QASA – Q&A Ethics and the Abortion Act

CBQ

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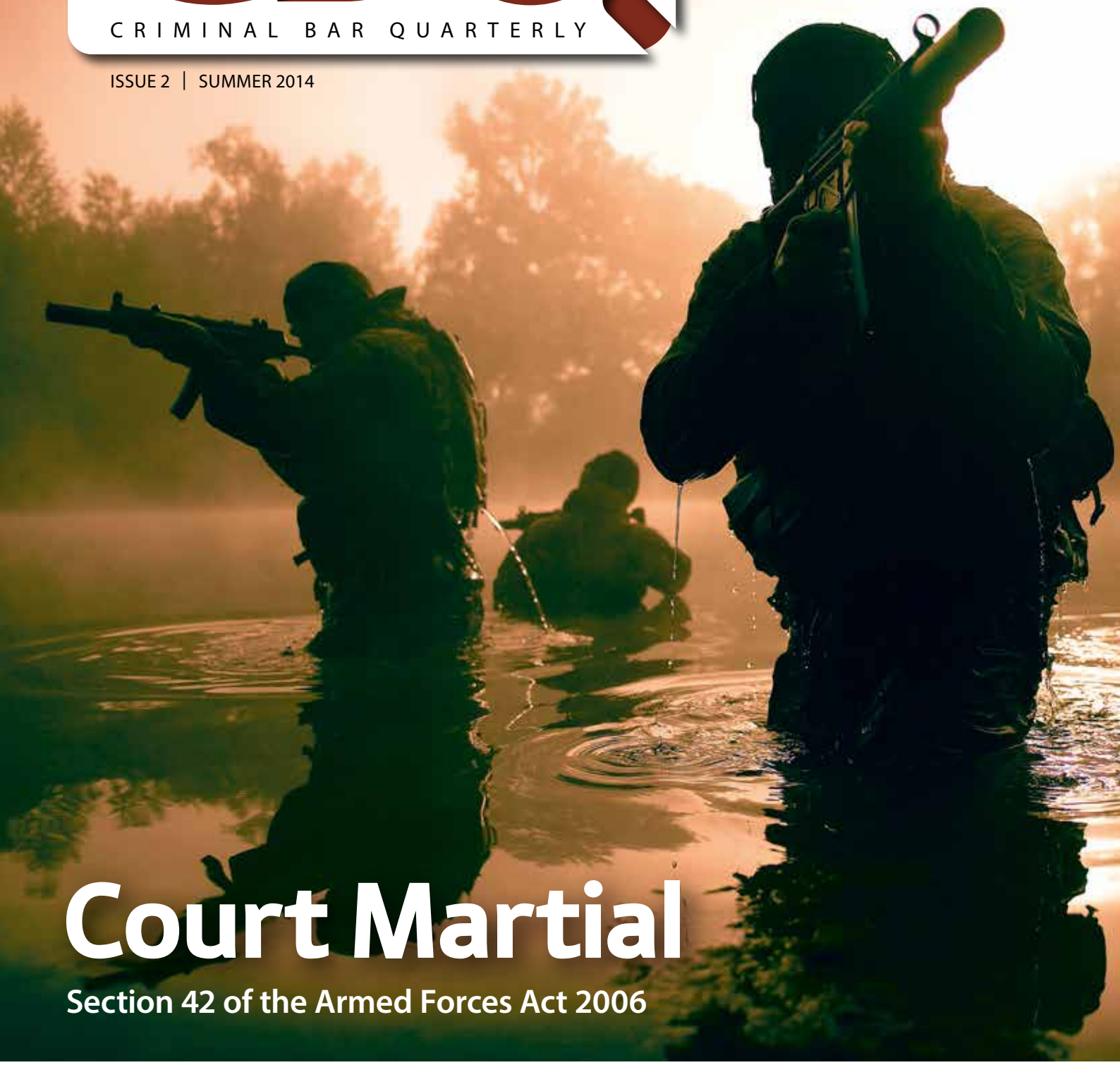

Court Martial

Section 42 of the Armed Forces Act 2006

Historic Abuse Allegations

Truths and lies

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FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

No Satisfaction

EDITOR
John Cooper QC

The observations by the trial Judge in Operation Cotton in ordering a Stay in those proceedings cannot be ignored, regardless of any result in the Court of Appeal.

It will remain a matter of complete condemnation for any Justice Secretary to hear a Judge say that the State have not provided the necessary resources to permit a fair trial to take place. It is the equivalent of a Health Secretary being told by eminent consultants that he is failing to supply safe hospitals to care for the sick.

Furthermore, the court made it clear that it is the duty of the State to provide advocates of the required skill and experience to represent the public. Clearly, he has not, and as a result of this, a trial is in jeopardy. When Mr Grayling presides over a situation in which he has clearly failed to deliver these requirements there are surely serious questions to be asked of his tenure which no decision in the Court of Appeal, one way or the other, can disguise. Important though the appeal is, what can only be described of scathing criticism from a highly respected member of the judiciary must be pressed upon the man who seems from his Parliamentary performances, incapable of giving any satisfactory reply. I am sure that the pressure will continue.

As always, *CBQ* tries to take in the wider issues of law and practice which impact upon the Criminal Bar. In this issue, Barbara Hewson writes on historic abuse allegations; Andrew Otchie on military law and Dan Bunting commenting on QASA and more. As this is the edition before the Summer lets hope that we are blessed with some sunshine. ■

25 Bedford Row

The views expressed here are not necessarily the views of the Criminal Bar Association.

A Great Journey

CHAIRMAN'S COLUMN

Nigel Lithman QC

Since I last wrote the Chairman's message in this magazine, the landscape has changed beyond all recognition. We have been on a great journey together and continue to travel. I have always been captivated by travel. Whether it's a love of steam trains on the Norfolk coast or epic journeys such as to the Antarctic Peninsula. But as with any journey, the road is long and full of hazards. All such journeys are taken by those who bring qualities of courage, resilience and belief to their endeavours; Endeavour itself was the apt name of Ernest Shackleton's ship. What is important is to focus at all times on the destination and the unwavering determination to reach it intact. Thus it is with the challenges – and there have never been more – that face the Criminal Bar.

For those who have followed my weekly Monday messages, you will know the efforts we have been making and continue to make to ensure our survival as a specialist profession of independent referral advocates. We have had huge support from the Chairman of the Bar Council, Nick Lavender QC, and the Circuit Leaders with whom we have worked closely to ensure the survival of the Criminal Bar – but we also could not have come this far without so many of you who have stood up and been counted. For those who may have been on another planet for the past few months, here is a round-up of where we are now.

In March to April 2014, we maintained our belief that the days of action along with a policy of no returns would succeed in bringing a dramatic breakthrough. It did to a large extent. The Ministry of Justice offered us 89% of what we had been asking, namely that any cuts to Graduated Fee cases be booted off into the long grass *post* the 2015 election. If they were to re-emerge my successors would take us back to the policies that Tony Cross and I have instigated. The acceptance of this "deal" to secure the fee income of the vast majority of our members came after a ballot of all members of the CBA – carried two thirds to one.

It was recognized that by accepting the deal as offered by the MoJ, we did not secure the outcome sought by the solicitors' profession for their members whose livelihoods are also under serious threat or an outcome that secured the reversal of the extensive legal aid cuts that undermine access to justice in this country. In an ideal world, we would have fought on to secure the reversal of all the Government's policies on the legal aid budget. Those who voted to accept the deal did not do so to ignore the plight of others also facing being driven out of their professions – the solicitors, probation officers, court interpreters or the thousands affected by the legal aid cuts. But they accepted the reality of what could be achieved within the mandate and limitations of the Criminal Bar at that time and the need to at least continue to keep their heads above water for which they should not be blamed.

> "They accepted the reality of what could be achieved within the mandate and limitations of the Criminal Bar at that time and the need to at least continue to keep their heads above water for which they should not be blamed."

No deal was struck in relation to the VHCC cuts but an agreement reached to engage in ongoing discussions with the MoJ to find an alternative scheme to the VHCCs. We received an assurance from the Lord Chancellor which we accepted that he had no intention of expanding the Public Defence Service (PDS) beyond the existing round of recruitment.

This was set against the back-drop of the second limb of the pincer movement threatening to crush us: QASA. United in our opposition, the registration date for the first circuits has now come and gone. At the heart of our objections to the scheme is the conviction that Plea Only Advocates, regulated in an entirely different way, will remove even more market share from the Bar. Added to this objection is the legal advice of our local heroes Tom De La Mare QC and Dinah Rose QC, in particular that Judicial Evaluation creates a conflict in the Judge as evaluator of advocate whilst judging the issues as much as the advocate is in conflict between fearlessly representing his client before the Judge from whom he seeks accreditation. There were several bumps in this road. Lord Justice Leveson rejected the application to judicially review the scheme. Our application for leave to appeal was also turned down. But then the road straightened as the Court of Appeal granted leave. We await the final outcome of the substantive appeal which will be heard in July.

Two other significant matters need our attention. Both acknowledge that the Criminal Bar offers the best independent specialist advocacy skills required to do this job.

First, the *Jeffrey Review* has published its' findings and we are in the process of formulating our response. What is clear are the challenges we face in securing a market share of the work despite being

manifestly the best trained as specialist advocates and offering both excellent quality and value.

Secondly, on another battlefield on another day, in granting the application for a stay in *R. v. Crawley* (Operation Cotton), HHJ Leonard QC accepted the persuasive arguments of Arthurian knight Alex Cameron QC, acting *pro bono* in the best traditions of the Bar, that the defendants could not receive a fair trial in the absence of defence counsel of sufficient experience and skill willing to represent them at the current VHCC rates. Although subsequently overturned by the Court of Appeal, as so often the devil is in the detail, and their view could not have been more clearly expressed:

"It remains critical that there remains a thriving cadre of advocates capable of undertaking all types of publicly funded work, developing their skills from the straightforward work until they are able to undertake the most complex …" and

"It is of fundamental importance that the MoJ led by the Lord Chancellor and the professions continue to try to resolve the impasse that presently stands in the way of the delivery of justice in the most complex of cases; this will require effort by both sides. The maintenance of a criminal justice system of which we can be proud depends on a sensible resolution of the issues that have arisen."

These words echo what we at the Criminal Bar have been trying to do. Important we keep in mind that we went back to work in exchange for the punt into the long grass of the cuts to the AGFS and that part of the agreement is not in question. The reasons for the current impasse have been rehearsed many times. I have heard it said the MoJ believe the CBA has encouraged people not to take VHCCs at the cut rate. That is not correct. We have made it clear since the date of accepting the deal with Government that there is no boycott on members of the Bar undertaking these cases and that the decision as to whether or not to do so is a matter for each individual.

Having accepted the assurances of the Lord Chancellor in good faith, the Criminal Bar does not regard the threat to expand the PDS either as the way forward, a "sensible resolution of the issues" or the sort of "effort by both sides" the Court of Appeal envisages in the concerns expressed above; that way will inflict a mortal wound on the future of the Criminal Bar and we cannot stand idly by and see that happen. These sentiments were agreed by the CBA Executive this week who resolved that any further expansion of the PDS, by stealth or contract, should be met by determined action on our part.

Following that meeting, together with the Circuit Leaders, we issued two documents to make it clear that we are willing to do our part to try and resolve the current impasse. The first was an invitation from the CBA and Circuit Leaders to meet with the Lord Chancellor:

"Dear Lord Chancellor,

Since the end of April we have not met.

Our negotiations then anticipated further engagement from both sides.

In the light of the President of the Queen's Bench Division's observations in the final paragraphs of *R. v. Crawley*, we extend an open invitation for us to meet at the earliest opportunity to break this impasse. We can then arrange for our teams to meet to discuss substantive matters.

Both your department and the Criminal Bar have repeatedly stated their belief in the importance of a strong, independent and high quality Criminal Bar at the heart of the criminal justice system. You have made your own position clear on this on many occasions. We are just as sure that you do not wish to see the hard-working taxpayer spend even more money on a Public Defender Service that we all recognise is a more expensive, less high quality mechanism to deliver advocacy. It would be surprising if your Government, of all governments, was the one that nationalised this part of the public sector.

We very much look forward to meeting you after the European elections and we are confident, as we all were a couple of months ago, that we can quickly design a new system for high cost cases that will satisfy all of the stakeholders in the criminal justice system and provide value for money and a quality service for the British taxpayer."

Many of you will have seen the Press Release that was issued at the same time:

"We welcome the observations of the President of the Queen's Bench Division in the case of *R. v. Crawley*, handed down yesterday. Sir Brian Leveson's comments as to the importance of the best quality advocates at the heart of the criminal justice system echo the report of Sir Bill Jeffrey into the future of criminal advocacy commissioned by the MoJ and published last month. Such comments are also in accordance with the views of the Lord Chancellor himself, publicly stated, on many occasions.

We have, therefore, invited the Lord Chancellor to re-enter discussions with the leaders of the criminal bar in order to design as soon as possible, a new system for the payment of high cost cases; one that provides value-for-money and high quality in a sustainable and long term manner.

We call, in the meantime, for a suspension to the mid case 30% cuts which have caused this state of affairs to exist and a cessation of recruitment to the public defender service.

We look forward to the constructive engagement with the Lord Chancellor and the MoJ as was anticipated at the time of the last negotiations which both sides entered into and concluded in good faith."

At the time of going to press, we now await the Government's response to our invitation to engage constructively in seeking to resolve this impasse.

Despite all the trials and tribulations, this year I asked that people attend the CBA dinner to rejoice in their membership of our fabulous profession. Over 200 did so, many attending being the younger members of the Criminal Bar. It is for them that we must maintain our position come what may. We still have a long and difficult journey ahead to secure our future but we will not give up until we have reached our destination. ■

The Palace of Despair

Preface

The role of therapy culture in historic abuse allegations

Contributor

Barbara Hewson

For some decades now, child abuse has been seen not just as a serious social problem (which it undoubtedly is), but as the supreme evil of our age, by comparison with which the horrors of the Second World War are but a distant memory. Those who have joined the crusade against this supreme evil experience few external or internal constraints. Furthermore, they have a vested interest in identifying abusers. The law has been a central institutional arena in which claims of abuse are constructed and presented. And lawyers pursuing compensation claims have played a key role in generating multiple claims of abuse.

The present vogue for historic allegations of sexual abuse has its roots in the Welsh children's care home scandal of the early 1990s. But it is a product of a Californian culture of child protection developed in the 1970s, which took as a given that children never lie about abuse, and which assumed that child abuse is something that can be diagnosed.

The Californian model shifted responsibility for investigating allegations of child abuse from traditionally cautious criminal law enforcement agencies onto healthcare professionals – therapists, psychologists and clinicians – together with social workers. Child protection became a form of therapeutic endeavour. The present requirement for interagency working has meant that the police have

now adopted, to a large extent, the child protection ethos. But the problem with this model, as the historian Richard Webster noted, is that "in some cases an attitude of disbelief was replaced not by an open-minded willingness to investigate, but by a kind of systematic credulity."[1]

The Californian model fostered a mindset that views complaints of sexual abuse, not as allegations requiring investigation, but as "disclosures" to be accepted. Hence the mantra, so popular today: *believe the victim*.

Webster's analysis of the Bryn Estyn and related scandals led him to conclude that the presumption of innocence, in criminal cases involving multiple allegations of historic sexual offences, has effectively been replaced by a presumption of guilt. Professor Martin Conway, a memory expert, agrees.[2] Indeed, it's striking how easily lawyers, Judges, academics and policy-makers been persuaded to remove procedural safeguards for the accused (this is an example of what I mean by the absence of any restraints).

So the right to confront one's accuser in court; the right to cross-examine robustly; the previous corroboration requirement, and the previous restrictions on the introduction of "similar fact" evidence have all been treated as inconvenient anachronisms. Now the DPP and the police propose that Judges should issue warnings to juries at the start of a rape trial about "rape myths". They seem oblivious to the fact that what they may be doing is generating a new set of counter-myths about rape.[3]

Historic accusations are troubling anyway because, as the old adage has it, "justice delayed is justice denied." The claim that complainants should be allowed to pursue stale complaints for personal psychological reasons, such as a perceived need for "closure", is not convincing.

We now have a surreal situation in which crimes under old laws are tried very belatedly, albeit *without* the procedural safeguards that would have been mandatory at the time of the commission of the offence. This does not seem right.

Mature women give evidence in court described as "Girl A" and "Girl B". Such language exemplifies a doublethink, whereby adults present as children decades after they attained their legal majority. The CPS and the media habitually portray complainants as passive innocents, taken advantage of by predatory older men who use trickery and, ultimately, force, to satisfy their depraved lusts. In an echo of the old idea that rape is a fate worse than death, complainants contend that their lives have been ruined.

This is classic social purity rhetoric harking back to the late 19th-century, when the editor Stead penned his apocalyptic exposé, *The Maiden Tribute of Modern Babylon*: "Maidens they were when this morning dawned, but to-night their ruin will be accomplished … London's lust annually uses up many thousands of women, who are literally killed and made away with – living sacrifices slain in the service of vice."[4]

A further example of social purity rhetoric appears in Barnardo's 2011 Report on underage sex and prostitution, entitled *Puppet on a String*. In that report, the word "teenager" is used once, while "child" and "children" appear 251 times. It complains that children "are being brainwashed by abusers in the most pernicious way and are often transported between towns and cities to be subjected to multiple acts of abuse by groups of men." The current preoccupation with white slave traffic also harks back to the concerns of the 1880s social purity campaigners, and the promoters of the US Mann Act 1910.

"The claim that complainants should be allowed to pursue stale complaints for personal psychological reasons, such as a perceived need for "closure", is not convincing."

As the historian Pamela Haag has noted, this discourse chooses to view all sexual commerce as an act of violence. It conflates acts of real oppression with those which have been chosen willingly, albeit illegally.[5] So today we see the slogan often deployed by the CPS: "they don't know they're victims."

Where does therapy culture fit into this? Therapy culture has adapted the anachronistic idea that rape = ruin, though it uses the language of trauma to express this concept. Instead of loss of chastity, the moral damage caused by rape is portrayed as a lasting psychic wound. The origins of this approach lie in second-wave feminism in the 1970s, which used "speak-outs" against rape and incest as a means of raising support for the view that these crimes had been under-reported and minimized. Whilst this was a valuable exercise in raising

awareness of a serious social problem, it led to some deliberate exaggeration of the scale of the problem, and to some decidedly dubious claims about "traumatic amnesia", which kept US psychologists busy for decades to come.

Although the UK has not experienced "Memory Wars" of the kind that were litigated extensively in the US, in cases alleging historic incestuous abuse, the problem remains in that, whilst research scientists have debunked the notion of "repressed" or "recovered memory", a great many clinicians and practising therapists are still wedded to this discredited theory.[6] The counselling profession is largely unregulated.

This probably accounts for the references that one sees in cases of alleged historic abuse to clients "suppressing" or "blocking" memories of abuse: this does sound like the discredited theory of "repressed memory", repackaged.

Many therapists also believe that child abuse is always traumatic, and is responsible for a whole host of problems in later life: a kind of emotional determinism. As one mental health professional says, "there is a veritable trauma industry comprising experts, lawyers, claimants and other interested parties: it is a kind of social movement trading on the authority of medical pronouncements."[7]

This idea of lifelong damage is also vigorously promoted by "survivor" charities. But as the Harvard researchers Susan Clancy and Richard J McNally point out, not all childhood experiences of abuse fit this model. The fact is that much child sexual abuse is not violent, and is not perceived as traumatic at the time.[8]

So, when a mature client presents with a problem, many therapists look for an explanation in the patient's past. It is not surprising if the therapist sometimes elicits an account, which matches his or her expectations. The ensuing account of abuse becomes a jointly constructed narrative, in which the person affected learns to identify as a "survivor".

Professor Philip Jenkins points out that what this process entails is effectively a form of conversion experience:

"Though expressed in psychological terms of self-help, the recovery movement owed its strength and resilience to its pervasive ideological and religious quality. The treatment of incest survivors implies archaic themes like the loss of primal innocence through sexual sin, and the recovery of an untarnished child-like state. Equally familiar to the evangelical tradition, this restoration often occurs in a sudden emotional moment of realization, which is essentially a conversion experience. The analogy is not perfect, in that the survivor is realizing not her own lost and sinful state, but rather the evil visited upon her by a victimizer, but the underlying structure of loss, regeneration and redemption is accurate. Also recalling religious systems is the emphasis on faith, of belief in the testimony of others, even if it directly contradicts common sense: the children, external or internal, must be believed at all costs. As with any religion, survivorship implies a total world-view impervious to disproof or even challenge by conventional standards of evidence or rationality."[9]

One professor of psychiatry at Harvard told a Minnesota court in a recent case that so-called "repressed memory" is very different from other psychological memory processes.[10] For example:

- Ordinary forgetting, where a person can be reminded of an event later on;
- Not thinking about something for a long time;
- Incomplete encoding of a traumatic event – if someone is threatened by a gunman, they may not recall the colour of the gunman's shirt, but they will remember the gun;
- Organic amnesia – being knocked out;
- Psychogenic amnesia (very rare) - as when a person awakes in a hotel with no idea who he is;
- Childhood amnesia, when a child is too young to remember something; and
- Intentional non-disclosure, where a person chooses not to talk about an event they have experienced.

If a person has simply forgotten about something, or has not thought about it for a long time, it hardly seems the kind of experience that warrants a major criminal investigation, decades later. Equally, if a person has experienced a genuinely traumatic event, with intrusive memories, there would appear to be every reason to seek help sooner rather than later. But if a person has elected to put something behind them, why should they be allowed to change tack decades later?

In the case of such a high-profile person as the singer Michael Jackson, various individuals made *inter vivos* claims, in both the civil and criminal courts. So the idea that an accused's fame or social standing is somehow a barrier to justice is not very convincing. Well-known footballers are regularly accused of sex offences.

Equally, where a potential accused is concerned, the principle of legal certainty should guarantee stability. As one Judge commented, who could sleep soundly at night if he thought that at any moment, he might be arrested for something that allegedly happened decades before? It could be you. ■

1 Richard Webster, *The Secret of Bryn Estyn* (Orwell Press, 2009) p. 85

2 Martin A. Conway, 'On being a memory expert witness: Three cases', *Memory*, 7 May 2013, 1-9, p. 7

3 Helen Reece, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?', Oxford J. Legal Studies, March 25th 2013

4 http://www.attackingthedevil.co.uk/pmg/tribute/mt1.php

5 Pamela Haag, *Consent: Sexual Rights and the Transformation of Ameri can Liberalism* (Cornell UP, 1999), p. 67

6 Katharine Mair, *Abused by Therapy: how searching for childhood trauma can damage adult lives* (Matador, 2013), Foreword by Christopher French

7 Quoted in Frank Furedi, *Therapy Culture: Cultivating Vulnerability in an Uncertain Age* (Routledge, 2004), p. 99

8 Susan A. Clancy, *The Trauma Myth: the truth about the sexual abuse of children – and its aftermath* (Perseus, 2009), Richard J. McNally, amicus brief in 2005 at http://www.religioustolerance.org/rmtmcnally.htm

9 Philip Jenkins, ' "Go and Sin No More": Therapy and Exorcism in the Con temporary Rhetoric of Deviance' (2001) http://www.personal.psu.edu/faculty/j/p/jpj1/sin.htm

10 *John Doe v Archdiocese of Saint Paul and Minneapolis and Diocese of Winona,* State of Minnesota Supreme Court, A10-1951, filed July 25, 2012, pp. 12-13

The writer is a barrister in Gray's Inn. This article represents her personal views.

Ethics, evidence and the Abortion Act 1967

Preface

Do we need a root and branch review of the Abortion Act?

Contributor

Charles Foster

In a thoughtful piece in the *Guardian*, Sarah Wollaston MP calls for a review of the Abortion Act. She focuses on the decision by the General Medical Council (GMC) not to pursue Fitness to Practice proceedings against 67 doctors who had pre-signed, without assessing the women concerned, the forms used to authorize abortion. She concludes:

"… it makes no sense to prolong outdated and paternalistic attitudes that only doctors can make judgments about whether the grounds for the Abortion Act are satisfied. It makes even less sense to leave the situation as it is now with doubts about the legal obligation for a doctor to have seen the woman to whom form HSA1 refers; clear guidance must be issued as to whether doctors may sign based on evidence from clinical nurse specialists. A change to allow clinicians other than doctors to certify directly would, however, require an amendment to the Abortion Act.

In my view, the act is no longer fit for purpose. This would be a good time for a wider review of the ethical

arguments and public attitudes, and to establish a legal framework fit for the 21st century."

Wollaston's article is not a blithely uncritical plea for unrestricted abortion. Indeed she criticizes the GMC for its failure to act in the face of apparently clear breaches of the law. Nor is her objection merely the (powerful) constitutional one – that a statutory professional regulator should not disapply the law of the land for professionals under its jurisdiction. She acknowledges that some regulation is necessary, and points out that failure to ensure some medical oversight of abortion might encourage (for instance), the practice of abortion on the grounds of fetal gender. Nonetheless, she says, the case illustrates the need for a review of the law. Her argument seems to be along the following lines:

"(1) A lot of doctors don't comply with the law.
(2) That indicates that the people who know most about the issues are opposed to the law in its current form and/or that the doctors are reflecting the zeitgeist, which similarly is opposed to the law in its current form.
(3) This in itself warrants a review."

This is a curious argument. If burglary is rife, that would seem to be a good reason to pursue and prosecute burglars more energetically, and arguably to sentence convicted burglars more savagely. And to suggest that the unlawful administrative practices of hard-pressed clinicians amount to or evidence serious moral deliberation is also strange, as is the suggestion that doctors' own views or practices say anything much about the demographically and democratically relevant stakeholders.

I'm not at all opposed to a review of the Abortion Act 1967. Indeed, I welcomed Fiona Bruce's re-examination of some of its provisions. But nothing that has occurred in recent years justifies a fundamental re-design of its architecture.

Here is s.1:

"(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith:

(i) that the pregnancy has not exceeded its 24th week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
(ii) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
(iii) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
(iv) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

"The only real argument against the adequacy of these categories is the unnuanced argument based on the absolute rule of maternal autonomy: "It's my uterus, and there's nothing else to discuss."

The broad outline thus is:

1. This is a decriminalizing statute. An abortion will amount to a criminal offence (under s.58 of the Offences Against the Person Act 1861) unless there is certification by two registered practitioners that one of the criteria (a) – (d) is satisfied.
2. The certification has to be reached "in good faith". One cannot possibly come to a conclusion about the satisfaction of (a), (b), (c) or (d) in the case of X unless one has seen X.

The decriminalizing nature of the statute is important and legally adroit. It very obviously has not inhibited doctors from performing abortions. The fact that a criminal statute lies behind the 1967 statute has had no chilling effect. Its nature is an acknowledgement that abortion which does not fall into one of the four statutory categories is likely to be frowned on by society. Is that really so controversial? Go through the categories, ignoring, for the moment, the references to stages of gestation. The only real argument against the adequacy of these categories is the unnuanced argument based on the absolute rule of maternal autonomy: "It's my uterus, and there's nothing else to discuss."

But surely there is more to discuss? Nothing in life is that simple. And it is partly because there obviously is more to discuss that the statute insists that discussion occurs – with medical practitioners who can help to articulate some of the voices that should participate. Those voices will include, of course, the voice of the woman's own best interests. It's hardly offensively paternalistic to say that patients should be warned about the complications of a procedure. Outside the abortion clinic we say that that honours autonomy, rather than truncating it.

So: by all means examine the way that the 1967 Act should be redrafted in the light of scientific understanding and medical advance. But don't blame the Act because it has been badly policed by those responsible for its enforcement. Sort out the police instead. ■

Barrister, Serjeants' Inn Chambers

* This first appeared as blog at http://www.halsburyslawexchange.co.uk/do-we-need-a-root-and-branch-review-of-the-abortion-act/

Is Military Law Appealing?

Preface

On the legal framework of UK military justice system

Contributors

Andrew Otchie

It has been said "Military law is to law what military music is to music" – if this saying is supposed to mean that military law is boring and lacks imagination – then perhaps it is time to think again. The high-profile Court Martial of Marine A, now known to be Sgt Al Blackman has brought attention to the military justice system, with strong sentiments being expressed as how the law should treat the Royal Marine, captured unsuspectingly in vivid footage from a headcam, in the blatant killing of a wounded Afghan insurgent. Convicted of murder, with the use of a firearm by a Court-Martial and sentenced to 10 years' imprisonment, as well as discharge with disgrace from Her Majesty's Armed Forces, Sgt Blackman's case has now received treatment from the Criminal Court of Appeal .

The judgment is undoubtedly an interesting one, due to the unique and extreme circumstances in which the offence took place and may be useful for practitioners appearing before Courts Martial generally. However, the attitude of the Court of Appeal to matters that are referred from the Court Martial is normally that, in line with appeals from other statutory Tribunals, it will be slow to interfere with what it sees as a decision made by a specialist criminal court, because the Court Martial is particularly well placed to deal with "service issues which arise in circumstances which cannot arise for any civilian". Nevertheless, the case has also come at hand in a time when profound questions are being asked about the nature and desirability of the law that applies when British Armed Forces are deployed on overseas military operations and in ensuing litigation from the use of force.

In fact, the recent case from the English Supreme Court on liability for negligence and the scope of combat immunity

as well as decisions from the European Court of Human Rights on the extra-territorial application of the ECHR have made high-ranking military commanders fear that legitimate combat decisions may now be subject to the later forensic scrutiny by lawyers and Judges in courts in civil actions for damages. The problem is compounded by the fact that, whilst British military personnel on active duty are bound by strict rules of engagement and the law on the use of force, the enemies that they face often do not hold any compunction in violating the laws of war. The predicament is such that these various and related issues have now been addressed by the Defence Committee of the House of Commons, by a report into the legal framework for the future of UK military operations.

The select committee's inquiry has been brought about by an increasing view that the applicable Law of Armed Conflict (otherwise known as International Humanitarian Law) and legal cases are having damaging consequences for military effectiveness. The genesis of this issue was brought to fore in October 2013, when the policy exchange published a paper entitled: *The Fog of Law: the legal erosion of British fighting power*. The report caused a stir by suggesting that there has been "sustained legal assault" on British forces, which could have "catastrophic consequences" for the safety of the nation. In essence, there is a growing body of opinion, which has now been given serious consideration by the Defence Select Committee, in that the application of civilian norms to the military is creating a new norm of military negligence claims and depleting the fighting spirit of troops. Among the explanations given for this recent trend and indeed a focus of legal criticism, is the failure to apply the doctrine of Crown immunity, juxtaposed against the extraterritorial application of the Human Rights Act. However, other scholars have already retorted to that effect that there is no such sharp dichotomy between safeguarding the rule of law through the current legal model and the effectiveness of military operations.

Thus, in the midst of Sgt Blackman's case, the contours were already being set for the debate as to which system of law (military, civilian, International Humanitarian law, English Criminal law, or European Human Rights law) ought to apply on the battlefield? This is already a complicated question because the answer is that all systems can apply at varying degrees, depending upon the status of the parties (Soldiers, civilians, insurgents, regular enemy forces, or prisoners) the intensity of the conflict at the time they interact and whether it is an International Armed Conflict, or an internal insurrection. When the British Parliament passed the Human Rights Act in 1998, it was never envisioned that it would apply extraterritorially, or that it could have any effect upon military operations overseas. At the same time, the effect of s.42 of the Armed Forces Act 2006 is that the Court Martial may try UK service personnel, for any criminal offence of England and Wales, committed anywhere in the world. Advocates for Human Rights law have pointed out that civilian oversight over the actions of the Armed Forces is not objectionable and in fact, provides a useful check against the worst excesses of prisoner abuse by Soldiers, as has been witnessed in the death in custody of the Iraqi Baha Mousa. Moreover, although the military and civilian systems of law can be treated as discrete entities, the interaction between the two has increased, as the changing nature of the conflicts in which British troops have been deployed, has also evolved.

However, the criticisms of a Human Rights based approach to military operations are also weighty. Military conflicts demand an assessment of calculated risks, which are needed to win victory and often made under extreme pressure. The fundamental rights and freedoms as guaranteed by the ECHR were clearly not designed to be exported to anywhere the British military happens to step foot. Moreover, the perception that legal constraints prevent the Soldier from fighting an enemy in the manner that he is being attacked, do damage confidence and morale. Following the murder by Sgt Blackman, the MOD could face a civil claim for the breach of the right to life, under art.2 of the ECHR, by the family of the murdered Afghan insurgent; but ironically, it is not the encroachment of European Human Rights law that has been most crucial in the Sgt Blackman case. Under English law, murder carries a mandatory life sentence and discretion was exercised by the Court Martial to set his minimum tariff at a 10 years imprisonment, from a starting point of 15 years. Whilst this was reduced by the Court of Appeal, so that Sgt Blackman will serve eight years, he was treated more leniently because on the whole of the evidence, combat stress, arising from the nature of the insurgency in Afghanistan, and the particular matters affecting him, ought to have been given greater weight as a mitigating factor. This dilemma, and graphic illustration of the differing circumstances in which murder can be committed, calls into question the suitability of mandatory life sentencing for murder under English law.

Situation ethics can be complicated further when friend, or foe, is mortally injured and mercy killing is contemplated. But as the law currently stands, there are no special exemptions for offences committed by soldiers acting in the heat of battle and the military justice system imposes the same principles of law upon our soldiers, as would a Crown Court in any other part of the land. As well, the Law of Armed Conflict and International Human Rights Law continue to bind the British Armed Forces, as does now the ECHR. This provides a strong basis upon which British military can claim their actions are moral and can deserve our support. At the same time, the British public has a right to expect its soldiers to behave in a certain way. The wide spectrum and types of military operations that have been carried out in recent years makes the work of the Court Martial and military lawyers increasingly specialized. So, when the role of the lawyer is to bring some form of order to the chaos that ensues in war, it is often the soldier that has donned a military uniform, with the noble ambition to try to bring the rule of law to those not fortunate enough to enjoy it – both need each other more than they may think.

Andrew Otchie is a practising Barrister at 12 Old Square Chambers and recently defended an MPhil thesis analysing the legal issues arising from the Use of Force by NATO. He is a member of the Association of Military Court Advocates (AMCA).

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QASA - Questions to Answer

Preface

What is the regulatory impact of QASA boycott?

Contributors

Dan Bunting

On January 20, 2014 the judgment in the Judicial Review as to the legality of QASA was given (if you haven't heard by now, spoiler alert – the scheme was upheld). It is a remarkable achievement to get something on which that not just all barristers, but all barristers and solicitors, can agree. For that, the Joint Advocacy Group (JAG) is to be congratulated in the universal opposition to the QASA scheme that they have engendered.

I won't rehash the arguments for and against: they are all there in the judgment if you wish to see them. The judgment was not a ringing endorsement of the scheme, a conclusion that it is lawful does not mean that it is desirable, and various suggestions were made by Leveson P as to how the scheme may be improved.

As a result of this, the JAG announced that the roll out date for QASA has been put back for these suggestions to be analysed and amendments to the *QASA Handbook* to be made by the end of February. Consequently, the implementation period has been put back by about three months.

This hasn't satisfied the CBA, who has been leading the charge against QASA. They have made their position clear; the plan for a boycott is still maintained. The arguments over lawyers going on strike (or "strike" as many would have it) have been strong, and many have looked at not just the politics or the ethics of it, but whether it would amount to the sort of behaviour that could get your collar felt by the BSB.

Little attention, however, has been paid to the regulatory impact of a QASA boycott, with all the attention being focussed on whether it will work or not, but should we be so complacent? The strike of January 6, 2014 coincided with the release of the new *BSB Handbook*. This is a completely new approach to regulation, a lot more sophisticated (and longer) than the previous method. Instead of a Code of Conduct saying what you can and cannot do, there are Outcomes, Core Duties, Rules, Guidance and Regulations, all of which have to be weighed and balanced. There is a whole section on QASA (starting on p.45 if you're interested).

Whilst practicing without signing up to QASA would be a disciplinary offence, a boycott is often presented as raising no ethical issues, but is that correct? Do we have a professional obligation to sign up to QASA? Rule 61 states: "Barristers currently undertaking criminal advocacy are required to apply for registration under the QASA Scheme in accordance with the phased implementation programme as set out at paras.2.11 to 2.13 of the *QASA Handbook*."

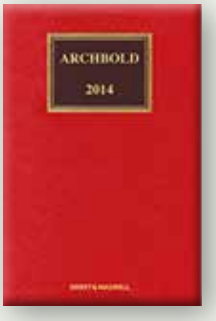
On the face of it, how can I be forced to sign up to a scheme such as this? The point is that unless you are retiring from practice however, you know that this is coming. If I know I am going to be part-heard (or I have a trial coming up after the deadline) then is it a disciplinary offence to fail to register?

After all, it's one thing to withdraw because of something that arises unexpectedly during a case, but the consequences of failing to register are eminently foreseeable – no registration, no practicing certificate. Do I not then have an obligation to register so that I can finish my trial (or return a pending trial so that a QASA-approved advocate can be instructed)?

The first two Core Duties require a barrister to: "observe your duty to the court in the administration of justice" and "act in the best interests of each client". This would tend to suggest there are problems for those who wish to protest with a boycott. This is before we see what happens if individual Judges, not wanting to derail a part-heard murder trial, start issuing directions to advocates to sign up to QASA or else face contempt proceedings.

The last year has seen lawyers, a historically conservative profession, take unprecedented levels of action, and it looks like this will continue with a boycott of QASA. I have certainly nothing against that (and plan to join the boycott), but I hope all lawyers read the small print first. ■

2 Dr Johnson's Buildings (@danbunting)



Archbold: Criminal Pleading, Evidence and Practice 2014

Editor: James Richardson, QC
62nd Edition, Full Print + Supplements
Sweet & Maxwell

H/B. ISBN: 9780414028616. Price £475

This year's *Archbold* once again presents a clear grasp of the developing case and statute law over the previous twelve months. Included in the new edition is succinct analysis of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which encompasses a wide range of matters going to the heart of our criminal justice system as well as the new Crime and Courts Act 2013, both pieces of legislation skilfully described throughout the new work in a number of different chapters. The 2014 Edition also marks the sad death of David Thomas QC, the sentencing editor. David Thomas's influence upon virtually every criminal barrister cannot be overstated, he rightly developed a reputation for being right at the top of his expertise. He will be missed.

Blackstone's Criminal Practice 2014

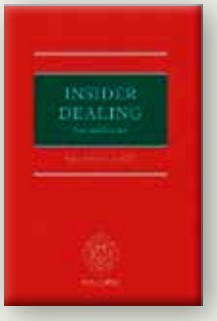
Professor David Ormerod QC (Hon) and
The Right Honourable Sir Anthony Hooper
Oxford University Press

Book, all supplements & digital pack pp.3,328

ISBN: 978-0-19-968140-2. Price £367

Blackstone's Criminal Practice deals with the implementation of the final sections of the Coroners and Justice Act 2009 as well as the new case law on partial defences to murder, insanity and intoxication and the significant new law relating to mental health and the criminal law. This edition also contains analysis of the Code for Crown Prosecutors which was published in 2013. Again, helpfully, this is referenced throughout the edition and supplements coverage of the volume of guidelines issued from the DPP on a range of subjects. Interestingly, what both works acknowledge is the gradual increase of authority which has developed from outside the conventional statute and caselaw stable. The Criminal Procedure Rules and Practice Directions are also taking up increasing space in these staple texts meaning that the frequency with which the Supplements are published is a vital feature of the essential provision provided by these books. In fact, the Supplements are becoming works in their own right and in the case of *Blackstone's,* purchasers are given the option to subscribe to two additional cumulative supplements to be published in the Spring and Summer. As always, both works provide an essential tool to the practitioner and commend themselves for both their lucidity and accessibility.

John Cooper QC



Insider Dealing: Law and Practice

Sarah Clarke
Oxford University Press

H/B. pp.368

ISBN: 978-0-19-967295-0. Price £145

Sarah Clarke's book, *Insider Dealing: Law and Practice*, is the first practitioners' text book to address the ever expanding area of insider dealing law.

The book tracks the evolution of the law on insider dealing from its conception, by virtue of Part V of the Companies Act 1980 and provides an in-depth yet easy-to-digest analysis of the current legal position as laid out in the Criminal Justice Act 1993. The text not only offers guidance in relation to criminal proceedings but it also provides an overview of the civil market abuse regime as contained in Part VIII of the Financial Services and Markets Act 2000 [FSMA]. In relation to civil abuse, the author places particular emphasis, in chapters 16, 17 and 18, on the types of behaviour which amount to a market abuse. These Chapters allow the reader to navigate through the tricky provisions of the FSMA and are particularly useful for: junior practitioners, seeking to offer advice on such topics; and employees of Financial Institutions, seeking to clarify their legal obligations.

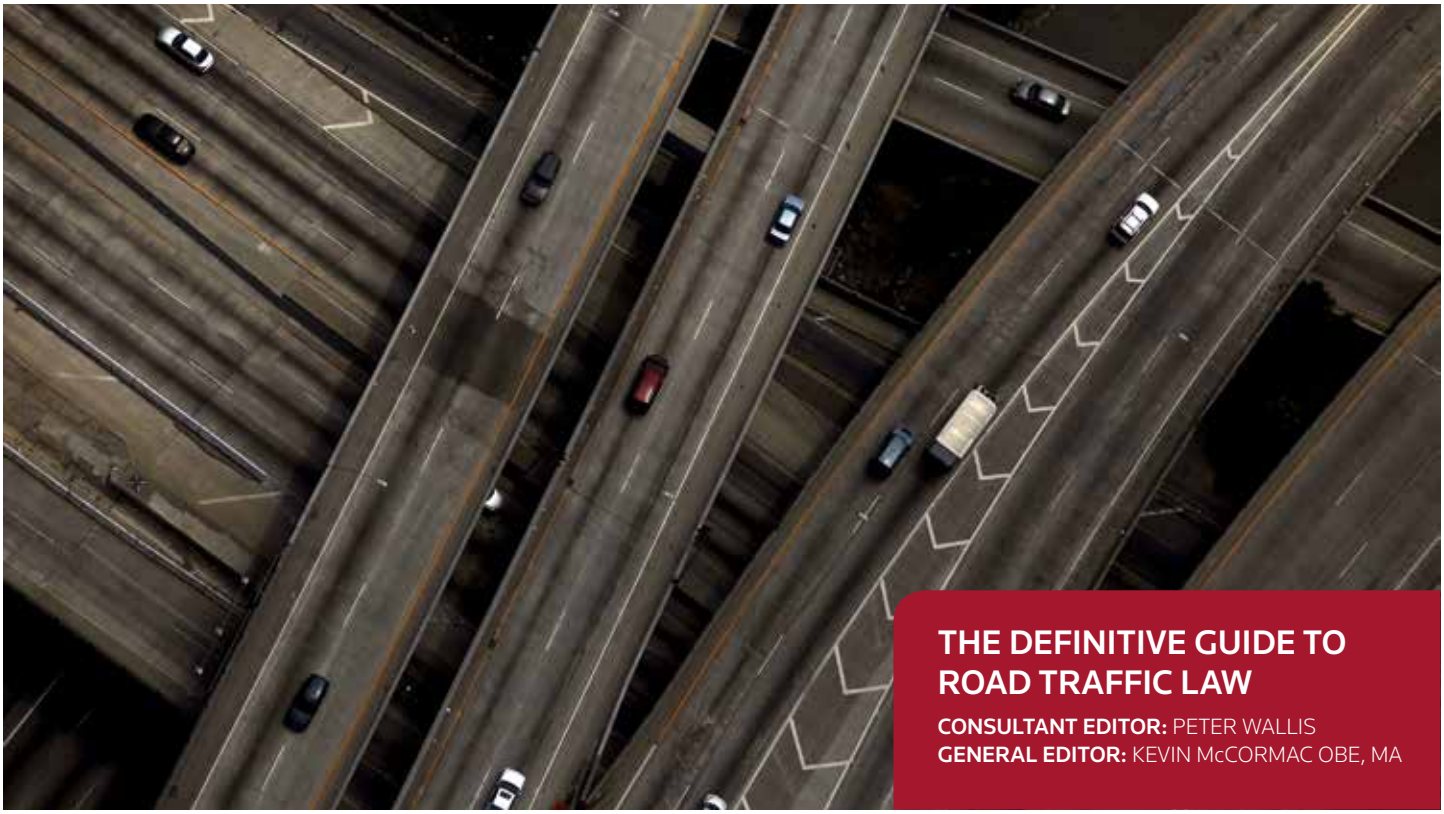
Clark's well-written text offers a simple and informative introduction to insider dealing law, which is beneficial for both experts and layman alike. In ch.2, the author offers a concise overview of the "essential principles" of market trading which is ideal for those who are not *au fait* with the workings of the markets.

Whilst clearly offering relevant information for junior practitioners, this current text is also useful for more experienced practitioners. Drawing on her vast experience from working both as in-house counsel for the FSA and more recently in private practice, Sarah Clarke's discussions on recent case law and legal developments offer guidance on an area of the law which is rapidly increasing. Providing a succinct analysis of the law coupled with "real-life" practical examples, this interesting book manages to simplify what is a challenging area of the law.

In summary, *Insider Dealing: Law and Practice* is an excellent, and much welcomed, commentary on insider dealing from a person with unparalleled experience in this field. The text is as useful for those who are new to the topic as it is for those with substantial expertise. It serves as a good introduction to insider dealing law and gives a practical overview of how insider dealing operates within our legal system.

Insider Dealing: Law and Practice is a thorough, well considered practitioner's text and should find its way into the hands of any purporting to have an interest in the financial markets.

Colin Wells



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