Reform of the criminal law - the Law Commission's 14th Programme consultation

Ruby Ward and Roseanna Peck

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As required by statute, the Law Commission of England and Wales undertakes periodic public consultations to establish what areas of law it should review in its next Programme of Law Reform. Applying criteria agreed with the Lord Chancellor a draft Programme of Law Reform is then submitted to the Lord Chancellor for approval. The 13 th Programme, agreed in 2017, included 14 projects. The Commission has identified several themes and ideas which could feature in its 14 th Programme, including four potential areas of law reform relevant to the criminal law.

Review of Appeal Powers in the Criminal Courts
This project would be the first comprehensive and holistic review of appeals powers in the criminal courts in decades. It would focus on a range of technical reforms to solve the problems that have been generated by incremental legislative change to the Court of Appeal (Criminal Division's) (CACD) powers. The project would aim to ensure that the CACD has appropriate powers to guarantee public protection and to deal with offenders in accordance with the will of Parliament.

The project could consider a wider review of the myriad appeal rights spread across legislation outside of the Criminal Appeal Act 1968. It could explore reforms to the tests governing appeals against conviction and sentence (both by the defendant and by the Attorney General under the unduly lenient sentence scheme), and referrals from the Criminal Cases Review Commission (CCRC) to the CACD. Finally, the project could extend to appeals from the magistrates' courts to the Crown Court.

Reform of appeal powers could generate much-needed efficiencies within the criminal courts, as well as provide clarity and simplicity.

Technological Advances and Procedural Efficiency in the Criminal Courts
The challenges presented by the coronavirus pandemic have accelerated the use of online hearings and remote participation in court proceedings seems likely to be an enduring aspect of the criminal justice system. A project to assess how well the criminal courts are keeping pace with technological advances and seek to ensure that the law allows efficient and effective use of the opportunities new technology offers is therefore timely.

Stakeholders have suggested that the way in which witness evidence is adduced has not kept pace with modern technology and is neither the fairest nor the most effective way of conducting trials. This project could examine whether pre-recorded evidence in chief should be more widely used, including recording of witness statements by police body-worn cameras.

This project would seek to improve the efficient administration of criminal justice and ensure that the rights of those involved in hearings, and the rule of law, are properly protected.

The Search, Production and Seizure of Electronic Material
Electronic materials are increasingly important in criminal investigations and prosecutions yet the law governing their search, production and seizure is not fit for purpose.[1] This project would aim to ensure that the legal framework provides law

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enforcement agencies with the powers necessary to investigate crime and obtain evidence, whilst applying effective safeguards to ensure appropriate use of those powers.

Three issues could be considered within this project. First, the necessity of powers to search electronic devices not contingent on premises, or to search electronic data directly. Second, the efficacy of the current powers of a constable to require production of electronic data accessible from premises.[2] Third, the further regulation of data extraction devices beyond the provisions relating to the consensual extraction of data currently before Parliament in the Police, Crime, Sentencing and Courts Bill 2021.

Contempt of Court

The law of contempt has developed since its origins in royal courts, once used by Kings against their enemies, to address a range of behaviours that affect court proceedings. Our previous reviews[3] have explored specific elements of modern-day contempt--scandalising the court, juror misconduct and internet publications, court reporting, and contempt in the face of the court--but recent high-profile cases[4] have raised a potential need for a holistic review, which could include contempt in the face of the court, a project we consulted on but have not yet concluded.

A wider review of contempt could consider other areas. First, the case for full codification of the law of contempt and how best to address current inconsistencies. Second, the distinction between "civil" and "criminal" contempt, which currently does not correspond to the generally accepted distinction between civil and criminal wrongs, and whether the distinction should be abolished in the context of contempt (as the Victorian Law Reform Commission has recently recommended).[5] Third, whether the concept of contempt, with its overtones of disrespect, still appropriately reflects the harms it seeks to counter.

Consultation

The Commission invites views on these four potential projects and would welcome ideas for other law reform projects. Full details of the 14 th Programme and information on how to respond to the consultation are available on the Commission's website: *www.lawcom.gov.uk/14th-programme/* . The deadline for responding is 31 July 2021.

Research assistant and legal assistant in the criminal law team at the Law Commission.

Footnotes

1 Law Commission, *Search Warrants* (2020), Law Com No 396, Ch.18.

2 Under ss.19(4) and 20(1) of the Police and Criminal Evidence Act 1984.

3 Available at *www.lawcom.gov.uk* .

4 See, for example, *SFO v O'Brien* [2014] UKSC 23; *AG v Yaxley-Lennon* [2019] EWHC 1791; *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167; *R (Finch) v Surrey* [2021] EWHC 170.

5 Victorian Law Reform Commission, *Contempt of Court Report* (2020), Recommendation 59.

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