Pre-charge Bail ICC

CBQ

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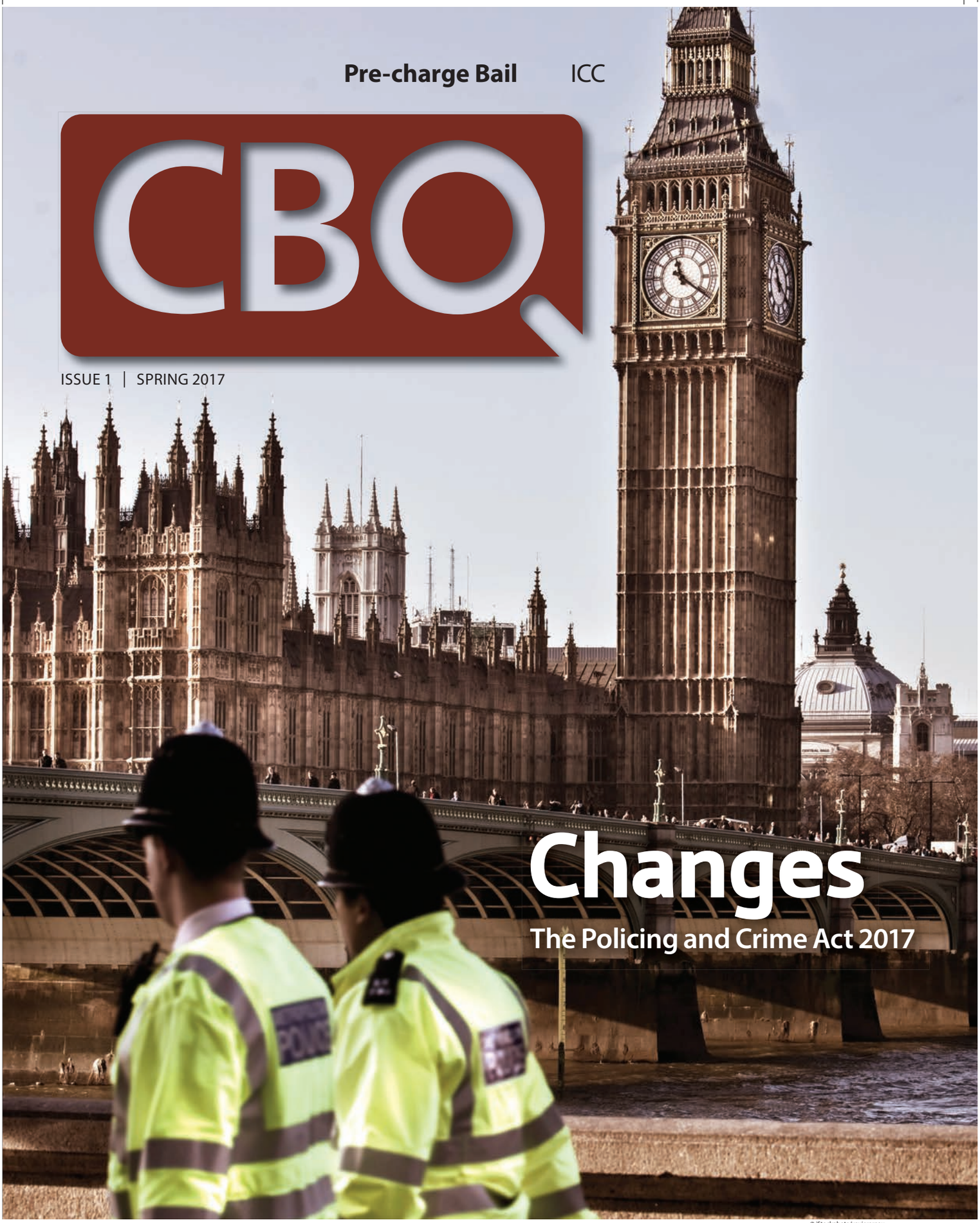

Changes

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FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

Reinforcing Values

EDITOR **John Cooper QC**

There is much talk at the moment about the need to protect the reputation of our judiciary and rightly so.

The recent attacks upon their integrity and independence from some sections of the Press has been nothing more than infantile and reprehensible.

But as we rightfully acclaim the merits of our judiciary it is, perhaps, timely that we should reenforce to the public the vital role that the Criminal Bar plays in promoting precisely the same values exemplified by the independent judiciary.

Many members of the public, press and media who think that they will never interface with the criminal justice system find it all too easy to undermine the work done by rank and file members of the criminal bar up and down the country, portraying them as "defenders of the indefensible".

During those highly charged days a few years ago when the criminal bar were standing shoulder to shoulder with other "stakeholders" as we now call them, many people constantly repeated the essential truth, that the criminal bar was more than the silly media profile of defenders of "the dark side". It was the work of criminal barristers who prosecuted and defended who ensured that every citizen, from wherever they came from, received a fair and just trial. I often say, it is the defence lawyer who defends to the hilt who ensures if their client is found guilty then it is a safe conviction … most of the time.

It is always a sobering reminder to those who doubt what we do that even the innocent might face an allegation. ■

QC, 25 Bedford Row. The comments made are not necessarily those of the CBA.

Fees and Investment In People

Chairman's column
Francis FitzGibbon QC

Legal aid fees have been the dominant issue of the first six months of my tenure as Chair of the CBA. In the December *CBQ,* I said I wanted to see an end to the Byzantine complexity of the AGFS payment scheme for advocates, which distributes the money in an unprincipled fashion. I continue to support the principles and many of the details of the new scheme that the MoJ has developed, with assistance from advocates. The consultation stage ended on March 2. Most of those barristers who have made their opinions known have criticised the proposals, and some say they reject them outright.

The underlying problem is chronic and serious underfunding. Redistribution of money creates new swings and roundabouts, but can't disguise the problem. The new arrangements represent a change of culture. Change is often seen as a threat and it makes people afraid. When the change comes from a government Ministry that advocates are predisposed to distrust, the threat appears all the greater. The concept of cost-neutrality, fixed at one year's figures, is not a good place to start planning the future, long-term planning for the funding of Crown Court Advocacy.

The relatively generous Carter settlement of 2007 rested on healthier public finances, economic optimism, and a greater willingness to put money into public services. They did not last. Within a year, we had the crash, public finances went south, economic optimism died, and austerity got under way. Cuts to legal aid were savage and carried out with little regard to anything except immediate savings.

The Ministry of Justice lost about 20% of its staff to the Civil Service cuts, including those employed in the HM Courts & Tribunals Service and the Legal Aid Agency. Those left are overstretched. Strategic thinking remains at a premium. Time and energy were wasted in 2013-15 on fights with solicitors and barristers over fees. Initiatives bravely started, like the Quality in Advocacy consultation of October 2015, gather dust. Crises in the prisons need dealing with, and they distract policy makers from other matters. While £700M has been found to invest in badly needed technology, there is no new investment in human capital.

> "Much as the NHS runs on the dedication and sheer professionalism of its doctors and nurses, so our courts run on the good-will and professionalism of the Judges, advocates and staff. Can it last indefinitely, without significant extra funding?"

Technology alone will not remedy the ills of the two-tier justice system, accurately described by the last Lord Chancellor in 2015:

> "Despite our deserved global reputation for legal services, not every element of our justice system is world-beating. While those with money can secure the finest legal provision in the world, the reality in our courts for many of our citizens is that the justice system is failing them. Badly."

It seems to me to be plain common sense that investing in people has long-term dividends, as much as investing in badly needed new systems. Human capital is indispensable. What sort of leaders and Judges do we want in 15 or 20 years time? People who are just good at filling in forms and operating computers, or men and women whose backgrounds represent society at large, and who have talent, skill and wisdom? If the latter, we need them now.

We already have a demoralised Judiciary that is struggling to replenish itself, as fewer senior practitioners offer themselves to the Circuit and the High Court benches. At the other end, able people won't join the Criminal Bar, or walk away after a few years, repelled by poor prospects coupled with often unreasonable working conditions.

The amazing thing is that, for all these multiple problems, we still have a functioning criminal justice system that is fair and conscientious. We have it because of the people in it. Much as the NHS runs on the dedication and sheer professionalism of its doctors and nurses, so our courts run on the good-will and professionalism of the Judges, advocates and staff. Can it last indefinitely, without significant extra funding?

Here's a warning of what happens when things are allowed to drift too far. I have experience of the First-Tier Tribunal (Immigration & Asylum Chamber) which hears asylum, immigration and deportation appeals. Legal aid has been cut to the bone. It's worse than in crime. The Home Office representatives are not lawyers and often have little grasp of the principles of advocacy; not infrequently, the appellants have representatives who should not be let anywhere a court, even though they or their bosses have demonstrated the statutory "competences". The appellants are invariably vulnerable people who don't speak English, and they have to pay what their representatives demand, without being aware of their inadequacies, or represent themselves. The Judges often have the burden of asking the necessary questions, providing the right authorities,

copying documents, and taking on an uncomfortably inquisitorial role in what is meant to be an adversarial proceeding. They do it without complaint, and try to do justice, but it's far from satisfactory. There's only a fuss when some one misleadingly puts it about that an asylum seeker was allowed to stay because of the human rights of his cat.

If the standards of advocacy in criminal courts fell to the level often seen in that jurisdiction, there would be an outcry – not perhaps because of perceived unfairness to defendants, but because victims and witnesses would be getting short shrift. It must not be allowed to happen.

I repeat: investment in people in critical.

Wellbeing

Some aspects of life at the Criminal Bar are taken to be immutable. Others have, over the last 20 years, changed almost beyond recognition. It has always been a stressful occupation, but structural, financial and cultural changes have conspired to place unprecedented burdens on practitioners.

Consequently, we have suffered the premature loss of loved and respected colleagues, and too often have found ourselves wondering if there was anything we could have said or done to prevent these tragedies.

This year, as part of the Wellbeing at the Bar initiative's programme of expansion, the CBA has appointed a Wellbeing Officer (Sarah Vine, of 187 Fleet Street) to take the lead in providing support, help and information to the membership. Our aim is to reach beyond the traditional committee structure and, over time, to create a national network of members willing to promote and engage with the programme in a way that will help to dismantle the stigma surrounding mental health issues, and normalise wellbeing as a subject of conversation for the Criminal Bar.

Mentoring and Diversity

It is a continuing disgrace to the profession that so few women reach its highest ranks and go on the High Court bench, and beyond. We do not accept that it is necessary to wait 50 years to achieve parity. Hence, the CBA has started a programme to support women barristers' career development supported by Rafferty LJ who was the first woman to chair the CBA and is closely associated with this initiative.

In January we held an event attended by 11 Silks who spoke about their varied experiences at the Bar – good and bad. Wisdom and generosity abounded. About 70 women attended, including many nearer pupillage than Silk. The audience and the panel spoke openly about their triumphs and disasters; how to build self-confidence; how to stop feeling like an impostor – not confined to women, of course; how to integrate a successful legal practice into one's life. We need to retain the many talented women advocates who leave the profession and don't come back, and we need to do it now. ■

The Policing and Crime Act 2017

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Preface

Michael Zander reviews changes made during the passage of the Bill

Contributor

Michael Zander

The Policing and Crime Act (PACA) began as a Bill last February at 211 pages with 112 clauses and 12 schedules. When Royal Assent was given on January 31, 2017 it finished as an Act almost double the length with 405pp, 184 sections and 19 schedules.

(For the writer's three-part account of the provisions of the original Bill see *CL&J*, February 20, 2016, p.125, February 27, 2016, p.145 and March 5, 2016, p.165.)

Pre-charge Bail

For practising lawyers and the police, the Act's most significant provisions are likely to be the 19 pages added to PACE under the umbrella heading "Pre-charge bail" (PACA, Pt.4, Ch.1 ss.52-69). These challenging provisions are due to go live as from April 1, unless the Home Office is persuaded that the police need more time to get their systems and their training up to speed.

There will be a new statutory presumption that, unless two conditions are fulfilled, release of a person whilst an investigation is ongoing should be without bail. The conditions are that the custody officer is satisfied that bail is "necessary and proportionate" having regard in particular to any bail conditions and release on bail has been authorised by an inspector.

Release of arrested persons without bail is plainly therefore intended to become normal, if not the norm. This will require a major culture change for the police. It will

be interesting to see to what extent they adopt the new approach. Street bail is not much used. Will release without bail prove a more successful innovation?

A suspect who is released without bail after arrest normally will have been fingerprinted and a DNA sample will have been taken but if that did not happen or there was a problem, they can be taken under PACE ss.61(5A) and 63(3ZA) in the same way as for suspects who have been bailed. (PACA s.59) Entry and search under PACE s.18 will be possible where someone has been released without bail.(PACA s.53)

The second main theme of the new provisions on bail is statutory time limits which can be extended, first by a superintendent and then by a magistrates' court. Attempts to persuade the Government to permit inspectors rather than superintendents to have the power to extend bail time limits failed.

The Bill as introduced set the initial time limit at 28 days but provided that a superintendent could extend 28 days to three months. (The time limit provisions are in PACE new ss.47ZA to 47ZM inserted by PACA s.63.)

Attempts were made when the Bill was in Committee in the Lords to increase the initial time limit, mainly to reduce the time spent by police officers handling extensions.

Research by Professor Anthea Huckelsby of Leeds University, based on the records of some 14,000 cases in two forces, showed that in both force areas the majority of suspects were on bail for more than 28 days. Professor Huckelsby argued that a 60-day time limit would be more appropriate. ("A time-limit of 60 days would be proportionate for both suspects and the police. This would allow cases involving routine forensic analysis, which officers in my study consistently reported took an average of six weeks, to be completed.")

But amendments to increase the time-limit to 56 days were resisted by the government and were not pressed to a division. The Minister (Baroness Williams of Trafford) told the House of Lords:

"From the figures in the impact assessment published alongside the Bill, which set out a worst-case scenario by assuming no reduction in the need for bail in spite of the other reforms in the Bill, those officers would need to make 404,000 initial bail decisions and 118,000 bail extensions, or 86 *per* inspector and 161 *per* superintendent over the course of a year … The Government recognise that the introduction of statutory controls on the use of pre-charge bail will entail additional work for the police when compared with the current free-for-all. Introducing effective controls in a situation where none exists at present will always have a cost, which the Government consider is justified by the enhancement to the rights of those who, let us not forget, have not even been charged with an offence, let alone been convicted." (*Hansard,* November 2, 2016, cols.662-63)

One late change of practical importance, however, was to permit a custody officer to set a time-limit *shorter* than 28 days where an earlier charging decision is likely (PACE, new s.47ZA(4),(5)).

Another late government amendment requires that the general duty created by the Act to notify persons who have been released after arrest if a decision is reached that they will not be prosecuted (for "lack of sufficient evidence") applies equally to persons who have been interviewed voluntarily (PACE, new s.60B inserted by PACA s.77).

Police complaints

IPCC to IOPC: The Independent Police Complaints Commission is to be renamed the Independent Office for Police Conduct. (PACA s.33)

Sensitive information: When the IOPC receives sensitive intelligence or intercept information it may not disclose the information, or even that it has been received, without the consent of the relevant agency. (PACA s.19)

> "A time-limit of 60 days would be proportionate for both suspects and the police."

IOPC powers of seizure and retention: Designated staff members of the IOPC are given PACE powers of seizure and retention of material relevant to a matter being investigated. (PACA s.20)

Police Discipline – Lay Member

Police Appeal Tribunals hearing appeals in discipline cases from non-senior police officers have three members, one of whom must be a retired police officer. The retired police officer role will be replaced by a lay person. (PACA s.31(3))

Retention of Biometric Material

PACE and the Terrorism Act are amended to enable DNA profiles and fingerprints to be retained on the basis of convictions outside England and Wales in the same way as such material may currently be retained on the basis of convictions in England and Wales. (PACA ss.70, 71)

Maritime Enforcement

Considerable additions were made to the Bill regarding maritime enforcement. Eleven sections were added dealing with offences committed under Scottish law and another nine sections dealing with offences committed under Northern Ireland law. General powers were added in respect of any maritime enforcement operation to allow "protective searches" to be carried out – to search any person found on the ship for anything (for example, weapons or tools), which might be used to cause physical injury, damage to property, or endanger the safety of any ship and to seize and retain any such thing.

Cross-border Enforcement

Cross-border enforcement powers in the Criminal Justice and Public Order Act 1994 are extended. The provisions close a gap in the cross-border arrest powers to make it possible for a person who commits an offence in one UK jurisdiction to be arrested without a warrant by an officer from the jurisdiction in which the person is found. (PACA s.116). The ancillary rights of suspects (information to be given on arrest, the right to have someone informed, the right of access to legal advice etc) are those that apply in the

jurisdiction in which the offence was committed. (PACA s.116) The same applies to the ancillary police power of entry and search. (PACA s.117)

The power to remove disguises – Authorisation for use of the police power to remove disguises at present has to be given in writing in advance (Criminal Justice and Public Order Act 1994 s.60AA). A government amendment to s.60AA to deal with the problem of flash demos organised by social media, provides that if written authorisation is not practicable, oral authorisation is sufficient. It must state the matters that have to be given in a written authorisation and must be reduced into writing as soon as practicable. (PACA s.120)

Disciplinary proceedings against former police officers – The provisions in the Bill to permit disciplinary proceedings against officers who have retired or resigned, for misconduct whilst in post only allowed such proceedings if the misconduct came to light within 12 months of the officer retiring or resigning. A government amendment provides that where the misconduct is sufficiently serious to have justified dismissal, disciplinary proceedings may be taken even if it only comes to light later. The pre-conditions are that the Independent Office of Police Conduct determines "that taking such proceedings would be reasonable and proportionate having regard to – (a) the seriousness of the alleged misconduct, inefficiency or ineffectiveness, (b) the impact of the allegation on public confidence in the police, and (c) the public interest." (PACA s.29 inserting new subs. (3E) in the Police Act 1996 s.50)

> We will also look to include provisions to give the officer the opportunity to consult with mental health professionals if it is safe and practicable to do so.

The Minister, Baroness Williams of Trafford, told the House of Lords: "This will mean that disciplinary proceedings can be brought in relation to the most serious matters which are considered of an exceptional nature where serious and lasting harm has been caused to public confidence in policing as a result of the wrongdoing. . ." (HL *Hansard* October 26, 2016, col.240)

Not retrospective: "[T]he exceptional circumstances test will not operate retrospectively. As such, these provisions will apply only to those officers who are serving on or after the date that they come into force. Where there is a finding that the former officer would have been dismissed at a subsequent misconduct hearing, the individual will be barred from future service in police and other law-enforcement agencies." (HL *Hansard,* October 26, 2016, col.240)

Effect on pension: Such disciplinary proceedings could not result in reduction or removal of the former officer's pension. However, if criminal activity was identified following an investigation and the officer was convicted, it would be open to the force to apply for some of the officer's pension to be forfeited. (HL *Hansard,* October 26, 2016, col.243)

Police Stations as "Places of Safety"

The Act gives the Secretary of State the power to make regulations as to when a police station can be used as a "place of safety" under the Mental Health Act 1983. The Government resisted an amendment that would have included adults in the Act's ban on police stations as places of safety for persons under 18. But the Minister, Baroness Chisholm of Owlpen, said regulations will provide greater support:

"Let me make it plain that while the Government's position is that it would be wrong and potentially very dangerous to ban outright the use of police stations as places of safety for adults, we have no intention of leaving police officers without support in making the judgment that a particular situation is of such severity that this would be the correct response. The regulation-making powers in [PACA s.81(6) inserting new s.136A into the 1983 Act] will be used to set out factors relevant to the decision on whether circumstances merit the use of a police station. We envisage that these will cover a range of issues, such as how dangerous an individual's behaviour is and how serious a risk of harm to themselves or others they represent. We will also look to include provisions to give the officer the opportunity to consult with mental health professionals if it is safe and practicable to do so.

Equally importantly, if the decision is made to use a police station, we must make sure that the individual receives all the appropriate healthcare and treatment they need while they are there. This, too, will be covered in the planned regulations. The regulations will further provide for a regular review of the individual's condition so that they can be moved to a more appropriate place of safety if the circumstances change – for example, if their behaviour has moderated and the move is in their best interest and can be achieved without delaying the mental health assessment." (HL *Hansard,* November 30, 2016, col.281)

Access to Advice for Persons Detained Under the Mental Health Act

Rejecting an amendment to require an appropriate adult for persons detained under the Mental Health Act, the Minister said:

> "On detainees' access to advice, for example from a mental health advocate or an appropriate adult, the guidance supporting the implementation of these provisions will set out the expected support to be provided to any person detained at a place of safety under s.135 or s.136. Such support can, in our view, most appropriately be provided by health staff already present, rather than another person in a bespoke role, which would introduce delays and jeopardise professionals' ability to conduct the assessment within 24 hours."(HL *Hansard,* November 30, 2016, col.282)

The text of the Act is now accessible at www.legislation.uk. It is available from HMSO. ■

Michael Zander QC is Emeritus Professor, LSE

Victim Complex

Preface

The presumption of innocence cannot coexist with the presumption of victimhood on the other side

Contributor

Richard Gibbs

If you type the word "victim" into Google you will be told that it is a noun meaning "a person harmed, injured or killed as a result of a crime, accident or other event or action." Of course, there are possible other definitions but as a starting point, it is hard to argue with that offering from Google.

The CPS sets out on its website the various definitions contained within the EU Victims' Directive 2012/29/EU (*The Victims' Directive*) and of course, since 2006 there has been the *Code of Practice for Victims of Crime; the Victims' Code*. There is a considerable amount of definition and explanation contained within the CPS guidance but perhaps the most important and, for the purposes of this article, certainly the most resonant, is the first paragraph which appears under the heading of General Principles on the CPS website and because of that is worth quoting in full;

> *"Victims are entitled to receive services under the Victims' Code if they have made an allegation that they have directly experienced criminal conduct to the police or had an allegation made on their behalf."*

Of course the logic here is clear; someone who is a "victim" is entitled to be treated as such, but look again and compare it to Google's offering (or that of any dictionary in the English language.) A victim is someone who has been harmed in some way. A victim according to the CPS is someone who has "… made an allegation that they have directly experienced criminal conduct to the police… ."

There is a clear difference between the two but perhaps that would not matter if it wasn't for the fact that the status of someone as a victim gives rise to a plethora of issues within the modern Criminal Justice System. The simplistic noun from Google becomes a self defining category, it isn't an objective definition in that sense it is a self proclaimed status and comes virtue not of something done or not done to a complainant but simply because they have made an allegation.

All of this could seem like semantics but perhaps in our perfectly understandable and reasonable rush to ensure that those who are victims in the English language sense of the word, are properly treated and looked after, we have inadvertently lost sight of the fact that in doing so we may have jettisoned the presumption of objectivity and fairness within the CJS. It isn't just the CPS who now approach

victims in this way; look on the website of any police force in England and Wales and you will find a similar definition to that which the CPS rely on, in other words a self certified victim status.

Lest it seem that in questioning this I should appear to be suggesting that someone who has been the victim of a crime in the sense that they have had some wrong done to them, should be treated indifferently, expressly I am not saying that. If someone has been made a victim of crime, then they are of course rightly entitled to be treated with the full range of respect and assistance that human decency and judicial fairness can provide. To do otherwise would, I respectfully suggest, be utterly appalling. In the past we know that those who were victims of sexual and domestic criminality were ignored, marginalized and ridiculed. That can and must never recur as it would be unjust to do so.

"

Words matter and in few professions or situations do they matter more than ours.

"

Justice of course cuts both ways; it would be unjust for us to return to that element of the past with all its faults, but two wrongs do not make a right. The solution to genuine victims being further harmed by the justice system is not a procedure which assumes all who make a complaint are victims. To do so is clearly both not objective and is also unfair. It is also the reality of where we appear to be in terms of considerations as to what counts as a victim.

We are all meant to come to the law as equals, the scales of justice symbolize the very essence both of the rule of law and of the fairness of the proceedings which are meant to be the mechanics of our justice system. That surely requires us to maintain an equality of arms both intellectually and practically between defence and prosecution up to conviction? How can it be right to systemically presume that one party – the complainant as they should be called – is deserving of different or special treatment over and above that which would be given to a defendant, someone we should not forget is rightly presumed innocent until they are proven to the requisite standard, to be guilty?

If it seems I am being puritan in his assertion, just think of the last time you were at court, either prosecuting or defending a trial. When the CPS or the Police made reference to a complainant, did they call them that or did they call them the victim? Perhaps they called them the alleged victim, which would be marginally better, though I doubt it. They probably just called them the victim. They probably worked on the presumption that they were telling the truth, that they were accurate and honest. And maybe they were and maybe it is necessary to work on this presumption to a degree. And maybe it is less damaging if that presumption is being made at the stage that the prosecution have brought the case and the parties are at court.

The problem is however, that they don't just make the presumption and allocate the label of victim at the doors of the court – they've done it since the complainant walked into the police station and made the accusation. The police haven't followed the evidence and objectively reached a conclusion in the way of a detective seeking the truth impartially; they have operated to build a case (Case Building is an active term used by the police and, you might think, the very inverse of objective.) They haven't done this through some group think driven desire to be subjective but rather because systemically and institutionally they are expected to be champions of the principle that to obtain convictions is the right thing; that this is not a fact finding or truth finding exercise but a point proving operation. The days of the fair minded minister of justice may be numbered if that is the case but even so, we should all counsel caution where such concepts and presumptions are concerned.

Words matter and in few professions or situations do they matter more than ours. The courts should not be an exercise in zero sum politics where to question the political motives behind the nomenclature we use is deemed as being a champion of the social mores of the 1970's; where questioning what underpins our use of language is seen as an immediate endorsement of the sort of policing practiced by Gene Hunt in *Life on Mars*. The system can only work if it is balanced and fair, in other words if it is objective and that means that someone cannot self certify themselves as a victim just because they deem something has happened to them. If something really has happened, then yes, they are a victim and should be treated as such. That is something that can only really be determined by a jury convicting someone. But we should not allow the word to be abused to import concepts that become exercises in tautology.

The presumption of innocence cannot coexist with the presumption of victimhood on the other side – they are mutually exclusive and it is about time we admitted that to ourselves and the public. Yes, that means we should also hold off on having victim personal statements drafted before the verdict, it means we should be more cautious of allowing a creeping shift in our attitudes because we are being lazy in our use of language. Once you put a label on someone, before conviction, you change the way you treat them and the way you look at what they say. Imagine for one moment that the Ministry of Justice decreed that from this day forth all defendants were to be called the Condemned. Hardly commensurate with innocence until proven guilty you might think. So why is it acceptable to do the opposite, to call the complainant the victim when the offence hasn't been proved?

Words matter because they change our attitudes. We must preserve equilibrium in our approach because if we don't, we wont be ensuring fairness, we will be pushing a pendulum away from the centre and toward another unfairness. ■

Barrister, No 5 Chambers

Immunity *versus* Impunity Debate

Preface

How departure from the ICC by African states has triggered immunity *vs* impunity debate

Contributor

Christina Warner

On October 21, 2016, South Africa announced its withdrawal from the International Criminal Court's jurisdiction. The Gambia swiftly followed by announcing its withdrawal on October 26.

The ICC based in The Hague hears allegations of the most serious nature including war crimes, crime against humanity and genocide. This is a devastating blow for the Court whose efficiency and legitimacy was brought into question on numerous occasions last year. Although credited for setting ground-breaking precedents throughout 2016 through cases such as that of Ahmed Al Faqi Al Mahdi and Jean-Pierre Bemba Gombo, the Court has been criticised by various African nations as being ineffective due to its neo-colonist approach. An argument which has been rumbling on for some time and forced address by the ICC. Russia has also questioned the ICC's practices. Having withdrawn its signature from the ICC's governing legislation, the Rome Statute in November 2016, accusing the court of failing to live up to hopes of the international community and denouncing its work as "one-sided and inefficient". In January 2016, Russia had been open about reconsidering its position in relation to the Court due to rulings on the 2008 war between Russia

and Georgia. At the time, Russia representatives had accused the ICC of failing to consolidate "the rule of law and stabi[lising] international relations".

It also didn't go unnoticed that the proposed withdrawal by Russia came a day after a report was issued by the ICC classifying Russian appropriation of Crimea as a military conflict with Ukraine and an occupation. This came amid accusations by France that Russia's actions in Syria were tantamount to war crimes.

South Africa had first expressed the possibility of departing from the ICC's jurisdiction in 2013 and was later confirmed in 2015 by President Jacob Zuma. The first state to completely withdraw was Burundi, based in the African Great Lakes region of East Africa, in October 2016 and it appears that South Africa and Gambia are soon to follow suit. Burundi's withdraw was dubbed "a major loss to victims". The response has sparked a widespread with the International Federation for Human Rights compiling a mock film trailer with the hashtag #stopthismovie demonstrating the fragility of the nation's political climate amid the escalating concerns of an outbreak of conflict and genocide.

> "The proposals to leave the ICC's jurisdiction have been clear in their intention but not as transparent as to their procedure and decision-making processes."

South Africa has alleged bias on the court's part claiming that only cases involving African nations have been before the Court in its 14 year history. Sheriff Bojang, the Information Minister for The Gambia states contradictory actions on the part of the ICC citing the decision not to indict the former British Prime Minister Tony Blair for actions during the Iraq war. Bojang claimed that the ICC should not be allowed to continue the "persecution and humiliation of people of colour, especially Africans".

These allegations have been strongly refuted, with responses by the ICC's chief prosecutor, Fatou Bensouda stating that there are ongoing investigations in Colombia, Georgia, Palestine and Ukraine and that a withdrawal would mean "regression for the continent". But the Court still struggles to establish world-wide acceptance of its jurisdiction as the US, China, India and much of the Middle East have failed to ratify the Rome statue.

Many speculate that South Africa's proposed departure comes at a time when they have received stark criticism due to their failing to execute an international arrest warrant for Sudanese President Omar al-Bashi who is wanted on allegations of war crimes in Darfur. The South African government allowed al-Bashir to leave the country and so failed to comply with their obligation to the Court. Further controversy followed with a ruling by the African National Congress wanting the Court's governing statutes to be reviewed to ensure a "fair and independent court". The African Union as a whole discussed a mass withdrawal of 34 of its member states from the ICC's jurisdiction unless the ICC complies with several conditions such as immunity for African heads of state. Whilst some African countries have expressed an intention to pursue domestic avenues in prosecuting matters which would have been dealt with by the ICC.

Responses to these proposals have been received on an international scale with remaining states expressing their disapproval. Amongst those in support of the ICC is Senegal (who has been clear in their lack of support towards proposals for an Africa-wide withdrawal), Botswana (who has often stood along in its support and has dubbed the withdrawals as "undermining victims") and Nigeria who along with Senegal and Tunisia has supported the ICC at AU summits.

One hundred and thirty non-governmental organisations wrote an open letter to the AU urging the nations to remain and outlining the negative message which would be sent of Africa's lack of commitment to "protect and promote human rights and to reject impunity".

Aside from the potential implications of prosecuting war crimes and crimes against humanity, there are also doubts arising regarding the ICC's role.

Similar to the responses of the Brexit outcome; there are questions as to whether a shift is taking place towards a more autonomous attitude towards conflict resolution with multigovernmental bodies falling out of favour. The proposals to leave the ICC's jurisdiction have been clear in their intention but not as transparent as to their procedure and decision-making processes. This is the argument submitted by many human rights groups – the decision is being made by authorities who have not consulted with the civilians of the nations they represent, only further supporting the need for the nations to remain under the ICC's watchful eye and their leaders within the Court's reach.

These proposed withdrawals have served another blow to the Court's attempts to establish a global legal order in the pursuit of accountability for those guilty of the largest-scale war crimes and crimes against humanity.

The Court has:

- Over 800 staff members: From approximately 100 States.
- 6 official languages: English, French, Arabic, Chinese, Russian and Spanish.
- 6 field offices: Kinshasa and Bunia (Democratic Republic of the Congo, "DRC"); Kampala (Uganda); Bangui (Central African Republic, "CAR"); Nairobi (Kenya), Abidjan (Côte d'Ivoire).
- 2 working languages: English and French.
- Headquarters: The Hague, the Netherlands.
- 2016 budget: €139.5m.

"The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes and crimes against humanity". ■

Barrister, 10 King's Bench Walk

Pre-Charge Bail

Preface

Criminal lawyers cannot take their eye of the ball

Contributor

Dan Bunting

On January 31, 2017, the Policing and Crime Act 2017 received Royal Assent. Part 4 of the Act relates to amendments to Police Powers which contain a raft of significant measures including (ss.52-69) a comprehensive overhaul of the law relating to pre-charge bail. (see Michael Zander article *ante*).

This has been enacted in response to various high profile cases where people were kept on bail for years before a decision as to charge has been made. The aim is to shorten the bail times for all suspects, as well as to put the whole pre-charge bail framework on to a more formal basis.

The Act creates a presumption that when someone is arrested and interviewed, but the police are not in a position to charge, they will be released without bail unless bail is necessary and proportionate. Where the test for bail is satisfied, the police will have to set a bail to return date within the Applicable Bail Period ("ABP") – the maximum period of time that a suspect can be on bail for.

The setting of an ABP can only be granted by an officer of the rank of Inspector (or higher), and then only for a maximum period of 28 days. The actual process of bailing and setting conditions however, will be conducted by the Custody Sergeant.

After that initial 28 day period, extensions up to period of three months from first release can be granted by a Superintendent. Any extensions after that can only be granted on an application (on notice) to the magistrates' court.

Before an ABP is set, a suspect has the right to make representations. This right applies where a case goes to a Superintendent for an extension. The guidance from the College of Policing indicates that the notice given to the suspect "*must be long enough to give a reasonable opportunity* [for them] *to make representations*", and talks of days rather than a quick phone call at the time (although one suspects this may be honoured in the breach).

After the three month period, the application to the court must be made within the ABP, but it can be granted after the ABP is expired provided "*it is not practicable for the court to determine the application before the end of that period*".

The ABP is deemed to be extended until the application is determined, however if "*it appears to the court that it would have been reasonable for the application to have been made in time for it to have been determined by the court before the end of the applicable bail period in relation to the person, it may refuse the application*". What approach the court takes to such applications remains to be seen.

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There Criminal Procedure Rules will be amended to reflect the involvement of the magistrates' court, and forms will be produced for the police to make the application. It is not clear whether any separate funding will be made available by the LAA for this.

The above framework does not apply where a case is sent to the CPS for charging advice. If that happens after the initial arrest then bail can be granted, and bail conditions imposed, by the Custody Sergeant without reference to anyone else.

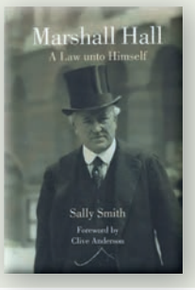
If a case is sent to the CPS for advice before the end of the ABP, then the clock is stopped on the day when the file is sent. It will restart however if the CPS send the case back to the police for further inquiries.

It may be that this will be a "fault line" in the new system. Currently cases can be with the CPS for a long while, some people feel too long on occasions, and there is nothing to prevent this continuing.

There is an exception to the above rules if the case is designated as an "exceptionally complex" one by a "*qualifying prosecutor*" (as yet to be defined). In that case, the ABP period is six months. Also, reflecting the generally complex nature of SFO cases, the initial ABP for an SFO case is three months, rather than the usual 28 days.

The creation of a formal system of bail is to be welcomed, especially given some of the bail periods that we have seen. However, there is a concern as to the pressure this will put on already stretched police forces and, as always the critical question is how it will work in practice and be interpreted by the courts. ■

Barrister, 2 Dr Johnson's Buildings



Marshall Hall: A Law Unto Himself

Sally Smith QC

Wildy, Simmonds and Hill Publishing, hardback, pp 302, including bibliography, notes and index, 2016. ISBN: 9780854901876. Price £25 print

Marshall Hall 1858-1927 was the leading advocate at the English Bar in the first quarter of the twentieth century. With what today would be seen as theatricality and histrionics he secured some remarkable verdicts from juries, such as Wood in the Camden Town murder, and Madam Fahmy, a former mistress of the then David, Prince of Wales. In the Seddon arsenic poisoning murder case and in the brides in the bath case he was in a sense unlucky not to secure acquittals. In the days of capital punishment the drama of the murder trial could hardly be exaggerated – the media and the nation were gripped by the story as the trial unfolded.

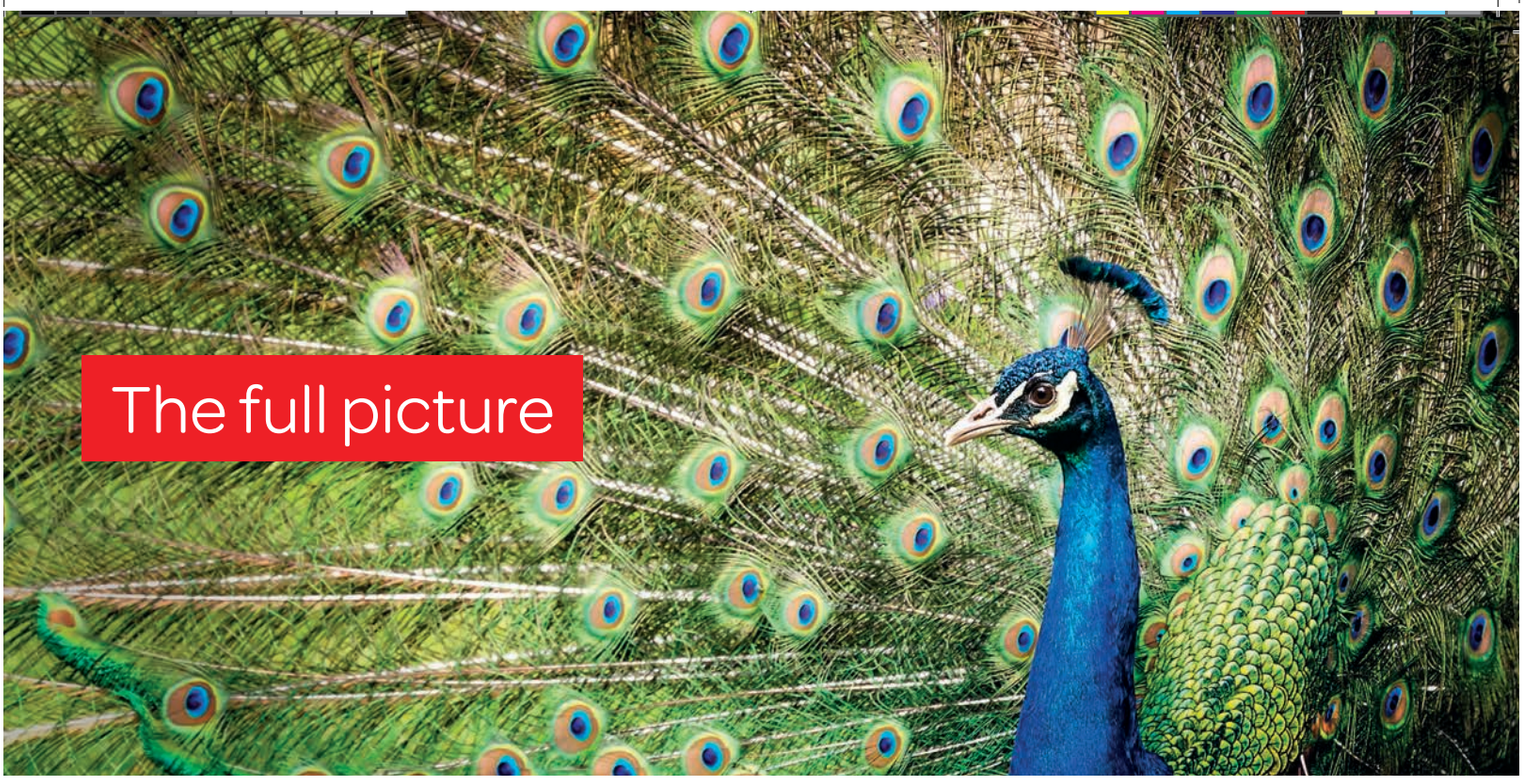
Modern criminal law was developing, and Marshall Hall had to cope with the defence difficulties. The defendant could give evidence as a witness in his own defence: How should the advocate advise: give evidence or stay silent? The prosecution offered similar fact evidence: When admissible? The evidence is essentially circumstantial, principally motive and opportunity: How effectively to challenge? Problems such as these are still very much with us today.

As forensic evidence began to be introduced, Marshall Hall made sure that he was thoroughly conversant with poisons and weapons and ballistics and jewellery, so as to be able effectively to cross-examine the experts.

A weakness in his advocacy was a tendency to argue with the Judge and to run into trouble with the Judge. The jury may sympathise with the advocate in dispute with the Judge, but the advocate is playing a dangerous game. Firm, forceful but polite submissions are fine, indeed a duty to the court and to the client. Retaining the respect of the Judge and working in harmony with the Judge should be the aim of the advocate seeking to do the best for the client.

Sally Smith QC, well experienced in the criminal law, has produced a closely researched, scholarly, original, definitive and readable biography of a giant amongst advocates, set in the context of the development of the criminal law of the time, a study of the skills of jury advocacy and the challenges, and the achievements.

Alec Samuels



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