to our clients, to provide advice and assistance in relation to such important changes. If anyone is interested to know more or requires further advice on any of these articles please do not hesitate to contact Chambers.

2. Grassing up the opposition and others

The Crim PR state that all "participants" in a criminal case must not only prepare and conduct the case in accordance with the overriding objective but must "at once inform the court and all parties of any significant failure to take any procedural step required by these Rules, any practice direction or any direction of the Court". A number of important issues arise from this. The failure must be "significant" but it applies not just to the parties but to participants. A participant is anyone involved in any way with a criminal case. Therefore the CJU, Police Officers, Experts, Probation Officers, Group 4 Security etc must be aware that their failures will be reported to the Court with the possibility of costs sanctions. The larger and more complex the case then the greater the number of participants and the greater the risks of significant failures. The requirement to keep the Court informed of significant failures is inextricably linked to both the active case management powers which the Crim PR gives the Court and to the role of Case Progression Officers (see para 7).

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3. Short and Clear Evidence

Judges must now ensure "that evidence, whether disputed or not, is presented in the shortest and clearest way" (Crim PR 3.2(2)(e)). At Plea and Case Management Hearings, which replace PDHs, in the Crown Court, the Defence will be expected to justify why they need the witnesses that they have asked to attend trial. In long trials the question of which witnesses are needed has often been neglected whilst a 'wait and see' policy ensued. However, the requirement to distill evidence potentially impacts on the Prosecution to a greater extent as they will be asked, especially in long cases, to justify why they wish to rely on some/many of their witnesses.

4. Shorter Trials

Dealing with cases justly also includes "dealing with the case efficiently and expeditiously". The Protocol unashamedly states that "it is essential that the current length of trials is brought back to an acceptable and proper duration". Any case likely to last six months or more, which many fraud cases do these days, must now be referred to the Director of the Prosecuting Authority. It is clear from the Protocol that three months is the target length for complex criminal cases. As well as distilling evidence one of the ways in which Judges will be expected, under the Crim PR, to shorten the length of trials is by the imposition of a trial timetable which will set parameters for the length of speeches and questioning, including cross-examination. Not only are Trials to be shorter but also guidance is given in the Protocol that Abuse of Process arguments (which are commonplace in fraud cases) should, unlike at present, take no longer than a day. In those hearings, full written submissions and not skeleton arguments, will now be expected.

5. Severance

The Protocol states that "Severance for reasons of case management alone is perfectly proper". The endorsement for severance in the Protocol is likely to lead to an increase in successful applications and those who Prosecute will need to consider very carefully the question of severance at an early stage but they should never allow the Judge to rule on the question until the Defence have served detailed Defence Statements. In addition the requirement under the Crim PR to

consider the needs of the victims and witnesses, who might have to give evidence twice or more if severance was granted, will remain a powerful argument against severance.

6. Disclosure

Disclosure has been a thorny problem in both fraud and complex criminal cases. The Protocol states "It is almost always undesirable to give the warehouse key to the Defence". It is to be noted that the Crim PR makes it a duty of the Court to encourage the "participants to co-operate in the progression of the case" (Crim PR 3.2(2)(g)) and that unnecessary hearings should be avoided (Crim PR 3.2(2)(f)). Both the Prosecution and the Defence need to consider their stance on disclosure in the light of those two requirements. If disclosure is a "real issue" in the case then it must be grappled with at an early stage and a timetable set down so that the Trial is not disrupted by the question of disclosure.

7. Case Progression Officers

As a result of the Crim PR the Court, the Prosecution and the Defence must appoint (unless the Court directs otherwise) a Case Progression Officer ["CPO"] whose name and contact details will be kept by the Court. The duties on the CPO are significant. They include monitoring compliance with directions, keeping the Court informed with the progress of the case and being contactable during ordinary business hours. As far as compliance with active case management the buck will stop with the CPOs. Both the Prosecution and the Defence will need to consider with care who at their office is best placed to undertake the onerous obligations, especially in complex cases.

Both the Crim PR and the Protocol provide powerful case management weapons for the Court, the Prosecution and the Defence. If those weapons are used properly along with the Preparatory Hearing regime then the days of the year long fraud trial might just be a thing of the past. Watch this space!

◆ **TOM LITTLE**

Tom was appointed by the Lord Chancellor as a Member of the Criminal Procedure Rules Committee in June 2004

Hearsay: Trust the Jury?

The Criminal Justice Act 2003 ("the CJA") radically reforms the criminal hearsay rules and attempts to bring them in line with civil law. Now the general rule is that all hearsay evidence will be admissible if it falls within a certain category or, alternatively, if it is in the interests of justice. This is a big departure from what criminal practitioners have previously been used to. What follows in this article is an overview for those who need to consider hearsay when preparing cases.

Where we are now

Before the CJA, hearsay evidence was inadmissible unless you could argue its admissibility under various statutory or common law exceptions. The result of these strict rules meant that juries never heard important evidence which may have influenced the outcome of a trial.

Under the CJA, we move from an exclusionary rule to a presumptive category of evidence. In other words, the admissibility of hearsay becomes a "hurdle" not a "closed door".

Section 114 of the CJA offers four primary routes under which hearsay evidence can now be admitted:

1. Invoking statutory exceptions (Sections 116, 117, 119 & 120 of the CJA)





2. Invoking one of the preserved common law exceptions (Section 118 of the CJA)
3. Agreement of all the parties (Section 114 of the CJA)
4. Persuading the court that it would be in the interests of justice to admit the evidence (the "safety valve")(Section 114 of the CJA)

1. Statutory and common law exceptions

Section 116 of the CJA replaces Section 23 of the CJA 1988 and enhances it. Now evidence from witnesses who have died, are unfit, are abroad or cannot be found becomes admissible as of right, provided that the witness can be identified to the court's satisfaction, and that they were both credible and competent to make the statement. The evidence of fearful witnesses is also admissible but, beware, leave is still required for fearful witnesses who may be reluctant to attend court. The only objection to such evidence will be an application under Section 78 of PACE and/or Article 6 of the ECHR. The inability of a defendant to challenge evidence raises potential problems with Article 6(3)(d) of the ECHR which sets out the right of a defendant "to examine and have examined" the witnesses against him as one of the elements of a fair trial under Article 6(1). Whilst the calling of live evidence is not an absolute requirement, breaches of Article 6 may occur if hearsay evidence is admitted other than in situations where there is a genuine impossibility of the evidence being tested.

The admissibility of business records, under Section 117 of the CJA, remains much as it was before. However, the statement is not admissible if the statement's reliability is doubtful. It will be interesting to see whether the types of evidence which a judge considers are doubtful for the Defence are not considered so doubtful for the Prosecution.

The law in relation to inconsistent and consistent statements has also been radically overhauled (Sections 119 and 120 of the CJA) as both will now be admissible as evidence of the truth and no longer solely demonstrative of consistency. This should assist the Prosecution with hostile/reluctant witnesses. Also of note is the fact that the admissibility of recent complaint evidence is no longer confined to sex cases. It is rare to find criminal cases where there is not recent complaint evidence and the impact of these changes should not be underestimated.

2. Common law exceptions

Only some of the common law exceptions to the rule against hearsay have been retained and they are the rules relating to res gestae, public information, reputation, confessions, admissions by agents, common enterprise and experts. It is probably the common enterprise exception which has most general application to practitioners in both conspiracy and joint enterprise cases.

3. Agreement of the parties

To avoid long legal arguments this is likely to be the first port of call for the Prosecution. They will simply ask the Defence to agree that the hearsay evidence is admissible. There will also be cases where the Defence also wish to adduce hearsay evidence. Although it will take some time for the Court of Appeal to deal with appeals relating to the changes to the hearsay rules, both the Prosecution and Defence will need to consider their obligations under the Criminal Procedure Rules to cooperate when considering what stance they take on the admission of such evidence.

4. The "safety-valve"

If the hearsay relied upon does not fall within the statutory or preserved exceptions then a party can still seek to persuade the court to exercise its discretion under Section 114(1)(d) of the CJA and admit the hearsay if it is in the interests of justice to do so.

In deciding whether to admit the evidence the following factors must be considered:

- how much probative value the "statement" has?
- what other evidence has been, or can be, given?
- how important the evidence is in the context of the case as a whole?
- the circumstances in which the statement was made?
- how reliable the maker of the statement appears to be?
- how reliable the evidence of the making of the statement appears to be?
- whether oral evidence can be given and, if not, why not?
- the difficulty involved in challenging the statement?
- the extent to which that difficulty would lead to prejudice?

Long and rather tedious legal arguments can be envisaged with such broad ranging considerations having to be taken in to account!

Multiple hearsay

This is the most dangerous hearsay of all as it amounts to 'Chinese whispers'. That is perhaps why it has been given its own part of the Hearsay Chapter of the CJA. A number of hurdles are placed in front of the admissibility of multiple hearsay the effect of which is likely to reserve its admissibility to business records and like documents.

Safeguards within the CJA

Section 125 of the CJA provides a new power for the court to stop a case where it depends on hearsay and the evidence is unconvincing to the point where a conviction based on it would be unsafe. In such circumstances, the judge may direct the jury to acquit the defendant or discharge the jury and order a retrial.

Under Section 126 of the CJA the court retains discretion not to admit hearsay evidence if the admission would result in an undue waste of time. It would seem that wasting time is fine just so long as it is not an "undue" waste of time!

Procedure

The Criminal Procedure Rules at Part 34 set out the timing and notice requirements which apply to all hearsay and the requirements for objecting to such evidence. Although Part 34.7 of the Rules allows those requirements to be waived it is vital that both the Prosecution and the Defence grapple with the question of hearsay at as early a stage as possible.



Conclusion

The attempt to simplify this notoriously complex category of evidence is welcomed but it has come with a cost. The new law weakens the "best evidence" rule and could lead to miscarriages of justice. Not only will untested evidence be given a probative force which it does not deserve but there is a risk of concoction of evidence or for insincere, ambiguous, misperceived or mistaken statements being put before the court. These dangers have been recognised for centuries thus leading to a continued reluctance to relax the rule on hearsay up until the CJA.

It is also important to note that the new law does not just have the potential to lead to wrongful convictions but also wrongful acquittals. For example, the "absolute admissibility" condition for unavailable witnesses under Section 116 of the CJA has the potential to open the floodgates for bogus alibis from "would be" defence witnesses purporting to be abroad or unable to attend trial.

In response to these difficulties the courts will no doubt refer to the safeguards built into the CJA. The question is will these safeguards be enough to avoid miscarriages of justice?

◆ Will Noble



Bad Character - "All Change?"

The Criminal Justice Act 2003 ("the CJA") has made wholesale changes to a vast area of common law that has been growing and adapting following the 1898 Criminal Evidence Act. The whole approach to bad character changed with one fell swoop on the 15th December 2004 and with the assistance of Lord Justice Rose a month later (Bradley [2005] EWCA Crim 20). The old common law rules have been abolished by Section 99 of the CJA and it is all change. The provisions themselves are a morass of mountains and gateways to negotiate. This article attempts to point the reader in the right direction on matters relating to Bad Character evidence.

In summary, instead of a defendant's previous convictions and any other wider bad character evidence being kept from the eyes (and ears) of the jury unless there was no other option, prosecutors must now consider at the very earliest opportunity the previous history of a defendant and any use to which it may be put at trial. Conversely those cross-examining on behalf of a defendant, who previously needed to establish no justification for cross-examining upon previous convictions and only relevance in respect of other evidence, now need to apply and justify such cross-examination. As between co-defendants the situation may now be rather more straightforward than the mental gymnastics that used to be required following the cases of Randall [2004] 1 WLR 56, and Mertens [2004] EWCA Crim 2252 and others.

What is the meaning of Bad Character?

This is defined in wide terms as "evidence of, or of a disposition towards, misconduct on his part" excluding the current offence or any misconduct during the course of that investigation. Misconduct is "the commission of the offence or other reprehensible behaviour." The arguments as to what may constitute reprehensible behaviour may well be many and various.

It seems likely, in addition to fairness safeguards that are included in the CJA, that Section 78 of PACE will apply to all prosecution applications.

Bad Character of the Defendant

The "gateways" for admission of bad character of a defendant are found in Section 100(1) and they need to be considered with care:

- (a) *all parties to the proceedings agree to the evidence being admissible. Self explanatory*
- (b) *the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it. Again, straightforward.*
- (c) *it is important explanatory evidence. Explanatory evidence is evidence without which it would be impossible or difficult to understand the other evidence and its value is substantial in understanding the case as a whole. Leave is not required.*
- (d) *it is relevant to an important matter in issue between the defendant and the prosecution. The matters in issue include whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence. (To my mind this is an extraordinary piece of drafting requiring mental gymnastics to assimilate! In what circumstances the last phrase will occur will be interesting.) Propensity may be established by evidence that he has been convicted of an offence of the same description or of the same category. Offences of the same category are Theft Act and Sexual offences against those under 16 (CJA 2003 (Categories of Offences) Order 2004).*

In section 103(b) of the CJA the matters in issue also include the question as to whether the defendant has a propensity to be untruthful except where it is not suggested that the defendant's case is not untruthful in any respect. The Explanatory Notes published with the CJA indicate that this section was to allow the admission of perjury or other offences involving dishonesty. The fact that a defendant has been convicted after a not guilty plea will also be capable of admissibility. The court must consider the length of time between the offences charged and the evidence sought to be relied upon and there is a specific exclusion provision if the admission of the evidence would have "such an adverse effect" on the fairness of the proceedings. The word 'such' places a significant hurdle for defendants seeking to exclude such evidence.



- (e) *it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant.* This gateway is open only as between defendants. It preserves a similar position to that of the Criminal Evidence Act 1898 and the common law line of authorities in particular Randall (as above). It must be evidence which is to be (or has been) adduced by the co-defendant or which a witness is to be invited to give (or has given) in cross-examination by the co-defendant (section 104(2)). However, evidence which is relevant to the question whether the co-defendant has a propensity to be untruthful is only admissible if the nature or conduct of the defendant's defence is such as to undermine his co-defendant's evidence (section 104(1)).
- (f) *It is evidence to correct a false impression given by the defendant.* The prosecution evidence adduced must go no further than is necessary to correct the false impression, which may be an express or implied assertion. The defendant is responsible for the assertion if it was made by him in the proceedings, or made by him when questioned or charged and evidence of this is given, or made by a defence witness, or intentionally elicited in cross-examination by the defendant, or, finally, is made out of court and the defendant adduces evidence of it. The assertion may also be made by means of his conduct in the proceedings (other than while giving evidence) including his dress. If it appears just to do so, the court may treat the defendant as being responsible for the misleading impression.
- (g) *the defendant has made an attack on another person's character.* Section 106 explains this gateway. The defendant loses his shield in a very similar way as under the old law, save that he does not have to give evidence now to lose it. There is a safeguard against the admission of the evidence if it would have such an adverse effect on the proceedings that the court ought not to admit it. The court must also consider the length of time between the matters to which the evidence relates and the matters which form the subject of the offence charged.

Bad Character of the Non-Defendant

In respect of a non-defendant's bad character, the gateways and explanations are found at Section 100 of the CJA. There are three circumstances in which such evidence will be admissible:

- (a) it is important explanatory evidence.
 - Important explanatory evidence is defined in a similar way to that of gateway (c). In assessing the probative value of the evidence the court must bear in mind four factors in addition to any others considered relevant:
 - (i) the nature and number of events or other matters
 - (ii) when they happened or existed
 - (iii) if similarity of misconduct is relied upon, the nature and the extent of the similarity
 - (iv) where the evidence is of a person's misconduct and it is suggested that that person is also responsible for the misconduct charged and the identity of the person responsible for the misconduct is in dispute, the extent of the evidence that shows that the same person was responsible.
- (b) it is of substantial probative value in relation to a matter in issue and it is of substantial importance to the case as a whole; or
- (c) all parties agree to the admissibility of the evidence.

Serving Notice and Applications

Notice is required in respect of any application, although the prescribed forms may be varied, and applications may be made orally. (The notice provisions are contained within Part 35 of the Criminal Procedure Rules, which can now be found in the second supplement to the current edition of Archbold). Time limits may be shortened or extended even after expiration. The main time limits to be aware of are the prosecution's application to adduce evidence of a Defendant's bad character is to be made within 14 days of committal or transfer, the Defendant's application to exclude is to be served within 7 days (this is treacherously tight) of receipt of the Prosecutor's notice. Applications in relation to a Non-defendant's or Co-defendant's bad character must be made within 14 days of primary or purported primary disclosure

Recent Court of Appeal Guidelines

The first guideline case that has attempted to bring order to the chaos (set out above) is that of Hanson, Gilmore and Pickstone [2005] EWCA Crim 824. The case only dealt with applications by the prosecution to adduce previous convictions in three separate cases in relation to propensity to commit like offences. The Court hoped (in contrast to CPS practice that I have seen) that applications under the CJA would not be made routinely, but based on the circumstances of each case. This may be more of a hope than a reality, bearing in mind the short notice period for the prosecution to take the necessary decision. The Court of Appeal outlined three questions to be considered where propensity to commit the offence is relied upon:

- (i) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
- (ii) Does that propensity make it more likely that the defendant committed the offence charged?
- (iii) Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?

Where propensity for untruthfulness is relied upon the tests are different. Unless the defendant has contested previous proceedings and been disbelieved by a jury, or the offence itself shows dishonesty (eg false representations or perjury), it is unlikely to be probative of an issue. The Court of Appeal will be slow to overturn a trial judge's discretion and will apply the "Wednesbury test". The judgment is a must-read (I am afraid) in respect of any Prosecution application in these early days of the CJA's application. The Court of Appeal in a second series of cases, R v Bovell, R v Dowds, Unreported 25th April 2005, declined to give any further additional guidance than that set out in Hanson.

Conclusion

The rationale behind the CJA can only have been a desire to increase the conviction rate, especially in the areas of sexual offences and dishonesty. Whether this will be the effect only time will tell. Many words have already been written in respect of these far-reaching changes to this area of law by academics and practitioners alike. Expect many more in the months to come as the Court of Appeal grapples with first instance decisions. No doubt with a systematic approach and regular use, as with all of the new changes, a workable regime will emerge.



The New Sentencing Provisions

An Overview and Some Practical Considerations



A judge sitting at Harrow Crown Court commented recently *"all these new [sentencing] provisions are not so much a minefield as much as they leave one feeling as though they're walking in thick fog"....*

A very thick fog indeed, as the Criminal Justice Act 2003 ("the CJA") contains no less than 163 sections and 30 schedules dealing with sentencing. There are some entirely new provisions as well as some minor amendments to the old sentencing regime. It is not possible to deal with all the new provisions here, but rather it is hoped that this article can give an overview of some of the main changes and the new sentences available.

For the first time, the aims of sentencing are defined in section 142(1) of the CJA as being:

- a) punishment of offenders
- b) reduction of crime
- c) reform and rehabilitation
- d) protection of the public
- e) reparation by offenders

It is also clear that one other aim of the CJA was to achieve consistency in sentencing across the whole of England and Wales. With that in mind the Sentencing Guidelines Council was created in 2004 in order to frame guidelines to assist the courts. The Council is an independent body which took over responsibility for developing comprehensive sentencing and allocation guidelines.

Since coming into being the Sentencing Guidelines Council has published three Guideline Documents which can be found on www.sentencing-guidelines.gov.uk:-

1.Reduction in sentence for a guilty plea

2.Overreaching Principles - Seriousness

3.New Sentences - Criminal Justice Act 2003

The main thrust of what now follows is to alert the reader to the content of the third of these three Guideline Documents - the New Sentences. However it is first worth mentioning the following:-

1.Reduction in sentence for a guilty plea

Already in force, many will be familiar with the provisions, which can be summarised as follows:-

- A guilty plea is a separate issue from mitigation and aggravation generally
- The sentencer should consider all mitigating features when deciding the most appropriate length of sentence before calculating the reduction for a guilty plea
- There is a sliding scale for the reduction in sentences ranging from a maximum of one third (where the guilty plea was entered at the first reasonable opportunity in relation to the offence for which sentence is being imposed), reducing to a maximum of one quarter (where a trial date has been set) and to a maximum of one tenth (for a guilty plea entered at the door of the court or after the trial has begun).The application of the reduction on the sliding scale may properly form the basis for, for example, imposing a community sentence instead of a custodial sentence. It will be interesting to see how the sliding scale is applied in practice especially in light of the recent u-turn by the Court of Appeal in relation to judicial indications of sentence in the case of *R v Karl Goodyear* [2005] EWCA Crim 888

2. Overreaching Principles - Seriousness

The Guidelines apply to sentences for those aged over 18. Consideration of the statutory provision in Section 142 (1) of the CJA determines the type of sentence and level or length. Other considerations are level of culpability, level of harm, and the assessment of the balance between the two. The reader is recommended to refer to the Sentencing Guidelines Council documents for the aggravating and mitigating factors (but note, it is plainly not an exhaustive list) and for custody thresholds.

3. New Sentences - CJA 2003

Of significant importance is the creation of a number of new sentences. A brief overview of the most important ones are set out below.



Community Orders

The CJA provides for a single generic community sentence to which a number of conditions can be attached. These include:-

- Compulsory unpaid work (this replaces Community Punishment Orders. Please note that the maximum number of hours that can be imposed has been increased to 300)
- Specified activity requirement
- Programmes aimed at changing offending behaviour (for example Think First)
- Prohibition from certain activities (as part of the sentence for an offence, so seemingly separate from any ASBO or SOPO requirements)
- Curfew ('tagging')
- Exclusion orders
- Residence requirement
- Mental Health treatment (with the offender's consent)
- Drug Treatment and Testing (with the offender's consent)
- Alcohol treatment (with the offender's consent)
- Supervision
- Attendance Centre requirement for those under 25.

Although in theory this will allow the courts to tailor a sentence to the offender as may be required to achieve the aims of sentencing, on another view, this sentencing option compares to an 'all you can eat buffet' and one cannot help but think that there are some serious potential difficulties with this type of sentence. For example:-

- over-dosing (too many requirements - setting an offender up to fail) which essentially ups the sentencing tariff;
- lack of resources (it is well known that the Probation Service is over-stretched and under-resourced);
- the inevitable problems associated with breaches of these sentences.

Deferred or Suspended Sentences

These are another area where the Probation Service's resources will be tested, as the CJA now requires that offenders, who may be required to comply with any requirements that the court thinks are appropriate, will be monitored and reports be prepared at the end of the deferment period. Failing to comply with a requirement will result in the offender being brought back before the court early for sentence.

Similarly suspended sentences (see Sections 189-195 of the CJA) can be imposed with a condition to undertake specified activities in the community, supervised it would seem by the Probation Service!

Custodial sentences of 12 months or less

The CJA introduces new forms of sentences (which are not yet in force) in respect of custodial sentences of under 12 months:

1. Custody plus; and
2. Intermittent custody.

Custody plus involves a short period in custody (up to 3 months) followed by a minimum period of 6 months' supervision in the community. The court will have to specify the length of each part and attach specific requirements. (In other words, more work for the Probation Service!)

Intermittent custody means exactly that. Designed to enable offenders to keep jobs, education etc. it is currently being piloted. The feedback we have heard from Preston, one of the pilot areas, is positive so far.

Custodial sentences of 12 months or more

There are new arrangements for prisoners' early release on licence. The CJA provides for the early release of prisoners serving more than 12 months. They will now automatically be released at the halfway point of the sentence. The second half of the sentence will be subject to standard licence conditions plus any other conditions that the Secretary of State may order. For the first time, a sentencing court may recommend such conditions.

Note that recall is now an executive decision carried out by the prison and probation service. There will be a right of appeal to the Parole board, who will scrutinise decisions to recall. This new procedure may well result in a growth area for lawyers (subject to funding being made available!). Section 257 of the CJA, gives the Home Secretary power to add days to prison sentences, under prison rules, where disciplinary offences are committed in custody. Again, something of which offenders should be advised.

It is important to note that for those who may be classified as Dangerous Offenders, the CJA provides for life imprisonment and a new form of extended sentence.

IPPs and DPPs

The CJA also creates a new type of sentence known as Imprisonment for Public Protection (IPP, section 225 of the CJA) and in the case of a youth it will be known as Detention for Public Protection (DPP, Section 226 of CJA).

A court must determine whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences. In the case of an offender under 18 or of an offender not previously convicted of any relevant offence (any specified offence in England) the court must take into account all such information as is available to it about the nature and the circumstances of the offence, any pattern of behaviour of which the offence forms part and any information about the offender which is before it.

A sentence of imprisonment for public protection is a sentence of imprisonment for an indeterminate period. The sentencing court will at the time of passing sentence determine the tariff of the period to be served before the offender might be released by the parole board. An offender sentenced to a term of IPP will remain on licence on release for at least the qualifying period of ten years after which he may apply to the Parole Board for an order directing that his licence should cease to have effect. Note that offenders serving a discretionary life sentence rather than an IPP will be on licence for the rest of their lives.

The decision making process with regards to life sentences or IPP is this; the offender must be over 18, convicted of a serious offence and the court is of the opinion that there is significant risk to the public of serious harm occasioned by the commission by the offender of



further specified offences. Consideration has to be given as to whether the offence carries a maximum of life

If the offence does not carry a maximum of life the court must pass a sentence of IPP (i.e. even though the offence may have a maximum of ten years). If, on the other hand the offence does carry a maximum of life imprisonment the court must still pass a sentence of IPP unless it considers that the seriousness of the offence or the offence and one or more offences associated with it, is such as to justify the imposition of imprisonment for life.

Extended Sentences

Extended Sentences are now provided for in Section 227 of the CJA. An extended sentence can be imposed if the offender is aged 18 or over and is convicted of a specified offence other than a serious offence and the court considers that there is a serious risk of serious harm to members of the public by the commission of a further specified offence.

The sentence has two components 'the appropriate custodial term' and 'the extension period'. The appropriate custodial term is the term of imprisonment, which would otherwise be imposed in the usual way which must be of at least twelve months. The appropriate custodial term itself must not be increased to provide for greater protection. The extension period is the period of licence which follows release from sentence. It must not exceed five years in the case of a violent offence or eight years in the case of a sexual offence and in any event the aggregate length of the appropriate custodial term and the extension period must not exceed the maximum sentence for the offence.

The impact of all these new provisions is yet to be felt, but watch this space or more likely the lack of space in prisons!

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Andrew Baillie QC
Andrew Robertson QC
Gary Burrell QC
Michael Joyce
Frederick Ferguson
Philip I. Henry
Martin Pinfold
Simon Carr

Gaurang Naik
Jonathan Loades
Rosina Cottage
Sally Bradley
Bozzie Sheffi
Ed Lucas
Adrian Maxwell
Rajeev Shetty
Melanie Winter

Tom Little
Busola Johnson
Giles Mooney
Cleo Perry
Will Noble
Robert McAllister
Emily Radcliffe
Oliver Millington