**Internet ASBOs** More loss of civil liberties

# CBQ

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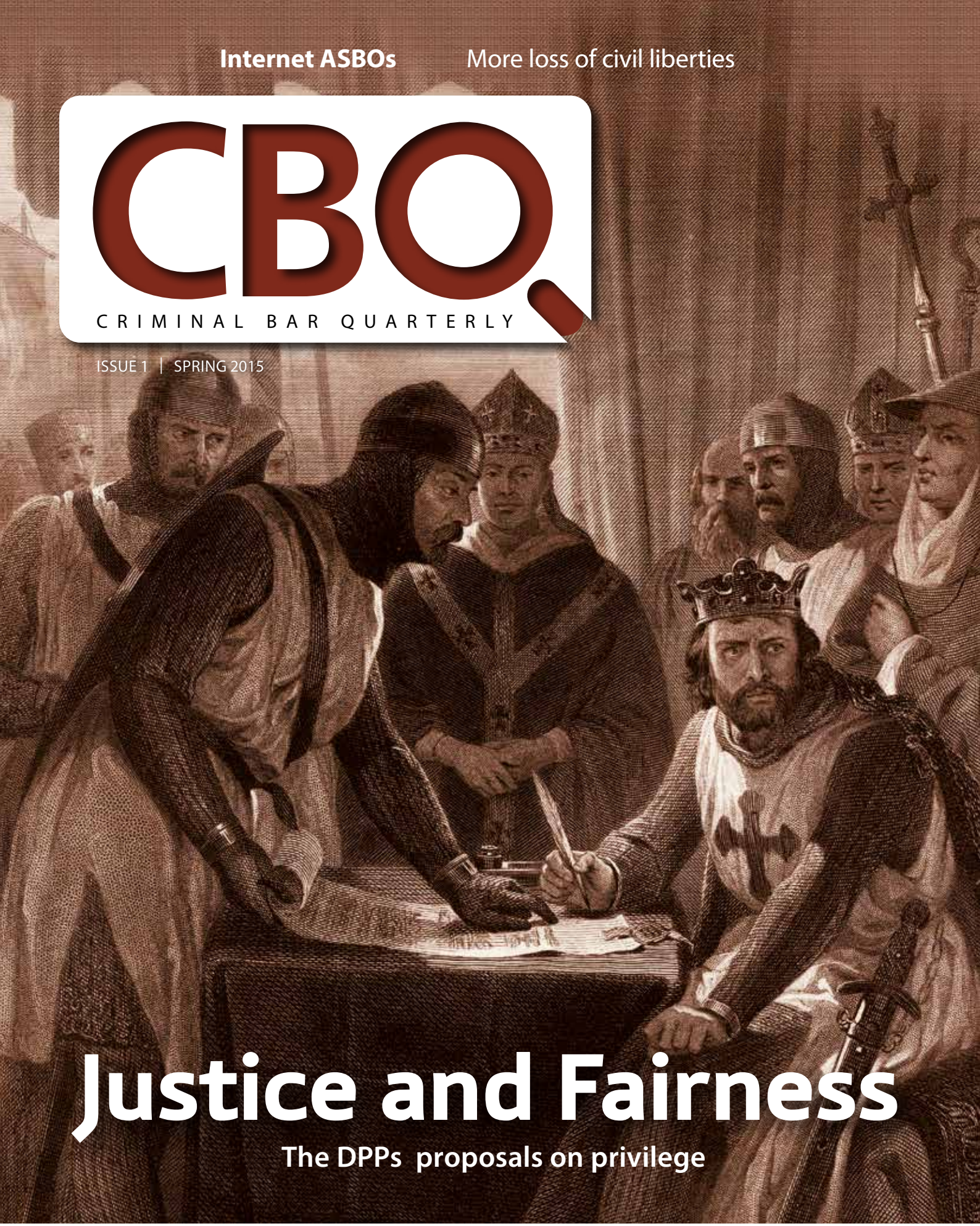

# Justice and Fairness

## The DPPs proposals on privilege

## Public Legal Education

**The cornerstone of the justice system**

Publication of

THE CRIMINAL BAR ASSOCIATION OF ENGLAND & WALES

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## FEATURED IN THIS ISSUE







# Victims First

EDITOR
**John Cooper QC**

A few weeks ago I attended the Better Courts Conference in London.

Set up by the Centre for Justice Innovation, it presented two days of probing, critical and at times, cutting edge discussion on the future of our court system.

Naturally, much of it was occupied with the future of our criminal courts and the quality of speakers made attending the event entirely worthwhile.

Perhaps the highlight of the conference was the keynote speech by Sir Keir Starmer QC who spent some time graphically describing how the criminal justice system presently leaves victims exposed and vulnerable from the moment of complaint to the ultimate verdict.

It was refreshing to hear the former DPP emphasize that there is an imperative to improve the whole experience, or journey, as he put it, of the victim through the process, but that any much needed change must not be at the expense of a fair trial to the defendant.

It is at times difficult for those of us brought up, trained and educated in the criminal justice system to conceive of a new process which actively embraces the victim as an essential part of the regime. Indeed, the rights of the defendant have only recently, in legal terms, been established, it was in 1898 that a defendant could finally give evidence in his own trial and it was but a blink of the eye since the vital protections offered by PACE in 1984.

But it is time for those involved in the criminal justice system to take a step back and begin to address and perhaps reposition the victim into the centre of the process.

The criminal justice system works because the majority of society trust and respect it. Placing the victim at the heart of it will strengthen that bond, but to do so will require a radical reconsideration of the system and the demise of a number of sacred cows.

Like it or not, that debate will happen and the criminal bar needs to be engaged within it with an open mind. ■

25 Bedford Row


# Letter from the Chair

CHAIRMAN'S COLUMN
**Tony Cross QC**

No one said it would be easy being the Chairman of the CBA. No one though said quite how difficult it would be!

The role of Chair of the CBA has changed dramatically over the years. In recent times the job has become more and more challenging.

Industrial action, political negotiation, PR duties, statements to the press and media duties, education, professional discipline, negotiations with Government, with other bodies from the DPP to the Victim's Commissioner, making representations to all and sundry, Bar Council, GMC, organizing this and that, and not least countless ceremonial duties.

This is but an outline of the work that the modern Chairman has to deal with. All this places more and more responsibility on the other officers who also must try and run their practices and daily lives. Were it not for Aaron Dolan and the officers (and other volunteers) and the support of others in the Bar Council then the whole edifice would come tumbling down.

> "The CBA must modernize. We must make sure that the office of Chairman is open to members throughout our land."

It is time for change. The CBA must modernize. We must make sure that the office of Chairman is open to members throughout our land. I grow increasingly concerned that it is becoming more and more impossible for a non-London practitioner to play as full a role in the Association as is necessary. I have formed the view that it is impossible for the role to be performed as it should be by a part-time Chairman/Woman. I have therefore decided to ask the officers to appoint a sub-committee to look at how this might be achieved. This is all too late for me and my successor but we must, if at all possible, explore all options.

Meanwhile we carry on doing what we are best at advocating our cause not least through these pages. ■

# Internet ASBOs for hate crimes: what are the challenges?

Preface
Internet ASBOs

Contributor
**Lyndon Harris**

In the struggle against Internet trolls, cyber bullying and the general way in which the advent of the Internet has caused problems for the criminal law, over the weekend the latest idea to combat the evils of the internet appeared: Internet ASBOs.

Quite aside from the fact that Parliament repealed the ASBO last October (as they were considered to be ineffective and were being worn as "a badge of honour" by errant youngsters) and so perhaps the term is somewhat inappropriate, one has to wonder whether this is this a good idea. The proposal, or at least the idea that the APPG Inquiry into anti-semitism has asked the CPS to look into, is that users of social media who persistently spread racial hatred online could be made the subject of a court order prohibiting them from accessing social media.

One assumes this would work in the same way that a Sexual Offences Prevention Order prohibits a person convicted of a sexual offence accessing the Internet, possessing any device without the capability of storing internet history and from deleting that history or any other such permutation of restrictions designed to protect individuals from online sexual offending. Similarly, in the way that a restraining order prohibits an abusive ex-partner from contacting etc, the victim of harassment, or a Criminal Behaviour Order (the ASBO replacement: side note, little more than a rebrand) prohibits a youth from congregating with certain individuals etc., an "Internet ASBO" could prohibit the use of social media sites.

This is not a new idea, merely the expansion of something that has been around for quite some time: the behaviour order. England and Wales has many behaviour orders, enabling courts to prohibit various types of behaviour, and so in theory at least, there is nothing objectionable about extending this power to online abuse.

However, an examination of the practical challenges of policing those who breach such an order may prove to be the death knell of the Internet ASBO. We know already that the police do not have sufficient time or resources to "police the Internet" and there have been many examples in recent years of widespread flouting of court orders (eg the images purporting to be of Venables/Thompson that seem to do the rounds every couple of years). The question remains: is this workable? If the order is unable to be enforced, then what use it?

Behaviour orders are preventive, not punitive, and so the idea is that they stop future offending (being imposed after the commission of an offence). Undoubtedly they are a useful tool, but in some cases perhaps the issue of Internet abuse should be tackled in a more proactive rather than reactive way, in order to stop the offending giving rise to the order taking place in the first place.

It will certainly be interesting to see what the CPS's response is. ■

Barrister, General Editor of *Current Sentencing Practice*; Editor of *Criminal Appeal Reports (Sentencing)*
This article first appeared on *Halsbury's Law Exchange*: http://www.halsburyslawexchange.co.uk/internet-asbos-for-hate-crime-what-are-the-challenges/

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# Justice and Fairness

Preface

The DPPs proposals on privilege

Contributor

**Richard Gibbs**

Justice is often equated, rightly, with fairness and it is often the case that when we hear calls for justice to be done for someone or in a certain situation, what is actually being called for is fairness. Whatever the many faults of the English criminal justice system, the cornerstone of fairness is the ideal which runs throughout everything the courts aim to achieve. It is expected that the law our Parliamentarians pass are intended to be fair (whether this is achieved or not is a matter for others to determine) but it is also expected – and crucial – that the processes by which the courts enact and operate these laws must be fair.

Whilst it is a truism that every matter which comes before the courts is, for those involved, probably the most important thing that they will ever face, it has to surely be the case that the deprivation of liberty, since the abolition of the death penalty, is the most serious and severe sanction that our legal system can impose. However case-hardened and hackneyed trial counsel and lawyers, police, the judiciary and the specialist media may become, we should never forget that. In this year where we celebrate the 800th anniversary of Magna Carta, the very document which enshrines fairness – in reality and perception – as the essence of our criminal justice system, we should afford ourselves the opportunity to reflect on how much we have managed to maintain that central essence.

## The Burden

Many who quote Magna Carta, who fall back on its provisions to support their arguments in relation to the criminal law in particular, site a myriad of its terms. However, one does not need to be an expert in the wording of that great document to know that perhaps the greatest single point is the right to trial by jury where the principle that the defendant is innocent until proven guilty – beyond all reasonable doubt – by the Crown, is enshrined clearly. The principle which underpins this; that it is for the state with its vast armoury of investigative powers to shoulder the immense burden of satisfying 12 jurors of the guilt of the defendant is central to everything our Criminal Justice System stands for. Intellectually it must surely be beyond argument that those making the proposition of guilt – the Crown – must convince the decision makers of the jury of the point the prosecution seeks to make. Of course, this is a simplification and there are many inferences a jury can reasonably draw from a defendant's comments – or their silence – and in certain specific situations that burden is

reversed or limited. Fundamentally though, it is hard to disagree with the centrality of the established burden of proof; quite simply, it is unarguably fair.

However, its also hugely inconvenient for the prosecution in every case. As all of us who have had to stand before a jury and try to convince them of the guilt of a defendant – especially when we are clear in our own mind that they are guilty – having to shoulder that burden can be a huge cross to bear. Prosecutors find it frustrating when points have to be proven; of course we do. Undoubtedly – and there is a wealth of evidence on this point – complainants and witnesses find the need to relive the events to which they bear testimony, an extremely uncomfortable and sometimes frightening task. Being cross-examined is potentially even more uncomfortable and for some categories of witness, this sense of foreboding must be exponentially heightened.

## Rape And Sexual Offences

In recent years a spotlight has been rightly shone upon the travails of those making complaints of rape or sexual offences; far too frequently, it has been the case that those called upon to give evidence have felt that the way in which they have had to relive their ordeal has been as traumatic in some ways as the original event. Undoubtedly, some counsel have gone too far in unfair cross examination. The courts have tried to put in place steps to alleviate this; there is better training for advocates than ever before; special measures, ABE interviews and many other innovations are aimed at not just mitigating these very real problems but are also aimed at retaining that essential, central element of fairness within the trial process.

Rightly, the CPS have been concerned at the relatively low level of convictions for rape in particular; the current DPP Alison Saunders has made, and continues to make, laudable efforts to address this and to actively focus on ways in which the rate of convictions for sexual offences and rape can be increased and means by which the obtaining of best evidence – whilst simultaneously seeking to make the experience as painless as possible for the complainant – can be achieved. No doubt can reasonably be maintained as to the importance of these goals and the very real nature of them.

However, it is important that in our determination to see justice done for complainants, we sound a cautionary note. The DPP has recently set out a number of proposals for how the increase which is currently being seen in rape convictions can be maintained and also how the DPP seeks to amend the trial process to tackle the problem of rape complainants feeling ambushed in court. At this point, let me emphasize that like all other members of the Bar with whom I've ever spoken, I have no desire to see complainants pilloried, unfairly impugned or unnecessarily attacked for any reason. I do have a desire, however, to ensure that the complaint against anyone I defend is advanced and set out clearly and fairly and that means having the ability to properly test its veracity. After all, until a jury return a guilty verdict, the complainant is not automatically a victim; it is noticeable that in recent years prosecuting authorities have begun to refer to complainants/victims interchangeably; all of us who pride fairness in the criminal justice system should be concerned about this as it fundamentally demonstrates a presumption of guilt based on no objective testing of the evidence.

To digress, if the defendant was automatically called the "condemned" or "the perpetrator" from the moment they walked into the court, we would consider that absurd. So why is it acceptable to use such loaded terms for prosecution witnesses?

## Proving Consent?

The DPP has proposed that the question of consent in rape cases should be looked at differently to how it currently is; that a woman who is so intoxicated as to not be aware of the actual point at which it is alleged there was no consent, should not be expected to demonstrate that there was no consent forthcoming. This is not far from a suggestion – as appears to have been mooted in the current consultation – that those facing such allegations, should be expected to demonstrate that there was consent in order to rebut the charge of rape made against them. It is hard to see that as anything other than a reversal of the burden of proof.

At this point, the usual counterpoint to this argument relies upon the difficulties which complaints face as outlined above. Reiterating the problem should not be seen as either providing a solution to the problem. Nor is it a justification for creating an equally damaging unfairness. There is, it must be said, a tendency amongst some in this debate to do that all too often and one is tempted to draw the conclusion that at least among some – perhaps those who view victimhood as a self defining and conclusive category – the interests of justice and fairness mean simply removing the inconvenience of that ancient burden of proof simply to maximise the chances of conviction. This cannot be right.

## We Must Be Realistic

Giving evidence in court, especially about matters such as rape and sexual offences is undoubtedly a difficult and painful experience for all involved. Let us simply be honest with ourselves and with those who come to the courts seeking justice and accept that whatever steps we take to make the task easier, it will never – perhaps can never and should never – become easy. This is not a counsel of despair; there are plenty of positive proposals that the DPP has made such as those surrounding the nature of disclosure of the defence case at an early stage and in a clear way and these proposals have considerable merit for making the task of giving evidence in such cases a less terrifying experience for those involved.

But in this 800th year of Magna Carta we need to be extremely careful that we are not, in our aim to make life easier for complainants and witnesses, enshrining great unfairness. The burden of proof must remain where it is and it must still be the case that it is a difficult burden to overcome. Those who prosecute and in particular the CPS as an institution, must remain objective and must guard against inadvertent presumptions of guilt and operative reversals of the burden through lazy language or too great a desire to simply see convictions rise. To do otherwise would be unfair and it would be unjust; no amount of reiterating the problem will change that. ■

No 5 Chambers

# Public Legal Education: The cornerstone of the justice system

Preface
Citizenship Foundation

Contributor
**Sufiya Patel**

When you ask most people to think about the law they will say things like "police", "jury", "courts" and "prison". If you ask them to describe a lawyer they will usually say something like "posh, educated, elitist", maybe even throwing in "scary" or "intimidating" and "someone who is not like me".

Citizenship has been part of the national curriculum since 2002. Schools that follow the national curriculum have to teach some basic facts about the legal system, including "precious liberties" enjoyed by citizens in the UK, "the nature of rules and laws and the justice system", and "different sources of law and how the law helps society deal with complex problems". However, large swathes of schools don't have to follow the national curriculum as they are academies, independent schools or free schools. In addition, there have been challenges by the Government who in the recent past haven't regarded citizenship as important as other subjects. They have preferred to focus on things such as "employability" or the more traditional subjects. Even

in the schools where the national curriculum is followed, specialist citizenship teachers – faced with an uncertain future – have been on the decline.

When I speak to my peers, who were not themselves the beneficiaries of citizenship as a taught subject, their source of information about the law comes from TV and Google. So, there is a real need to ensure people are taught about the law from a young age, ideally in schools. Support for citizenship education and, therefore, legal education is further undermined by AQA, a leading exam board, dropping its A level in citizenship studies. This may seem innocuous but it sows the seed in the minds of teachers and parents that, instead of *strengthening* the citizenship provision, they really shouldn't be too concerned about it.

People don't think the law impacts them much. Many people perceive the law as one-off events such as: buying a house or writing a will. They don't see law as something that affects their daily life or as a mechanism that helps society work. So, unless they have a particular interest, people will deal with legal matters in much the same way that many of us deal with our health: "I have a problem so I am now going to the doctor and I hope it's not too painful".

This is why Public Legal Education (PLE) is critical. In 2007, the PLEAS Taskforce defined PLE as providing "people with awareness, knowledge and understanding of rights and legal issues, together with the confidence and skills they need to deal with disputes and gain access to justice. Equally important, it helps people recognise when they may need support, what sort of advice is available, and how to go about getting it. PLE has a further key role in helping citizens to better understand everyday life issues, making better decisions and anticipating and avoiding problems."

The programmes run by the Citizenship Foundation – such as the mock trial competitions and the Lawyers in Schools programme – are the largest public legal education programmes for young people in the UK. Lawyers in Schools does what is says on the tin: teams of lawyers go into schools, typically over a six-week period, and run interactive workshops with young people about various aspects of the law. The mock trial competitions put students into real-life court rooms with a specially written criminal case, supported by barrister mentors and judged by real Judges. Crucially, these programmes provide not only legal knowledge but an opportunity to develop skills such as public speaking, critical analysis and teamwork, which are essential to gaining access to the law.

Our young participants come into contact with a legal profession that is often seen as out of touch and clump lawyers together as one homogenous mass. And the profession is misunderstood. A comment from a recent Lawyers in Schools participant was revealing: "I didn't know women could be lawyers". You may be incredulous to hear that people can even think such a thing, but it is not atypical. Hearteningly, though, students often emerge from our programmes with their impressions changed. After the Bar Mock Trial heats in November, one student commented: "Through interaction with a barrister and others I realized that the profession is more open to a diverse range of backgrounds than I first thought, and more realistic to access, rather than just to those from upper class backgrounds".

The Bar Mock Trial Competition is one of our flagship programmes. Andrew Phillips (now Lord Phillips of Sudbury), President of the Citizenship Foundation, provided the early impetus in 1991; Anthony Hooper QC (now Sir Anthony Hooper) chaired the first Working Party and wrote the first mock trial cases. The 24 years since have seen the competition grow. More than 200 schools take part each year: approximately 3,000 students aged between the ages of 15 and 18. Every year, around 300 barristers help the schools prepare and senior barristers and Judges preside over the heats. The national finals have seen some high profile Judges lend their support, including Lord Woolf and Baroness Scotland; this year, Lord Justice Leveson will be in the line-up at the Edinburgh Court of Session on March 28, (which you are welcome to attend).

Our legal programmes are about producing young people who are legally capable. In its broadest sense, legal capability is defined by the Law for Life framework as "focusing on the ability of individuals to recognize and deal with law-related issues that they might face". The framework also identifies four domains, namely: recognizing and framing the legal dimensions of issues and situations; finding out more about the legal dimensions of issues and situations; dealing with law-related issues and situations; engaging and influencing. Our programmes help young people start this journey.

The highest domain of legal capability is about "engaging and influencing". Government reforms have seen huge cuts in legal aid, the introduction of fees to litigate, court closures, and a reduction in the magistracy. But the general public don't seem to mind that much. Political parties are gearing up for the general election and the topics they seem to be arguing about are the economy, the NHS and to some extent education. But few speak about the justice system. Even if they did, how much of it would capture the public imagination? People also seem willing to accept rushed legislation on numerous other domains of society without fully understanding the consequences. I don't think the Government should be allowed to pass measures without proper scrutiny and this scrutiny will only happen if people understand its importance. A legally capable population would have some chance of being part of the process.

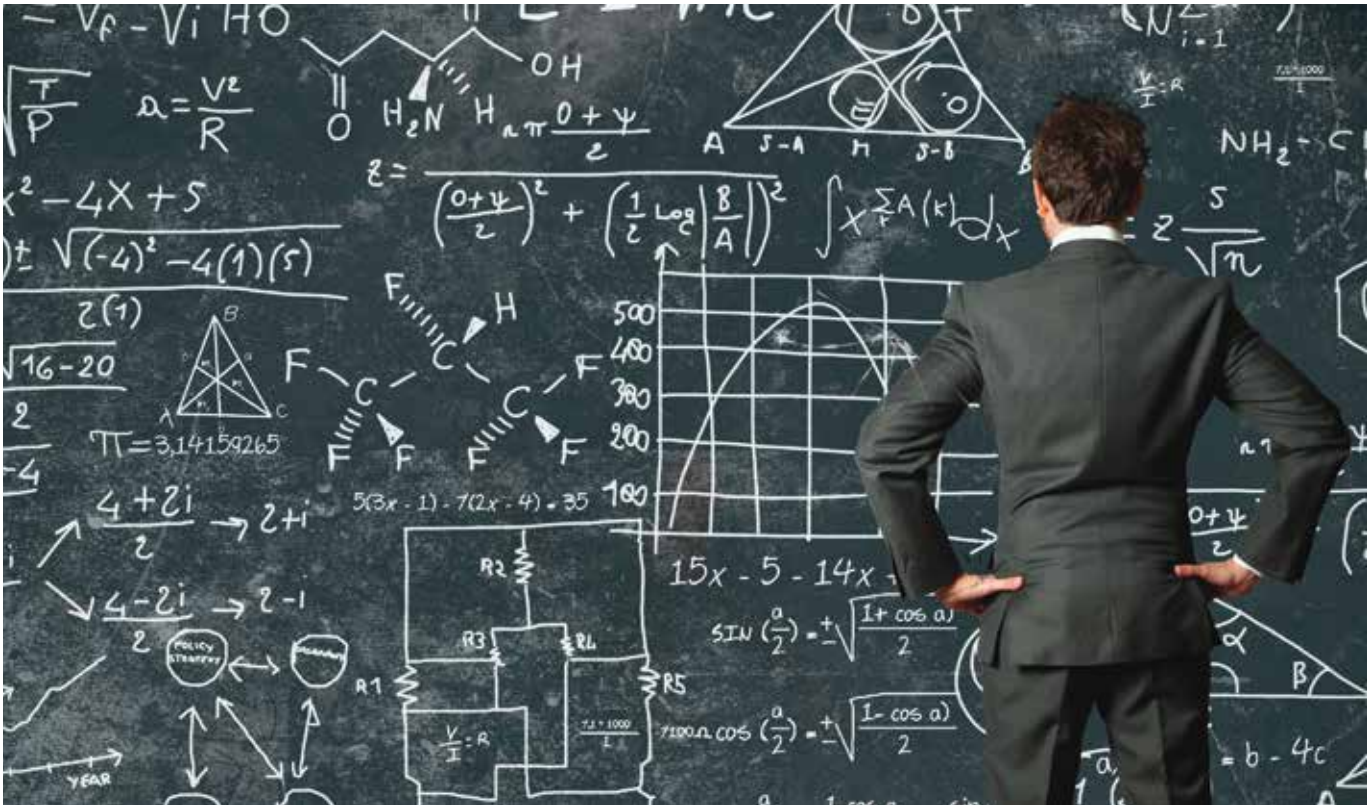
So help us by supporting our public legal education programmes. Or join the various campaigns for citizenship education in schools to make it a key part of young people's education.

We care about you and think the general public should too.

If you would like to find out more about the legal programmes we run at the Citizenship Foundation and the ways you can get involved please contact: sufiya.patel@citizenshipfoundation.org.uk ■

Sufiya Patel is the Mock Trials Project Manager at the Citizenship Foundation

# Obligations and Formulas



Preface

Abuse of Process in Criminal Proceedings

Contributor

**Nicholas Gomez**

The rights of those faced with criminal charges are to be found in the European Convention on Human Rights and the Gibraltar Constitutions 1969 and 2006, which contain virtually identical provisions on the right to fair trial: "fair hearing within a reasonable time by an independent and impartial court established by law".

This simple formula gives rise to a wide and increasing range of obligations on both police and prosecuting authorities when investigating alleged crimes.

For example, in both England and Wales, (Criminal Procedure and Investigations Act 1996, Code of Practice 1996, para.3.4 and Gibraltar, Criminal Procedure and Evidence Act 2011 – Code of Practice on the recording, retention and disclosure of material obtained in a criminal investigation 2012.137 para.3.5), there are strict obligations on and investigators to provide proper disclosure, and retain evidence. The State is under the "Code of Practice on the recording, retention and disclosure of material obtained in a criminal investigation" duty bound to "pursue all reasonable lines of inquiry, whether these point towards or away from the suspect."

A failure to carry out a proper investigation can lead to proceedings being held to be unfair on the accused and thus a breach of the Convention and the Constitutions.

## What Is a "Reasonable Line of Inquiry"?

Not every line of inquiry will be reasonable and it is clear that farfetched inquiries will not impose an obligation on the State. The same is seen in request for further information under the Civil Procedure Rules which provides that request must be "*reasonably necessary and proportionate*" (CPR 18 PD 1.2 "a request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet) and does not allow for *fishing expeditions*.

The test found at para.3.5 of the Codes of Practice prefixes the duty with a re-statement of the test of reasonableness which provides: "*What is reasonable in each case will depend on the particular circumstances.*"

As with all "*reasonableness tests*" the result in each case will be fact sensitive and it is submitted by this author that *"particular circumstances"* must refer to the *relevance* of the inquiry in the context of the case, (*R. v. Shah* [2002] EWCA Crim 1623). However, it has also been read to imply a degree of proportionality in relation to the offence charged, (*R (on the application of Ebrahim) v. Feltham Magistrates* [2001] EWHC Admin 130, para.70),

and could alternatively be read to include a degree of proportionality in relation to the resources needed to carry out the investigation. Of course, the art.6 right requires that fairness to the accused must prevail over such issues as resources, convenience and even on occasion, practicality and as was held in *Kaufman*, [*Kaufman v. Belgium* (1986) 50 DR], where the Commission held that applicants should, "have a reasonable opportunity to defend their interests in conditions which did not place them at any disadvantage *vis-a-vis* their opponent."

The State's obligation to conduct as full an inquiry as reasonably possible is only part of the overall duty to provide fairness and justice. Those accused are entitled to "*competent and effective legal representation*" (*Artico v. Italy [1980] ECHR 4; Imbrioscia v. Switzerland* [1993] ECHR 56*; Daud v. Portugal* [1998] ECHR 27*; Sannino v. Italy* [2006] ECHR 508*; Cuscani v. UK* [2002] ECHR 630), within the context of "*equality of arms*" which allows the accused to interrogate, test and object to the procedures and evidence ranged against him.

This, of course requires proper funding to allow for a balance to be had with the inevitably greater resources available to the prosecution and authorities.

## Duty to Investigate - Relevance *versus* Proportionality

In *R. v. Shah* [2002] EWCA Crim 1623, the Court of Appeal held that the duty to investigate relied upon the relevance of the inquiry in the facts of the proceedings.

In that case the Police entered Shah's apartment and found him and a Mr Fennessey in the living room. Shah was in possession of a small quantity of heroin at the time. The police also found seven bags of heroin in a kitchen cupboard. Shah pleaded guilty to possession of a class A drug but not guilty to possession with intent to supply of the same (the seven bags).

During the investigation (and later at trial) the defence alleged that Fennessey was the supplier of the heroin and that it was Shah who was purchasing it; and provided a statement from a Mr Jones to support this allegation. The statement averred that Jones had, some years previously, regularly bought heroin from Fennessey. The defence requested that the Police carry out an investigation based on this material. Despite Jones' statement, the Police did not investigate Fennessey and Shah was subsequently found guilty by a majority of possession with intent to supply.

On appeal the defence argued that the conviction was unsafe due to the investigating authorities "*wilfully ignoring their responsibilities as set out in the Codes of Practice*". The appellant's contention was that the investigating authorities ought to have investigated the allegations levelled at Fennessey.

LJ Kay held that although evidence of Fennessey having been a dealer *was* relevant to an investigation, Jones' evidence did not *demonstrate a flaw in the prosecution case* as it did not allege that Fennessey was *at the time* a drug dealer. Moreover, the evidence obtained by the police pointed to Shah supplying drugs. In the circumstances LJ Kay found no fault in the police not having pursued the inquiry. Shah's contention was found not to be relevant to the charge he faced and therefore not *reasonable*.

In contrast, LJ Brooke described the obligation in *Ebrahim* as having to be, "proportionate to the seriousness of the matter being investigated." Neither proportionality nor seriousness appear in the Codes and this interpretation would appear to give a different test to that provided by the draftsman. When the addition of *proportionate* and *seriousness* is taken to its logical conclusion we arrive at a situation where a person charged with common assault (as Ebrahim was) may be subjected to a judicial process of lower quality or rigour than a person charged with a more serious offence. It is submitted that this distinction risks causing unfairness and gives rise to a sense of inequality among defendants.

Alternatively it means that the leeway for the Police to make mistakes (or omit to investigate) is much greater for those charged with a *less serious* offence and smaller for those charged with a *more serious* offence. This leads to the unsatisfactory situation where the serious criminal activity is amenable to successful technical challenges.

What of the situation where the Police have acted *reasonably* but their investigation has for example been hampered by other factors outside of their control? Does the duty survive this or is it extinguished so that a defendant cannot rely on it?

Whilst the obligation does not provide recourse for this event, recent case law suggests that an accused who encounters shortcomings in the manner in which evidence is presented may still argue abuse.

The case of *Clay v. Clerk to the Justices* [2014] EWHC 321 (Admin), related to a traffic accident in which a large heavy goods vehicle was driven without due care and attention into another vehicle. The smaller vehicle was disposed of before the accused was charged and the accused therefore lost the opportunity to have the vehicle inspected. Clay made an application to have the prosecution stayed.

On appeal, LJ Pitchford said with reference to *Ebrahim*:

"With great respect to the court in *Ebrahim,* it seems to me that the question of whether the defendant can have a fair trial does not logically depend on whether anyone was "at fault" in causing the exigency that created the unfairness. If vital evidence has as a matter of fact been lost to the defendant whether occasioned by the fault of the police or not, the issue is whether that disadvantage can be accommodated at his trial so as to ensure that his trial is fair."

What is required therefore is objective fairness. The court determining guilt must be able to test the best evidence that is reasonably available and can be contested by a properly represented accused person. The mere fact that certain evidence might be unavoidably missing cannot logically be ignored. Sight must never be lost of the basic principle that it is the prosecution's obligation to prove an offence and that the defence should not be hampered in its capacity for rebuttal. Unsatisfactory as it might sometimes appear, the absence of crucial elements of guilt must inexorably lead to acquittal. ■

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# Genie out the bottle?

Preface
Escalation of loss of civil liberties

Contributor
**David Cook**

*"Thomas Hawtry, gentleman, was served with a subpoena to testify his knowledge touching the cause in variance; and made oath that he hath been, and yet is a solicitor in this suit, and hath received sever fees of the defendant; which being informed to the Master of the Rolls, it is ordered that said Thomas Hawtry shall not be compelled to be deposed, touching the same; and that he shall be in no danger of any contempt, touching the not executing of the same process."*

*Berd v. Lovelace* [1577] EngR 10

I am not sure if the concept of legal professional privilege is more important in criminal cases than in other jurisdictions, but it certainly seems like that to me. Perhaps it is because we in the criminal law see the sanctity of privilege protected in the court room on a fairly regular basis. Rarely does a trial occur in which a defendant, does not at some stage or another, states that they have done something based on legal advice and the position is so well-established as to be trite: privilege is of paramount importance and there is no question of seeking to balance privilege against other public interest considerations. It is one of the most inviolable principles in the English legal system. We should be proud of it, as we once were of our legal aid public funding. As we once did with legal aid, we are now seeing the slow creep of challenges to the concept of privilege.

> "An observer may be forgiven for concluding that our intelligence services are out of control and seem to be acting without fetter or check whatsoever".

We have recently learned that the Government has been forced to release secret policies which show that GCHQ and MI5 have for years advised staff that they may "target the communications of lawyers", and use legally privileged material "just like any other item of intelligence".

The release of the documents resulted from a claim brought on behalf of Abdel-Hakim Belhadj and Sami al-Saadi, two Libyan men who sued the Government for alleged complicity in their detention, subsequent rendition to the Libyan authorities and the Gaddafi regime, and numerous periods of torture during which various agents wearing balaclavas are described as having British accents and American accents. It is a troubling position indeed.

To date, the Government has refused to make a full statement concerning the revelations about privilege, saying only that it did not comment on on-going legal proceedings. It should also be both concerning and illuminating that these disclosures have come so soon after the Government having submitted documents which showed for the first time that its intelligence services could access raw material collected in bulk regarding UK citizens (as well as foreign nationals) by the National Security Agency, and other foreign spy agencies, without a warrant.

An observer may be forgiven for concluding that our intelligence services are out of control and seem to be acting without fetter or check whatsoever.

It is argued by those that represent Belhadj and al-Saadi that, by intercepting their privileged communications, the Government has infringed their right to a fair trial. It is difficult to see how much more a right to a fair trial could be infringed than in a scenario whereby one party is able to listen to the confidential discussions between the other party and their legal team. Simply put – the game is massively rigged in favour of the Government. The unfair advantage is plain.

Many might suggest that the extraordinary threat of terrorism requires an extraordinary response. There are those that believe that our important civil liberties should rightfully be curtailed in circumstances troubling national security. Many suggest that "minor" infringements of civil liberties are a small price to pay for our on-going safety. But it is my firm view that we are seeing an escalating erosion of such freedoms now, under the Trojan horse excuse of national security, such that the collateral effect on the rest of us will be inevitable. Once this genie is out of the bottle, it is almost impossible to put it back.

While nobody wants to take a decision that ends up with them being subsequently blamed for a successful terrorist attack, somebody in the Government needs to take a stand against this continued erosion of our civil liberties. Once they are gone, it would be very difficult to ever get them back.

An individual's ability to access the justice system by encouraging complete disclosure to legal advisers without the fear that any disclosure of those communications may prejudice the client in future should be protected at all costs. ■

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# Feeling the Pinch Too?

Preface

**The Judges Attitude Survey**

Contributor

Dan Bunting

Being a criminal barrister, despite being sometimes the best job in the world, can at time be a soul destroying experience. Mixing with other barristers there can be a gallows humour – it's you against the world. Or at least more and more nowadays, you, the solicitors, the police, the court staff, all who are suffering from cuts to resources, cuts to pay and crumbling morale, against a hostile government and media.

What I had never stopped to think about is that the man or woman sitting on the bench in front of me may be feeling exactly the same as me, if not worse. On February 4, 2015 Professor Cheryl Thomas released the *2014 UK Judicial Attitude Survey*. This was a survey open to almost all the full time judiciary (courts and tribunal) and the results make bleak reading. The fact that 90% of Judges replied to the survey is an indicator of itself of the strength of feeling.

The most telling statistic is that over half the judiciary believe that "*the amount of change in recent years has brought Judges to breaking point*". A third of Judges would take early retirement (whilst nearly a quarter more would consider it). This includes nearly 60% of the Court of Appeal, a move that would be catastrophic for the justice system.

The general view amongst the Judges is that morale is collapsing – they have been hit by a cut in their salaries at the same time as their job is made more difficult due to government initiatives (91% of Judges state that this has made their job harder) and the continual churning out of new legislation (62%). 94 % of Crown Court Judges and 91% of District Judges feel that their working conditions have worsened in the last five years, with 46% of Judges stating that their caseload was too much in the last year.

Over three quarters of Judges feel that their pay and pension do not "*adequately reflect the work they do*" and a similar number believe that there has been a net reduction in earnings in the last five years. In what is almost certainly a big change, nearly half of Circuit and District Judges and even 40% of High Court Judges would, or would consider, returning to practice if that was permitted.

The cuts to legal aid and to the justice system in general have also indirectly hit the judiciary (particularly the non-criminal branches) as they are having to deal with an increase in litigants in person as well as cuts in the number of support staff and facilities.

Only two per cent of Judges state that they feel "valued" by the Government and four per cent by the media (although it could be said given the frequent attacks on them by both, it could be said to be surprising that it is that high).

The Lord Chief Justice and Sullivan LJ (on behalf of the UK tribunal Judges) issued a statement saying that "*The survey shows that many Judges are feeling, in common with millions of other people, that their work has become harder year after year in many ways. Even though they know they are well paid compared to most people, they, like many others, have seen their pay drop in real terms.*" Although this appears mild it is, for the normally restrained judiciary, very strong words indeed.

It is easy to look at the six figure salaries that almost all Judges receive and have no sympathy for them. The huge increase in the numbers of applications for judicial positions and all levels tell the story of how disillusioned and insecure members of the legal profession feel. Faced with cuts to their salary of a third or more over the last 10 years, coupled with the extra burdens placed by the Criminal Procedure Rules and a general feeling of being undervalued by the government and judiciary, it is hardly surprising that many seek the attraction of the "purple lifeboat". This survey is a reminder that that particular escape route may not be as attractive as it once seemed. It is also a reminder to practitioners that the Judge in front of them is not just a neutral arbiter, but a human being who may be just as hacked off with everything as we are. ■

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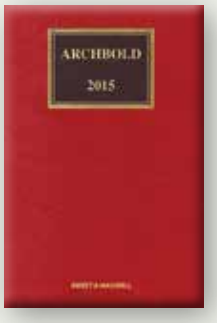


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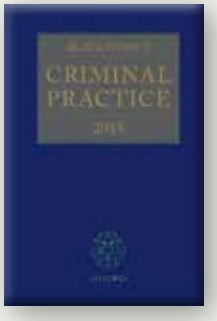


## Blackstone's Criminal Practice 2015

Oxford University Press
Professor David Ormerod QC (Hon)
25th edn, Book, all supplements & digital pack. pp.3,328,

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ISBN: 978-0-19-871313-5

I was thumbing through some old books in the library of the Old Bailey a few weeks ago and came across an edition of *Archbold* which went as far back as the 1950's. It was an interesting read on a number of levels. The criminal law has changed significantly since those days and criminal procedure is virtually unrecognisable from the highly proscribed regime that we work under today. But what was most notable, even before I opened up the book was how slim it was. Hardly registering 200 pages this Edition illustrated more than a wealth of commentary, how detailed and complex criminal law has become, particularly in recent years and I suspect that that is not going to change.

That is, no doubt, precisely why the present Editions of both *Archbold* and *Blackstone's* have developed a digital presence which is, in my opinion, no longer a luxury, but an essential feature. After all holdalls, wheelie cases, what you will, have a finite size and there is fast approaching a time when I suspect that the expanding waist-lines of both publications will result in them being exclusively offered in electronic form, a sort of digital gastric band.

The digital offerings of *Archbold* and *Blackstone's* conveniently allow practitioners to navigate the comprehensive content of both works including the Supplements.

Downloading *Archbold* was straight forward and simple. The email provided was clear and the steps advised were easy to follow. There are two different versions; one for PC and another for ipad. Both downloaded immediately without any problems. Likewise, with *Blackstone's*, I downloaded two versions, one for my PC and an app for my ipad but once this was installed , the instructions were simple and quickly understood.

Both works, as you would expect, analyse the new legislation, including the wide ranging provisions of the Anti-Social Behaviour, Crime and Policing Act 2014, and the Offender Rehabilitation Act 2014. The Data Retention and Investigatory Powers Act 2014 is also properly considered in the new Editions.

What is so gratifying about both books is that they mutually provide essential assistance to the practitioner through what I have already remarked, is a continuously developing area. In many of the major criminal law disciplines it is now common practice to have both works open on the desk or screen before you and discovering independent and additional references in each book, cumulatively adding to the sum total of assistance provided.

As always, the *Blackstone's Supplement* is a standalone work of quality and particularly excels in its coverage of sentencing developments. It is in many ways, a sentencing manual which deserves recognition in its own right.

*Archbold* maintains the breadth of its coverage including analysis from other common law jurisdictions enabling those who access the text to provide the court with comparative arguments.

Perhaps the ultimate that can be said for both books is that they provide the increasingly burdened criminal lawyer with the support and guidance which in modern practice has become essential. **JCQC**