THE CRIMINAL BAR ASSOCIATION

'The Annual Update'

Saturday 30th November 2019
09.00 – 13.30

IET, 2 Savoy Place
London, WC2R 0BL

Keynote Speech:

Lady Justice Macur
Senior Presiding Judge

Confirmed Topics Include:

Mobile Telephones / Technological Advances
Mobile) Electronic Evidence: Some Difficulties for the Law
Sentencing
Hate Crime
Updates in Crime

CPD Accreditation – 4 hours

THE CRIMINAL BAR ASSOCIATION

Saturday 30th November 2019

'The Annual Update'

PROGRAMME

08:30 – 09:00: Registration / Breakfast

09:00 – 09:15: Introduction / Opening Remarks

Speaker: Tracy Ayling QC, Director of Education

09:15 – 09:30: Keynote Speech

Speaker: Lady Justice Macur

09:30 – 10:10: Topic: Updates in Crime

Speaker: Karl Laird

10:10 – 10:40: Topic: (Mobile) Electronic Evidence: Some Difficulties for the Law

Speaker: Professor Alisdair Gillespie

10:40 – 11:10: Topic: Mobile Telephones / Technological Advances

Speaker: Detective Chief Inspector Stephen Jennings, Senior Investigating Officer, Kent & Essex Serious Crime Directorate

11:10 – 11:50 Tea and Sandwiches

11:50 – 12:30: Topic: Sentencing

Speaker: Lyndon Harris

12:30 – 13:00: Topic: Hate Crime

Speaker: Rebecca Cohen

13.00 – 13:15: Closing Speech & Questions

THE CRIMINAL BAR ASSOCIATION

Internet Access during the Conference:

Saturday 30th November 2019

Wi-Fi is available throughout the day.

The name of the network is: _IET-Guest

Once connected open your browser and click "I agree".

If you experience any problems, please speak with a member of the IET Reception staff.

Thank you.

THE CRIMINAL BAR ASSOCIATION

Conference Menu:

Morning Arrival

Freshly Brewed Coffee, Speciality Teas and Fruit Juice

Pastries (V)

Fruit Skewers

Mid-Morning Break

Freshly Brewed Coffee, Speciality Teas and Fruit Juice

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A Choice of Sandwiches on Artisan Breads & Tortilla Wraps

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Crisps, Mini Pretzel Knots

~

Sliced Fruit Plate & Pudding

Updates in Crime

Karl Laird

6KBW
COLLEGE HILL

CRIMINAL LAW UPDATE 2019

KARL LAIRD
6KBW College Hill
St Edmund Hall, Oxford

Table of Contents

Offences Against the Person

Assaulting police officers in the execution of their duty

***Dixon v CPS* [2018] EWHC 3154 (Admin)**

Summary
The defendant appealed his conviction for assaulting an officer in the execution of his duty, contrary to s. 89(1) of the Police Act 1996. The defendant had been asked to stop by three police officers (B, D and H). When he failed to do so, H took hold of the defendant's arm; he was not arresting the defendant or exercising powers of stop and search. A fight ensued and H was joined by B, who struggled to restrain the defendant. They were then joined by D, who went to restrain the defendant's arm because he believed that the defendant might be reaching for a weapon. The defendant then bit D on the arm. The Crown Court upheld the defendant's conviction on the basis that D had been acting in the execution of his duty when he grabbed him. This was despite the fact H had not been acting lawfully when he initially took hold of the defendant's arm. The defendant appealed by way of case stated on the basis that it was not open to the Crown Court to conclude that D had been acting in the execution of his duty, since he had gone to the aid of H, who it was accepted was acting unlawfully. The defendant placed reliance upon *Cumberbatch v CPS* [2009] EWHC 3353 (Admin), in which it was held that where the arrest of an individual by a police officer was unlawful, other police officers who went to assist their colleague were not acting in the execution of their duty, so that an individual who used reasonable force to resist those police officers was not guilty of an offence under s. 89(2). The Divisional Court held that this case was not easy to reconcile with *Joyce v Hertfordshire Constabulary* (1985) 80 Cr App R 298, although it observed that this may be as a result of a typographical error in the report of that judgment. The court declined to express a view on whether the decisions can be reconciled. On the facts of the instant case, the court held that what was determinative is the defendant was threatening to act unlawfully by appearing to reach for a knife. Therefore, unlike the position in *Cumberbatch*, on the facts as found by the Crown Court, D reasonably believed that the defendant might be about to use force which was excessive and which would constitute an unlawful assault even if the attempt to detain him was itself unlawful. The court stated that there was nothing artificial or untoward in holding that a constable who acts reasonably to protect a fellow officer from unjustified assault is acting lawfully and in the execution of his duty even if this involves assisting an officer who is acting unlawfully.

Analysis
This is one of a number of recent cases in which s. 89 of the Police Act 1996 has been analysed (see also *Oraki v DPP* [2018] EWHC 115 (Admin) and *Wheeldon v CPS* [2018] EWHC 249 concerning the availability of self-defence). Despite the fact it declined to resolve the apparent conflict between *Cumberbatch* and *Joyce*, the Divisional Court's judgment is helpful in clarifying the circumstances in which an offence contrary to s. 89(1) will be committed. The court noted that there is nothing artificial or untoward in holding that a constable who acts reasonably to protect a fellow officer from unjustified assault is acting lawfully and in the execution of his duty even if this involves assisting an officer who is acting unlawfully. This conclusion must be seen in light of the fact that in *Oraki* it was confirmed that self-defence can still be pleaded even though the police officer was acting lawfully. Provided the defendant can plead self-defence, there is nothing harsh in the court's conclusion that he has *prima facie* committed an offence,

Consent; Offences against the person; Deception; Identity

***R v Melin* [2019] EWCA Crim 557**

Summary
The appellant administered Botox injections for cosmetic purposes to two women, both of whom suffered serious injury after the second injection. The appellant was not medically qualified. Neither woman had met the appellant before he administered the first injections. Both maintained that the appellant told them, at different times, that he was medically qualified when he administered the injections. Both said that they would not have allowed the appellant to administer the injections had they known he was not medically qualified. The Crown's case was that the appellant had lied about his qualifications and that the women only consented in the belief that he was medically qualified. The appellant made a submission of no case on the basis that deception as to a qualification was insufficient to vitiate consent and that it did not constitute deception as to identity. The judge rejected this submission. The appellant appealed. The Court of Appeal held that as a matter of common law, only deception as to identity or as to the nature of the act are capable of negating consent. The issue was the nature of the mistake, rather than the reason why the mistake was made. The court accepted that it would be undesirable for all deceptions to negate consent, no matter how trivial. The court also accepted that there will be circumstances where a person's identity was inextricably linked to his professional status. Therefore a person's identity as a doctor, where that was integral to his identity, could vitiate consent. The court distinguished *Richardson* [1999] Q.B. 444 on the basis that the treatment in this case was given by someone impersonating a doctor. In *Richardson*, however, the defendant was a qualified dentist but had been suspended. For the two women in this case, if administration of the botox by someone who was medically qualified was a condition of giving consent, this was, at least potentially, a deception as to identity rather than merely qualifications or attributes. There were positive false representations that the appellant was a doctor, whereas, in *Richardson* , there was a failure to inform. Therefore, the judge did not err in concluding that there was a case to answer. In respect of the first woman, however, the court held that there was insufficient evidence for the case to be left to the jury. The appellant had made no representations as to his medical qualifications before the woman attended her first treatment, so she was willing to undergo the treatment before any representations were made about his qualifications. In respect of the second woman, the representations were made before her first treatment and the injury she suffered was caused by the second treatment i.e. after the defendant had falsely asserted that he was medically qualified.

Analysis
At common law, only deceptions as to the identity of the person and the nature of the act are capable of negating consent. Deceptions as to professional qualification cannot. As the court recognised, there will be instances where a person's professional status is integral to their identity. Indeed, it could be argued that the attribute is more important than identity. The most obvious examples involve medical professionals. For example, would a patient visiting a general practitioner and being told that a new doctor is taking the surgery be more concerned as to the "status" of the person or his "identity"? The same argument might apply to the attribute of being a police officer. This is not the same as saying that qualifications can vitiate consent. Not every qualification will be sufficiently important to negate consent. In fact, as a matter of reality, it may be that very few are capable of doing so outside of the medical context. There is nothing unorthodox about the approach taken in this case and, indeed, it seems to conform with common sense.

Cruelty, Particularised counts

***R v Cooper* [2019] EWCA Crim 43**

Summary
The defendant ran a boarding school for a number of decades. Allegations of mistreatment were made and, as a result of the findings of a police investigation, the defendant was charged with a number of counts of cruelty to a person under the age of 16. The prosecution's case was that the defendant, when faced with unruly schoolboys, had occasionally overstepped the mark and been cruel to some of them. The defence case was that none of the alleged incidents had in fact occurred. The defendant was found guilty of a number of counts, but not guilty of others. The defendant appealed against his convictions. In respect of count 8, the particulars had alleged that the defendant had "assaulted and humiliated" the complainant. The particularised offence was therefore one of alleged assault and humiliation. Both had to be proved, but in his written directions to the jury, the judge directed them in the terms of the language on section 1(1) of the Children and Young Persons Act 1933, which makes no reference to humiliation. In quashing the conviction for count 8, Davis LJ stated that the judge's direction had properly focused on the ingredients of the statutory offence. It was incumbent upon him, however, to address at some stage in his summing up the need for the jury to be sure in respect of the humiliation. From the transcript, it was clear that the judge did not explain to the jury that they had to be sure that there was both an assault *and* humiliation. The conviction on count 8 was therefore unsafe.

Analysis
The word "humiliation" does not appear in section 1(1) of the 1933 Act, so it is easy to see how the significance of including it in the particularised count may have been overlooked. Given the Crown's decision to take it upon itself to prove both assault and humiliation, it was necessary for the jury to be directed, at some stage, that they had to be sure that both took place. This case is a reminder that it may be insufficient to refer solely to the words of the statute in question when summing up to the jury. Depending upon how the counts have been particularised, it may also be necessary to embellish the statutory language to ensure the direction reflects how the case has been presented by the prosecution.

Assault; Using a noxious substance; Prison discipline

***R v Veysey* [2019] EWCA Crim 1332**

Summary
The defendant was accused of what is known in the prison estate as "potting", which involves a prisoner throwing bodily fluid, such as urine or faeces, at a prison officer. He was charged with unlawfully and maliciously administering a noxious substance, contrary to section 24 of the Offences Against the Person Act 1861. It was submitted on the defendant's behalf that, as a matter of law, urine is not capable of being a noxious thing. The essence of the defendant's submission was that a substance cannot be a noxious thing within the meaning of section 24 of the 1861 Act unless it has the capacity to cause some impairment or harm to a person's faculties or functioning, whether because of its intrinsic quality or because of the quantity in which it was administered. Counsel pointed to the fact that the prosecution adduced no expert evidence as to the nature of urine, and no evidence of any harm being caused by the defendant's actions beyond the evidence of the prison officer that his eyes were stinging after urine was thrown in his face. As urine is not an intrinsically harmful substance,

the defendant's conviction was unsafe. Citing *Marcus* [1981] 1 W.L.R. 774, a case relied upon by the Crown, the Court of Appeal held that where a substance is administered in a manner and a quantity which is in fact harmful, and the requisite intent is proved, then the offence will be made out even though the same substance in a lesser quantity, or administered in a different manner, may not have been harmful. The court concluded that, where an issue arises as to whether a substance is a noxious thing for the purpose of section 24 of the 1861 Act, it will be for the judge to rule as a matter of law whether the substance concerned, in the quantity and manner in which it is shown by the evidence to have been administered, could properly be found by the jury to be injurious, hurtful, harmful or unwholesome. If it can be properly so regarded, it will be a matter for the jury whether they are satisfied that it was a noxious thing within that definition.

Analysis

The Court of Appeal made clear in *Marcus* that the word "noxious" is to be given a broad meaning. A substance which may be harmless if taken in small quantities is noxious if administered in sufficient quantity to injury, aggrieve, or annoy. The meaning of the word is taken to be coloured by the purpose which the defendant may have in mind. The court quoted the *Shorter Oxford Dictionary* meaning: "injurious, hurtful, harmful, unwholesome". Given the prison officer's evidence that the urine made his eyes sting, this seems more than sufficient to cross the threshold articulated in *Marcus*.

Sexual Offences

Belief; Intention; Engaging in sexual activity in the presence of children

***R v B and L* [2018] EWCA Crim 1439**

Summary
The appellants appealed against their convictions for engaging in sexual activity in the presence of a child contrary to section 11(1) of the Sexual Offences Act 2003. The prosecution's case was that the appellants were, for the purpose of obtaining sexual gratification, intentionally engaging in sexual activity in the presence of their child, and that they had known or believed that the child was aware that aware that they were engaging in such activity. The appellants denied that the child's presence was intentional and that they had engaged in sexual activity in her presence for sexual gratification. Their submission of no case to answer at the close of the prosecution case was rejected. The judge ruled, and directed the jury, that there did not have to be a proven link between the presence of the child and the sexual gratification. The issue for the Court of Appeal was whether the person engaging in sexual activity had the necessary purpose of obtaining sexual gratification by simply engaging in sexual activity in the knowledge or belief that a child was present or observing and aware of the activity, or whether the sexual gratification had to be obtained from the knowledge or belief that the sexual activity was being carried out in the presence of, or under the observation of, a child. The court noted that various texts took different approaches to this issue. It concluded that the approach as set out in *Rook and Ward* and *Blackstone's Criminal Practice* was the correct one. The prosecution must prove that the sexual activity was for the *purpose of obtaining sexual gratification*, which qualifies section 11(1)(c) of the Sexual Offences Act 2003. The prosecution must therefore prove a link between "for the purpose of obtaining sexual gratification" and the presence or observation of a child. It was therefore insufficient for the prosecution to prove that a child just happened to be present

when sexual activity was taking place. The court concluded that the offence has the following elements:

> i. A intentionally engages in an activity that is sexual;
> ii. in the presence or under the observation of a child (B);
> iii. A does so for the purpose of A's obtaining (some) sexual gratification from B's presence or observation;
> iv. A knew or believed that B was aware of the activity or intended that B should be aware of the activity; and
> v. the child B was under 16 and A did not reasonably believe that B was 16 or over or B was under 13.

Analysis

As the court stated, the Crown's preferred construction of the offence would have rendered section 1(1)(c) otiose. The gravamen of the offence is not that a child happens to be within sight of the defendants' sexual activity. The offence is much narrower than that. The Crown must be able to prove that the defendants, in having sex in the presence or under the observation of a child, had as their purpose sexual gratification. Without the nexus between the presence or observation of the child and sexual gratification, there is no offence. Whilst this will make the offence more difficult to prove, it is true to Parliament's aim.

Homicide

Gross negligence manslaughter; knowledge of the defendant

***Winterton* [2018] EWCA Crim 2435**

Summary
The defendant was the construction manager of a building site and had overall responsibility for health and safety at the site. A labourer on the site died after the trench he was standing in or near collapsed. The owner of the company that dug the trench was convicted of health and safety offences. The prosecution case was that the accident was entirely foreseeable and preventable, and that it had been caused by the defendant's gross negligence. It was argued that it was, or should have been, obvious that there was a risk that the trench would collapse and that that risk presented a clear and obvious risk of death to anyone standing at the edge of, or in, the trench. The prosecution's expert witness stated that a report on the site before construction began had concluded that the soil was prone to collapse and that precautions should therefore have been taken to prevent the trench from collapsing. There was also evidence from a local water company employee, who had visited the site on the day before the collapse, stating that he had warned of the trench's instability. The judge rejected a submission of no case and the defendant was convicted. The defendant was granted permission to appeal on the basis that, placing reliance upon *Rose* [2017] EWCA Crim 1168, the judge erred in law in directing the jury that they were entitled to consider what he ought to have known about the way in which the trenches were being dug on site at the time of any alleged breach of duty by him. It was submitted that, as a result of *Rose*, the defendant could only be guilty if he actually saw the trench in an unsafe state with someone working inside. What was required was actual knowledge of the serious an obvious risk of death. Having regard to the appellant's convictions in relation to breaches of the Health and Safety at Work, etc Act 1974, there was a risk that the jury had decided that those statutory breaches fixed him with the necessary foreseeability required to establish guilt of the offence of gross

negligence manslaughter, but this would have been in retrospect, not prospect. In upholding the defendant's conviction, the court stated that the *ratio* of *Rose* is that the question of available knowledge and risk is always to be judged objectively and prospectively as at the moment of breach, not but for the breach. The court stated that the evidence in this case regarding the excavation of the trench clearly demonstrated the dangerous workmanship that posed a real and significant risk of death. It also stated that there was evidence that the defendant was aware of the dangerous state of the trench. The factual matrix in this case was that it was a question of 'when' not 'if' the trench would collapse, and this was or should have been apparent to anybody. The court stated that the breach of duty on these facts was not able to be cast as that in the case of the optometrist in *Rose*, and the GP in *Rudling*. They were not sufficiently alerted - and had no cause to be - to the risk of death on the facts available to them at the time of the breach of their respective duties of care, and which when objectively assessed should have alerted them to the serious and obvious risk of death. The court stated that the warning signs were there to see.

Analysis

In light of the criticisms that have been made of *Rose* (see K. Laird, "The evolution of gross negligence manslaughter" [2018] Arch Rev 6), this judgment presented the Court of Appeal with the opportunity to reassert the objective nature of the elements of gross negligence manslaughter. The House of Lords confirmed in *Adomako* that the test is whether a reasonably prudent person would have appreciated the existence of a serious and obvious risk of death. The court in *Rose* held that in considering whether there was a serious and obvious risk of death, the question of available knowledge and risk is always to be judged objectively and prospectively as at the moment of breach, not but for the breach. The court concluded that in cases of gross negligence manslaughter it is not appropriate to take into account what the defendant would have known but for his or her breach of duty. As a result of *Rose* the precise nature and content of the duty imposed upon the defendant is even more crucial to assessing his or her liability (see D. Ormerod and K. Laird, *Smith, Hogan, and Ormerod's Criminal Law*. 15th edn, 2018, pp 590 – 592). In *Rose*, the court recognised that that in some cases the risk will be inherent in the defendant's breach of duty. For example, had the victim in *Rose* presented with symptoms which themselves pointed towards a serious risk of death, then the defendant may have been liable. Given that the victim attended the optometrist for a routine eye examination, there was nothing to suggest, said the court, that her failure to conduct an intra-ocular examination posed a serious risk of death. It is submitted that the defendant's breach of duty in the instant case falls into this category. Given the dangers that are inherent in digging trenches of such depth, there was a serious and obvious risk of death in the defendant's failure to ensure that they were constructed properly. For this reason, this case was not the most appropriate case in which to test how *Rose* has impacted on the elements of gross negligence manslaughter. The judgment serves to highlight how a divergence is developing in how gross negligence manslaughter applies to healthcare professionals, as compared to others upon whom the law imposes a duty of care. Treating those who are ill poses inherent risks, but because a serious death risk of death may only become obvious had the defendant complied with his or her duty, no liability will follow. The conduct of other duty holders may also carry inherent risks. In contrast to healthcare professionals, such individuals will be liable because these risks are obvious without further enquiries being made. This was not something upon which it would have been appropriate for the Court of Appeal in the instant case to express a view, but it does merit further consideration.

Loss of control; Diminished responsibility; Mental disorder

R v Sargeant [2019] EWCA Crim 1088

Summary

D was charged with the murder of her mother. The issues for the jury at trial were whether D was acting in lawful self-defence; whether she intended to kill or seriously injury her mother; had she lost her self-control; or was her responsibility substantially diminished by the adjustment order from which she was suffering. The jury found D guilty and she appealed on the basis that the judge erred in failing to withdraw the murder charge from the jury; the judge erred in refusing to admit the evidence of two experts; the judge erred in not giving a propensity direction in relation to the established character of V; the judge misapplied the ratio of *Rejmanski* [2017] EWCA Crim 2061; the judge erred in failing to give appropriate safety warnings in his direction on diminished responsibility. Turning to the first ground, the Court of Appeal made reference to *Golds* [2016] UKSC 61 and *Blackman* [2017] EWCA Crim 190 and stated that the medical evidence was that D's ability to exercise self-control could have been substantially impaired, not that it had been. The prosecution advanced a rational basis for contending that it had not been, namely that this was a case of loss of temper in the context of an argument about money rather than loss of control. This was not a matter of semantics. It was the central issue in the case. The prosecution case was that this was a killing in anger, uninfluenced by medical condition. The prosecution contended that there was evidential support for this case, not only in the D's own account of the context in which the altercation arose, but in her subsequent actions, explanations and false scene setting, including wiping up bloodstains and clearing up the scene; trying to make it look as if her mother had killed herself; putting the knife in her hand; giving an elaborate initial false account as to what had occurred; and creating what the prosecution contended was an invented back story about being threatened with scissors. This showed a person who was in control of herself and who was looking for ways to avoid the consequences of what she had done. The court agreed with the prosecution and the judge that these were matters for the jury to evaluate and decide upon in light of the evidence as a whole. This was therefore not one those rare cases where the judge should have exercised the power to withdraw the murder charge. In respect of ground 2, the court held that the decision to refuse to admit the joint statement of the experts was well within the range of reasonable conclusions open to the judge. The court rejected ground 3 on the basis that there was no need for the judge to give a formal direction. It was submitted on D's behalf in respect of ground 4 that the judge's direction on self-control failed sufficiently to explain the objective test and left highly relevant matters "in the background". Citing *Rejmanski*, the court held that the judge's direction was correct, as he made clear that D's mental disorders were not relevant to the question of the degree of tolerance and self-restraint which would be exercised by the hypothetical normal person. He did, however, direct the jury that they may have been relevant to the gravity of the qualifying trigger. In respect of the final ground, it was submitted that the judge should have given the following safety warnings: (1) Brutal killings may be the product of a disordered mind; (2) Planning may be consistent with disordered thinking; (3) Not to turn themselves into amateur psychiatrists; (4) The jury should accept the expert evidence unless there is some identified reason not to do so. The court stated that it deprecated any suggestion that *Golds* requires specific legal directions to be given in every case involving diminished responsibility. The court explained that D's suggested warnings (1) and (2) were introduced in *Golds* by the words "If the facts of the case give rise to it". The amateur psychiatrists warning is said to be "ordinarily" advisable, and the failure to add those words will not necessarily call into question the safety of a conviction. It must be made clear

that there is a rational basis for rejecting the medical evidence and what that is. The court held that the summing-up as a whole was a model of clarity and was conspicuously fair to the defence.

Analysis
This judgment confirms yet again that it will be a rare case where it will be appropriate for the trial judge to withdraw the murder charge from the jury. If the prosecution invites the jury to disregard the expert evidence it is incumbent upon the trial judge to ensure that there is a rational basis for them to do so. The judgment also confirms that there is no form of words that must be given in every case involving diminished responsibility. The judge must, however, convey to the jury that they should resist the temptation to become amateur psychiatrists.

Gross negligence manslaughter; Knowledge; Breach of duty of care

R v Kuddus [2019] EWCA Crim 837

Summary
D appealed against his conviction for gross negligence manslaughter. A 15-year-old girl had died after suffering a severe allergic reaction to food ordered from the takeaway he ran. The appellant, who also worked as a chef at the restaurant the takeaway operated from, had pleaded guilty to health and safety and food safety regulatory offences. He was sentenced to two years' imprisonment for manslaughter. The previous owner of the takeaway, R, who was the restaurant manager, was convicted on the same three counts. V's friend had entered the words "nuts, prawns" on the comments section of a third-party webpage when ordering the food, because V had what was believed to be a mild allergy to those ingredients. The website had a further link which asked customers about allergies or other dietary requirements and which "strongly advised" customers to contact the restaurant directly before placing orders. It was not known if V or her friend had accessed that link, but they had not contacted the restaurant directly. When an order was placed, the restaurant received a printout. V's order was seen by R but there was no evidence that it was passed on to the appellant. Food was provided which contained peanut proteins. V died in hospital two days later. The prosecution asserted that D's failure as owner of the business to introduce systems of allergen control had led to a negligent breach of the duty of care he owed to V. The judge directed the jury on reasonable foreseeability of the relevant risk, but rejected a defence submission that the jury should first be asked to consider whether there had been a serious and obvious risk of death to V. It was submitted on D's behalf that the judge had erred (1) not directing the jury that it needed to consider whether there was a serious and obvious risk that the breach of duty would cause V's death; (2) directing the jury in terms which equated the knowledge of the business, or R, with that of D, on the basis that he was responsible for the systems in place. The Court of Appeal held that there was no requirement to prove a serious and obvious risk of death for the specific victim. If that was an issue, the question was whether the breach had given rise to a serious and obvious risk of death to the class of persons to whom D owed a duty. In terms of knowledge, the court held that the scope of a defendant's duty was fact-sensitive. The judge's summing up treated giving notice of allergies to the restaurant as sufficient to demonstrate notice to R and the appellant. No difficulty arose regarding R as he had received the order form. However, the appellant had not been notified about the terms of the order. The fact that he was the sole director of the business placed on him the duty of ensuring that appropriate systems were in place to avoid the risk that a customer with a declared allergy was not served food containing that allergen. The risk, however, was the risk that a customer might present with the underlying condition which the system should have

been designed to prevent, rather than the obvious and serious risk of death. More generally, if a reasonable person, possessed of the knowledge available to the defendant, would have foreseen only a chance that the risk of death might arise, that would not justify a conviction for gross negligence manslaughter. In the instant case the appellant knew nothing of the declared allergy. In those circumstances, the conviction for gross negligence manslaughter could not stand.

Analysis
This is an important judgment which requires careful reading. The Court of Appeal has confirmed that there is no need to prove a serious and obvious risk of death to the specific victim. Should the issue arise, the question is whether there was a serious and obvious risk of death to the class of persons to whom the defendant owed a duty. The existence of a serious and obvious risk of death are issues of objective fact, which are not dependent upon the state of mind or knowledge of the defendant. In any case of gross negligence manslaughter there is, by definition, a risk of death, because it must be proved that the defendant's breach caused the death of the victim. Whether the risk of death was obvious is also a question of fact. It is important in two related contexts: first, whether the risk would be foreseen by a prudent person standing in the shoes of the defendant; and, second, for the jury to take into account when considering whether the defendant's breach was so serious that it should be regarded as criminal. The seriousness of the risk of death, as an objective fact, is itself a question of fact and is distinct from the question whether a reasonable person in the defendant's position should have foreseen that the risk was serious (and obvious). Each of these objective facts is distinct from the question of foreseeability.

Alternative verdicts; murder; unlawful act manslaughter

R v Braithwaite **[2019] EWCA Crim 597**

Summary
The appellant stabbed the victim to death. His case was that he acted in self-defence, as he believed the victim was reached for a knife. The Crown's case was that he stabbed the victim in anger, intending to cause at least really serious harm. The judge left manslaughter to the jury, directing them that they might find the appellant guilty of manslaughter if they concluded that he had stabbed the victim, intending to cause some harm falling short of really serious harm. The appellant wanted manslaughter left on the basis that the victim had impaled himself on his knife. The appellant was convicted of murder and appealed on the basis that the judge should have directed the jury that they could return a verdict of unlawful act manslaughter if they were satisfied that, although he had not honestly believed he was about to be attacked, the knife had made contact with the victim in the way he claimed. The Court of Appeal concluded that the judge did not err in leaving unlawful act manslaughter to the jury in the way that he did. The appellant's version was remote from the real issue in the case, which was whether he deliberately stabbed the victim. It was also artificial and unreal to see it as a viable alternative. The court concluded that the judge had been right to leave to the jury a version of manslaughter that was not fanciful and which mitigated the danger of the jury convicting the appellant of murder simply because, although they might not be sure that he was guilty of that offence, they were sure that he was guilty of "something" and did not want him to go unpunished.

Analysis
As the court recognised, fairness to the defendant necessitated leaving manslaughter to the jury. The defendant's account simply did not withstand scrutiny and this judgment provides a useful reminder that judges ought to take a robust approach in terms of how they leave alternative offences to the jury.

Diminished responsibility; jury directions; murder

R v Hussain **[2019] EWCA Crim 666**

Summary
The applicant was convicted of murder after driving from Coventry to Manchester, where he stabbed a stranger five times with a knife in an apparently motiveless and unprovoked attack. Two weeks earlier, he had driven from Coventry to Nottingham and had punched a stranger in the face. Both the forensic psychiatrist instructed on the appellant's behalf and his treating psychiatrist, who had been directed by the trial judge to provide a report, agreed that the appellant was suffering from paranoid schizophrenia. The prosecution also instructed a forensic psychiatrist, but did not rely on his evidence. The defence case was that the appellant was not guilty of murder but was guilty of manslaughter by reason of diminished responsibility. The prosecution case was that the appellant was not suffering from paranoid schizophrenia and that the doctors had been duped. Alternatively, it argued that any mental illness he was suffering from had not substantially impaired his responsibility for the killing. In seeking for leave to appeal out of time, the applicant relied upon the judgments in both *Brennan* [2014] EWCA Crim 2387 and *Golds* [2016] UKSC 61, neither of which had been handed down when he was convicted. In denying leave, the court stated that the Supreme Court in *Golds* did not change the law, it merely clarified it. There had to be some rational evidential basis for challenging agreed expert evidence but the decision as to whether a defendant fell within the provisions of section 2 of the Homicide Act 1957. The court stated that the Supreme Court in *Golds* did not suggest that a trial judge should withdraw a murder charge from the jury simply on the basis that the medical evidence pointed one way and that reliance should not be placed on any judgment predating *Golds* on that issue. The court concluded that this was not one of those rare cases where the judge should have withdrawn the murder count from the jury. The prosecution were entitled to pursue the charge of murder and to challenge the medical evidence. The prosecution had material which potentially undermined the experts' opinions and, once deployed, no submission of no case to answer had been made and the judge had not raised the issue of withdrawal. All parties would have been aware that there had to be an evidential and rational basis to challenge the expert evidence.

Analysis
This judgment provides a useful reminder that it will be a rare case in which the trial judge ought to withdraw the murder count from the jury. See also *Blackman* [2017] EWCA Crim 190 on this point. The prosecution is well within its rights to attempt to undermine the expert evidence, provided it has a rational basis for doing so. The court also stated in this case that the judge's directions to the jury could not have been fairer, as he emphasised the standing and experience of the doctors called to give evidence. This is perhaps something worth bearing in mind for future reference.

Corporate Liability

Strict liability; corporate liability

***Highbury Poultry Farm Produce Ltd v CPS* [2018] EWHC 3122 (Admin)**

Summary
The defendant slaughterhouse was convicted of committing offences contrary to the Welfare of Animals at the Time of Killing (England) Regulations 2015. The district judge found that the offences in question did not require proof of *mens rea*, but stated a case asking whether an offence contrary to reg.30(1)(g) required proof of (1) *mens rea*; (2) a culpable act and/or omission on the part of the business operator. The Divisional Court observed that the 2015 Regulations were silent as to the need to prove any mental element. Citing the House of Lords in *Sweet v Parsley* [1970] AC 132, the court observed that *mens rea* is an essential ingredient of every offence unless some reason could be found for holding that that was not necessary. In the absence of a clear indication in statute that an offence was strict liability it was necessary to examine all the relevant circumstances to establish that that had to have been the intention of Parliament. The threshold for rebutting the presumption of *mens rea* was high and the only situation in which the presumption could be displaced was where the statute was concerned with an issue of social concern, and public safety was an issue. The principal objective of the 2015 Regulations read in conjunction with the EU Regulation according to the court was to promote the welfare of animals during the slaughtering process by obliging both business operators and those employed by them to take all necessary measures to avoid pain and minimise distress. It was held that there was no sensible distinction between public and social concern, or between public and animal safety. That indicated strongly that the presumption should be displaced. The objects of the legislation were furthered, and greater vigilance engendered, by insisting on strict compliance with the Annex III requirements referenced in art.15 of the EU Regulation.

Analysis
This case turns on its own facts, but it is a good example of the complexity that can be encountered in determining whether the presumption of *mens rea* has been displaced. The court engaged in a detailed analysis of the relevant Regulations before concluding that Parliament had displaced the presumption. The judgment is also interesting as it is a rare example of vicarious liability in the criminal context. It was never alleged that the members of staff who failed to kill the chickens before they were scalded represented the directing mind and will of the defendant corporate. This did not preclude liability, however, as the vicarious nature of the offences meant that there was no additional need to prove that the corporate was culpable in order to fix it with criminal liability. Leave to appeal to the Supreme Court has been granted.

Conspiracy; corporate defendants; Directors

***R v Alstom Network UK Ltd* [2019] EWCA Crim 1318**

Summary
The defendant company applied for leave to appeal against its conviction for conspiracy to corrupt on the basis that two directors who had constituted its directing mind and will for the purposes of the impugned contracts were not present at trial and did not give evidence. It was argued on the company's behalf that a fair trial could not be conducted in the absence of

the two directors, as corporate bodies are deemed to act and acquire knowledge through individuals who could be identified as its directing mind and will. In denying the company's application, the court recognised that its guilt turned on the guilt of one or both of the directors in question. The court went onto state, however, that there was no rule or practice which the required the directing mind and will of a corporate to be indicted with it or to be available to give evidence. This was because, according to the court, a company is a separate legal entity from the person constituting the directing mind and will, and their absence from the trial did not mean that the company itself was absent. In the instant case, the company had been fully represented at trial and had participated effectively in it. The court's analysis was heavily influenced by the incentive the company's analysis would create for directors to absent themselves from a trial in order to shield the company from potential liability.

Analysis

As a matter of company law, a company has a legal personality that is distinct and is separate from its directors. This much has been clear since the House of Lords' seminal judgment in *Salomon v Salomon* [1897] A.C. 22. The court was therefore correct to say that a company is legally separate from the individuals who constitute its directing mind and will. The issue, however, is that the criminal liability of a company turns on the fiction that the company is indistinguishable from its directors. This is one reason why there can be no criminal conspiracy if the only parties to it are the company and a director. There can, however, be a conspiracy as a matter of civil law. It is respectfully submitted that the court may have paid insufficient attention to the fact that the relationship between a company and its directors, as a matter of criminal law, differs from that which pertains under the civil law. Further consideration may need to be given to this issue in future cases.

Terrorism

R v Lane and Letts **[2018] UKSC 36**

Summary
The defendants were charged with entering into a funding arrangement for the purposes of terrorism, contrary to section 17 of the Terrorism Act 2000. The prosecution alleged that the defendants had sent, or arranged to send, money overseas when they knew or had reasonable cause to suspect that it would or might be used for the purposes of terrorism. At a preparatory hearing, the judge ruled that "reasonable grounds to suspect" ought to be interpreted objectively and there was no need for the defendants subjectively to have suspected that the money would be used for the purposes of terrorism. The defendants appealed and the Court of Appeal agreed with the trial judge's interpretation. The Supreme Court, in a judgment delivered by Lord Hughes, held that its task was to determine how Parliament intended for "reasonable grounds to suspect" to be interpreted. The court observed that section 17 is not silent as to the state of mind required for the commission of the offences of funding terrorism. The legislative history of the terrorism funding offences indicated that, in adopting the words "knows or has reasonable cause to suspect," instead of the words "knows or suspects" which had been used in earlier statutes, Parliament had clearly intended not to require proof of actual suspicion and to widen the scope of the offences so as to include those who had, objectively assessed, reasonable cause to suspect that the money might be put to terrorist use, and it was not open to the court to ignore that clear parliamentary intention. The court rejected the argument that such an interpretation rendered section 17 an offence of strict liability. Although the state of mind of such a person was less

culpable than that of a person who knew that the money might be used for terrorism, the court stated that it could not be described as being in no way blameworthy.

Analysis

The Supreme Court's judgment provides useful clarification as to how the terrorist funding offences in section 17 ought to be interpreted. The court agreed with the view expressed by Lloyd-Jones LJ (as he then was) in the Court of Appeal that the lesser culpability of an offender who only had reasonable grounds to suspect that the money would be used to fund terrorism could be reflected in sentence. One issue that was not considered by either the Court of Appeal or the Supreme Court is the position of an individual whose mental disorder means that they are unable to appreciate that there exist reasonable grounds for suspecting that the money would be used to fund terrorism. Given the objective interpretation adopted by the Supreme Court, it appears that such an individual would be convicted, subject to pleading insanity. The Supreme Court did state that the requirement is satisfied when, *on the information available to the accused*, a reasonable person would suspect that the money would be used to fund terrorism. In *B* [2013] EWCA Crim 3, Hughes LJ, as he then was, expressed discomfort about the prospect of an individual whose paranoid schizophrenia induced in him a mistaken belief that his partner was consenting to sex only being able to rely upon insanity to avoid liability for rape. This issue arises due to the fact that the *mens rea* for the non-consensual offence in the Sexual Offences Act 2003 is objective. Assuming that the same concern arises in the context of the objective *mens rea* in section 17 of the Terrorism Act 2000, his lordship might have intended for the "information available to the accused" element to temper the otherwise harsh consequences of adopting an objective standard of *mens rea*.

Defences

R v Taj [2018] EWCA Crim 1743

Summary
The appellant encountered V, whose van had broken down, on the Albert Embankment. Smoke was emanating from the van and the appellant, who became suspicious that V was a terrorist, phoned 999 and told the authorities that he suspected there was a bomb. The police responded and quickly determined that V was not a terrorist. The officers tried to jumpstart V's van, which caused a great deal of smoke to emanate from it. The attempts were unsuccessful and the officers advised V to await recovery. The police left the scene and the appellant returned to his van and drove away. As he did so, however, it was his case that he had "ruminating thoughts" about V having a bomb, and he felt compelled to do something about it. He returned to V's van and beat him with a tyre lever that he had in his van, causing V serious injuries. Medical evidence demonstrated that the appellant was suffering from drug induced psychosis and was suffering from a drug or alcohol induced psychotic disorder at the time of the offence. The appellant had the ability to form an intent at the time of the alleged offence; the driving force behind his actions was a drug induced/drug and alcohol induced paranoid state of mind. By his own admission, the appellant had abused drugs and alcohol from a very young age. The defence sought to rely upon self-defence on the basis that the defence is available even if the defendant is mistaken as to the circumstances as he genuinely believed them to be, whether or not the mistake was a reasonable one for him to have made. It was submitted that as there was no suggestion that the appellant had alcohol or drugs present in his system at the time, he was not 'intoxicated' and so was not deprived of the defence. Delivering the judgment of a five-member CACD, Sir Brian Leveson P observed that in *Coley* Hughes LJ had suggested that that there was scope for the argument that an illness caused by the defendant's own fault ought, as a matter of policy, to be treated

in the same way as is drunkenness at the time of the offence. His lordship held that this would represent a significant extension of the principle enunciated in *Majewski* and was at risk of covering mental illness attributable to many years of past drug or alcohol abuse. Sir Brian Leveson P stated that it was difficult to see why the language (and the policy) identified in *Majewski* is not equally apposite to the immediate and proximate consequences of such misuse. That is not to say that long standing mental illness which might at some stage have been triggered by misuse of drugs or alcohol would be covered. His lordship stated that a defendant who is suffering the immediate effects of alcohol or drugs in the system is, in truth, not in a different position to a defendant who has triggered or precipitated an immediate psychotic illness as a consequence of proximate ingestion of or drugs in the system whether or not they remain present at the time of the offence. Given that the appellant's paranoia was the direct and proximate result of his immediately prior drink and drug-taking, the court stated that the view expressed by Hughes LJ applied to the facts of the instant case. In terms of how the phrase "attributable to intoxication" ought to be interpreted in section 76(5) of the Criminal Justice and Immigration Act 2008, the court stated that:

> "[the term is] broad enough to encompass both (a) a mistaken state of mind as a result of being drunk or intoxicated at the time and (b) a mistaken state of mind immediately and proximately consequent upon earlier drink or drug-taking, so that even though the person concerned is not drunk or intoxicated at the time, the short-term effects can be shown to have triggered subsequent episodes of *e.g.* paranoia. This is consistent with common law principles. We repeat that this conclusion does not extend to long term mental illness precipitated (perhaps over a considerable period) by alcohol or drug misuse. In the circumstances, we agree with Judge Dodgson, that the phrase "attributable to intoxication" is not confined to cases in which alcohol or drugs are still present in a defendant's system. It is unnecessary for us to consider whether this analysis affects the decision in *Harris*: it is sufficient to underline that the potential significance of voluntary intoxication in the two cases differs" at [60]

The court also stated that the judge could have withdrawn self-defence based upon the second limb of the defence based upon the application of the judgment in *Oye,* in which Davis LJ stated:

> "The position remains, as we think plain from the provisions of s.76 of the 2008 Act, that the second limb of self-defence does include an objective element by reference to reasonableness, even if there may also be a subjective element: see, in particular, s. 76(6) and see also the decision in *R v Keane and McGrath [2010] EWCA Crim 2514* . An insane person cannot set the standards of reasonableness as to the degree of force used by reference to his own insanity. In truth, it makes as little sense to talk of the reasonable lunatic as it did, in the context of cases on provocation, to talk of the reasonable glue-sniffer."

The court stated that this analysis was apposite in the instant case.

Analysis

This judgment provides yet another example of the difficulties that can be faced in applying the so-called "prior fault" policy that governs the relationship between intoxication and criminal liability (for further discussion, see D Ormerod and K Laird, *Smith, Hogan, and Ormerod's Criminal Law* (2018, 15th edn), Ch 9). The court did not just consider the proper construction of section 76(5) of the 2008 Act, but also expressed a view on the scope of the

rule that was enunciated by the House of Lords in *Majewski.* The court stated that a defendant whose consumption of drink or drugs triggered or precipitated a psychotic illness can be equated with one who has drink or drugs in his system at the time he committed the offence. This will only be the case, however, where the ingestion of the intoxicant was proximate to the commission of the offence. It is submitted that this analysis has the potential significantly to expand the scope of *Majewski* and means that a defendant who was not intoxicated at the time of he or she committed the offence will be deemed to be guilty provided he or she was reckless in taking the drink or drugs. It is not clear what the court means by "proximate ingestion" and how proximate the ingestion must be to the commission of the offence. Further, if the defendant suffers a psychotic episode triggered by drink or drugs, it is not clear why the court considers proximity to be relevant. The fault exhibited by the defendant is the same irrespective of proximity. The court's analysis also needs to be considered in light of the recent judgments that have examined the relationship between diminished responsibility and intoxication. As a result of *Lindo* and *Kay; Joyce* a defendant whose drink or drink taking triggers a pre-existing medical condition can plead diminished responsibility, but a defendant whose ingestion of drink or drugs causes a medical condition cannot plead the partial defence (for discussion, see D Ormerod and K Laird, *Smith, Hogan, and Ormerod's Criminal Law* (2018, 15th edn), pp 562 – 563). What is sorely needed is a judgment that considers the operation of the prior fault policy in a holistic fashion and analyses whether the distinctions that are presently drawn by the law are rational. The court's interpretation of 76(5) could give rise to difficulties in practice, as it is possible to envisage disputes arising as to whether the ingestion of the intoxicant was sufficiently proximate to the offending. Once again, if the defendant's mistaken belief in the need to use force was induced by a mental disorder that was triggered by drink or drug consumption, why should it matter whether it is proximate to the commission of the crime?

***R v Cheeseman* [2019] EWCA Crim 149**

Self-defence, householder defence, Trespasser

Summary
The defendant, a corporal, stabbed and injured another serviceman in the room he occupied in his army accommodation. He was charged with attempted murder. He denied an intention to kill and also pleaded self-defence. In respect of self-defence, the Judge Advocate General ruled that the so-called "householder defence", introduced by way of amendment into section 76 of the Criminal Justice and Immigration Act 2008, was only available in cases where the person who was injured was an intruder, as opposed to someone who had entered premises lawfully and then become an intruder. The Board convicted the defendant of wounding with intent, and acquitted him of attempted murder. The defendant appealed his conviction on the basis that the Judge Advocate General was wrong to rule that the householder defence is unavailable in cases where the victim initially entered the dwelling lawfully. Allowing the appeal, the Court of Appeal held that the language of the statute was clear – the question is whether, at the time of the incident, the defendant *believed* the other person to be in the dwelling as a trespasser. The defence is not directly concerned with the question whether someone was or was not a trespasser, but rather the defendant's belief.

Analysis
The Court of Appeal's conclusion is unimpeachable. As the court explained, the householder defence is not concerned with whether, as a matter of law, the victim was a trespasser. The provision is concerned with whether the defendant believed the victim was a trespasser at the

time of assault. The householder defence can therefore be contrasted with burglary. The benefit of this is that, as can occur in the context of burglary, there is no need to engage in a detailed analysis of the civil law of trespass.

Contempt of Court

In re Stephen Yazley-Lennon **[2018] EWCA Crim 1856**

Summary

The appellant was committed to prison for 13 months following breach of orders made under section 4(2) of the Contempt of Court Act 1981 in Leeds and Canterbury. In Leeds the appellant was convicted and sentenced within 5 hours of the alleged conduct occurring. The appellant alleged that the trial judge did not follow the procedure proscribed in Part 48 of the Criminal Procedure Rules, as he had not been served with a written statement as required by r.48.7. He also submitted that the judge had wrongly purported to pass a "sentence". The appellant contended that the judge had referred to conduct outside the scope of the section 4(2) order and had failed to identify which conduct he was treating as contempt. The appellant indicated that the court records erroneously treated the sentences as ones of imprisonment made following criminal convictions. In terms of the Canterbury proceedings, the court held that the appellant had not received a written statement under r.48.7, but he had been served with four witness statements. He had not complained at the hearing about lack of clarity regarding the allegations and had suffered no real prejudice from the failure to particularise the contempt. There was no doubt about the conduct alleged, the appellant had unequivocally accepted it and also that it amounted to contempt of court. In terms of the use of the word "sentence", the use of criminal sentencing terminology had caused the appellant no prejudice. In terms of the Leeds proceedings, the court stated that there was merit in the argument that the judge had dealt with the contempt too quickly. Such haste created a real risk that procedural safeguards would be overlooked, the nature of the allegations would remain inadequately scrutinised and significant mitigation would be missed; those risks had materialised. The judge appeared not to have considered referring the matter to the Attorney General, which was the almost invariable course taken, nor an adjournment. Save for cases involving obstructive, disruptive, insulting or intimidating conduct in the courtroom or its vicinity, or otherwise immediately affecting the proceedings, the judge should usually avoid initiating contempt proceedings. There was a lack of clarity about which parts of the video the appellant had taken constituted an attempt. The judge had had regard to matters beyond the section 4(2) order. The court also concluded that the failure to follow Part 48 had been more than technical. These factors led the court to quash the Leeds contempt.

Analysis

The point made by the court is clear: judges ordinarily should not initiate contempt proceedings and should only take this exceptional course of action where it is necessary to ensure that the proceedings are not further disrupted. The more appropriate course of action is for the judge to refer the case to the Attorney General. Given the fact the appellant was being disruptive in the vicinity of the court, the approach taken by the judge in the instant case is understandable. The fact that the court disagreed with it highlights how exceptional the case must be before the judge should consider initiating contempt proceedings.

Possession

***R v Okoro* [2018] EWCA Crim 1929**

Summary
The appellant was convicted of being in possession of an indecent image of a child and also of extreme pornographic images. The appellant claimed that he had been sent the images, unsolicited, via WhatsApp; had not known what they contained until he downloaded or opened them; had accessed them only once; and believed that he had deleted them but had saved them by mistake. The central issues for the jury were whether the appellant had seen the videos, whether he had cause to suspect that they were indecent, and whether he had kept them for an unreasonable length of time. In his route to verdict, the judge directed the jury that the appellant had admitted being in possession of the images since they were on his phone. The court observed that neither the Criminal Justice Act 1988 nor the Criminal Justice and Immigration Act 2008 defined "possession", but that the meaning of the term had been considered by the Court of Appeal on a number of occasions in the context of images stored on a computer. The issue for the court in the instant case was different, as it concerned a file that was sent uninvited. The court stated that it cannot be the law that a defendant must be shown to be aware of all the relevant content of a digital file on his device. If that were necessary, then the statutory defences would be redundant. The question is whether it is enough that the accused should know that digital files had been sent to him, for example, as an attachment to an email, or as an encrypted file by one of the apps by which digital content may be transmitted. The court stated that the statute requires proof by the Crown of possession of the pornography or images of child abuse, as a preliminary step before the burden of proof shifts to the accused, to establish the statutory defences. An accused cannot be convicted in relation to material of which he was genuinely totally unaware. Nor could a defendant be said to be in possession of a digital file if it was in practical terms impossible for him to access that file. However, for these statutory purposes we are clear that possession is established if the accused can be shown to have been aware of a relevant digital file or package of files which he has the capacity to access, even if he cannot be shown to have opened or scrutinised the material. It was held that that represents the closest possible parallel to the test laid down in the authorities set out above, and appears to us to be consistent with the criminal law of possession in other fields, such as unlawful possession of drugs. The court concluded that two elements had to be established: (1) the images must have been within the appellant's custody or control, i.e. so that he was capable of accessing them; and (2) he must have known that he possessed an image or a group of images. It is clear that knowledge of the content of those images is not required to make out the basic ingredients of the offence; instead that issue is dealt with by the statutory defences. Where unsolicited images are sent on WhatsApp, and automatically downloaded to the phone's memory, it was held that it is highly likely that the first element will be fulfilled. The court stated that the second element will depend on whether the defendant knew that he received an image or images.

Analysis
The impact of this judgment is likely to increase at time goes on, given the prevalence of messaging apps and the reliance placed upon them to send and receive images. The court's analysis of the relationship between mens rea and the statutory defences is useful and must surely be correct. Knowledge of the content of the message is unnecessary, but is relevant to the statutory defences. The two issues should not be conflated.

Prison Mutiny

***R v Barratt* [2018] EWCA Crim 1603**

Summary
The appellant was convicted of prison mutiny contrary to section 1 of the Prison Security Act 1992 after a riot broke out HMP Bedford. The prosecution was permitted to amend the indictment to add an additional count alleging an offence contrary to section 1(4) of the Act, which provides, "Where there is a prison mutiny, a prisoner who has or is given a reasonable opportunity of submitting to lawful authority and fails, without reasonable excuse, to do so shall be regarded for the purposes of this section as taking part in the mutiny". At his trial, the appellant applied to have the count dismissed on the basis that the prosecution had to prove that there was an opportunity at a time after the mutiny started to submit to lawful authority. It was argued that since there was no opportunity, the appellant could not have committed the offence. The judge rejected this submission and the appellant was convicted. Placing reliance upon *Mason and Cummins* [2004] EWCA Crim 2173, the appellant appealed his conviction on the basis that the prosecution could not demonstrate the required synchronicity between the mutiny and the failure to submit to unlawful authority. The Court of Appeal derived the following propositions from the case law:

(1) Section 1 creates a single offence of prison mutiny which can be committed either:
i. by conduct with the requisite purpose under section 1(2) or
ii. on a *deemed* basis pursuant to section 1(4).
(2) To be guilty of an offence on the deemed basis:
i. the prosecution must prove that a mutiny is taking place, (i.e. at least two prisoners engaged on the mutiny) with the requisite intent, but
ii. it is not necessary to prove that a person failing to submit to lawful authority shares the purpose of "overthrowing lawful authority".
(3) "Overthrowing" is a stronger word than by subverting and is not synonymous with refusing to obey lawful orders or mere defiance of or challenge to lawful authority. The word was chosen deliberately to confine offences of prison mutiny to serious disturbances.
(4) The prosecution must prove 'synchronicity' between the mutiny and the failure to submit to lawful authority. If a disturbance only 'ripened into a mutiny after such a failure' the failure would not be caught by s.1(4).

The court stated that in order for a defendant to be deemed to be taking part in a prison mutiny the prosecution must prove two things: (1) that a mutiny was taking place in the prison and (2) a prisoner who has, or is given a reasonable opportunity to do so, fails to submit to lawful authority. The court concluded that the offence is not committed by failing to follow an express instruction during a mutiny. A reasonable opportunity of submitting to lawful authority does not require any order to have been given. The fact that an order has been given and not heeded may well be powerful evidence that the defendant did in fact have a reasonable opportunity to submit to authority and failed to do so, but it is not necessary for an order to be given.

Analysis
Parliament cannot have intended for an offence to be committed only if an order to submit to lawful authority was given. As the court stated, the fact that an order was given is powerful evidence that the defendant did have a reasonable opportunity to submit to authority and

failed to do so. As a matter of law, however, it is not necessary for such an order to have been given in order for an offence to be committed.

Offensive Weapons

Possession of an offensive weapon; Butterfly knife; Reasonable excuse

Garry v Crown Prosecution Service **[2019] EWHC 636 (Admin)**

Summary
The defendant was stopped on a Saturday afternoon by police and found to be in possession of a butterfly knife. He accepted that the knife was an offensive weapon *per se*, but argued that he had a reasonable excuse for being in possession of it on the basis that he used it for his work as a plumber, electrician, and gas engineer. The defendant discounted alternative tools, such as a Stanley knife as being ineffective. When he was stopped he was not on his way to work. The Crown Court accepted that the butterfly knife might be used for work purposes, but concluded that this was not determinative of the issue. It held that even though used for work, an offence weapon per se required the court to consider whether such use was reasonable. His appeal was dismissed and he appealed by way of case stated against the dismissal of his appeal against conviction at the Crown Court for possession of an offensive weapon, contrary to s. 1(1) of the Prevention of Crime Act 1953. The questions were whether the court (i) was correct in law in making a distinction between items such as a Stanley knife and a butterfly knife in holding that the latter was offensive per se, whereas the former was not and was capable of being a tool and (ii) was correct when, it considered reasonable excuse, in describing as irrelevant that the appellant had no convictions for violence.

The Divisional Court concluded that the Crown Court had done no more than find that a Stanley knife, which was not offensive *per se*, was capable of being a tool, whereas a butterfly knife was offensive *per se*. That did not mean that the court found that a weapon that was offensive per se could not be used as a tool. The court stated that the tribunal of fact had a wide discretion in determining whether reasonable excuse was made out. An innocent purpose for having an offensive weapon in a public place did not equate to a reasonable excuse. The court was entitled to consider necessity or the immediate temporal connection between the defendant's possession of the item and the purpose for which it was carried. The defendant's assertion that he carried the butterfly knife for work was evidence of what he suggested was the reasonableness of its possession. The court also said that context was important. In this case, the knife was discovered on a Saturday afternoon where there was no evidence that the defendant worked on Saturdays. The Crown Court's ruling was not Wednesbury irrational or perverse.

Analysis
It cannot have been Parliament's intention for the defendant's assertion that he used the item for a lawful purpose such as work to be determinative. If it is not determinative, then it is necessary for there to be a framework to help the court assess whether the defendant had a reasonable excuse for being in possession of the item. The court's reliance upon the concepts of proximity and necessity provides a helpful way of evaluating the reasonableness of the defendant's assertion. As the court observed, given that there was no evidence the defendant worked on Saturdays and, indeed, on the day in question, he was not on his way to work, the Crown Court's conclusion is unimpeachable.

Road Traffic Offences

Driving with excess alcohol; adjournment

R (on the application of Parashar) v Sunderland Magistrates' Court **[2019] EWHC 514 (Admin)**

Summary
The defendant crashed his car into a parked vehicle. He was breathalysed and was found to be more than three times over the legal limit. As a result, he was charged with driving with excess alcohol and released on bail. He pleaded not guilty and an expert report was served on the prosecution. The trial date was set for June 2018. The prosecution failed to serve all its evidence, however, and the trial was re-listed for November 2018. The defence informed the court that the new trial date was unsuitable for the defence's expert and he applied to vacate the trial date, asking for an oral hearing of that application. The court refused the application on paper and stated that the expert report could be admitted as hearsay.

The Divisional Court stated that, generally speaking, the High Court would not entertain an interlocutory challenge to proceedings in the magistrates' court unless there was a powerful reason for doing so. The court confirmed that an application for judicial review might in principle be an appropriate means by which to challenge a decision of a magistrates' court as to an adjournment. Those circumstances might be where: (a) it was properly arguable that the ability of the defendant to present his defence was so seriously compromised by the decision under challenge that an unfair trial was inevitable; (b) an important point of principle was raised, likely to affect other cases; (c) the case had some other exceptional feature which justified the intervention of the High Court. It was only in rare cases that the High Court would consider an interlocutory challenge once the trial was under way. The court concluded that the magistrates' court's decision was unsustainable. If the trial had proceeded as the magistrates' court had planned, it would have been required to decide between the evidence of two experts, one of whom was present and one of whom was not. The court concluded that the prosecution should have supported the defence's application for the trial to take place on a date when both experts could attend, or indicated that they would not pursue the application to adduce their expert's report. The decision to fix a date for a trial at which the prosecution expert could attend and the defence expert, whose report had been served in good time, could not, was clearly wrong.

Analysis
The court's decision to adjourn is difficult to comprehend. As the Divisional Court explained, the court was required to decide between two competing experts. To have only one expert present would have been unfair to the defendant. The court's assertion that it could admit the statement as hearsay is no answer, given that this would not have rectified the lack of parity between the defence and the prosecution. It is also difficult to see how the criteria in s. 114(1)(d) would have been satisfied. An amended Criminal Practice Direction came into force on 1 April 2019 codifying when a magistrates' court should adjourn proceedings.

Road traffic offences; Mobile telephones; Video recordings

***DPP v Barreto* [2019] EWHC 2044 (Admin)**

Summary

The DPP appealed by way of case stated against the quashing of the respondent's conviction for driving a motor vehicle while using a hand-held mobile phone contrary to section 41D of the Road Traffic Act 1988 and reg. 110(1)(a) of the Road Vehicles (Construction and Use) Regulations 1986. The respondent had been convicted in the magistrates' court on the basis that he had used his mobile phone to film the scene of a road traffic accident as he drove past. The Crown Court overturned the conviction, holding that taking photographs or film with a mobile phone did not amount to "using" it the purposes of reg.110(1)(a) of the Regulations and s.41D of the Act. Rather, it concluded that, pursuant to reg.110(6)(a), the offence would only be committed if the mobile phone was being used for "making or receiving a call or performing any other interactive communication function". The questions stated were whether (1) "using" a hand-held mobile phone for the purposes of s.41D ad reg.110(1)(a) was restricted to using an interactive communication function; and (2) the Crown Court had been right to conclude that the respondent's conduct did not amount to "using" his mobile phone for the purposes of s.41D and reg.110(1)(a). The court held that section 41D provided that a person would be guilty of an offence if they failed to comply with a construction and use requirement (such as that in reg.110) as to not driving while using a hand-held mobile phone or "other hand-held interactive communication device", and the word "other" equated hand-held mobile phones with hand-held interactive communication devices. Regulation 110(1)(a) prohibited driving while using a hand-held mobile telephone, and, taken together, reg.110(1)(b) and reg.110(4) prohibited driving while using a hand-held device that "performs an interactive communication function by transmitting and receiving data". It was plain from the context that "performs" meant "is being used to perform", and therefore it was only the use of the device for interactive communication functions that would bring it within reg.110(1)(b). The Regulations did not define "hand-held", but the dictionary definition referred to something that was designed to be used while held in the hand. Using the language of a deeming provision, reg.110(6)(a) provided that a mobile phone or other device was to be treated as hand-held if it was, or had to be, held at some point during the making or receiving of a call or the performance of any other interactive communication function. To achieve the aims of the legislation, it treated devices as being hand-held by reference to the way they were being used rather than the way they had been designed. The court concluded that the legislation did not prohibit all use of a hand-held mobile phone while driving; rather, it prohibited only the making and receiving of calls and the use of interactive communication functions. The respondent's activity therefore did not breach reg.110(1)(a) and the Crown Court had been right to quash his conviction.

Analysis

This judgment narrows the scope of the offence and makes it more likely that reliance will be placed upon the offence of careless driving to address the use of mobile telephones while driving. As the Court of Appeal pointed out, this area of the law is in need of review, which is ultimately a matter for Parliament. This judgment may act as the catalyst for much-needed legislative reform in this area.

Drugs Offences

Possession of drugs; jury directions

***Coker* [2019] EWCA Crim 420**

Summary
The defendant pleaded guilty to being in possession of cannabis. He then was convicted of being concerned in supplying a class A drug. He was sentenced concurrently on each count. Count 1 charged the defendant with an offence under s. 4(3)(b) of the Misuse of Drugs Act 1971, not s. 4(3)(c). In summing up, the judge directed the jury in the following terms in respect of count 1:

> "Now, in count 1, members of the jury, for an offence to be shown to be committed, the prosecution must prove, firstly, that there has been a supply of class A drugs to another, or the making of an offer to supply class A drugs to another. Secondly, that the defendant participated in such an enterprise involving such supply or such an offer to supply; and, thirdly, that he knew the nature of that enterprise, i.e., that it was the supply of class A drugs."

It was submitted on behalf of the defendant that subsections 4(3)(b) and 4(3)(c) of the Act created two separate offences. The direction given by the judge involved an impermissible "either/or" with the risk of the defendant being convicted under section 4(3)(c) with which he had not been charged or of leaving the jury with the impression that provided some agreed on one basis and some on another they would be entitled to convict. Instead, in order to convict the defendant, the jury needed to be sure that he was concerned in the supply of drugs to another because that was the subsection under which the prosecution had elected to proceed.

The court held that s. 4(3) of the Act gives rise to three separate and distinct offences. Section 4(3)(a) deals with "supply" or an "offer to supply". Subsections 4(3)(b) and (c) broaden the ambit of the section by applying to those who are "concerned in" *either* the supply *or* an offer to supply controlled drugs. It follows, according to the court, that there is no room for an either/or direction. When the issue goes to whether a defendant was concerned with supply or an offer to supply controlled drugs, the count in question must either relate to subsection (b) or subsection (c). Here, the appellant was charged under subsection (b). When an individual it charged with an offence under s. 4(3)(b), the prosecution must prove (1) that there has been a supply of a controlled drug to another; (2) that the defendant participated in an enterprise involving such supply; (3) that the defendant knew the nature of the enterprise, namely that it involved such supply. The judge had therefore misdirected the jury, but this did not render the defendant's conviction unsafe as the case against him was unanswerable.

Analysis
Gross LJ makes very clear that s. 4(3) creates two offences. As a result, the either/or formulation is duplicitous and should not be used. The court invites the editors of both Blackstone's and Archbold to make the necessary amendments to their texts to reflect this judgment. Judges will need to be alive to this judgment to ensure that indictments are drafted correctly.

Public Order Offences

Freedom of expression, Obstruction of highway

***DPP v Ziegler* [2019] EWHC 71 (Admin)**

Summary
The DPP appealed by way of case stated against a district judge's decision to dismiss charges of obstructing a highway, contrary to section 137 of the Highways Act 1980. All of the respondents had taken part in protests outside an arms fair. Some had lain in the approach road to the arm fair, while others had suspended themselves by ropes from a nearby bridge, causing the police to close the road. The only issue was whether the respondents had a "lawful excuse" for obstructing the highway. The judge found for the respondents, placing emphasis upon their rights under Articles 10 and 11 of the ECHR. The DPP served an application for the first group of respondents within 21 days of the oral verdict, and the application for the second group two weeks later. In allowing the appeal in part, the court held that the key question for the district judge was whether there had been a proportionate interference with their Convention rights. This required the judge to assess whether a fair balance had been struck between the respondent's rights and the rights of the community. In doing so, the court noted that only unreasonable obstructions are unlawful and that the lawful exercise of ECHR rights would mean that the prosecution had failed to prove that a defendant's use of the highway was unreasonable. The court advised trial judges to avoid expressing approval or disapproval of the viewpoints held by protestors. In terms of the judge's assessment of proportionality, the question for the court on appeal was whether the judge had reached the wrong assessment, not whether it was one which no reasonable court could have reached. The court concluded that the judge had erred in assessing proportionality. The fact that the protests were peaceful did not prevent an offence contrary to section 137 from being committed. The court stated that it was highly relevant that other people had been unable to use the highway, as they were entitled to do, for a significant period of time. The fact that nobody complained about the respondents' conduct was irrelevant. The judge had failed to strike a fair balance between the respondents' right to protest and the general interest of the community. The appeal in respect of the first group of respondents was allowed. In respect of the second group, the DPP's application to state a case was out of time. There was no discretion to extend the 21 day time limit, so the Divisional Court had no jurisdiction to consider the appeal against the district judge's verdict.

Analysis
This judgment merits detailed study, as it provides a useful framework for how to conduct the proportionality exercise in prosecutions of protestors. The judgment provides a salutary reminder that in assessing whether a fair balance has been struck, due consideration must be given to the general interests of the community. What appears to have been fatal in this case is that fact the judge gave insufficient weight to the right of the public to use the highway. As Singh LJ explained, the Convention rights are not trumps that necessarily override other interests. The judgment is also useful for confirming that the principle enunciated by the Supreme Court in *B (A Child)* [2013] UKSC 33 applies in the context of criminal proceedings. As a result, on appeal, the question for the court will not be whether the first instance judge's assessment of proportionality was Wednesbury unreasonable, but whether it was wrong. The final point worth noting about the judgment is the court's reminder that section 112(2) of the Magistrates' Courts Act 1980 gives a party 21 days to apply for a case stated. There is no discretion to extend this time limit, so failure to comply will be fatal.

Secondary Liability

Joint enterprise, Appeal outs of time, Intention

R v Towers and Hawkes **[2019] EWCA Crim 198**

Summary
The defendant's case was referred to the Court of Appeal by the CCRC. He was convicted of murder after the victim was stabbed by two youths and also of wounding with intent in respect of the stabbing of another victim. The defendant admitted throwing some punches earlier in the altercation, but witnesses confirmed that, at the time of the stabbing, he had been some distance away. He admitted knowing that the other boys were armed with weapons. The prosecution's case was that that murder was established if the fatal injury was inflicted with each of the three intending to cause the first victim really serious harm or, alternatively, that they had had foresight that serious bodily injury could be inflicted. A count of wounding with intent in relation to the second victim was put on the basis of shared intent to cause grievous bodily harm. The defendant was convicted. Upholding the defendant's conviction, Sir Brian Leveson P emphatically rejected the submission that the test of substantial injustice, which needed to be satisfied in change of law cases, was similar to the test the court in applied in assessing the safety of a conviction. His lordship confirmed that the threshold imposed by the former is considerably higher. In considering the evidence in the case, the starting point was that the defendant was involved in a joint enterprise to use unlawful force on the victim, knowing that both he and the principals had weapons and he foresaw the possibility that really serious harm would be caused to the victim. A number of features were, in the court's view, determinative. First, the defendant involved himself in a joint enterprise knowing that he and his co-adventurers were armed. Second, he took part in, or associated himself with, the attack by lifting and throwing a paving slab at the first victim when two others were or had been attacking him. Third, he went on, with the intention of causing grievous bodily harm, to involve himself in the attack (whether by attracting his attention, encouraging or otherwise): the fact that the defendant might have had animus to one of the victims did not undermine the intention found by the jury to have been proved in an attack so soon after that the victim who was killed.

Analysis
The Court of Appeal has confirmed, once again, that the substantial injustice test, which must be satisfied in cases such as this, is not the same as the test of safety. The threshold imposed by the respective tests differ significantly. The outcome of this appeal is not surprising, given that the facts fall squarely within the terms of *Johnson* [2016] EWCA Crim 1613. The point seems to be that if the defendant was himself carrying a weapon, or knew the principal(s) was carrying a weapon, then it is very unlikely that he will be able to satisfy the substantial injustice test. It is ironic that in *Jogee* [2016] UKSC 8 the Supreme Court held that knowledge of a weapon is not determinative of guilt, but it now appears to determine whether a defendant will be able to demonstrate substantial injustice. As the court recognised, the touchstone is whether the change of law *would* have made a difference. It appears that this test will only be satisfied where the defendant did not know of the presence of a weapon and did not set out to commit or participate in a crime of violence.

Change of law; Joint enterprise; Intention

***R v Daley* [2019] EWCA Crim 627**

Summary
The defendant was convicted of murder on the basis that he participated in a joint venture to murder the victim. At trial the defendant admitted that his co-defendant had shot the victim, but he denied any prior knowledge of the gun or his co-defendant's intentions. The defendant appealed his conviction to the Court of Appeal, but his appeal was dismissed. As a result of the Supreme Court's judgment in *Jogee* [2016] UKSC 8, the defendant applied to the CCRC. The CCRC concluded that there was a real possibility that the defendant had been convicted on foresight only and that the change of the law would have made a difference to the outcome of his trial. The Court of Appeal dismissed the appeal on the basis that there was no substantial injustice. The jury's verdict demonstrated that the defendant and his co-defendant were in a joint enterprise to possess a loaded gun. The defendant encouraged or assisted in that offence and realised that the gun might be used to commit murder. It was held that the defendant's knowledge of the gun meant that the inference of participation with an intent to cause at least really serious harm was very strong. The court concluded that there was no substantial injustice as the defendant had not shown a sufficiently strong case that the change in law would have been a difference to the jury's verdict.

Analysis
This is yet another example of how difficult it is for defendants who were convicted pre-*Jogee* to demonstrate a substantial injustice. The Court of Appeal has shown no signs of departing from the strict approach that was adopted in *Johnson*. In this case, the fact the jury must have concluded that the defendant was aware of the gun was fatal to his appeal. This is because the court in *Johnson* made clear that knowledge of a weapon is strong evidence of intent. It is ironic that the Supreme Court in *Jogee* was keen for knowledge of a weapon not to be determinative of guilt, but it now appears to determine whether a defendant will be able to demonstrate a substantial injustice.

Modern Slavery

Coercion; controlling prostitution for gain; Decisions to prosecute

***R v O and N* [2019] EWCA Crim 752**

Summary
Both appellants were victims of trafficking and convicted of criminal offences prior to the introduction of the Modern Slavery Act 2015. The issue for the Court of Appeal was whether there was a nexus between the offences they committed and the trafficking, and whether it was in the public interest to prosecute them. In respect of N, the court concluded that there was a nexus between his status as a victim of trafficking and his cultivation of cannabis. He was in fear of immediate reprisals if he did not do what the traffickers told him to. The court agreed that the public interest did not require prosecution and that his conviction was therefore unsafe. The court observed that there were some misgivings about O's status as a victim of trafficking, but that she had been given the benefit of the doubt. The court stated that if O was a trafficking victim on arrival in the UK, she was complicit in trafficking others thereafter, and not because of coercion. Even on her own, eventual, account, there was a

significant time interval between her arrival in the UK and the offences, and a significant geographical distance between her and her alleged "operator" at the time of the offences. She had demonstrated free will in the operation of her business as a sex worker, and an ability to accumulate money and to produce a simple accounting system for the earnings of other prostitutes. The court concluded that the public interest required prosecution in O's case.

Analysis
This case demonstrates that cases in which the allegations pre-date the introduction of the Modern Slavery Act 2015 will require some care, given the fact that section 45 – which creates an offence which can be pleaded by victims of trafficking or modern slavery – will be of no application. The defence may make an abuse application and the judge will have to conduct a detailed analysis of whether the defendant is in fact a victim of slavery or modern trafficking and, if so, whether there is a nexus between their status and the offence they are alleged to have committed. This case demonstrates that the fact the defendant is a victim of modern slavery or trafficking does not necessarily negate their culpability.

Abuse of process; Defences; Human trafficking

R v N [2019] EWCA Crim 984

Summary
D pleaded guilty to one count of production of a Class B drug. It was submitted that his conviction was unsafe because, as a victim of trafficking, he ought not to have been prosecuted for the offence and, had the issue been raised, it would have been appropriate for the trial judge to stay the proceedings as an abuse of process. After D's conviction, evidence came to light suggesting that he was a victim of trafficking. It was submitted on behalf of D that, had the evidence been available at trial, the statutory defence in section 45 of the Modern Slavery Act 2015 would have applied and he therefore should never have been prosecuted, or alternatively, the defence would have been successful. On behalf of the Crown, the submission was made that a reasonable person in the same situation as D, and having his relevant characteristics, would have had a realistic alternative to committing the offence. The Court of Appeal observed that the mitigation advanced on D's behalf was sufficient to raise an issue that he was a possible credible victim of trafficking. The court observed that this should have been apparent to D's advocate, the representative of the prosecution, and the judge. It would have been open to the judge to raise this issue. He did not do so. However, the Guidance provided by the CPS expressly provides for this situation. Had the Guidance been followed, as the court believed it should have been, the prosecutor should have sought an adjournment to ensure that the steps set out in the relevant section of the Guidance, namely, the duty to make proper enquiries, should have taken place. Analysing the evidence, the court observed that there was nothing to dispute D's account that he was locked in a property in Birmingham and was visited every two or three days by his captors. For the short time he was in Birmingham, D had no travel documents; he had a history of being beaten by traffickers following his earlier escape in another country; he was in a new country; and he had no contact with any persons other than those involved with the traffickers. Were appropriate weight to be given to these facts, the court concluded that the defence in section 45 would probably have succeeded and no public interest consideration would outweigh such a determination. In these circumstances, the court quashed D's conviction.

Analysis

This judgment is a salutary reminder that all participants in the trial process must be alert to the possibility that the defendant is a victim of modern slavery or trafficking. This includes the judge for, as the Court of Appeal confirmed, he or she can raise the issue. If there is evidence that the defendant may be a victim of modern slavery or trafficking, then the defence in section 45 ought to be left to the jury. This is a complex defence, for discussion see K Laird, "Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?" [2016] Crim LR 395.

Misconduct in Public Office

Misconduct in public office; Error of law; Members of Parliament

Johnson v Westminster Magistrates' Court **[2019] EWHC 1709 (Admin)**

Summary
The claimant sought judicial review of a district judge's decision to issue a summons made by the interested party in contemplation of a private prosecution. The three proposed counts alleged that the claimant, who was at the material time an MP and the Mayor of London, had wilfully neglected his duty and/or wilfully misconducted himself by endorsing and making, without justification, false and misleading statements concerning the cost of the UK's membership of the EU. It was alleged that this constituted an abuse of public trust in his office. The Divisional Court noted that the common law offence of misconduct in public office comprises two essential elements: that a public officer was "acting as such" when engaging in the conduct complained of and that he or she wilfully neglected their duty and/or wilfully misconducted themselves. The district judge had found that these was *prima facie* evidence that these two elements were satisfied. In its analysis of the offence, the court stated that whether a public officer was "acting as such" was not a matter to be left for evidence at trial. It required a finding that the officer had engaged in the conduct complained of as they discharged the responsibilities of the office in question, not simply whilst they occupied that office. The alleged misconduct had to be incompatible with the proper discharge of the responsibilities of the office, and the officer, having been entrusted with powers and duties for the public benefit, had to have somehow abused them. The district judge's conclusion that the claimant had made the statements while he held the public offices in question was insufficient. There was also no evidence that the district judge had rigorously analysed the scope of the offence with a view to determining whether the claimant had neglected to perform his duty and/or wilfully misconducted himself. Had she done so, the judge would have appreciated that she was extending the scope of the offence, as there was no previous case in which it had been held that the offence could be equated with bringing an office into disrepute or misusing a platform outside its scope.

Analysis
As the Law Commission's work on misconduct in public office amply demonstrates, it is a protean offence. As a result, its boundaries can be difficult to discern. The Divisional Court's message in this case is unambiguous: the scope of the offence should not be expanded to encompass new forms of conduct. To commit the offence a public office holder must have engaged in the impugned conduct as they discharged their functions as a public office holder. It is insufficient for he or she to have merely been in a public office at the relevant time. There must be a nexus between the conduct and the office holder's discharge of their office.

Judges should scrutinise carefully whether such a nexus exists and, if it does not, dismiss the charges.

Fraud

Insolvency; Winding up; Fraud

***R v Druzyc* [2019] EWCA Crim 1076**

Summary
D was convicted of fraudulently removing property in anticipation of the winding-up of a company, contrary to section 206(1)(b) of the Insolvency Act 1986. The property in question were payments totalling £43,500 which had been transferred from the account of D's company to his personal account in January and February 2012. An administrator was appointed in respect of D's company on 23 February 2012. On 2 May 2012, there was an initial meeting of creditors, at which it was decided to move from administration to a creditors' voluntary liquidation. On 6 August 2013, the administration was completed and a liquidator was appointed for the purposes of the creditors' voluntary liquidation. It was now common ground that the winding-up of D's company only began in August 2013 and that accordingly the transfers from the company account to D's account in January and February 2012 were not paid in the period of 12 months immediately preceding the commencement of the winding-up, as required by s.206(1). It was argued by D that the fraudulent conduct in question had not occurred within the requisite period i.e. 12 months immediately preceding the commencement of the winding-up. It was argued on behalf of the Crown that the error in the count amounted to no more than "mislabelling" which not materially affect the criminality pleaded. The court observed that the burden of proof under section 206(1)(b) was different from the burden of proof under section 207. A charge under s.207 would have imposed evidential burden on D, if not a full reverse burden of proof. It would also have required the jury to focus on events at a stage of the company's trading history which was significantly longer before the date of the commencement of the winding-up than the allegation originally pleaded. In those circumstances, this was not a case of mere technicality or of mere mislabelling of an appropriate charge. Rather, it was a case of charging an offence which could never be proved on the evidence to be adduced. The conviction under s.206(1)(b) was unsafe for the reason that it was a conviction for an offence which was not and could not be proved by the evidence on which the prosecution relied. The court also held that it could not exercise its power to substitute a new offence, as a charge alleging an offence contrary to s.206 did not expressly include an allegation of an offence contrary to s.207.

Analysis
There are clear differences between the two offences and to characterise the Crown's error as "mislabelling" would undermine Parliament's intention is creating two separate offences with distinct elements. The court's conclusion is therefore unimpeachable.

Fraud; Failure to disclose; False representation; Duty to notify

_R v D_ [2019] EWCA Crim 209

Summary
The defendant paid council tax on her property, but after a number of years told the local authority that she had moved out, leaving it tenanted. The Crown's case was that the defendant in fact remained in the property and had made false representations in order to avoid paying council tax. She was charged with six counts of fraud. The last one alleged that the defendant had committed fraud by failing to disclose that she continued to live in the property. It was common ground that the defendant could only commit the offence if she failed to disclose something she was under a legal duty to disclose. The judge ruled that she was under no legal duty to inform the council that she remained in the property and dismissed the charge. The Crown appealed against this terminating ruling on the basis that the legal duty could be implied. The Court of Appeal agreed with the trial judge's conclusion. Although the council could bring a civil action for recovery in the event of a failure to pay, this did not of itself connote that the defendant was legally obliged to notify the council of her continued residence in the property. According to the court, it was wrong to equate a liability to pay with a liability to notify. Parliament had not included a duty to notify within the statutory scheme. The court also rejected the Crown's argument that such an obligation to notify could be read into the statutory scheme. The court accepted that there may be some occasions where such an implication was appropriate, this was not one of them. In reaching this conclusion, the court had regard to the Explanatory Notes to the Fraud Act 2006 as well as the Law Commission report which preceded it. The latter indicated that a legal duty to disclose might derive from statute, the terms of a contract, the custom of a particular trade or market, the fact that the transaction in question was one of the utmost good faith, or a fiduciary relationship between the parties. In this case the court held that there was no common law relationship between the local authority and the defendant that could give rise to a duty to notify, and nor was there any relevant fiduciary duty or equitable obligation. The local authority was a creature of statute and required statutory authority to recover council tax from those resident within its area. As a result, the court concluded that the matter had to be addressed by reference to the statutory provisions and, far from there being any notification duty, the indications were to the contrary.

Analysis
As the court noted, Parliament did not specify in section 3 of the Fraud Act 2006 what constitutes a legal duty to disclose. To ascertain whether a duty to disclose exists, it is necessary to turn to other sources from whence it might derive, such as contract, statute etc. Once the court concluded that the Council Tax (Administration and Enforcement) Regulations 1992 did not impose a duty to disclose, there was no other source from where such a duty could have originated. The court's observation that the Crown was unable to articulate with precision the content of the duty is telling in this regard. It might come as a surprise to many that there is no legal duty to disclose that a house continues to be occupied and that its occupant is therefore liable to pay council tax, but Parliament has not provided for one. Given the penal consequences that would follow the imposition of such a duty, it was right for the trial judge and the Court of Appeal to take a cautious approach. If the Crown submits there is a legal duty to disclose something, and that failure to do so potentially constitutes fraud, it must be able to point to the source of that duty. The courts will not lightly infer its existence.

(Mobile) Electronic Evidence: Some Difficulties for the Law

Professor Alisdair Gillespie

(Mobile) Electronic Evidence: "Digital Strip Searches" and the Law

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INTRODUCTION

Telephony has changed considerably in the last 40 years. 1978 saw the launching of the first commercial mobile telephone network, although the telephone was (literally) the size of a suitcase.[1] The 1980s saw the process of miniaturisation, with handheld telephones becoming available for the very rich, and becoming a status symbol. As with traditional telephones, these early mobile telephones were only for talking.

In the 1990s, mobile telephones became digital,[2] and by 1992 a system for sending text messages was developed (known as SMS – Short Message System), which gradually included picture messages too. This was the second-generation (or 2G) telephone. A further development (often referred to as 2.5G) led to the establishment of GPRS and Edge technology.[3] This allowed users to begin to access the internet on their mobile telephones, including the sending and receiving of emails. Blackberry became the business person's telephone of choice because it meant that they could stay in touch with the office wherever they were.

Third-generation telephones (3G) promised broadband-like speeds.[4] This allowed for the creation of true so-called 'smartphones'. This led to a change where telephony became less important than other forms of communication. Instant messaging, email, internet browsing and VoIP[5] services became more important than ringing someone. Smartphones led to the development of 'apps'. There are c.2.8 million apps available for the Android system through the Play Store.[6] These apps range from games and silliness to high-level communication and productivity programs. Others allow the management of finance, debt or health. Smartphones became mini-computers,

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[1] Tom Farley, 'Mobile telephone history' (2005) 101 Telektronikk 22 at 27.
[2] Ibid., at 31.
[3] Pulkit Gupta, 'Evolvement of mobile generations: 1G to 5G' (2013) 1 International Journal for Technological Research in Engineering 152 at 154.
[4] Sameer Kumar, 'Mobile communications: global trends in the 21st century' (2004) 2 International Journal of Mobile Communications 67 at 78.
[5] Voice Over Internet Protocol.
[6] https://www.statista.com/statistics/266210/number-of-available-applications-in-the-google-play-store/#:~:targetText=The%20number%20of%20available%20apps%20in%20the%20Google%20Play%20Store,under%20the%20name%20Android%20Market. (Accessed 21.xi.19).

something that has become more established with the development of 4G and 5G, offering even quicker data access.

The development of telephones to computers means that inevitably such devices are rich with data about a person. When giving evidence to the Justice Select Committee, who were undertaking an inquiry into disclosure, Joanna Hardy noted:

> [A phone can tell you] what time they woke up because they have an alarm app…what they had for breakfast because they have a health app…what they put in their satnav, where they went, what time they go there, potentially how fast they drove, where they parked and what they had for lunch. If they go to a bar…a taxi app might show what time they left.[7]

Additionally, banking apps can tell how much money a person has, photo albums show where they have holidayed, and who with (including by 'tagging' the name of individuals featured), and messages and emails show with whom they have been speaking. Realistically no aspect of a person's life cannot be found on a mobile telephone.

DIGITAL "STRIP SEARCHES"

The fact that so much data exists has led to recent controversy over its use within the criminal trial. Most recently, this has focused on rape victims, and whether they are being forced to surrender their mobile telephone when reporting their attack. The process has been referred to as a 'digital strip search' because it makes complainants feel that their entire personal life has been subject to search and examination. There are concerns that requiring telephones to be surrendered is putting rape victims off reporting their attack, or withdrawing an allegation once made.[8] This paper seeks to explore these issues and the legal framework that governs it.

Background to the issue

Press comments suggest that there has been a change in policy as a result of high-profile failures of rape prosecutions. The police and CPS deny that this is the case. While this may technically be true, it will be seen that there does appear to have been at least a change in practice. Most link this

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[7] Justice Committee, Disclosure of Evidence in Criminal Cases (HC 2017-19, HC 859) at 18.

[8] https://rapecrisis.org.uk/news/latest-news/exclusive-rape-crisis-data-on-rape-victims-mobile-phone-downloads/ (Accessed 21.xi.19).

change to the case against Liam Allan whose trial for rape collapsed on the third day after the discovery of exculpatory evidence from the victim's mobile telephone that had not been disclosed to the defence, despite repeated requests.

Asking complainants for their mobile telephone has occurred for several years. Indeed, the collapse of the case against Liam Allan demonstrates this. The case did not collapse because of a failure to seize the complainant's telephone; it was a failure to disclose exculpatory evidence on the telephone. In other words, it would be wrong to suggest that it is only in the last year that complainants have been asked to surrender their mobile telephone, although the frequency of such requests may have changed.

Until 2019, complainants were asked to surrender their telephone as part of an overarching approach known as a 'Stafford Statement'. This form gave consent for the police to gain access to information about the complainant. It was not restricted to telephones but included medical, educational, psychiatric, social services and family court records. In essence, it allowed the police full access to the victim's private life, with the result that almost all aspects of the victim's life are known. While a Stafford Statement was, in theory, voluntary, concerns were raised by, amongst others, the (London) Mayor's Office for Policing and Crime that a refusal to give consent led to the dropping of a formal investigation.[9]

The National Police Chiefs Council (NPCC) was concerned that there was disparate practice, and they introduced a standard form when seeking the complainant's mobile telephone. This form is to be used by all 43 police forces in England & Wales. This form, known as a 'Digital Processing Notice' replaces the Stafford Statement, and is supposed to provide full information on why disclosing a mobile telephone may be necessary. A copy of the NPCC's notice is appended to this paper. Nothing in the notice says that it is only for sexual offences, but there is an almost universal acceptance that it is primarily used for these cases.

Analysis of Mobile Telephones

The Digital Processing Notice requests the passwords for all applications, including social media, email and the device's lock-screen release. There are three levels of extraction:

[9] https://www.theguardian.com/society/2018/oct/17/data-gathering-may-deny-victims-access-to-justice (accessed 19.xi.19).

> Level 1. Called 'logical extraction'. This provides access to all of the data you could see if you were to turn on the device and browse through it. It will not normally extract data that has been deleted from the device.
>
> Level 2. This is either a 'logical extraction' using selected tools in a laboratory environment or a 'physical' extraction, which recovers a copy of data held on the memory chip of the device. "Physical" downloads can extract deleted data, although capabilities vary depending on the nature of the device and operating system.
>
> Level 3. This is usually an expert and bespoke method to tackle complex issues or damaged devices.[10] The intent is to recover data comparable to that obtained in a level 2 search.

The notice states that police technology is often unable to recover messages from a specified time period, leading to the recovery of all data stored on the mobile telephone. The notice also states that while they may be able to download the data at a police station, it may be sent to a laboratory and, if it does this, then it is likely they will retain the telephone for several months, including potentially until the end of criminal proceedings. Victims are warned that any relevant evidence will be passed to the defence.

The notice expressly refers to evidence of other crimes. The notice states that if any evidence is found that indicates that the complainant may have committed a criminal offence, then this will be passed to a relevant law enforcement agency for investigation. Where the evidence is not conclusive, it will be retained as intelligence, allowing it to be shared with other forces and agencies.[11]

The section entitled 'what happens if I refuse consent for the police to access my data or information held about me' is particularly instructive:

> If you do not provide consent for the police to access data from your device you will be given the opportunity to explain why. If you refuse permission for the police to investigate,

[10] Digital Processing Notice (NPCC, 2019) p.2.
[11] Ibid., at 3.

> or for the prosecution to disclose material which would enable the defendant to have a fair trial then it may not be possible for the investigation or prosecution to continue.
>
> If a prosecution is able to continue then the defence representatives will be told of your refusal and a judge may order disclosure to take place. If this happens, you will be given the opportunity to make representations to the court about the reasons why you object.[12]

As will be discussed below, this raises particular questions about the extent to which a victim gives valid consent. It is also the source of much of the argument over this policy because one reading is that the police are trading privacy against the investigation of (serious) crime.

What is the purpose of the Notice?

The NPCC states that its notice is designed to standardise the procedure, and explain to victim's what happens. However, it is remarkably light on why such intrusion is necessary. It states:

> The police have a responsibility to investigate crimes and gather all evidence that may be relevant to the case. "Relevant" means anything that has some bearing on any offence under investigation, or on the surrounding circumstances of the case. Investigations have to be thorough and the police have a legal duty to follow all reasonable lines of enquiry.[13]

That is, of course, an uncontroversial statement. However, it does not explain why examining the mobile telephone of rape victims will constitute a 'reasonable line of enquiry'. It also does not say why instead of looking at messages between the suspect and victim, it may seize all communications with anyone. As the surrendering of the telephone will lead to the police gaining access to all the data on the mobile, sensitive, or not, it is submitted that the explanation contained in the form is not good enough. The form should provide a narrative that explains what the police are going to do and why. There should be space on the form for the investigating officer to provide case-specific information so that the complainant reading the form understands how the request is going to affect them personally.

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[12] Ibid., at 4.
[13] Ibid., at 1.

The main point of argument at present is the extent to which it has now become routine to request the mobile telephone of a rape complainant. Victim's rights organisations and the Association of Police and Crime Commissioners believe that it has become automatic. That instead of pursuing 'reasonable lines of enquiry', it has now been decided that all rape victims must surrender their telephones, or at the very least, there is a strong presumption in favour of this. The fear is that the response to acquittals such as the Liam Allan case has meant that the CPS, in particular, has adopted the approach that they need to be ultra-conservative and test whether victims lie. The difficulty is that such an approach is based on false logic. A principle has been extrapolated from a case where that principle was not even in issue.

Liam Allan did not deny that he had sexual intercourse with the complainant. Neither did he deny that he had been in repeated contact with the complainant. The Liam Allan case was an ordinary failure of disclosure. There was evidence from Allan himself that there had been electronic communication between them. Thus, checking the content of these communications was both reasonable and necessary. Indeed, the police were requested to do so by the defence because of the previous communication. Had the police or CPS checked the material several messages exonerating Allan would have been found. Thus, the Allan case was an ordinary (and sadly not uncommon) failure of disclosure. However, it does not justify the automatic examination of mobile telephones and all data connected to them.

On their website, the CPS denies that mobile telephone evidence is automatically requested.

> It is not true that complainants in rape cases must automatically hand over personal data on their digital devices or run the risk of the prosecution being dropped. Mobile phone data, or social media activity, will only be considered by the police when relevant to an individual case.[14]

The problem is that very few people appear to believe them. There are too many instances where it does appear routine. Indeed, it is an issue where the police and the CPS disagree. An illustrative example reported in the press is that of 'Jane'.[15]

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[14] https://www.cps.gov.uk/cps/news/handing-over-mobile-phone-data-rape-prosecutions (Accessed 19.xi.19).
[15] https://www.independent.co.uk/news/uk/crime/rape-victims-phones-medical-records-met-police-cps-a8949636.html (Accessed 19.xi.19).

Jane alleges that she was raped by a stranger eight years ago. It was an attack that occurred when she was walking home from the bus stop. She immediately rang 999, forensic evidence was taken, but the person was never caught. Seven years' later, the same person raped another person. This time he was caught. DNA evidence showed that he was the attacker of Jane.

The police asked Jane to supply her electronic information, together with consent forms, to look at school records. She was asked whether she had the same telephone number as then, and, if not, whether she still had the telephone. When asked why, the police responded:

> There have been some recent quite high-profile cases where the Met and Crown Prosecution Service have been really criticised for charging someone without collecting sufficient evidence, which then means the case falls apart in court. So now the CPS are asking for all this stuff upfront before they will charge.

The CPS denied that this was required in this case, and said that it was not proportionate to ask Jane for this information. However, the police responded:

> All elements of the investigation and lines of inquiry in this specific case are standard practice, regardless of whether the victim and defendant are known to each other… It is the recommendation of the CPS that police conduct a comprehensive review of the case, this includes either direct or indirect communication about the incident.

It is highly unlikely that mobile telephone evidence would be required in this case. However, it shows that, at least in some areas of the country, there is a belief that all complainants should be asked for their mobile. At the very least it shows a lack of understanding of the official policy, including a misunderstanding about how the police and CPS should cooperate on these matters.

'Jane' is not alone. Speaking in the House of Commons, Harriet Harman referred to an email sent to her by one alleged victim:

> Six months ago, I was seriously sexually assaulted by a complete stranger. Two months after the assault, the police demanded full access to my phone, including my Facebook and Instagram passwords, my photos, stretching back to 2011, notes, texts, emails and the full history of 128 WhatsApp groups and individuals' conversations stretching back over five years. I had no prior or subsequent contact with my attacker. I lie awake at night worrying about the details of private conversations with friends, boyfriends, business contacts, family that are now in the hands of the police. It is a gross intrusion into my privacy and theirs. I feel completely as if I am the one on trial.[16]

This illustrates the extent of disclosure. It would seem to constitute a 'Level 2' disclosure within the meaning of the Digital Processing Notice. At first sight, there does not appear to be any reason why a mobile telephone would be required in these circumstances. Of course, it is possible that the suspect alleged that there had been contact, although this could be verified in the first instance by an examination of the suspect's telephone. Even if the telephone was required, it is difficult to see any justification for securing information dating back to 2011.

The legality of the searches

'Big Brother Watch', a leading NGO dedicated to countering surveillance, produced a report challenging the approach to digital strip searches.[17] Within the report, they note that the suspect has greater protection from digital analysis of their devices than victims.[18] The Police and Criminal Evidence Act 1984 is relatively permissive but subject to internal guidance that restricts their use. The Law Commission has also recommended the strengthening of protection, to include the possibility of search warrants to gain access to devices (save where the general power of search is available).

There is no express legal power to require the mobile telephone of a complainant.[19] Indeed, the police do not purport to exercise a statutory power, but instead, argue that they are asking for cooperation. There is no compulsion on a complainant to cooperate, but if they fail to do so, then the police and CPS may not proceed with the investigation. Indeed, the Digital Processing Notice

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[16] HC Deb vol 659, col 45. 29 April 2019.
[17] 'Digital strip searches: The police's data investigations of victims' (2019, Big Brother Watch). Available online at: https://bigbrotherwatch.org.uk/wp-content/uploads/2019/07/Digital-Strip-Searches-Final.pdf (Accessed 19.xi.19).
[18] Ibid., at 15.
[19] Depending on the circumstances it could fall within Police and Criminal Evidence Act 1984, ss.19-20, but this would not be particularly common.

states that the defence and judge will be told expressly that the victim refused to cooperate with the notice.[20]

While no statute governs the acquisition of mobile telephones from the complainant, it does not follow that what the police is doing is lawful. As is well-known, it is unlawful for the police to act in a way that is incompatible with a right under the ECHR.[21] It is beyond doubt that taking a mobile telephone and recovering its contents amounts to a *prima facie* breach of Article 8(1), the Right to Respect for Private Life, Family Life, Home and Correspondence. To act lawfully, the interference must be justified under Article 8(2). This requires four elements:

1. That it is in accordance with the law.
2. That it is in the pursuit of a legitimate aim.
3. That it is necessary.
4. That it is proportionate.

The easiest of these to satisfy is the legitimate aim. The detection and investigation of crime is a legitimate aim contained within Article 8(2). However, it is far from certain that the other three elements are satisfied.

In accordance with the law

In the absence of a statutory power, the police will be relying on the principle of consent. If a person voluntarily surrenders their telephone and allows the content to be read, then this is lawful. A person controls their device and data and can choose to allow access to others.

The police would point to the Digital Processing Notice as an example of how the complainant has given consent. However, has the complainant actually consented? Whenever the law relies on consent, it would ordinarily require that the consent is freely given.[22] Can it be said that this occurs here? Big Brother Watch argues it cannot.

> In this context, 'freely given' means that the victim cannot be coerced or pressured into consenting to the collection and processing of their personal information. They must

[20] Digital Processing Notice, n 10 above, at 4.
[21] Human Rights Act 1998, s.6(1).
[22] Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Bloomsbury Publishing 2007).

> be able to refuse to give consent without undue detriment to them, and must be able to withdraw consent easily at any time. If the victim has no real choice, consent is not freely given.[23]

The 'request' by the police is not framed as one of free consent. Complainants are told that their case may not be investigated if they do not cooperate and that if proceedings are still brought, the defence and judge will be told the complainant did not cooperate. Big Brother Watch has collated several examples where a complainant has been told that no action will be taken without permission being given.[24] Press stories also provide other examples, including those where there was no obvious need for the telephone to be analysed.[25]

This combination of pressures is likely to mean that the complainant feels as though they have no alternative but to consent to the mobile telephone search. By reporting the rape to the police, they wish to have the matter investigated in the hope that their perpetrator will face justice. By threatening not to investigate or prosecute the matter, this can only be seen as compromising the validity of their consent.

Big Brother watch also believe that there should be informed consent. They argue that this means that the victim should be told what data will be accessed and why.[26] The Digital Processing Notice provides generic information that 'call, data, messages, email' will be accessed, but it does not give any indication whether it is all of this data or some of it. There is no clarity why all data will be examined, which again potentially undermines consent. How can a person consent to something if they do not know what they are consenting to?

Where consent is compromised, then it is not valid in law. Without an alternative legal basis, the search of the telephone proceeds without a lawful basis, potentially leading to a (civil) cause of action under the Human Rights Act 1998.

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[23] Big Brother Watch, n 17 above, at 26.
[24] Big Brother Watch, n 17 above, at 27.
[25] See, for example, https://www.independent.co.uk/news/uk/crime/rape-victim-mobile-phone-police-england-wales-sex-attack-crime-disclosure-a8790606.html (accessed 20.xi.19).
[26] Big Brother Watch, n 17 above, at 28.

Necessity

An interference can only be justified when it is necessary. This will be judged on an individual basis, as it is that person's rights that are being interfered with. Therefore, the question is whether it is necessary for that complainant's phone to be taken and analysed. 'Necessary' should be considered strictly, and it does not mean that the search can happen when it is merely desirable or convenient.[27] This will mean considering whether there are alternatives, which, presumably, could include interrogating the suspect's telephone. There has been some concern expressed that complainants' phones are interrogated because procedurally it is more difficult to gain access to the suspect's telephone.[28] That is not an appropriate reason for analysing a mobile. A complainant's telephone should only be examined where it is believed that there is reasonable cause to believe that evidence relevant to the case will be found on the telephone.

It was noted above that there are examples where victims have been asked to surrender their telephone even though there was no evidence that the suspect and complainant had ever been in communication with each other. That does not preclude the possibility that there may be relevant information on the device, but it could equally mean that it is simply a fishing exercise. There needs to be some evidential basis for showing a need to examine the telephone. The default cannot be that telephones will be examined as that is contrary to the doctrine of necessity. The default is that a telephone will not be searched unless it is necessary to do so, and it being desirable or convenient to do so is not enough.

Proportionality

One of the most important aspects of Article 8(2) is the proportionality of the proposed interference. It is inextricably linked to the issue of necessity, and it also requires an examination of competing interests.[29] Proportionality secures against arbitrary interference and limits the scope of what the state does to that which meets the legitimate aim of the interference.

There are at least two planes to proportionality in this context. The first concerns the perceived justification for searching the telephones, and the second is the amount of material gathered as a result of the examination.

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[27] See the classic statement of the ECtHR in Handyside v UK (1976) 1 EHRR 737 at [48].
[28] Big Brother Watch, n 17 above, at 16.
[29] David Harris and others, Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights (3 edn, OUP 2014) at 520.

It has been reported that individual police have justified the examination of mobile telephones because some complainants lie.[30] There have, of course, been some prosecutions that have collapsed because there was evidence that the complainant lied. However, the number of false allegations of rape is tiny compared to the number of complaints.[31] That said, there is evidence to suggest that the police often believe that the rate is higher than it is,[32] which potentially means that they are more likely to 'chase ghosts' and seek evidence that a complaint is not true, rather than consider the case dispassionately. The routine examination of rape victims mobile telephones because there is a risk that a small percentage of allegations are false is neither reasonable nor proportionate.

The bigger issue in terms of proportionality, however, is the obtaining of unnecessary information. It is this which causes some victims to believe that they are being treated as a suspect, because all aspects of their private life are, in essence, capable of review by the police. As noted at the very beginning of this paper, mobile telephones are no longer simply a device to communicate by voice. Most smart-phones will be used routinely for emails (both home and work), taking and sharing pictures, conversing with others, shopping, banking and health-tracking apps. Their whole life is exposed.

There will be cases when it is necessary to examine the contents of a telephone, and it would be unwise in some instances to restrict an examination to communications between suspect and complainant. Conversations with others may be of interest, particularly where the suspect responds that the sex was consensual. Let us take an example:

> C accuses S of rape. C and S met in a nightclub and S took C back to his house. The next day, C complains to the police that she did not consent. When the police examine C's telephone, they discover a message sent from C to S the next day saying, 'when can I see you again?'. There is also a message from C to F, a friend, saying 'had the most amazing last night. Met a really fit bloke and we went back to his place. Spent all night at it, it was best sex ever'.

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[30] Big Brother Watch, n 17 above, at 25.
[31] Although identifying what is 'false' is not easy: see, for example, Philip NS Rumney, 'False allegations of rape' (2006) 65 The Cambridge Law Journal 128.
[32] Lesley McMillan, 'Police officers' perceptions of false allegations of rape' (2018) 27 Journal of Gender Studies 9.

Clearly, in this instance, if the examination was restricted to messages between C and S, then important evidence may have been missed. The examination related to proximate messages. It is unlikely that examining messages between C and others from 10 years ago would have been justified.

If reading the messages was understandable, it is perhaps less easy to understand why data relating to shopping, banking or fitness applications should be examined. However, the Digital Processing Notice permits their examination. Part of proportionality is about gathering only the material that is likely to be relevant to an investigation. It is difficult to see how much of the data on a mobile (held within apps) would meet this test.

Proportionality also relates to the classification of material. Many people will have their work emails on their telephones. These will be obtained, and yet they may be protected forms of evidence. For example, if C is a solicitor or barrister, it could have legally-privileged material on it. If C was a journalist, it could have confidential information on the telephone that should not be known to the authorities.

The police respond that their technology is not capable of extracting information in a nuanced way. The most popular way of extracting the information is to create a perfect clone of the mobile device.[33] However, that means everything on the telephone is copied. A perfect replica of the telephone is produced, with the possessor having the same control as the owner in terms of accessing the data. All information, regardless of its sensitivities or relevance, is stored and capable of being examined.

The Office of the Information Commissioner is investigating whether the way that the police examine the mobile telephones of rape victims breaches the GDPR because of the way that they gather, analyse and store data from complainant's phones. This includes disproportionate gathering, but also where there are mistakes over the use of sensitive data. In 2016, Kent Police was fined £80,000 by the ICO because they disclosed inappropriate information.[34] As part of a domestic violence investigation, the police extracted the full contents of the victim's mobile telephone. Intimate and

[33] Justice Committee, n 7 above, at 19.

[34] https://www.theguardian.com/uk-news/2016/apr/21/kent-police-passed-alleged-domestic-abuser-sensitive-details-of-complainant (Accessed 20.xi.19).

sensitive information about the victim that was not relevant to the case was passed to the defendant, with the ICO ruling this a serious breach of data protection principles.

Other Article 8 considerations

While the focus until now has been on the privacy issues inherent in the examination of the complainant's phone, other issues arise under Article 8, primarily focusing on the dignity of the complainant.

The threat to discontinue an investigation is perhaps the first issue to consider. Clearly, there may be circumstances where a lack of cooperation will mean that there is insufficient evidence to proceed. However, the mere fact that a telephone is not examined will not necessarily mean that this threshold is satisfied. Article 8 includes positive and negative obligations, with an important positive obligation relating to the right to an effective investigation into allegations of serious sexual misconduct.[35] Therefore, routinely dropping investigations because a telephone is not provided for examination would be contrary to this right. The phrasing in the Digital Processing Notice should be more nuanced to reflect this position.

Article 8 could also be compromised if the police were to use the data gathered to ask inappropriate questions of the complainant. There has been a long, and inglorious history of the police asking inappropriate questions of rape complainants.[36] The police service has spent several years trying to put this right, and ensure that those who report serious sexual assaults are treated with respect. Pejorative judgments must not be made about complainants, as it is unlikely to be based on matters relevant to the investigation.

A comparison can be drawn to the position at trial where the previous sexual history of a complainant is largely protected.[37] No equivalent prohibition exists during the interview, but it would be unfortunate if the content of the mobile telephone led to a detailed examination of the sexual history of complainants. It is conceded that this may sometimes be justified where, for example, the previous history is strikingly similar to the complaint under investigation. However, where it is not relevant, then it should not be considered. Let us take an example:

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[35] See, for example, X and Y v Netherlands (1985) 8 EHRR 235 and MC v Bulgaria (2003) 40 EHRR 459.
[36] McMillan, n 32 above.
[37] Youth and Justice Criminal Evidence Act 1999, s.41.

> C alleges that S 'spiked' her drink at a nightclub. C further alleges that S then raped her in a public park adjacent to the nightclub. S says that it was consensual sex and that she approached him in the park and demanded sex.
>
> Social media communications and text messages show that C is bisexual and that she is polygamous. She has had one-night stands in the past, although always at the partner's house.

It is highly likely that questions relating to C's sex life would be protected under s.41 at court. Similarly, they should be protected during the police investigation. C's sexual orientation and the fact that she has had polygamous relationships, and one-night stands, is not relevant to the allegation that has been reported. It might be justified for a police officer to look at C's telephone to see if S is a contact, or whether there has been any telephone call or text-message between them. That, however, is very different from examining all aspects of the complainant's personal life. Inappropriate questioning the complainant's sexual history is likely to breach the dignity aspects of Article 8. Where it is relevant, then the questioning is, of course, justified but arbitrary questioning will not.

Article 6

The obvious counterpoint to Article 8 is to consider Article 6. Dr Hannah Quirk, a leading academic on criminal law and evidence, commented on Twitter at the time that this furore erupted:

> Disappointing to see this 'digital strip search' line being peddled again with no mention of the importance of a thorough investigation to protect the wrongly accused. Plenty could be done to improve charging rates for sexual offences without compromising fairness to the accused.[38]

This is undoubtedly true. Cases such as Liam Allan do show that a failure to properly examine mobile telephones in appropriate cases could lead to an injustice. Article 6, of course, principally encapsulates the common-law right that a person is entitled to a fair trial. This includes ensuring that relevant evidence is identified and disclosed. The argument in favour of the digital strip search is that if it does not happen, then a defendant cannot get a fair trial.

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[38] https://twitter.com/hannahquirk1/status/1163390180939710464 (Accessed 19.xi.19).

The Justice Select Committee states:

> The law is clear in that the right to a fair trial is an absolute right which cannot be violated to protect the right to privacy.[39]

The reality is that it is more nuanced than this. While the ECtHR has been clear as to the importance of the right, and the fact that it should not be interpreted restrictively,[40] it does not follow that Article 6 is somehow more important than Article 8. Both are critical rights, and they must be balanced in a way that respects each. It is not the case that one trumps the other. Accordingly, it is not possible to say, 'mobile phones must be examined as otherwise, it is unfair' as that prioritises Article 6 over Article 8. Neither, however, can it be said that 'mobile telephones should never be examined' because there may be relevant information on a phone. The key point is that the balance will always be case-specific. Let us take an example:

> C alleges that S has raped her. She alleges that after a night out, she went to S's flat and agreed to spend the night, but it was clear that she did not want sex. S states that C wanted sex.
>
> C and S know each other. S alleges that C had sent a nude picture of herself to him saying, 'want some?'. S says that he regularly received text messages from C saying, 'I want you to fuck me', and 'why won't you fuck me. I'm yours'.

It does not follow from the example above that C was not raped. Irrespective of what C may, or may not, have said to S, C could decide at that moment in time that she did not want sexual intercourse. If S ignored that, then that would constitute rape. However, assuming that C and S disagree about whether C consented, then their previous communications can become relevant, and so an examination of the mobile telephone could be justified, to ascertain whether potential exculpatory evidence is present. This means that C's communications with others may also be relevant.

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[39] Justice Select Committee, n 7 above, at 37.
[40] *Perez v France* (2004) 40 EHRR 909.

The point, however, is that this analysis is case-specific. In the example above, the rights of the suspect would almost certainly justify the examination of C's telephone. This is partly due to Article 6, but also because the interference with C's Article 8(1) rights is, subject to the point about effective consent, justified under Article 8(2). It is necessary and proportionate to look at C's telephone, although the extent of the data held will be relevant to proportionality. That said, the interests of justice will mean that even when the evidence is disproportionate, its use will be permitted.

A more controversial issue relates to that of credibility. The credibility of a complainant (and, indeed, the suspect) can be an important part of the trial process, a point echoed in this debate.[41] However, any analysis of the telephone for credibility cannot constitute a fishing exercise. Scott notes that trawling for evidence is not restricted to complainants, and that suspect's telephones are routinely examined, and 'particular attention paid to embarrassing pictures and anything touching on his sex life… it is highly invasive of his privacy, but that is the nature of the criminal investigation'.[42] Saying 'the suspect is treated poorly so the complainant should be too' is not exactly the strongest of logical arguments. The police are not supposed to engage in fishing expeditions in respect of an investigation, and the courts have the power to ensure that only relevant information is placed before the jury. Where an issue is identified in the search that is prejudicial to him and only of passing relevance to the case, the judge would be required to exclude the evidence.[43]

Trawling through the medical evidence of complainants without justification has been the subject of fierce criticism,[44] and these mistakes must not be repeated by mobile telephone analysis. The ECtHR has previously said that sensitive information should only be disclosed where it is directly relevant to the case.[45] Disclosure should not be based on stereotypes and myths,[46] but on material that legitimately corroborates or weakens the prosecution case. It is incumbent on the police, prosecutors and, ultimately, the judge, to ensure that evidence to be disclosed meets the legal test

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41 Justice Select Committee, n 7 above, at 37.
42 https://blogs.spectator.co.uk/2019/04/theres-nothing-wrong-with-asking-rape-victims-to-hand-their-phones-to-police/ (Accessed 20.xi.19).
43 Police and Criminal Evidence Act 1984, s.78. The prejudicial effect outweighing the probative value.
44 Therese Murphy and Noel Whitty, 'What is a fair trial? Rape prosecutions, disclosure and the Human Rights Act' (2000) 8 Feminist Legal Studies 143.
45 Z v Finland (1998) 25 EHRR 371.
46 Jennifer Temkin, 'Digging the dirt: Disclosure of records in sexual assault cases' (2002) 61 The Cambridge Law Journal 126.

and that personal information only passed to the defence when there is a legitimate need to do so.[47]

The complainant and other proceedings

The Digital Privacy Notice states that the police will investigate evidence of other crimes or retain the information as intelligence.[48] This raises issues under Articles 6 and 8 for the complainant. Let us take an example:

> HMRC are investigating C for tax fraud. Separately, C is raped when returning home one day.

In the example above, it is quite possible that there may be evidence on C's telephone that will be relevant to the alleged tax fraud. It is quite possible/likely that there is insufficient evidence at this stage to interview C formally, and so the authority will not have access to the telephone or its apps.

There is a danger that by asking for the telephone as part of the rape investigation, the authority circumvents their duties under the Police and Criminal Evidence Act 1984. It allows puts the complainant is an insidious position. If she refuses to surrender her telephone fearing it contained incriminating material, then the Digital Processing Notice says that the rape allegation could be dropped, meaning her assailant faces no action. If she does surrender her telephone, then she may find herself assisting the prosecution case against her.

Can an argument be made that she is being compelled to incriminate herself? If so, could this constitute a breach of Article 6?[49] Arguably, she is not compelled as ultimately she has the choice not to surrender her telephone, but, as with the earlier discussion on consent, this is not free choice. If she chooses not to risk incrimination and the case is dropped, then this would seem to undermine the right to an effective investigation. If she does surrender the telephone, then this would show the disproportionality of the search as the incriminating evidence is unlikely to be

[47] On this, see R v E [2018] EWCA Crim 2426 below.
[48] Digital Processing Notice, n 10 above, at 3.
[49] Harris and others, n 29 above, at 422-426.

relevant to the alleged rape. The choice is so toxic that the only recourse is to prevent incriminating evidence gathered this way from being used against C in any subsequent trial.[50]

Putting it into practice: *R v E* (2018)

A key case in this area that demonstrates the correct approach is R v E.[51] E, aged 18, was accused of sexually assaulting his step-sisters, EC (aged 14) and R (aged 17). The assault was reported to the police some months after it happened.

R stated that she discussed what had happened with her friends, including through exchanging text-messages and communications on social media. EC, however, stated that she did not tell anyone. She also stated that she did not have E's telephone number. The police asked for R's mobile telephone, but not EC's.

A few months later, EC sent a text message to her father (who was also the father of E), saying that she was going to start seeing him again, including staying with him on alternate weekends.

The defence argued that the police should have seized EC's telephone, either at time of the initial complaint or, at the very least, after the text message was sent to her father. The CPS, for reasons not set out in the judgment, conceded that they should have taken the telephone after the message to her father was sent. The trial judge ruled that the failure to search the telephone of EC constituted an abuse of process and he stayed the indictment.

The prosecution appealed the decision as a terminatory ruling.[52] The Crown was represented by different counsel than at the trial, and he sought to withdraw the concession that had been made, arguing that it was wrongly made. Counsel argued that it had never been necessary to investigate the telephone of EC.

While refusing permission to withdraw the concession for procedural reasons, the Court of Appeal agreed with the overall submission, and quashed the ruling, ordering a new trial. The court noted that EC had been consistent throughout the process that she had not told anyone about the attack,

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[50] Potentially this could be achieved under Police and Criminal Evidence Act 1984, s.78 as it can be argued that the evidence was gathered in such an unfair way that it would not be appropriate for the prosecution to use it. Of course, this raises questions about where the evidence was used to locate evidence that would be admissible.
[51] [2018] EWCA Crim 2426.
[52] Criminal Justice Act 2003, s.58.

and that she did not have the telephone number of E. The court expressly disavowed the suggestion that there was a power to seize the telephone under such circumstances.[53]

The court noted that a fair trial meant that the guilty should be convicted and not just that a person should be acquitted when reasonable doubt remains.[54] By this, the court undoubtedly meant that denying the opportunity to conduct a fishing exercise by analysing the telephone without cause does not render a trial unfair. The court placed great emphasis on the fact that there was no evidence that EC had told anyone or that she had E's number. The fact that she had sent a text message to her father did not mean that other relevant information was someone on EC's telephone.[55]

While the Court of Appeal did not say so, the police would have been able to check E's telephone to identify whether he had EC's number on it. If he did, then it would tend to suggest that EC was wrong and that she did have his telephone number. That may have made it more likely that an examination would be justified. However, if E's telephone did not contain EC's number or any messages from her, then that would tend to suggest that she was correct and that there was nothing relevant to the investigation on EC's phone.

R v E shows the importance of necessity. Even the close relationship between suspect and complainant did not displace the rule that it must be necessary rather than desirable to examine the complainant's telephone. There was no evidence to suggest that there was anything of relevance on the phone. The demand for its seizure could be for no other reason than to mount a fishing exercise, and the Court of Appeal was right to reverse the judge's ruling on this point.

Artificial intelligence

Big Brother Watch is concerned with the use of artificial intelligence (AI) in the analysis of mobile telephones. The amount of data that can be stored on a mobile is immense, with it being estimated that it could involve over 35,000 pages of evidence per device.[56] It would be extremely challenging for a human to look through this material in a timely way. Delays in the investigation would be inevitable.

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53 [2018] EWCA Crim 2426 at [27].
54 Ibid., at [30] citing R (Ebrahim) v Feltham Magistrates' Court [2001] EWHC 130 (Admin).
55 Ibid., at [35].
56 Justice Select Committee, n 7 above, at 19.

Some police forces have responded to this difficulty by using AI to analyse the data found on a mobile phone. Big Brother Watch is critical of this move,[57] arguing that the police could use the technology to conduct fishing expeditions.[58] While that is true, it does not indicate that the use of AI is fundamentally wrong, rather that the technology can be misused.

Big Brother Watch also states that AI should not be making decisions. Again, that is correct, but that is criticising the use of the technology, rather than the technology itself. If used appropriately, AI could be used to find relevant information. For example, it could be used to find a reference to the suspect's name or the date of the incident. The suspect's photograph could be analysed, with AI finding any examples of it on the complainant's telephone.

While AI sounds intelligent, it is as dumb as its programming. Thus, if it is told to seek x, it will not report back anything to do with y or z. It can be told to look for information connected to x, but that would still mean it would not return hits on things that were not. This could mean that AI is less intrusive than when a human looks through the data. As AI is ultimately a computer program, it cannot make moral judgements. It is incapable of reacting to information that it sees, meaning that its analysis is objective. Unlike a human, it does not remember what it has seen, and will not become sidetracked. Ultimately, the results of an AI search should be considered by a human, but, if used correctly, it allows for the weeding of information, meaning that a human need only consider a small part of the evidence gathered.

The Way Forward

Where do we go from here? Notwithstanding the decision in R v E, the dispute that exists between the police and CPS on the one hand, and those representing victim s on the other runs deep. The Association of Police and Crime Commissioners strongly condemned the issuing of the Digital Processing Notice.[59] It is almost unprecedented for the body that represents those who exercise political oversight of the police to react in this way. It demonstrates that there are real problems with the current system.

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[57] Big Brother Watch, n 17 above, at 37.
[58] Ibid., at 39.
[59] https://www.apccs.police.uk/latest-news/apcc-requests-withdrawal-of-document-demanding-access-to-personal-digital-material/ (last accessed 20.xi.19).

Nick Baker, the Deputy Chief Constable of Staffordshire Police and NPCC lead for digital forensics, and Max Hill QC, the Director of Public Prosecutions, are adamant that their policy is not inappropriate. They state that mobile telephone evidence is only requested when it is necessary and proportionate to do so. The difficulty is that there is clear evidence that if the policy does say this, it is routinely ignored.

It does not matter what a DCC or the DPP says if a Detective Sergeant or area CPS caseworker ignores it. At that point, the policy becomes worthless. That appears to be the current position. Why the policy is being ignored is more difficult to explain. Is it a fear of individual criticism if a case collapses? Quite possibly, and it is perhaps an understandable reaction, particularly at this time when the investigation of rape has become politically charged, with attention being focused heavily on both convictions and acquittals. This is something that can only be addressed by senior people within the police and the CPS. Victims of serious sexual assaults should not suffer due to a performance culture, or because austerity has meant that non-specialists are undertaking this work. A failure to address this will lead to continued tensions and inevitable challenges.

I am not suggesting that there are no circumstances when the examination of the victim's mobile telephone is not necessary. Indeed, in many cases, it is likely to be required. However, there should not be a presumption that it is required, and it should not become routine. There should be a positive decision taken to ask the victim for their telephone. This should be taken by the SIO in consultation with the CPS, and both should be properly trained in rape and sexual assault cases. The decision to search the phone should only be made when it is necessary to do so.

In some instances, the need to look at the mobile telephone may be apparent from the initial complaint. For example, where C and S have had a friendly relationship, including exchanging electronic messages. Examining the telephone in this instance does not suggest that C is lying, but it recognises that a legitimate line of enquiry could be communications between, or about them. However, the police must not fall into the trap of rape-myths. The fact that C and S were friendly flirting or even dating does not mean that C did not consent. The communications should be considered objectively, and should not be used to ask inappropriate questions. A useful guide is that questions that would not be admissible in court due to s.41 should not be asked in the investigative interview.

The decision of whether to search the telephone does not, in most instances, need to occur at the time of the initial complaint. Victims should not be presented routinely with the Digital Processing Notice / Stafford Consent. Save for these instances when it is obvious that the device will contain relevant information (invariably as a result of what the complainant says), then the decision should be made afterwards.

Where an allegation is made against an identifiable suspect, the police will invariably interview that person under caution. Should a prosecution be initiated, there is an obligation on the defence to make a case statement.[60] Both of these provide an insight into what the defence argument will be. This could range from 'it did not happen' to 'it was consensual'. The defence interview or statement (following a 'no-comment' interview) will allow the SIO and CPS to decide whether the interrogation of a mobile telephone is necessary. For example, if the defence is 'it did not happen' then it is unlikely that an in-depth analysis of the telephone will assist the defence. Communications data may show, for example, that S and C were in the same approximate area,[61] but that does not require an examination of the telephone.

Where, however, the argument is, 'yes, it did happen, but we were in a relationship, and it was consensual' then an examination of the telephone may be appropriate. However, it should not be automatic, and the police should consider examining the suspect's telephone first. They have the right to examine the suspect's telephone, and if exculpatory statements are found on that device, this will either lead to the ending of proceedings or demonstrate the necessity of examining the complainant's telephone.

Any examination should be proportionate. The current approach of, in essence, taking all material cannot be justified. It is highly unlikely that the amount of detail that is recovered will ever be examined. That being the case, it is not appropriate to gather it in the first place. Evidence must be restricted to that relevant to the investigation. Saying 'it will not be used' is not sufficient. The concern of rape victims is that the police have access to some of their most intimate or private conversations and thoughts. This could involve topics such as their state of health, the state of their marriage, their work, their love-life and money issues. Their pictures could include intimate footage of themselves, that they only expected their partner to see. Why should the police be given

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[60] Criminal Procedure and Investigations Act 1996, ss.5-6B, and Criminal Procedure Rules, r.15.4.
[61] Contrary to popular TV shows, cell phone location is only an approximation: the devices can be located within the same triangulation

access to this footage? How will the victim feel if they are talking to an investigator who has seen their most intimate footage and thoughts?

The excuse by the police that their technology is not capable of extracting specific information is not good enough. The technology exists to do this. It is that the police have not invested in this technology. That is not the fault of victims, and they should not be punished for this failure of the police. Appropriate technology must be rolled out across all police forces, allowing police to target their examination to specific types of material. I do not share Big Brother Watch's denunciation of artificial intelligence. While AI should not be used to make decisions, using AI to identify relevant material could be considered less intrusive than a human investigator perusing all evidence. That said, the AI should solely be used to flag potentially relevant information for confirmation or analysis by a trained investigator. It should not be used as a way of conducting a fishing exercise into all aspects of the complainant's life.

It is often said that law enforcement in the UK involves policing by consent. The public disquiet over digital strip searches suggests that the police are in danger of losing that consent in respect of rape investigations. The rape conviction rate is already extremely low, with HM Inspectorate of Constabulary and Fire & Rescue Services estimating that it can be less than 2% of reported crime.[62] While it is impossible to gauge what the 'right' conviction rate should be, and it would be extremely dangerous to try and estimate such a figure, the fact that only a very small percentage of reported rapes lead to a conviction is problematic. There are many reasons why the rate is so bad, but the treatment of complainants by the authorities is often a reason.[63] Disproportionate and unnecessary trawls through the electronic lives of rape victims are not going to help matters.

[62] HMICFRS 'Rape monitoring group: Digests and Data 2017/18' (2018, London). 1,062 persons were convicted of rape but 53,970 rapes were reported to the police.
[63] Clare McGlynn and Vanessa E Munro, *Rethinking rape law: International and comparative perspectives* (Routledge 2010).

Digital Processing Notice

INSERT FORCE LOGO

Digital device extraction – information for complainants and witnesses

We understand that a request to obtain personal or private information, either from your mobile telephone or digital device has the potential to cause anxiety. The purpose of this document is to explain why we may be making a request, what will happen to your data and to address some of the concerns that you may have. A list of other agencies who may offer support and advice is included at the end of this information sheet.

You may be asked to give your consent to download data from your device, such as text messages and emails.

Digital Devices - why we may need to look at your 'phone and other digital devices

The police have a responsibility to investigate crimes and gather all evidence that may be **relevant** to the case. "Relevant" means anything that has some bearing on any offence under investigation, or on the surrounding circumstances of the case. Investigations have to be thorough and the police have a legal duty to follow all reasonable lines of enquiry. These lines of enquiry will depend upon the individual circumstances of each case.

Mobile phones and other digital devices such as laptop computers, tablets and smart watches can provide important relevant information and help us investigate what happened. This may include the police looking at messages, photographs, emails and social media accounts stored on your device. We recognise that only the reasonable lines of enquiry should be pursued to avoid unnecessary intrusion into the personal lives of individuals.

You may be able to tell us where you think the relevant information is on your phone or other digital devices, or you may not. You will be asked about this during the initial stages of the investigation. This process may also be applied to the suspect's mobile phone and other relevant devices in order to establish if there is any data that might be relevant to the case.

Digital Processing Notice

Before obtaining data from your device(s), we will ask for your consent and request you sign a form called a 'Digital Processing Notice'. The form provides you with important information about how we store and protect the data obtained from your device(s) and it is important that you read it carefully. You will be given a copy of this form and we will retain it in line with legislation.

What we do with your digital device

There are essentially 3 levels of examination that can be applied to a device and this will affect what data is obtained. The data that can be extracted may vary by handset and the extraction software used. You will be provided with further information by the officer dealing with your case. However, the following broadly describes the level of extraction:

- **Level 1** – called a "logical extraction". This may provide almost all of the data you could see if you were to turn on the device and browse through it. It will **not** normally extract data that has been deleted from the device.

- **Level 2** – either a "logical" extraction using selected tools in a laboratory environment or a "physical" extraction, which recovers a copy of the data held on the memory chip of the device. "Physical" downloads can extract deleted data, although capabilities vary depending on the nature of the device and the operating system.

- **Level 3** – these are usually expert and bespoke methods to tackle complex issues or damaged devices.

Some technology will not be able to obtain material using parameters such as a specific time period, meaning even though we may only consider a limited number of messages relevant to the investigation, the tool may obtain all messages.

Depending on the nature of the investigation, data from your device may be downloaded at the police station and your device returned to you, or we may need to send it to a digital forensics laboratory, which will mean that we will need to keep your device for a longer period, including until the end of any criminal proceedings.

The investigating officer will explain to you what level(s) of examination will be applied to your device and how long we are likely to keep your device for.

The Crown Prosecution Service (CPS) is the body responsible for prosecuting criminal cases investigated by the police in England and Wales. Evidence gathered by the police will be handed over to the CPS, who prepares the case for court. Sometimes the CPS will advise the investigating officer about what data should be examined before a case is charged, and sometimes they may ask for further investigation to be conducted after a case has been charged.

This process can take some time and it may be that we need to keep your phone and any other devices for several months, or we may request it from you again at a later stage. We may be able to supply you with an alternative mobile phone.

What happens to the data obtained from your device?

Once data has been downloaded and reviewed, we divide the material into different categories:

- 'Used' material – this is data that we want to use as evidence in court if the case goes to trial;
- 'Unused' material – this means that it is relevant but does not form part of the evidence that the prosecution wants to rely on. If unused material may undermine the prosecution case, or assist the defence then it must be provided to the defence if there is to be a trial; and
- Material which is not relevant because it is not capable of having any bearing on the case - this is not used either as evidence, or disclosed as unused material but will be retained until the conclusion of criminal proceedings.

Data obtained from your mobile phone or other digital device may be used as evidence to support the prosecution case, which means that it will be shown to the suspect/defendant and used in court. If unused material could assist the defence or undermine the prosecution case then it will also be shown to the suspect/defendant.

If data obtained from your device has been or will be shown to the suspect/defendant, either as evidence or as disclosed unused material then we will inform you of this.

In some cases the court will make an order for you to release data; but this is rare and before this happens you will be given an opportunity to make representations at a court hearing.

What happens if we find evidence of other criminal offences?

If information is identified from your device that suggests the commission of a separate criminal offence, other than the offence(s) under investigation, the relevant data may be retained and investigated by the police. This data may be shared with other parties including, for example other police forces or a court in any criminal proceedings.

If your device contains information that may assist in the prevention or detection of crime, or protecting the vulnerable, then the police may process and retain this information on our intelligence management system and/or share that information with relevant parties/agencies, including other police forces or government agencies, including those outside of the UK.

What happens if I refuse consent for the police to access my data or information held about me?

If you do not provide consent for the police to access data from your device you will be given the opportunity to explain why. If you refuse permission for the police to investigate, or for the prosecution to disclose material which would enable the defendant to have a fair trial then it may not be possible for the investigation or prosecution to continue.

If a prosecution is able to continue then the defence representatives will be told of your refusal and a judge may order disclosure to take place. If this happens, you will be given the opportunity to make representations to the court about the reasons why you object.

Further questions or complaints

If you have any further questions or you have a complaint, please speak to the investigating officer in charge of your case.

Alternatively, you can contact our Professional Standards Department (insert force details).

If you have a complaint regarding how the police have handled your data from your device device(s), you have the right to complain to the Information Commissioners Office, who are the UK's independent body set up to uphold information rights. They can be contacted through their website on https://ico.org.uk/make-a-complaint/ or 0303 123 1113.

National Support Agencies

- Victim Support 0808 1689 111/0808 1689 293 or www.victimsupport.org.uk
- Rape Crisis 0808 802 9999 **or** www.rapecrisis.org.uk
- SAMM 0845 782 3440 or 0121 472 2912 www.samm.org.uk
- Citizens Advice Bureau www.citizensadvice.org.uk
- UK Government Website www.gov.uk/find-a-community-support-group-or-organisation

INSERT FORCE LOGO

[INSERT POLICE FORCE] DIGITAL PROCESSING NOTICE

Crime Reference Number:

The police request your consent to take possession of your mobile phone or other digital device (laptop, iPad etc.) for the purpose of extracting information considered to be relevant to the investigation that you are involved with.

This form describes our data protection and safe storage responsibilities. Separate forms will be used for each device requiring examination. You will be provided with a copy of this form and it will be retained by the police until the conclusion of any related criminal proceedings.

This notice must be served alongside the information document entitled "Digital device extraction – information for complainants and witnesses" which explains the reason the police are requesting your digital devices(s), and how the data extracted may be used.

Please contact the investigating officer in your case should you wish to discuss further how we may use your data.

All information recovered in the course of a criminal investigation will be handled, stored and retained securely in accordance with the provisions of the Management of Police Information (MoPI). Further information on MoPI and other approved professional practice information can be found at the College of Policing Website (www.college.police.uk "APP"►*"Information Management"*).

We also have a duty to retain certain information. The retention period of the data we collect from your device will vary depending upon the severity of the offence investigated.

The officer investigating your case can print out relevant parts of MoPI for you if you have concerns, or email you the link to the appropriate parts of the website. This document can also be emailed with the following links: MoPI 2005

Retention period

"*APP"* ► *"Information Management"* ► "Retention, review and disposal" ► "Review schedule"

The police are under a legal obligation to pursue all reasonable lines of enquiry. To enable us to meet this obligation we are requesting access to your device and data on it as set out below.

In order to investigate the crime you are involved in, the police intend to extract the following data categories from the device e.g. call data, messages, email, contacts, applications (apps), internet browsing history etc.:
……
……
……
……
……
(Continue on a separate sheet if necessary.)

It is the intention of the investigating officer to use the following, or a combination of the following level of extraction. Should an alternative level of extraction become necessary in order to successfully recover data, the investigating officer will contact you with an update and further consent may be required.

- **Level 1** – called a “logical extraction”. This provides almost all of the data you could see if you turn on a device and browse through it. It will **not** normally extract data that has been deleted from the device.

☐ **Level 2** – either a “logical” extraction using selected tools in a laboratory environment or a “physical” extraction, which recovers a copy of the data held on the memory chip of the device. “Physical” downloads can extract deleted data, although capabilities vary depending on the nature of the device, and operating system.

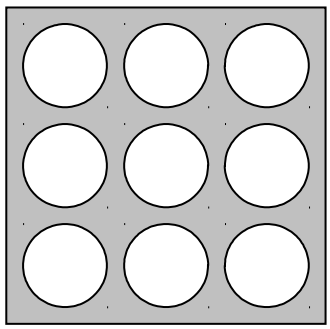
☐ **Level 3*** – these are usually expert and bespoke methods to tackle complex issues or damaged devices.

Each of these levels may extract data in addition to that listed above by the investigating officer. Additional data extracted but which is not relevant will be securely stored as described above.

The investigating officer will explain the technical capabilities or restrictions relating to the above level of extraction. This could, for example relate to whether the methods used are compatible with your device and what data can, or cannot be extracted.

The level of extraction will determine how long we may need to retain your device. The investigating officer will explain how long this is likely to be in your case.

*Although great care will be taken to avoid this, Level 3 extractions may result in damage to the digital device, or permanent loss of data.

<table>
<tr><td colspan="4">Device Details (to be completed by investigating officer):</td></tr>
<tr><td>Exhibit Ref:</td><td colspan="3"></td><td rowspan="6">Device Pattern Lock (indicate beginning and end)
  </td></tr>
<tr><td>Telephone No.:</td><td colspan="3"></td></tr>
<tr><td>Make/Model No.:</td><td></td><td>Memory Card Present:</td><td>Yes ☐
No ☐</td></tr>
<tr><td>Device PIN Code:</td><td colspan="3"></td></tr>
<tr><td colspan="4">If alternative lock methods are present (i.e. fingerprint/face or iris) please ask complainant/witness to disable these in advance.</td></tr>
<tr><td>General Description of Condition: (i.e. damage or faults, last used)</td><td colspan="3"></td></tr>
</table>

I have been given the “Digital device extraction – information for complainants and witnesses” form. I understand why the police are requesting my digital device and access to the data on it. I understand the process used to extract that data and I understand all relevant data (as determined by the investigating officer) will be handled, stored and retained as set out above.

The investigating officer will inform me if any of my data has been or will be disclosed to any suspect or their defence representative.

Name and DOB:	
Address inc. postcode and telephone number:	
Signature:	
Owner of device / parent or guardian details:	
Address inc. postcode and telephone number:	
Signature:	Date:

The police will not disclose your data to any party, including parents/guardians, other than as required for the purpose of criminal proceedings or to comply with a legal duty.

Ordinarily, the police seek the involvement of a parent/guardian of a complainant or witness under the age of 18. Any objection to the police informing a parent/guardian of this request will be recorded, together with any reasons given. The police will try and comply with your wishes but there may be circumstances when it will not be possible to do so.

Investigating Officer*			
Name:		Force ID Number:	
Rank/phone number:		Location/Unit:	
Signature:		Date:	

Data Controller:	Chief Constable of [INSERT POLICE FORCE]
Information Commissioner's Office Registration Number:	
Data Protection Officer Address:	
Should you wish to make a complaint in respect of how your information and data has be handled by the police, you can contact the Information Commissioners Office.	https://ico.org.uk/make-a-complaint/ 0303 123 1113

**Note for investigating officer: Please ensure a copy of this is provided to the complainant/witness and/or parent/guardian and/or owner of device.*

Mobile Telephones / Technological Advances

Detective Chief Inspector Stephen Jennings,
Senior Investigating Officer, Kent &
Essex Serious Crime Directorate

Digital Device Downloads and Data Extraction:

DCI Stephen Jennings

Contents

- Digital Overview
- The law in terms of power of seizure.
- Victim / witness consent.
- The practical application of digital downloads.
- Disclosure & the ‘Reasonable lines of enquiry’ application

So what may be stored on a Digital Device?

- Chat – Including SMS
- Contacts
- Calendar
- Images
- Video
- Audio
- Passwords
- Notes
- Emails
- Location Data

- Web Browsing History
- Medical History
- Religious Material
- Legal Privilege Material
- Health & Fitness Data
- Shopping Habits
- Sexual Preferences and activity
- Musical tastes
- Financial Information
- Political Preferences
- Etc.

…….Arguably, a persons whole life !!!!!

…….and that's just "Live" Data!!

Powers of Seizure / Process of data

- Section 19 PACE

 - lawfully on premises.

 - Evidence obtained in consequence of the commission of the offence and may be lost.

- A refusal does not constitute a belief that evidence will be lost or destroyed.
- Sec 35(2) Data Protection Act states that consent is required to process data.
- Powers of seizure not powers of search!

CPIA/IP Act v Data Protection

1. Consent is the basis for taking possession of the device.

In terms of processing the data from the device we have to satisfy the Data Protection Act 2018 and the Investigatory Powers Act 2016:

- S.35(2) of the Data Protection Act 2018 is satisfied when processing personal data is based on law (CPIA) and is with either the consent of the data subject or necessary for the performance of the task. In reality whilst we ask for the victim's consent to download their data we use the based on law/necessary element for data on the device belonging to 3rd parties.

- The Investigatory powers Act 2016 is currently open to interpretation when it comes to processing/accessing stored messages.

- The Act reads as if it would constitute interception of communications data, which the NPCC accepts.

- The NPCC view is that a mobile device is part of a private communications network, but capable of accessing the public network.

- As a result, consent from the owner of the device allows us to process the messages under section 3(2) IPA 2016.

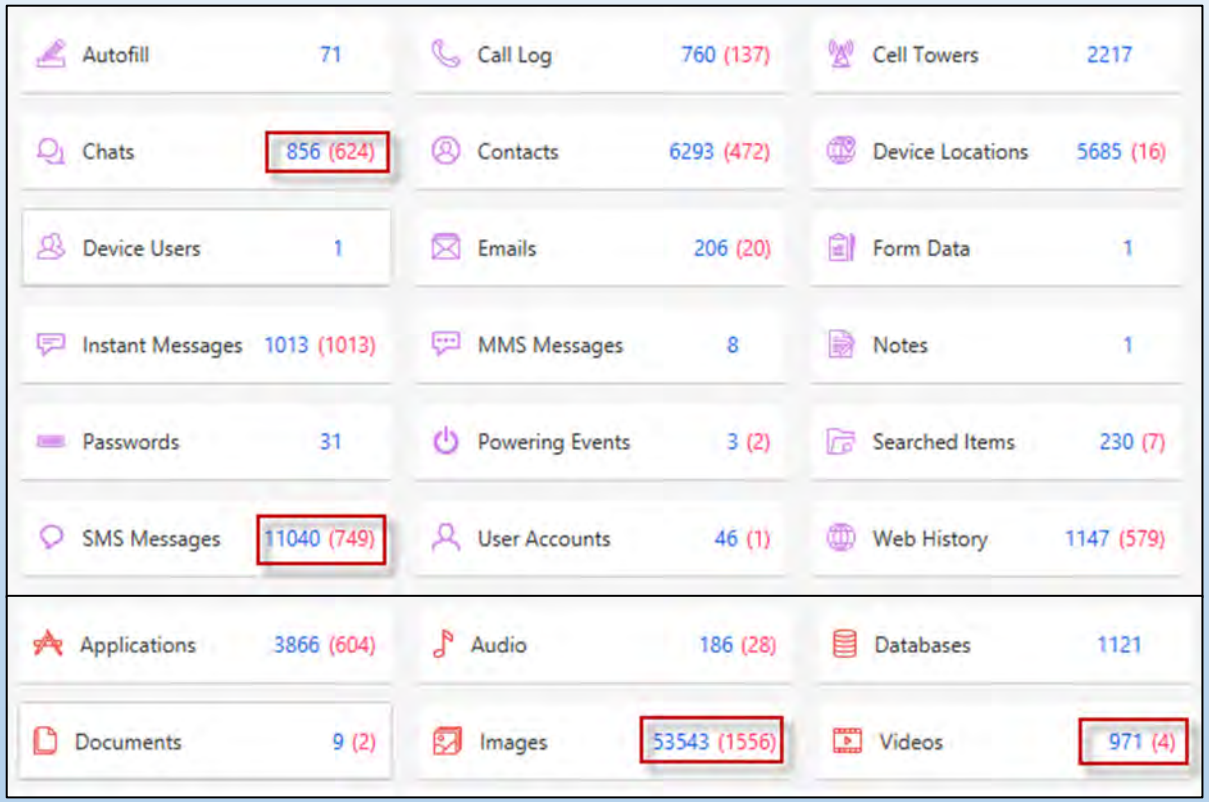
NPCC view – November 2019

CPIA/IP Act v Data Protection

- Data displayed or contained on a digital device does not constitute “surveillance” in section 48 RIPA.
- Voicemails not contained on the device but remain in the cloud or with the CSP may require a DSA or intercept warrant.
- Sec 49 RIPA notice to suspects
- Sec 53 RIPA failure to comply offence.

- *64GB iPhone*
- *33GB of data*
- *906,750 pages*
- *OR…*

Typical Phone Data Extraction



32GB Phone

856 Chat Conversations

11040 SMS Messages

53543 Images

971 Videos

National Digital Processing Notice – Explanation of extraction methods

- **Level 1** – called a “logical extraction”. This provides almost all of the data you could see if you turn on a device and browse through it. It will **not** normally extract data that has been deleted from the device.

THE DIGITAL HUB

- **Level 2** – either a “logical” extraction using selected tools in a laboratory environment or a “physical” extraction, which recovers a copy of the data held on the memory chip of the device. “Physical” downloads can extract deleted data, although capabilities vary depending on the nature of the device, and operating system.

- **Level 3*** – these are usually expert and bespoke methods to tackle complex issues or damaged devices.

scd
Serious Crime Directorate
Supporting policing from community to county

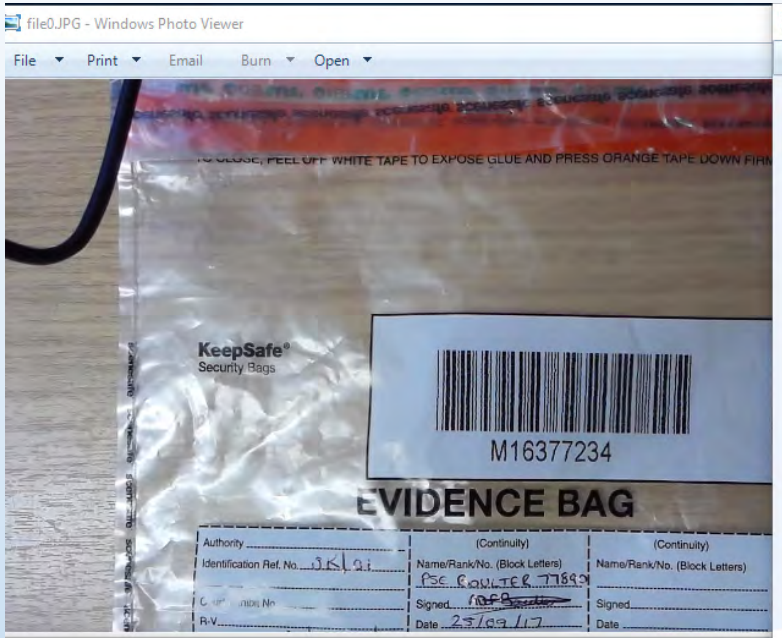
….Too Confusing?

How data is extracted….The technical side

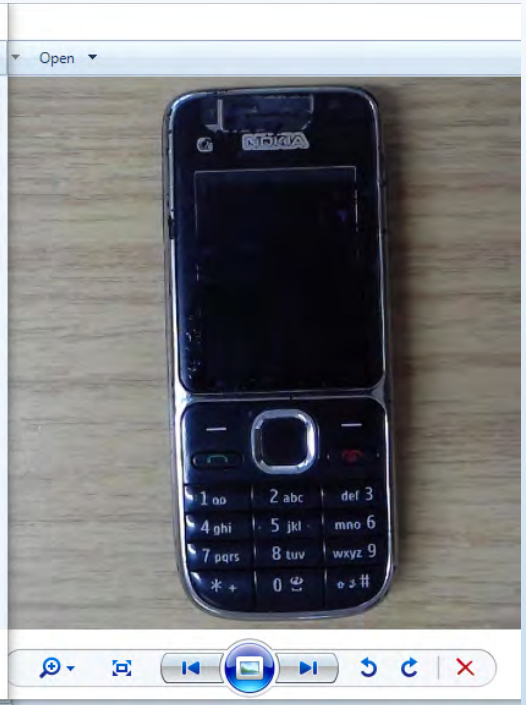
- Digital Hubs and Digital Forensics Unit (DFU)
- The software is called XRY or Celebrate
- Levels 1,2,3
- ISO17025 accreditation
- Photograph the exhibit
- Notes are taken throughout for continuity
- Download of SIM card, Handset and any memory cards
- Cannot partition download
- You can obtain deleted data

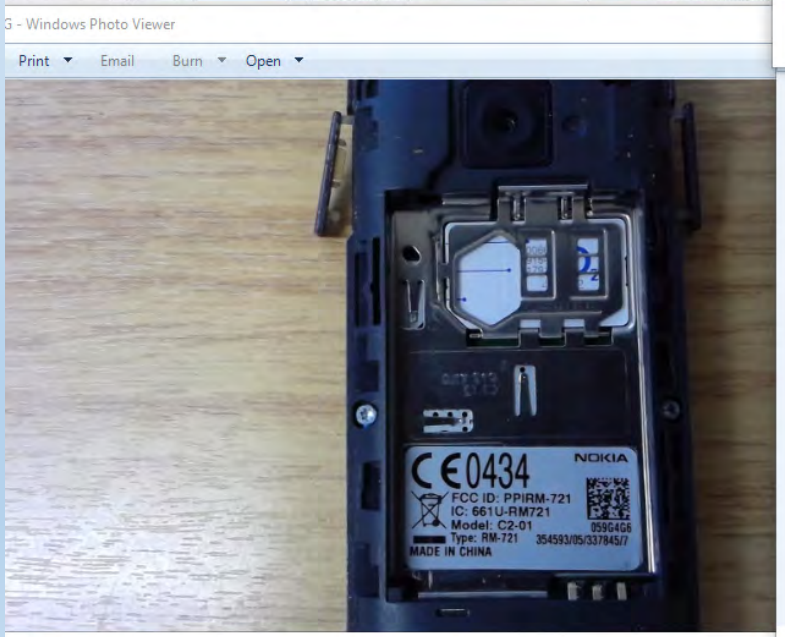
Victim / Witness Phone

- Victim/witness signs consent form
- ONLY data consented to is provided to the officer in the case
- The remaining data is deleted immediately.
- Master disc is stored in the Hubs for a year and then long term storage.
- Consent from next of kin if the victim/witness is deceased

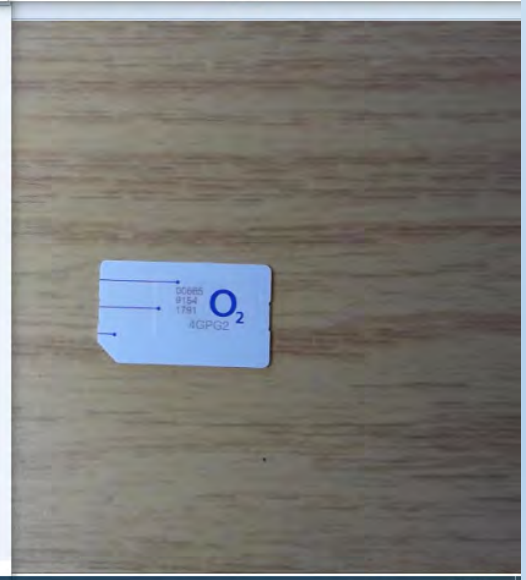

file0.JPG - Windows Photo Viewer
File
Print
Email
Burn
Open
KeepSafe®
Security Bags
M16377234
EVIDENCE BAG
Authority
Identification Ref. No.
(Continuity)
Name/Rank/No. (Block Letters)
Signed
Date
(Continuity)
Name/Rank/No. (Block Letters)
Signed
Date


file2.JPG - Windows Photo Viewer
File
Print
Email
Burn
Open


Open
NOKIA


Print
Email
Burn
Open
CE0434
NOKIA
FCC ID: PPIRM-721
IC: 661U-RM721
Model: C2-01
Type: RM-721
MADE IN CHINA


NOKIA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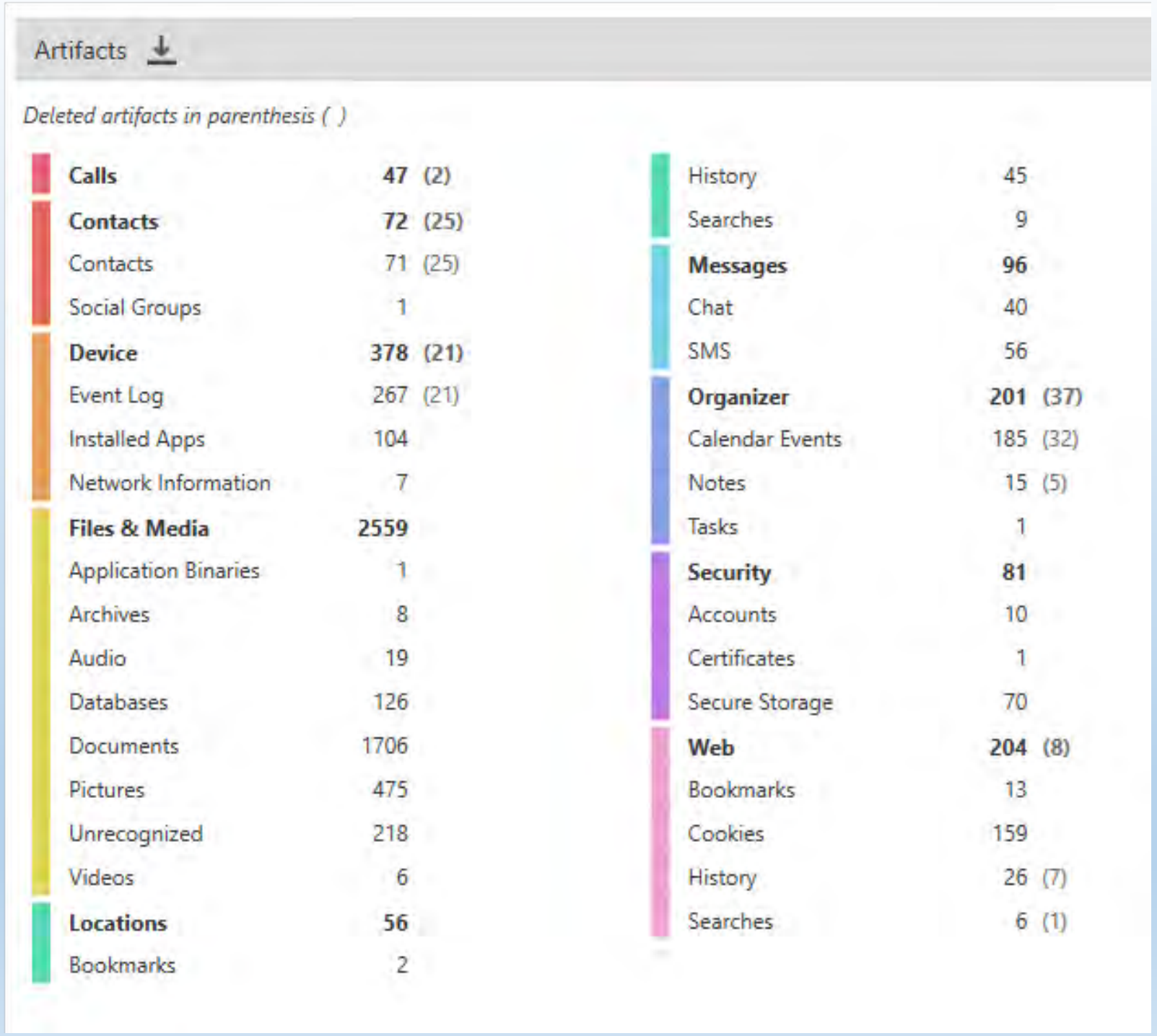
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Sentencing

Lyndon Harris

CBA WINTER CONFERENCE 2019

SENTENCING UPDATE

Contents

SENTENCING ORDERS

Dangerousness

Hill [2019] EWCA Crim 975

1. The court rejected a submission that a sentencing judge was bound to follow the approach set out in *R. v Ullhaqdad* [2017] EWCA Crim 1216; [2018] 4 W.L.R. 65; [2017] 2 Cr. App. R. (S.) 46 (p.397) of imposing determinate sentences for other offences and then an extended determinate sentence in respect of the most serious offence (to which the dangerousness regime applied). The court made clear there was a discretion to structure the sentences that way or to impose concurrent sentences and inflate the custodial term accordingly.

Hewison [2019] EWCA Crim 1278

2. H had pleaded guilty to one offence of domestic burglary and to two offences of robbery. He was sentenced as follows: on count 1 (burglary), to three years' imprisonment; on count 2 (the first of the offences of robbery), to an extended sentence, pursuant to section 226A of the Criminal Justice Act 2003, comprising a custodial term of six years and an extended licence period of three years; and on count 3 (the second offence of robbery), to an identical nine year extended sentence. On appeal, H submitted that the judge erred in making a finding of dangerousness as, inter alia, the more serious offences relied upon in making that finding were committed some 20 years ago.

3. Held, in making the assessment, the judge took account of H's past offending, and she clearly had well in mind the circumstances of both the robberies and the earlier burglary. On the basis of the factors that she considered, the judge reached a reasoned decision that H did satisfy the statutory criteria. There was no reason to interfere with the decision which the judge reached carefully and on a proper and reasonable basis. H's previous convictions were plainly relevant, notwithstanding the age of some of them.

Suspended sentence orders

Evans [2019] EWCA Crim 606

4. The three applicants, E, Ja and Jo, applied for leave to appeal against sentences of eight months' imprisonment (Ja and Jo) and four months (E) imposed following convictions for an offence of transferring criminal property contrary to s.327(1)(d) of the Proceeds of Crime Act 2002.

On appeal against sentence, it was submitted that the sentences imposed ought to have been suspended.

5. Held, the absence of reassurance that a plea of guilty might have provided and the continuing denial by all three applicants, plainly entitled the judge to conclude that he could not be satisfied that there was a realistic prospect of rehabilitation as a factor supporting suspension.

Middleton [2019] EWCA Crim 663

6. The single judge referred to the full court an application by the applicant, M, for an extension of time of 14 days and for leave to appeal against a sentence of 20 months' imprisonment, with a driving disqualification of 70 months and until an extended re-test was passed, imposed following a guilty plea on the day of trial to causing serious injury by dangerous driving and an earlier guilty plea to possession of cannabis. It was submitted that the judge failed to conduct the balancing exercise required by the Imposition guideline and that the sentence ought to have been suspended.

7. Held, all of the points in favour of M had to be weighed against the single factor against him, namely that appropriate punishment could only be achieved through the imposition of immediate custody. The court must conduct the balancing exercise, but one factor can out-weigh a number of factors on the other side of the scales.

Dawes [2019] EWCA Crim 848

8. With leave of the single judge, the appellant, D, appealed against a sentence of three weeks' imprisonment suspended for 24 months following a guilty plea to breach of a non-molestation order.

9. D had spent 83 days on remand in custody when he fell to be sentenced. Accordingly, the sentence of 12 weeks indicated by the relevant guideline would be halved to 6 weeks. It would be further reduced to three weeks as a result of D's guilty plea and that sentence would be suspended.

10. Held, D had served by way of remand, a period in custody which was the equivalent of double the starting point which the judge had in mind. Even if D had served the equivalent of what the judge had in mind there were no circumstances in the instant case which justified what was, in

effect, a further additional sentence. There was no justification for punishing D twice. It had been suggested that an immediate custodial sentence ought to have been imposed, but the proper course was to impose a conditional discharge. That was an exceptional course to adopt, but it did not demonstrate leniency in respect of the breach.

Behaviour orders

Maguire [2019] EWCA Crim 1193

11. M pleaded to ABH. (x2) and controlling and coercive behaviour. At the sentencing hearing, it was accepted on his behalf that a CBO was necessary. Submissions were made regarding its terms and an order was imposed containing the following condition:

> *"The defendant must inform the local police station of the name of any new partner within 14 days of commencing an intimate relationship … ."*

12. M conceded then, as he did on appeal, that the requirement that he inform the police where he was living was necessary and proportionate in the context of the history of domestic abuse, both relating to the index offences and events that featured in some prior relationships. Such a clause was included in the order and, when the sentencing judge considered the "relationship clause", he observed: "Paragraph (b) is designed, belt and braces, to also to put him under a duty to tell the police if he is forming a relationship with a female."

13. Held, the terms of the order were not sufficiently clear. What was meant by "relationship"? When was one "formed" in order to trigger an obligation on the part of M to inform the local police of the name of the female in question? How was a clause expressed in this way to be policed? The clause was "hopelessly vague" and that M's submissions to that effect were well-founded.

14. Identifying flaws in a clause that featured in a criminal behaviour order or sexual harm prevention order was normally relatively straightforward. It might be thought that the more difficult task, however, was settling on a formulation that did comply with the Boness criteria but, at the same time, addressed the proper concerns of the court by reason of M's past behaviour and the risk that he posed to women with whom he may be involved in the future. The fact that it might be considered necessary to impose a clause in an order that sought to "police" that aspect of M's conduct did not justify the imposition of an obligation that could not be sufficiently clearly understood and monitored.

AD [2019] EWCA Crim 1339

15. AD appealed against an eight-year extended sentence imposed following her guilty pleas to three counts of administering a poison or noxious substance so as to endanger life and one of child cruelty. A restraining order was also imposed prohibiting AD from having any unsupervised contact with any child under the age of 16. Ad submitted that the authorities required the person(s) to be protected by the order to be defined and that 'children under 16' was too wide a group to satisfy this requirement.

16. Held, section 5 of the 1997 Act was specifically aimed at the protection of "the victim or victims of the offence". However well-intentioned, a restraining order should not be used as a means of imposing, in the context of non-sexual offending, wide restrictions specifically permitted and sanctioned by the SHPO provisions. The restraining order was therefore unlawful and had to be quashed.

17. A CBO would be imposed instead, however. Such an order could contain "prohibitions" and/or "requirements". In the instant case, only prohibitions were appropriate, reflecting the terms in the restraining order. The appellant had "engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person", in subjecting her child to the distress of serious illness. A CBO would help prevent her from engaging in such behaviour. She would be prevented from having contact with any children under 16 years of age. The breadth of the restriction which rendered the restraining order unlawful did not inhibit the court from making a CBO in similar terms.

Detention and Training Orders

McGeechan [2019] EWCA Crim 235

18. With leave of the single judge, the appellant, M, appealed against a sentence imposed following the commission of offences during the currency of the supervision period of a detention and training order.

19. Held, the Powers of Criminal Courts (Sentencing) Act 2000 s.106 required that a sentence of detention in a young offender institution be imposed with immediate effect. Such a sentence, however, could not be made consecutive to any detention period imposed for breach of the DTO.

Referral Orders

Koffi [2019] EWCA Crim 300

20. The Registrar of Criminal Appeals referred an application by the applicant, K, for an extension of time and application for leave to appeal against a 12-month youth rehabilitation order with 60 hours unpaid work imposed following a guilty plea to an offence of money laundering.

21. Both defendants appeared in the magistrates' court. The co-defendant's case was sent to the Crown Court. K, who was aged 15 at the time of the offence, was still a youth at the time of the sending hearing. Her case was also sent to the Crown Court where she pleaded guilty on her first appearance. Her case was adjourned pending resolution of the outcome of the trial of the co-defendant. The judge decided it was not appropriate to remit the case to the Youth Court and imposed a YRO. K submitted on appeal that a referral order ought to have been imposed instead.

22. Held, reliance was placed on the decision in *Dillon* [2017] EWCA Crim 2671; [2019] 1 Cr. App. R. (S.) 22 (p.155) in relation to the submission that a referral order ought to have been imposed. As *Dillon* confirmed, the Youth Court had exclusive jurisdiction to make a referral order and the court had already referred to the terms of s.16 of the 2000 Act. Neither the judge in the Crown Court nor a member of the Court of Appeal (Criminal Division) could exercise the powers of a district judge under s.66 of the Courts Act 2003. In neither circumstance would the judge be sitting in the Youth Court.

Time on remand / qualifying curfew

Holmes [2019] EWCA Crim 612

23. With leave of the single judge, the appellant, H, appealed against a sentence of a community order with a curfew requirement of 12 months and a rehabilitation activity requirement following a guilty plea to an offence of burglary. H had spent six months on remand in custody prior to conviction and it was submitted that as that was the equivalent of a 12-month sentence, the community order imposed was manifestly excessive.

24. Held, the court had previously stated that time served on remand in custody did not, of itself, mean that a sentence had effectively been served and therefore prevented the court from imposing a custodial or alternative sentence on an offender: *R. v Sutherland* [2017] EWCA

Crim 2259 ; *R. v R* [2018] EWCA Crim 2447 . Accordingly, it should not be thought that time served on remand was equivalent to a sentence of the court.

Whitehouse [2019] EWCA Crim 970

25. The appellant, W, appealed against a sentence of four years' imprisonment imposed following a conviction for burglary. W was sentenced just under two years after the date of the offence. W had spent time on bail and for a significant period of time – some 20 months. - was subject to a number of "highly restrictive" conditions: he was to reside at a given address; he was to abide by a curfew between the hours of 19.00 and 05.00 daily, where he was required to present himself to a police officer on request; he had to report to a police station every Saturday and Sunday between the hours of 17.00 and 19.00; he was not to contact any of the prosecution witnesses; and he was not to go to the public house in question. There was no 'tag' imposed in connection with the curfew.

26. Held, the spent on a curfew did not appear to have been explicitly considered by the judge. The terms of the curfew would ordinarily, if there had been a tag, have entitled W to have the sentencing judge take into account the curfew and to reduce the final sentence by half the time that was spent on the restrictive conditions. That period was in excess of 20 months, towards 21 months. In those circumstances, the judge had a discretion to take that matter into account and should have done so, which was now an option for the instant court. There was no statutory obligatory period in respect of the actual curfew that was imposed and therefore there was no precise quantitive time that could be taken. Nevertheless, in all the circumstances, a period of nine months was fair and reasonable to reflect that additional factor.

Cox [2019] EWCA Crim 71

27. C was sentenced to seven months' imprisonment and his licence was endorsed with six penalty points. Following correspondence between the parties concerned, the matter was re-listed and the judge varied the original sentence to give credit for time spent on a qualifying curfew. In addition, C's driving licence having been endorsed with six penalty points, and it having subsequently (after the sentencing hearing) been noticed that he already had points endorsed on his licence for other matters, he was disqualified from driving for a period of 10 months under the totting-up procedure. All variations were conducted on the papers after written submissions from the parties.

28. Held, the recorder had not specified the actual number of days representing the qualifying curfew period at the time she pronounced sentence; albeit, that she had, in effect, in broad terms, specifically said that, whatever those qualifying days were, they would be deducted. It was particularly important that the correct deduction for time spent on qualifying curfew be made and announced in court at the time of sentence, as the statute required, where a short custodial term was imposed. If it was not, the prison warrant might not be correctly completed at the time and subsequent correction ran the risk of not occurring before the release date. It remained in all cases, however, most important that counsel for the prosecution and counsel for the defence ascertained the same figure of qualifying curfew time by the time of the sentencing hearing itself.

PROCEDURE

Pleading guilty to lesser counts

Beckford [2018] EWCA Crim 3006

29. The court endorsed the established practice of imposing no separate penalty where the appellant, having pleaded guilty to an offence charged as an alternative to another count on the same indictment, was later convicted of the more serious offence.

Mapstone [2019] EWCA Crim 410

30. The court considered the sentence imposed on the appellant following a plea of guilty to an offence of causing grievous bodily harm with intent in circumstances where no penalty had been imposed for an alternative, lesser, offence. In view of the plea to the more serious offence, the alternative offence should have been left to lay on the file.

Ismail [2019] EWCA Crim 290

31. The defendant had pleaded guilty to offences of possession of a prohibited weapon and the possession of ammunition without a firearm certificate (counts 3 and 4); counts 3 and 4 were lesser alternative counts to offences of possessing a firearm with intent to endanger life (count 1) and possessing ammunition with intent to endanger life (count 2). The Crown wished to proceed to trial on counts 1 and 2. Subsequently, he pleaded guilty to those counts. He had also pleaded guilty to possessing an accessory to a prohibited weapon (a silencer) (count 5) and to

possession of a Class A drug (cocaine) (count 6). The defendant was sentenced to two concurrent extended determinate sentences (fourteen years and six months' custody and an extended licence period of five years) in respect of counts 1 and 2, concurrent determinate sentences of three years and one month on counts 5 and 6 respectively, and no separate penalty in respect of counts 3 and 4. There was an appeal against sentence and the Registrar of Criminal Appeals referred the case to the full court to determine the lawfulness of the order for no separate penalty imposed on counts 3 and 4. The Court stated (at [21]–[22]):

> *"In R. v Cole [1965] 2 QB 388, it was held that a guilty plea does not amount to a conviction unless and until sentence is passed. When a defendant pleads guilty to a lesser offence, and the more serious alternative proceeds to trial, the correct practice at that stage is that the court should simply record the guilty plea. If the defendant is acquitted of the more serious offence, he can be sentenced on the count to which he had pleaded guilty, which will rank as a conviction from then on. But if the defendant is convicted by the jury on the more serious offence, he will be sentenced on that matter and the court should order that the alternative offence to which he had previously pleaded guilty should lie on the file. The same approach must apply where, as in the present case, a defendant initially pleads guilty to a lesser offence and then subsequently decides to plead guilty to the more serious alternative.*
>
> *This practice avoids a defendant being convicted of two alternative offences for the same criminal conduct. A decision to impose no separate penalty for a particular offence represents the court's sentence for that offence and gives rise to an additional conviction. It is, therefore, incorrect for a court to direct that no separate penalty be imposed for a lesser offence which is simply an alternative to a more serious offence for which the offender is convicted and sentenced".*

TICS

Gamble [2019] EWCA Crim 600

32. The court reiterated earlier guidance regarding the appropriate procedure for taking offences into consideration, noting that the process operated as a safeguard to ensure that a defendant had given their unequivocal assent to being sentenced on that particular basis:

33. The defendant should explicitly be asked whether or not he or she admitted the further offences and asked to confirm if he or she wished the court to take them into account. This exercise need not take long even where there were a significant number of additional offences; a judge could

quite properly ask whether or not, for example, a defendant admitted the 25 dwelling-house burglaries set out in the schedule and whether or not he wished the judge to take those offences into consideration when passing sentence without reading out the individual dates and addresses of each offence or the details of the property stolen on each occasion. That was not mere formality but, as Lord Diplock had explained, an essential safeguard to ensure that the defendant had given his express and unequivocal assent to being sentenced on that basis.

Victim Personal Statements

Chall [2019] EWCA Crim 865

34. The court held that expert evidence was not an essential precondition of a finding that a victim had suffered severe psychological harm for the purposes of the assessment of harm when applying the Sentencing Council's Definitive Guidelines.

Surcharge

35. Amended by SI 2019/985 to substitute new tables in the schedule of SI 2012/1696. The effect is to raise the amounts for offences committed on or after 28 June 2019, with the usual commencement provisions in place regarding multiple offence cases.

Sentencing remarks

Chin-Charles; Cullen [2019] EWCA Crim 1140

36. The court heard two otherwise unconnected applications for leave to appeal against sentence to allow the court to consider the length, nature and structure of sentencing remarks in addition to the individual merits of the applications.

37. Held, that, the key to the nature of sentencing remarks is the use of the terms "in ordinary language" and "in general terms". The offender was the first audience because he or she must understand what sentence has been passed, why it has been passed, what it means, and what might happen in the event of non-compliance. If the offender understands, so too will those with an interest in the case, especially any victim of the offence and witnesses, the public and press.

38. There had been a tendency in recent years, understandable but unnecessary, to craft sentencing remarks with the eye to the Court of Appeal rather than the primary audience identified by

Parliament. This had led to longer and longer remarks. That should be avoided. The pre-sentence report, Crown's opening, any sentencing note and a record of the mitigation should not be exhaustively rehearsed in sentencing remarks and, if mentioned, only briefly.

39. Turning to specific components of sentencing remarks:

    a) On occasion authority is cited by parties. Save in exceptional circumstances sentencing remarks need not refer to it.

    b) The sentence must be "located" in the guidelines. In general, the court need only identify the category in which a count sits by reference to harm and culpability, the consequent starting point and range, the fact that adjustments have been made to reflect aggravating and mitigating factors, where appropriate credit for plea (and amount of credit) and the conclusion. It may be necessary briefly to set out what prompts the court to settle on culpability and harm, but only where the conclusion was not obvious or was in issue, and also to explain why the court moved from the starting point.

    c) Findings of fact should be announced without, in most cases, supporting narrative.

    d) If in play, a finding of dangerousness contrary to statute must be recorded. Supporting facts should be set out only when essential to an understanding of the finding, not as a matter of course.

    e) Victim personal statements might merit brief reference.

Goodyear

Utton [2019] EWCA Crim 1431

40. The authorities demonstrated that if the court gave a *Goodyear* indication, the defendant has a reasonable opportunity to consider their position before the indication lapsed. What was a reasonable period would depend on the circumstances. In this case, the *Goodyear* indication had been sought immediately before the plea and trial preparation hearing and Utton was given an opportunity to speak to his legal advisers, but the indication was specifically not acted on. It was clear that a reasonable opportunity had elapsed without the appellant having pleaded guilty. In those circumstances, the indication ceased to have effect. Further, there was no unfairness to Utton as the judge indicated that the *Goodyear* indication had lapsed before the re-arraignment and before Utton pleaded guilty.

Newton hearings

DPP v Giles [2019] EWHC 2015 (Admin)

41. The Crown appealed by way of case stated against a magistrates' court's decision to sentence the respondent for an assault occasioning actual bodily harm without holding a Newton hearing. The questions in the case stated were whether it was open to a court to determine that a case presented by the prosecution as aggravated under s.146, which was disputed by the defence, did not require a Newton hearing if the court found that the existence of the aggravating factor would not significantly affect the sentence, and whether the court had been right to so find in the instant case.

42. Held, appeal, it was difficult to conceive of circumstances where the aggravation by homophobic abuse would be immaterial and a Newton hearing to find the facts would not be required. Certainly, if such circumstances existed, they would be very rare. In enacting s.146(3)(a) and (b) in mandatory terms, Parliament had specifically marked offences committed in homophobic circumstances, which it considered to be abhorrent, as being a mandatory aggravating factor for sentencing purposes. Parliament had also taken into account the public interest in the publication of the fact that the offence was committed in such circumstances. It followed that, even if the court could properly conclude that the statutory aggravation would make no difference to the sentence to be imposed, to decline to make the relevant findings would frustrate the purpose of s.146(3)(b). Section 146 required the court to grasp the nettle and to determine, at a Newton hearing, whether, as the prosecution alleged, the offender had demonstrated hostility towards the victim based on his actual or presumed sexual orientation, and/or if the offence was motivated by such hostility. Thereafter, a two-stage process was usually required to decide upon the correct sentence. First, the court would need to determine the sentence that would have been appropriate if the offence had not been attended by homophobic circumstances. Second, the court would have to determine the aggravation to that sentence, in terms of the increase in the sentence, which the homophobic circumstances dictated. A statement to that effect then had to be made in open court. In order to achieve transparency in sentencing, an analysis of the court’s reasoning had to be set out in sentencing remarks, no matter how briefly.

Factual basis for sentencing

Wilson [2019] EWCA Crim 1882

43. The Court of Appeal (Criminal Division) made clear in *Bertram* [2003] EWCA Crim 2026 that a trial judge is not bound to accept the most favourable version of the defence. The judge should carefully apply the criminal burden of proof and give the defendant the benefit of the doubt.

[In relation to this issue, reference should be made to the following case]

King [2017] EWCA Crim 128

44. The correct approach by the judge, after a trial, to the determination of the factual basis on which to pass sentence was clear. If there was only one possible interpretation of a jury's verdict(s), the judge had to sentence on that basis. When there was more than one possible interpretation, the judge had to make up his or her own mind, to the criminal standard, as to the factual basis on which to pass sentence. If there was more than one possible interpretation, and the judge was not sure of any of them, (in accordance with basic fairness) they were obliged to pass sentence on the basis of the interpretation (whether in whole or in relevant part) most favourable to the defendant.

SENTENCING GUIDELINES

New guidelines

45. The Council has issued a number of new guidelines in the past 12-18 months. Of particular note are:

    a) Public Order (in force 1 January 2020)

    b) General Guideline and Expanded Explanations (in force 1 October 2019)

    c) Arson and Criminal Damage (in force 1 October 2019)

    d) Child Cruelty (in force 1 January 2019)

46. Additionally, there are two live consultation exercises:

    a) Firearms Offences Consultation

b) Terrorism Offences (revision) Consultation

Guidance on existing guidelines

Smythe [2019] EWCA Crim 90

47. The court considered sentences imposed on two parents following the death of their three-week-old son in circumstances where they had allowed significant injuries, including fractures, to be inflicted on him but where those injuries had not contributed to his death. The judge made reference to the then draft Child Cruelty Guidelines.

48. Held, the judge was plainly in error in sentencing by reference to the Child Cruelty Definitive Guideline. The guideline came into effect on 1 January 2019 and applied to all offenders over 18 who were sentenced after that date regardless of the date of offence. It did not apply to those who were sentenced before that date. The judge's reference to the categorisation in the guidelines, albeit that she described them as draft guidelines, indicated error. Although the court could not adopt the 2019 guidelines, other than as a means of identifying harm and culpability factors, it might have had regard to the 2008 guidelines: Overarching Principles—Assaults on Children and Cruelty to a Child.

McGarrick [2019] EWCA Crim 530

49. The Registrar of Criminal Appeals referred to the full court the application by the applicant, M, for leave to appeal against a sentence of 13 months' imprisonment imposed following guilty pleas to fraud by false representation and assault by beating of an emergency worker. On appeal against sentence it was submitted that the court ought to adopt the common assault or assault PC sentencing guideline.

50. Held, that the reliance on the Assault Offences Definitive Guideline was not apt. It was perfectly clear that Parliament intended the sentencing regime for such offences to be more severe. An approach that simply looked to an uplift from sentences for other offences was not helpful. There were no existing guidelines to which resort could usefully be had by way of analogy

Boular [2019] EWCA Crim 798

51. The court considered the application of the Sentencing Council's Terrorism Offences Definitive Guideline in relation to two offences under s.5 of the Terrorism Act 2006 where two young women had engaged in planning and preparatory acts in furtherance of the commission of acts of terrorism. One of the applicants submitted that her offence should have been categorised as a Category 2C offence as she had neither acted alone nor in a leading role by reference to the involvement of her mother and sister. Furthermore, although the judge could properly have found that the relevant activity was likely to have been carried out but for her apprehension, he could not properly find that this was very likely to have been carried out because the relevant category required that an offender be in or very near the vicinity of the intended scene of the attack.

52. Held, it is fallacious to assume that there could be only one leading role per offence. The submission regarding geographical proximity would be rejected as this would lead to very surprising results: for example, if a heavily-armed terrorist was speeding along a deserted road towards his target but was intercepted when still some distance away.

Oliver [2019] EWCA Crim 1391

53. Oliver faced one charge of handling stolen goods contrary to section 22(1) of the Theft Act 1968. He originally pleaded not guilty to that count. On the day of trial he changed his plea to guilty. Overnight on 27 November 2017 a Volkswagen Golf, valued at £32,000, was stolen during the course of a house burglary. A week later, on 4 December 2017, a police officer saw the stolen vehicle with false plates being driven on the M62 towards Leeds. They followed the car. When required to stop, it did. The appellant was the sole occupant.

54. Held, the judge was entitled to conclude that the possession of the car only a week after the burglary constituted "very recent" possession for the purposes of the guidelines.

Bricknell [2019] EWCA Crim 1460

55. The appellant had pleaded guilty to three offences of failing to comply with notification requirements, contrary to section 91 of the Sexual Offences Act 2003. He appealed against his sentence of 12 months' imprisonment. The judge considered the Sentencing Council's Definitive Guideline for sentencing offences of this nature. She assessed the offences as falling

into category A culpability, because both of the factors mentioned in the guideline were, in her view, present, namely, "determined attempts to avoid detection" and "long period of non-compliance". On appeal, it was submitted that the period of time over which the failures to notify occurred could not properly be regarded as a long period of non-compliance.

56. Held, the first failure to notify occurred in August and the series of more serious failures to notify occurred between November and February. We agree with the prosecution that the period of non-compliance is properly to be regarded as one of more than 6 months. Without seeking to define the parameters of "a long period" in this context, we conclude that it was open to the judge to find that that factor was indeed present in the circumstances of this case.

Rafique [2019] EWCA Crim 1680

57. The appellant pleaded guilty to one count of causing serious injury by dangerous driving, for which he was sentenced to sixteen months' imprisonment.

58. Held, that sentencing is not an arithmetical exercise. Nor is it a matter of simply scaling down the sentences from the guidelines on fatal cases in proportion to the different maxima.

Ardic [2019] EWCA Crim 1836

59. Two defendants had pleaded guilty to violent disorder and had been convicted of applying a corrosive fluid with intent to cause grievous bodily harm.

60. Held, there are no sentencing guidelines for an offence contrary to s.29 of the Offences Against Person Act 1861. Although not strictly applicable, the s.18 Guidelines allow a court to consider factors which bear on the seriousness of s.29 offending, as it may when considering a count of wounding with intent to resist arrest under s.18 (to which the s.18 Guidelines also do not apply): the maximum sentence being the same under each section, life imprisonment. *[The court went on to effectively apply the guideline notwithstanding it did not apply to the s.29 offence.]*

Guilty plea

West [2019] EWCA Crim 497

61. The court held that an informal discussion at a PTPH as to the acceptability of a plea to a lesser offence was insufficient to attract the greater discount reserved for early indications of pleas of guilty. Usually, the matter would have to be raised in open court with the defendant present.

Davids [2019] EWCA Crim 553

62. The court held that, where a Better Case Management Form had been completed at the magistrates' court with the words "likely to be guilty pleas on a basis", those words were insufficient to attract full credit for a plea entered at the first reasonable opportunity.

Parsons [2019] EWCA Crim 1451

63. Part of the basis for this appeal was a miscalculation of the credit for the guilty plea. If counsel, either for the defence or the prosecution, are of the view that a judge in passing sentence has made an arithmetical error in assessing either the period to be offered by way of credit or something of that precise mathematical nature, it is incumbent on counsel to point out that error either at the time or within the slip rule period. The CACD should not be troubled by cases based simply on mathematical errors which can be corrected without the waste of public resources and the additional anxiety caused to victims and appellants of the matter having to come to this court.

Bold [2019] EWCA Crim 1539

64. When interviewed he answered "no comment" to most questions. In a prepared statement he admitted the offence.

65. Held, the narrow issue is reduction for the guilty plea. The suggestion is that in the Magistrates' Court no BCM (Better Case Management) Form was filled in and that there was no record of an. indication of a plea or of the triggering question. The argument for a one-third reduction was. put in one of two ways, namely: either that there was no opportunity to plead in the Magistrates' Court so that the full one-third discount should be given because the first

opportunity was in the Crown Court; or that in any event the Applicant admitted his guilt at the first opportunity in the police station.

66. The record stated that either a plea of NG was entered, or that no plea was indicated. It followed that there was nothing in the appellant's complaint as he had not pleaded guilty nor given an indication of an intention to do the same.

Hoddinott [2019] EWCA Crim 1462

67. The appellants (D1-D4) appealed against the totality of sentences of imprisonment imposed for two counts of conspiracy to supply controlled Class A drugs. In writing, two appellants advanced a submission based upon a passage in *Sanghera* [2016] EWCA Crim. 94. At paragraph 19 of the judgment in that case, the court said of a particular appellant in a multi-handed case that the credit to be given for his guilty pleas was diluted by the fact that he had unsuccessfully contested a Newton hearing, but added that "as against that, it is in our view important in a complex and multi-defendant case to give particular credit to the first defendant to break ranks and plead guilty."

68. Held, the Sentencing Council's Definitive Guideline on Reduction in Sentence for a Guilty Plea, which came into effect after *Sanghera*, makes it clear that the maximum credit which can be given for a guilty plea is one-third. If a defendant is entitled to full credit, and the court is persuaded that weight should be given to the fact that he was the first to plead guilty and by doing so encouraged others to plead guilty, that might be treated as a mitigating factor justifying some reduction in the sentence which would otherwise be appropriate before credit is given for the guilty plea. But whether such a reduction should be made will be a fact-specific decision and Sanghera did not lay down any fixed rule applicable to all cases. In the present case, the very fact that more than one defendant sought to argue that he had "led the way" in pleading guilty, shows the weakness of the argument. In our judgment, in the circumstances of this case, this was a point to which very little, if any, weight could be given.

Yasin [2019] EWCA Crim 1729

69. The appellant submitted that he ought to have been given full credit for pleading guilty and that (1) the magistrates' court did not seek an indication of his plea at the first appearance and that this omission reflected that court's practice where the offence was indictable only and (2) that

the sending certificate in the Digital Case System simply identified the offence as indictable only and did not indicate whether an indication had been sought.

70. Held, the Better Case Management Form makes it clear that it is incumbent on the parties to complete the Form, not the court. The box to which we have referred is in Part 1 of the Form which states expressly: "To be completed by the parties before the hearing". Whilst best practice would be that at the hearing before the Magistrates' Court enquiry is made by the Court as to whether the Form has been completed, including the box in question, responsibility for the completion of Part 1 and for any indication as to plea clearly rests with the parties and their legal representatives. It follows that, if Part 1 of the Form and the box in relation to an indication of plea were not completed on behalf of the appellant in this case (as appears to have happened) and if no indication of plea was given by his representative at the hearing, that is not a matter for which the Magistrates' Court can be held responsible.

APPROACH TO SENTENCING

Nancarrow [2019] EWCA Crim 470

71. The court summarised the applicable principles in cases of possession of prohibited firearms to which the minimum sentence applied.

Chudasama [2018] EWCA Crim 2867

72. The court considered whether or not consecutive sentences were appropriate in circumstances where multiple deaths resulted from a single incident of driving.

Green [2019] EWCA Crim 196

73. The court provided guidance regarding the approach to the consideration of determination of sentence where there were previous sentences for similar “historic criminality.”

Murphy [2019] EWCA Crim. 438

74. Although the guideline on the offence of making threats to kill included in the Definitive Guideline on Intimidatory Offences might be relevant in appropriate cases of blackmail, it

would be unwise for sentencing judges to place too much weight on this guideline given that blackmail involved much more than simply making threats and contemplated the making of an unwarranted demand accompanied by a threat of some kind in circumstances that were necessarily very fact-specific.

Majeed [2019] EWCA Crim 516

75. The court rejected an argument that, in circumstances where a bladed article had been used to inflict injury, and where the defendant had pleaded guilty to both assault and bladed-article offences, consecutive sentences were inappropriate as this would constitute double counting. In the circumstances of the instant case, given that the weapon in question had been brought to the scene and then used, there was no double-counting as the gravamen of the assault offence was the use of the weapon and not its carriage in public.

Wakil [2019] EWCA Crim 1351

76. Sentencing for the offences created by s.15 to s.18 of the 2000 Act was especially fact-sensitive. Each offence was different and there were different general underlying degrees of culpability, having regard in particular to *R. v Lane* [2018] UKSC 36; [2018] 1 W.L.R. 3647. However, the guidelines did not impose an impermissible straitjacket on a sentencing judge. The covering rubric in the guideline recognised that the tables were non-exhaustive and there might be other relevant factors which substantially impacted on the sentence. In the context of an offence under s.17, a relevant factor was the underlying culpability of the offending.

Veysey [2019] EWCA Crim 1332

77. "Potting" is the name given to the actions of a prisoner either throwing at a prison officer, or smearing a prison officer with, urine, faeces or a mixture of the two. There was no relevant offence-specific guidance from the Sentencing Council applicable to s. 24 offences and therefore the Sentencing Guidelines Council's guideline "Overarching Principles: Seriousness" provided the guidance to be used (though the court noted that it would shortly be replaced by a Sentencing Council guideline.)

78. The defendant had admitted encouraging or assisting offences (s.46 of the SCA 2007) by supplying a substance used to dilute the purity of controlled drugs for sale was not manifestly excessive. The judge correctly considered the sentencing guidelines for the supply of Class A and Class B drugs.

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22 November 2019

Sentencing update

Lyndon Harris

Criminal Bar Association
Winter Conference, 2019

Topics

- Sentencing orders
- Procedure
- Sentencing Guidelines
- Guilty plea
- Approach to sentencing

Sentencing orders: Dangerousness

- *Hill* [2019] EWCA Crim 975
  - Multiple counts
  - Determinate + EDS OR concurrent EDS
  - Not bound to adopt approach taken in *Ulhaqdad*
  - At the discretion of the sentencer
  - Does it matter?

Sentencing orders: Suspended sentence orders

- *Evans* [2019] EWCA Crim 606
  - Can the absence of a guilty plea justify NOT suspending a sentence?
- *Middleton* [2019] EWCA Crim 663
  - Whether to suspend is a balancing exercise
  - How to perform the balance?
- *Dawes* [2019] EWCA Crim 848
  - Time on remand in excess of what the notional guideline sentence would be
  - How to sentence?

Sentencing orders: Referral Orders

- *Koffi* [2019] EWCA Crim 300
  - Crown Court does not have jurisdiction to make a referral order, even with HHJ exercising powers of a DJ(MC) under s.66 of Courts Act 2003
  - Guidance in *Dillon*
  - Remit to Youth Court / Sentence in Crown Court

Sentencing orders: Behaviour orders

- *Maguire* [2019] EWCA Crim 1193
  - “relationship condition”- inform the police of the name of a new partner within 14 days of entering an intimate relationship
  - Don’t forget *Boness*!
  - Alternative means of achieving the same result?

Procedure:
Pleading guilty to lesser counts

- Charged with, e.g. PWITS, plead to simple possession, convicted of PWITS
- *Beckford* [2018] EWCA Crim 3006
  - Endorsed practice of no separate penalty for the lesser count
- *Ismail* [2019] EWCA Crim 290
  - The offence should lie on the file
- *Mapstone* [2019] EWCA Crim 410
  - Endorsed approach taken in *Ismail*

Procedure:
Victim Personal Statements and psychological harm

- *Chall* [2019] EWCA Crim 865
  - Not an essential pre-condition of finding serious psychological harm that there is expert evidence before the court
  - Factual basis for sentence
  - Relevance of VPS

Procedure: Surcharge

- SI 2019/985
  - Amended SI 2012/1696
  - Substituted the tables in the Schedule to provide new amounts
  - Transitional provisions: offences committed on/after 28 June 2019
  - Updating the 2016 figures for inflation for 2018-2021

Procedure: *Goodyear*

- *Utton* [2019] EWCA Crim 1431
  - When does a *Goodyear* indication lapse?
  - “reasonable opportunity” to act upon it
  - Judge must make clear if it has lapsed

Procedure:
Newton hearings

- *DPP v Giles* [2019] EWHC 2015 (Admin)
  - CJA 2003 s.146 - aggravation for (in this case) homophobic abuse
  - Court declined to have a *Newton* hearing on the issue
  - ‘difficult to conceive of circumstances where the aggravation by homophobic abuse would be immaterial to sentence’

Sentencing Guidelines: New guidelines/consultations

- Public Order (in force 1 January 2020)
- General Guideline and Expanded Explanations (in force 1 October 2019)
- Arson and Criminal Damage (in force 1 October 2019)
- Child Cruelty (in force 1 January 2019)
- Firearms / Terrorism – consultation exercises

Sentencing Guidelines: Guidance on the guidelines

- *Smythe* [2019] EWCA Crim 90
  - Don't use guidelines which are not yet in force
- *McGarrick* [2019] EWCA Crim 530
  - Don't use the assault guidelines
- *Boular* [2019] EWCA Crim 798
  - Can have more than one leading role
- *Oliver* [2019] EWCA Crim 1391
  - Handling – is 7 days after the event "very recent" possession?

Sentencing Guidelines: Guidance on the guidelines

- *Bricknell* [2019] EWCA Crim 1460
  - Breach – is failure to comply over 6-month period a “long period”?
- *Rafique* [2019] EWCA Crim 1680
  - Serious injury by dangerous driving – don’t just scale down the numbers in the death guideline
- *Ardic* [2019] EWCA Crim 1836
  - Acid attack (s.29 OaPA 1861) – essentially apply the s.18 guideline

Guilty plea (1)

- When does an indication warrant a discount?
  - Informal discussion re acceptability to a plea to a lesser offence?

    West [2019] EWCA Crim 497
  - Writing “likely to be a guilty plea” on BCM form?

    Davids [2019] EWCA Crim 553
  - Admitting offence at police station?

    Bold [2019] EWCA Crim 1539
  - Mags Court not asking for a plea?

    Yasin [2019] EWCA Crim 1729

Guilty plea (2)

- Arithmetical errors spotted during hearing / within slip rule period
  - *Parsons* [2019] EWCA Crim 1451
- '*Sanghera*' discount for being the first to plead
  - *Hoddinott* [2019] EWCA Crim 1462

Approach to sentencing. (1)

- *Nancarrow* [2019] EWCA Crim 470 (firearms)
- *Chudasama* [2018] EWCA Crim 2867 (consecutive sentences, multiple deaths by single incident of driving)
- *Green* [2019] EWCA Crim 196 (sentencing where there are multiple convictions for similar criminality committed at similar time)
- *Murphy* [2019] EWCA Crim 438 (blackmail)

Approach to sentencing (2)

- *Majeed* [2019] EWCA Crim 516 (double counting for possession of knife)
- *Wakil* [2019] EWCA Crim 1351 (s.17 Terrorism Act 2000)
- *Veysey* [2019] EWCA Crim 1332 (“potting”)
- *Rowlands* [2019] EWCA Crim 1464 (s.46 SCA 2007 in context of drugs)

End

Hate Crime

Rebecca Cohen

Reforming hate crime legislation - the Law Commission's current review

Rebecca Cohen and Martin Wimpole

Journal Article

Archbold Review

Arch. Rev. 2019, 9, 4-6

Subject
Penology and criminology

Other related subjects
Legislation

Keywords
Hate crime; Law Commission; Legislation

Legislation cited
Crime and Disorder Act 1998 (c.37)
Public Order Act 1986 (c.64)
Criminal Justice Act 2003 (c.44)

Arch. Rev. 4 In September 2018, Lucy Frazer MP, then Parliamentary Under-Secretary of State for Justice, announced that the Law Commission would be asked to undertake a review of the coverage and approach of hate crime legislation following its earlier recommendation to do so. The review was to include "how protected characteristics, including sex and gender … should be considered by new or existing hate crime law". [1] This announcement was made after a debate in the House of Commons, in which Stella Creasy MP had tabled an amendment to the Voyeurism Offences (No. 2) Bill - the "Upskirting Bill" - that would add misogyny as an aggravating factor. [2] The new review was to follow a more circumscribed, but related report released by the Law Commission in 2014, entitled: *Hate Crime: Should the Current Offences be Extended?*

The existing hate crime framework in England and Wales

At present, hate crime legislation is the product of piecemeal reforms that have been made over the past three decades. [3] The overarching framework encompasses five protected characteristics - race, religion, sexual orientation, transgender identity and disability. However, these characteristics are subject to varying degrees of protection by the three main forms of hate crime laws: aggravated offences, stirring up hatred offences, and enhanced sentencing powers. [4]

Aggravated offences

There are currently 11 offences [5] which can instead be charged as racially or religiously aggravated versions under the Crime and Disorder Act 1998, [6] if the perpetrator demonstrates or was motivated by hostility on the grounds of race or religion. These aggravated offences are distinct, with higher maximum penalties than the basic form of the offence. However, in circumstances where relevant offending involves demonstration or motivation by hostility based on sexual orientation, transgender identity or disability, there is no recourse to an aggravated version of the offence.

Stirring up hatred offences

The Public Order Act 1986 contains offences which prohibit six forms of conduct that are either intended or likely to stir up hatred on the grounds of race, or intended to stir up hatred on the grounds of religion or sexual orientation.[7] The six forms of conduct include, *inter alia*, using words or behaviour and displaying, publishing or distributing written material. For stirring up racial hatred, the conduct must involve an element which is either threatening, abusive or insulting. However, for stirring up hatred on the grounds of religion or sexual orientation, the conduct must be threatening - abusive or insulting is insufficient. Moreover, the legislation carves out specific exemptions to protect freedom of expression in relation to religious beliefs - including "antipathy, dislike, ridicule, insult or abuse" - and criticism of sexual conduct or same sex marriage.[8] There are no such exemptions for stirring up racial hatred. The maximum penalty for each offence is seven years' imprisonment, or an unlimited fine (or both), regardless of whether the offence relates to hatred based on race, religion or sexual orientation. Currently, stirring up hatred on the grounds of transgender identity or disability are not captured by the legislation.

Enhanced sentences

The Criminal Justice Act 2003[9] provides that if any offence has involved hostility on the basis of race, religion, sexual orientation, transgender identity or disability, the judge must - on determining the sentence - treat this as an ag ***Arch. Rev. 5** gravating factor, and as a corollary increase the sentence. These enhanced sentencing powers do not permit the judge to raise a sentence above the available maximum that already exists for that offence. Moreover, if the offending has already been charged as a racially or religiously aggravated offence under the Crime and Disorder Act 1998, but the offender was instead found guilty of the basic version of the offence, the enhanced sentencing provisions cannot be used to increase the sentence.

The 2014 review

Following the publication of a consultation paper in June 2013, and three months of public consultation, in May 2014 the Law Commission published its final report on *Hate Crime: Should the Current Offences be Extended?* This review had a narrow scope and was focused on whether aggravated and stirring up hatred offences should each be extended to cover hostility or hatred in respect of all five characteristics.

Key recommendations made in 2014 included: in the absence of a wider review, extending aggravated offences to disability, sexual orientation and transgender identity; not extending stirring up hatred offences to disability or transgender identity on the basis that these offences are rarely prosecuted; and for a full scale review, to consider which characteristics need to be protected and on what basis, as well as whether aggravated offences and the enhanced sentencing system should be retained in their current form or amended.

Current status of the review

The Law Commission's current review of hate crime legislation was launched on 8 March 2019, at an academic research conference held at Oxford Brookes University. Subsequently, the Law Commission has focused on fact-finding pertaining to the review's expansive terms of reference, along with preparing the consultation paper in advance of its scheduled publication in spring 2020.

The review's terms of reference

The agreed terms of reference are detailed and provide an opportunity for a wholesale review of the existing hate crime framework and potential reforms. However, they emphasise that the review should consider *who* should be protected by hate crime laws - which expressly includes both current and potential protected characteristics - and *how* the law should operate to best provide effective and consistent protection from conduct motivated by hatred of protected groups or characteristics.

A lack of parity

Intrinsic to the issue of who - or which characteristics - should be protected by hate crime laws, is a fundamental criticism of the current framework: that it lacks parity between the existing protected characteristics. Indeed, it has been suggested there is currently a "hierarchy of hate",[10] ranging from race, which is subject to the full gamut of available protection, to the characteristics of transgender identity and disability - which are not encompassed by either aggravated or stirring up hatred offences. Moreover, whereas there is a relatively low threshold of "intended to or likely" for the stirring up of racial hatred - with conduct which is either threatening, abusive or insulting - the stirring up of hatred on the grounds of religion or sexual orientation must be "intended", "threatening" and may be exempted by freedom of expression provisions. While counter arguments exist,

which suggest groups experience hate crime in different ways requiring unique treatment, achieving parity within the law will be a key consideration in the course of the review.

Considering additional protected characteristics

There has undoubtedly been a significant push to extend hate crime to offences involving hatred or hostility of women, with different groups preferring varied terminology including misogyny, gender and sex. This campaign has built on work undertaken in Nottinghamshire, which since 2016 has had a policy of recording hate incidents involving misogyny that are reported to police. However, any consideration of extending hate crime to gender or sex-based hostility must contend with concerns regarding inevitable overlap with other key priority areas, including domestic abuse and violence against women and girls. Some have also argued that misandry must also be encompassed by any such reforms. There have also been arguments made for the protection of additional characteristics, particularly age, but also alternative subcultures, philosophical beliefs, people experiencing homelessness, sex workers, and other groups.

Criticism of distinct characteristics

While protected characteristics comprise a core component of the current hate crime framework, some view such categorisation as inherently problematic. In particular, victims' experience of hate-based offending is often intersectional, in that they are targeted on the basis of numerous characteristics - for example, religion, disability and gender - rather than one distinct trait. In addition, it has been suggested that with society's development and shifting prejudices, the specification of particular characteristics is short-sighted and a residual, inclusive category is preferable. However, equally, there are concerns that extending the application of hate crime in this way would remove the symbolic potency of naming particular forms of hatred.

Bringing clarity

In considering how the hate crime framework can be modelled to best effect, a key focus will be on ameliorating the lack of clarity which has beset the current law. As a result of their piecemeal development, the relevant hate crime laws are located in separate statutes. Complexities - pertaining to the overlap of these laws as well as the inconsistency of application to different characteristics - mean that the ***Arch. Rev. 6*** framework is not easily understood by those working with the law or affected by it.

Developing a more inclusive model

It has been argued that current hate crime laws were historically predicated on the nature of race-based hatred, and that, in particular, they are ill-equipped to address the bulk of crime experienced by people with disabilities. For example, whereas hate crime is currently built on a model of the perpetrator being motivated by or demonstrating hostility towards a particular characteristic, it has been suggested that disabled people are more likely to experience contempt and derision or exploitation, rather than outright hostility.

Evaluating existing components of the hate crime framework

The review will necessarily include assessment of the existing approaches to hate crime laws and evaluating their success. The UK has been described as having "one of the strongest legislative frameworks to tackle hate crime in the world". [11] However, key questions will include whether the current hostility model is the right test, and whether there is a need for both aggravated offences and enhanced sentencing, and if not, which approach is preferable. In addition, any interrogation of the stirring up hatred offences will undoubtedly include consideration of the rarity of prosecutions [12] and freedom of expression concerns.

Beyond the law

While the review is limited to the hate crime legislation itself, any proposed reforms must be placed in a wider context, including the application and enforcement of the law by police and other components of the criminal justice system. Particular considerations include the scale of offending, especially of hate crimes committed in the online context; the extent of regional inconsistency between police forces; the distinction between anti-social and criminal behaviour; and alternatives to prosecution including out of court disposals and restorative justice.

Next steps for the review

Following publication of the consultation paper in spring 2020, the Law Commission will hold a three-month public consultation period. The final report for this review is scheduled for early 2021. For further information, please see: *https://www.lawcom.gov.uk/project/hate-crime/ or email hate.crime@lawcommission.gov.uk.*

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Footnotes

1 BBC News, "Misogyny could become hate crime as legal review is announced" 6 September 2018, available at *https://www.bbc.co.uk/news/uk-politics-45423789*.

2 *Hansard* (HC), 5 September 2018, vol 646, col 253.

3 The first "hate crime" - stirring up of racial hatred - was introduced by way of the Public Order Act 1986.

4 The separate offence of racialist chanting at a football match is also within the scope of the review: Football (Offences) Act 1991, s.3.

5 These include *inter alia* different types of assaults; criminal damage to property; harassment and stalking.

6 Crime and Disorder Act 1998, ss.29 to 32.

7 Public Order Act 1986, ss.18 to 22 and 29B to 29F.

8 Public Order Act 1986, ss.29J and 29JA.

9 Criminal Justice Act 2003, ss.145 and 146.

10 See, eg: Equality and Human Rights Commission, "Hierarchy of hate crime is undermining confidence in the law" 12 October 2016, available at: *https://www.equalityhumanrights.com/en/our-work/news/hierarchy-hate-crime-undermining-confidence-law*.

11 Home Office, "Action Against Hate: The UK Government's plan for tackling hate crime" July 2016, at para. 10, available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543679/Action_Against_Hate_-_UK_Government_s_Plan_to_Tackle_Hate_Crime_2016.pdf*.

12 There were nine prosecutions for stirring up hatred offences in 2017-18, eight of which resulted in conviction: Crown Prosecution Service, "Hate Crime Annual Report: 2017-18" October 2018, available at https://*www.cps.gov.uk/sites/default/files/documents/publications/cps-hate-crime-report-2018.pdf*

SWEET & MAXWELL

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Archbold Review

Cases in Brief

Evidence—evidence by counsellors—expert evidence of counselling services—proper scope of evidence of (non-expert) counsellor—purpose—language in witness statement

R v SJ AND MM [2019] EWCA Crim 1570; 30 September 2019

At SJ and MM's trial for the sexual and physical abuse of two foster children, the evidence of P, a counsellor who had worked with one of the children, was wrongly admitted as expert evidence, and some of her evidence was inadmissible. P's evidence was given in an agreed edited witness statement.

(1) As to the proper scope of expert counselling evidence in general, an independent counsellor who had not seen a complainant could only give opinion evidence about counselling techniques and qualifications. An independent counsellor could not give evidence about the cause of any psychological or psychiatric condition and could certainly not comment on the truth or otherwise of allegations in the case: *R v W* [2012] EWCA Crim 1478.

(2) A counsellor could give evidence of the factual context in which they saw the complainant, which may include the statement that they dealt with youths "suffering from psychological trauma, encompassing sexual, physical and mental abuse". Some evidence from a counsellor about the demeanour of the complainant when recounting what they said had happened could be admissible, including obvious signs of distress when recounting a particular event, but should be subject of careful directions: *Venn* [2002] EWCA Crim 236; *Romeo* [2003] EWCA Crim 2844; [2004] 1 Cr.App.R. 30.

(3) The principal purpose of counsellor evidence was as to recent complaint. The counsellor could therefore give factual evidence as to what he or she was told, provided that the judge makes plain that that cannot be evidence of the truth of the underlying allegation.

(4) The evidence of P's opinion was inadmissible. She was not an expert. Examples of her opinion evidence that the court considered egregious were that the complainant was "damaged and suffering the effects of abuse", that she was "believable", and that P had a "deep belief in the truth of all that she ever shared with me". These were not only inadmissible statements of opinion, but they purported to tell the jury that a particular witness was reliable, contrary to the principle stated by Lord Taylor CJ in *Robinson* (1994) 98 Cr.App.R. 370 and repeated by the court in many cases following it.

(5) Legitimate complaint could also be made of the language of P's witness statement, even in respect of matters in respect of which she was entitled to give evidence (complaint, timing, context, demeanour). There was no place whatsoever for over-emotive language in any witness statement, particularly from a counsellor who was only giving evidence to support the timing and consistency of the complaints made. It ran the clear risk of prejudicing the minds of the jury, and it was probative of nothing. P's statement was naively drafted, with much too much subjective comment. Crown counsel should have undertaken a rigorous editing exercise, as should defence counsel before allowing the statement to be read.

(6) The court reviewed the evidence and concluded that the errors did not render the conviction unsafe.

Investigation of crime—police use of automated facial recognition technology—whether compliant with European Convention on Human Rights Art.8—whether breaches of Data Protection Acts 1998 and 2018—whether breaches of Equality Act 2010 s.149

R (BRIDGES) v CHIEF CONSTABLE OF SOUTH WALES POLICE [2019] EWHC 2341 (Admin); 4 September 2019

B, a civil liberties campaigner, challenged the use of automated facial recognition (AFR) technology by South Wales

CONTENTS

Police, for which it was the national lead. It was agreed that he was to be assumed to have been the subject of AFR on two occasions. The technology created biometric data based on digitised measurements of facial features. In the operation challenged (which involved numerous deployments of the technology), a CCTV camera captured images from which the software identified faces and extracted unique facial features to create a unique biometric template. That was then compared with those contained in a database or "watchlist" of those sought by the police drawn from the force's database of custody photographs. The software compared the two and arrived at a "similarity score", which, over a pre-set limit, produced a match. A police officer monitoring the process would be alerted to a match, and "intervention officers" would investigate or make an arrest. As for data retention, the CCTV feed was retained for 31 days then deleted. Facial images not matched were immediately deleted, as was the biometric template, regardless of whether a match was made. The facial images alerted against were either deleted following the deployment or within 24 hours. Match reports including personal information were retained for 31 days.

(1) The use of the AFR (in the form described above) infringed the European Convention on Human Rights Art.8(1) rights of B and those in a similar position to him (and those whose images appeared on the watchlist). The court considered *Von Hannover v Germany* (2004) 40 EHRR 1; *Re JR 38*; [2015] UKSC 42; [2016] AC 1131; *R (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 W.L.R 123; *AXA General Insurance v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868; *PG v United Kingdom* (2008) 46 EHRR 51; *Satakunnan Markkinaporssi Oy v Finland* (2018) 66 EHRR 8; *ASNEF v Administración del Estado* [2012] 1 CMLR 48; *Schwarz v Stadt Bochum* [2014] 2 CMLR 5 and *Amann v Switzerland* (2000) 30 EHRR 843 [GC].

(2) As to Art.8(2), B contended that the operation was not "in accordance with law", there being no legal basis for it, or alternatively that the general framework provided by, successively, the Data Protection Acts of 1998 and 2018, were insufficient justification for the purposes of Art.8(2). The court rejected the submission. The use of AFR was not ultra vires. The police's common law powers were amply sufficient: *Beghal v Director of Public Prosecutions* [2015] UKSC 49, [2016] AC 88; *Rice v Connolly* [1966] 2 QB 414; *Wood*; *R (Catt) v Association of Chief Police Officers* [2015] UKSC 9, [2015] AC 1065; and *Hellewell v Chief Constable of Derbyshire* [1995] 1 W.L.R 804. Having regard to the case-law on what was required for a sufficient framework (the court analysed *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12, [2006] 2 AC 307; *Catt*; *Re Gallagher* [2019] UKSC 3, [2019] 2 W.L.R 509; *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Sliver v United Kingdom* (1983) 5 EHRR 347; *Malone v United Kingdom* (1984) 7 EHRR 14; *Beghal*; and *S v UK*), the cumulative effect of the 2018 Act, the Surveillance Camera Code of Practice issued by the Home Secretary pursuant to Protection of Freedoms Act 2012 s.30, and the respondent force's own policies was that the force's use of AFR occurred within a framework sufficient to satisfy the "in accordance with law" requirement.

(3) Whether the use of the technology was an infringement of Art.8(1) justified under Art.8(2) depended on the third (whether a less intrusive method was available) and fourth (whether a fair balance was struck between individual and community) tests in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700. Applying a close standard of scrutiny, the court concluded that both tests were satisfied in relation to the two occasions on which, it was assumed, B had been subject to AFR; and the interference was, on the facts of the two deployments, proportionate.

(4) The court acceded to the parties' request that it consider B's data protection claims both under the Data Protection Act 1998 and as if they were governed by the then-not-yet-in-force Data Protection Act 2018 but rejected the claims under each of s.4(4) of the 1998 Act and ss.35 and 64 of the 2018 Act. Under the 1998 Act, the data held was not "personal data" in a direct sense, nor via indirect identification. However, the processing of B's image by the AFR operation was processing of his personal data on the basis that it individuates him from all others: *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003 and *Rynes v Urad* [2015] 1 W.L.R 2607. The processing was, however, necessary for the force's legitimate interests taking account of its common law obligation to prevent and detect crime (Sch.2 para. 6 to the 1998 Act.) (b) While, in respect of the (hypothetical) claim under s.35 of the 2018 Act, the AFR operation did involve the "sensitive processing" of the biometric data of members of the public, it also satisfied the requirements of s.35(5) as being necessary for law enforcement purposes and meeting a condition under Sch.8. (c) Contrary to B's claim, the force's impact statement satisfied the requirement under s.64 of the 2018 Act for a Data Protection Impact Assessment to be prepared.

(5) The force had not breached the public sector equality duty in Equality Act 2010 s.149(1), as demonstrated by its initial equality impact assessment.

Plea—change of plea—when application to change plea may be made—considerations

KC [2019] EWCA Crim 1632; 4 October 2019

K changed his plea to guilty after the start of the prosecution case, then after the jury had entered a directed guilty verdict, sought to apply to change his plea back again to not guilty. Freshly instructed counsel advised that it was not possible to make such an application following conviction by the jury, with which advice the judge concurred. Counsel and the judge had been wrong. The court had a discretion to allow a change of plea at any time up to sentence (*Plummer* [1902] 2 KB 339; *S v Recorder of Manchester* [1971] AC 481; *Dodd* (1981) 74 Cr. App.R 50); but the discretion was to be exercised sparingly in favour of the accused: *R v McNally* [1954] 2 All ER 372; *Revitt v DPP* [2006] 1 W.L.R 3172 and *R v Brahmbhatt* [2014] EWCA Crim 573. However, the errors had no impact on the safety of the conviction, and had an application been made, the judge should not have allowed it where at the time of entering the guilty plea the appellant was represented by experienced counsel and solicitors; K's detailed explanation for the initial change of plea clearly acknowledged guilt; he was under no disability by reasons of drugs or the absence of medication; he had, in full awareness of the context, expressly confirmed to counsel that the complainant was telling the truth; the decision was considered and taken overnight; K had made admissions in the pre-sentence report following the erroneous advice; and there was compelling evidence of guilt.

Trading standards—Regional Investigation teams—local authority powers—Local Government Act 1972 ss.101, 111 and 222—Localism Act 2011 s.1—investigations under—challenge to—delegation in respect of

R (QUALTER) v CROWN COURT AT PRESTON [2019] EWHC 2563; 3 October 2019

Q, a company director, sought judicial review of production orders granted under the Proceeds of Crime Act 2002 s.345, supported by a number of intervening companies. The orders had been made on the application of Cheshire West and Chester Council, which housed one of the seven national trading standards Regional Investigation Teams (previously, "scambuster teams") supported at a national level by funding directed through National Trading Standards, an informal body supported by a Government Department.

(1) The expediency test in the Local Government Act 1972 s.222(1) ("where a local authority consider it expedient … they may prosecute …") applied to the prosecution of or appearing in legal proceedings. It did not apply to an investigation by a local authority into alleged criminal activity and did not encompass applications made for an investigatory purpose. Accordingly, the argument that the authority's failure to have made a decision as to the expediency of any prosecution rendered any investigation unlawful failed.

(2) The local authority had a power to engage in investigation of the claimants by way of one or more of the Localism Act 2011 s.1, the Local Government Act 1972 Act s.101 or s.111. In particular, s.1 of the 2011 Act was intended by Parliament to widen the power of a local authority, notwithstanding the narrowing effects of *Brent LBC v Risk Management Partners* [2009] EWCA Civ 490, and there could be no doubt that a local authority had a general power of competence to conduct an investigation. The court acknowledged that the use of the term "an individual" in s.1(1) ("A local authority has power to do anything that individuals generally may do") was "legally puzzling", as it was put in *De Smith's Judicial Review* (8th ed, Sweet and Maxwell 2018), but it was unnecessary to resolve the issue. It may be, as the applicants argued, that a production order could not be made by any individual, but it could, in the context of a money-laundering investigation, be made by an "appropriate officer", any of whom were, by definition, "an individual", albeit one of a particular type.

(3) An investigation by a local authority into criminal activity could be open to a rationality challenge, albeit one with a high hurdle (*R v AB* [2017] EWCA Crim 534, [2017] 1 W.L.R 4071). While the applicants made no such claim, the court considered that whether the test was put in the terms suggested by the authority (could the local authority reasonably have believed that the investigation being undertaken might lead to a prosecution pursuant to the discretion under s.222(1) of the 1972 Act?), or a more objective variant (whether there was any realistic possibility that the investigation might lead to a prosecution within s.222(1)), the court had no doubt that the authority would satisfy either.

(4) Cheshire West and Chester Council had been delegated the trading standards functions of other authorities in the North West, in order to investigate region-wide rogue trading, in a protocol associated with the national scheme. One of the authorities was Lancashire, within which, it was alleged, the offences had taken place. Lancashire's power to investigate could not be realistically challenged, and the delegation had been effective. That Lancashire did not specifically refer to s.101 of the 1972 Act did not affect the legitimacy of the delegation so long as they were delegating a lawful function. Further, although there had been no specific reference to money laundering, it was inherent in allegations of corporate fraud that such offences were likely to have been committed. The delegation of the investigative function by Lancashire was not rendered unlawful because Lancashire did not identify every potential allegation.

(5) The court reviewed the authorities on the powers of local authorities in the context of fraud and/or criminal proceedings, noting that none of the authorities dealt with the lawfulness of an investigation rather than that in relation to prosecute or appear in proceedings, considering *London Borough of Barking and Dagenham v Jones* [1999] All ER (D) 923; *Oldham MBC v World Wide Marketing Solutions* [2014] EWHC 1910 (QB); *R (on the application of Donnachie) v Cardiff Magistrates' Court and Cardiff City Council* [2009] EWHC 489 (Admin); *Brighton and Hove City Council v Woolworths* [2002] EWHC 2565 (Admin); *AB v Richmond on Thames LBC ex parte McCarthy and Stone (Developments) Ltd* [1992] 2 AC 48.

SENTENCING CASE

Crossing age threshold between commission of offence and sentence

AMIN [2019] EWCA Crim 1583, 20 SEPTEMBER 2019

On 22 March 2019, the appellant was convicted of violent disorder, the offence taking place on 24 March 2018, when the appellant was 17 years and two months old. On 10 May 2019 he was sentenced to four years' detention in a young offender institution. He was then 18 years and four months old. He appealed, on the ground that the court should have taken as its starting point the sentence likely to have been imposed on the date when the offence was committed, the sentencing judge failing to take proper account of the appellant's age, and failing to follow the guidance contained in s.6 of the Sentencing Council's *Children and Young People Definitive Guideline*, and reflecting rulings in *Ghafoor* [2002] EWCA Crim 1857, *Bowker* [2007] EWCA Crim 1608 and *Y* [2013] EWCA Crim 1175.

> 6.2. In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence. But when this occurs, the purpose of sentencing adult offenders has to be taken into account which is: the punishment of offenders; the reduction of crime (including its reduction by deterrence); the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by offenders to persons affected by their offences.
>
> 6.3. Where any significant age threshold is passed, it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to the maximum may be appropriate.

Had the appellant been sentenced at the date of the offence, the maximum sentence available would have been a 24-month detention and training order.

In passing sentence, the judge did not refer to the provisions of the Sentencing Council Guideline, nor to *Ghafoor, Bowker* or *Y*. The sentencing remarks made no reference to what would have been the appropriate sentence available on the day the offence was committed. There was therefore a failure to take account of that factor which, following the authorities, would represent the starting point for the sentencing judge.

Having identified the starting point as being one of 24 months' custody, the court then asked whether there were any reasons to increase that starting point. Balancing the fact that the appellant was the leader of the group that committed the offence with the fact that he was 17 years old at the time, and following the guidance set out in para.6.3 of the Sentencing Council Guideline, the Court concluded that it would not be appropriate to impose a more severe sentence than that which could have been imposed at the time of the offence. The sentence of four years' detention was quashed and substituted with a sentence of 24 months' detention in a young offender institution.

Features

Reforming Hate Crime Legislation – The Law Commission's Current Review

By Rebecca Cohen and Martin Wimpole[1]

In September 2018, Lucy Frazer MP, then Parliamentary Under-Secretary of State for Justice, announced that the Law Commission would be asked to undertake a review of the coverage and approach of hate crime legislation following its earlier recommendation to do so. The review was to include "how protected characteristics, including sex and gender … should be considered by new or existing hate crime law".[2] This announcement was made after a debate in the House of Commons, in which Stella Creasy MP had tabled an amendment to the Voyeurism Offences (No. 2) Bill – the "Upskirting Bill" – that would add misogyny as an aggravating factor.[3] The new review was to follow a more circumscribed, but related report released by the Law Commission in 2014, entitled: *Hate Crime: Should the Current Offences be Extended?*

The existing hate crime framework in England and Wales

At present, hate crime legislation is the product of piecemeal reforms that have been made over the past three decades.[4] The overarching framework encompasses five protected characteristics – race, religion, sexual orientation, transgender identity and disability. However, these characteristics are subject to varying degrees of protection by the three main forms of hate crime laws: aggravated offences, stirring up hatred offences, and enhanced sentencing powers.[5]

Aggravated offences

There are currently 11 offences[6] which can instead be charged as racially or religiously aggravated versions under the Crime and Disorder Act 1998,[7] if the perpetrator demonstrates or was motivated by hostility on the grounds of race or religion. These aggravated offences are distinct, with higher maximum penalties than the basic form of the offence. However, in circumstances where relevant offending involves demonstration or motivation by hostility based on sexual orientation, transgender identity or disability, there is no recourse to an aggravated version of the offence.

Stirring up hatred offences

The Public Order Act 1986 contains offences which prohibit six forms of conduct that are either intended or likely to stir up hatred on the grounds of race, or intended to stir up hatred on the grounds of religion or sexual orientation.[8] The six forms of conduct include, *inter alia*, using words or behaviour and displaying, publishing or distributing written material. For stirring up racial hatred, the conduct must involve an element which is either threatening, abusive or insulting. However, for stirring up hatred on the grounds of religion or sexual orientation, the conduct must be threatening – abusive or insulting is insufficient. Moreover, the legislation carves out specific exemptions to protect freedom of expression in relation to religious beliefs – including "antipathy, dislike, ridicule, insult or abuse" – and criticism of sexual conduct or same sex marriage.[9] There are no such exemptions for stirring up racial hatred. The maximum penalty for each offence is seven years' imprisonment, or an unlimited fine (or both), regardless of whether the offence relates to hatred based on race, religion or sexual orientation. Currently, stirring up hatred on the grounds of transgender identity or disability are not captured by the legislation.

Enhanced sentences

The Criminal Justice Act 2003[10] provides that if any offence has involved hostility on the basis of race, religion, sexual orientation, transgender identity or disability, the judge must – on determining the sentence – treat this as an ag-

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2 BBC News, "Misogyny could become hate crime as legal review is announced" 6 September 2018, available at https://www.bbc.co.uk/news/uk-politics-45423789.
3 *Hansard* (HC), 5 September 2018, vol 646, col 253.
4 The first "hate crime" – stirring up of racial hatred – was introduced by way of the Public Order Act 1986.
5 The separate offence of racialist chanting at a football match is also within the scope of the review: Football (Offences) Act 1991, s.3.
6 These include *inter alia* different types of assaults; criminal damage to property; harassment and stalking.
7 Crime and Disorder Act 1998, ss.29 to 32.
8 Public Order Act 1986, ss.18 to 22 and 29B to 29F.
9 Public Order Act 1986, ss.29J and 29JA.
10 Criminal Justice Act 2003, ss.145 and 146.

gravating factor, and as a corollary increase the sentence. These enhanced sentencing powers do not permit the judge to raise a sentence above the available maximum that already exists for that offence. Moreover, if the offending has already been charged as a racially or religiously aggravated offence under the Crime and Disorder Act 1998, but the offender was instead found guilty of the basic version of the offence, the enhanced sentencing provisions cannot be used to increase the sentence.

The 2014 review

Following the publication of a consultation paper in June 2013, and three months of public consultation, in May 2014 the Law Commission published its final report on *Hate Crime: Should the Current Offences be Extended?* This review had a narrow scope and was focused on whether aggravated and stirring up hatred offences should each be extended to cover hostility or hatred in respect of all five characteristics.

Key recommendations made in 2014 included: in the absence of a wider review, extending aggravated offences to disability, sexual orientation and transgender identity; not extending stirring up hatred offences to disability or transgender identity on the basis that these offences are rarely prosecuted; and for a full scale review, to consider which characteristics need to be protected and on what basis, as well as whether aggravated offences and the enhanced sentencing system should be retained in their current form or amended.

The status and scope of the Law Commission's current review

Current status of the review

The Law Commission's current review of hate crime legislation was launched on 8 March 2019, at an academic research conference held at Oxford Brookes University. Subsequently, the Law Commission has focused on fact-finding pertaining to the review's expansive terms of reference, along with preparing the consultation paper in advance of its scheduled publication in spring 2020.

The review's terms of reference

The agreed terms of reference are detailed and provide an opportunity for a wholesale review of the existing hate crime framework and potential reforms. However, they emphasise that the review should consider *who* should be protected by hate crime laws – which expressly includes both current and potential protected characteristics – and *how* the law should operate to best provide effective and consistent protection from conduct motivated by hatred of protected groups or characteristics.

Who should hate crime laws protect?

A lack of parity

Intrinsic to the issue of who – or which characteristics – should be protected by hate crime laws, is a fundamental criticism of the current framework: that it lacks parity between the existing protected characteristics. Indeed, it has been suggested there is currently a "hierarchy of hate",[11] ranging from race, which is subject to the full gamut of available protection, to the characteristics of transgender identity and disability – which are not encompassed by either aggravated or stirring up hatred offences. Moreover, whereas there is a relatively low threshold of "intended to or likely" for the stirring up of racial hatred – with conduct which is either threatening, abusive or insulting – the stirring up of hatred on the grounds of religion or sexual orientation must be "intended", "threatening" and may be exempted by freedom of expression provisions. While counter arguments exist, which suggest groups experience hate crime in different ways requiring unique treatment, achieving parity within the law will be a key consideration in the course of the review.

Considering additional protected characteristics

There has undoubtedly been a significant push to extend hate crime to offences involving hatred or hostility of women, with different groups preferring varied terminology including misogyny, gender and sex. This campaign has built on work undertaken in Nottinghamshire, which since 2016 has had a policy of recording hate incidents involving misogyny that are reported to police. However, any consideration of extending hate crime to gender or sex-based hostility must contend with concerns regarding inevitable overlap with other key priority areas, including domestic abuse and violence against women and girls. Some have also argued that misandry must also be encompassed by any such reforms. There have also been arguments made for the protection of additional characteristics, particularly age, but also alternative subcultures, philosophical beliefs, people experiencing homelessness, sex workers, and other groups.

Criticism of distinct characteristics

While protected characteristics comprise a core component of the current hate crime framework, some view such categorisation as inherently problematic. In particular, victims' experience of hate-based offending is often intersectional, in that they are targeted on the basis of numerous characteristics – for example, religion, disability and gender – rather than one distinct trait. In addition, it has been suggested that with society's development and shifting prejudices, the specification of particular characteristics is short-sighted and a residual, inclusive category is preferable. However, equally, there are concerns that extending the application of hate crime in this way would remove the symbolic potency of naming particular forms of hatred.

How should hate crime laws operate?

Bringing clarity

In considering how the hate crime framework can be modelled to best effect, a key focus will be on ameliorating the lack of clarity which has beset the current law. As a result of their piecemeal development, the relevant hate crime laws are located in separate statutes. Complexities – pertaining to the overlap of these laws as well as the inconsistency of application to different characteristics – mean that the

11 See, eg: Equality and Human Rights Commission, "Hierarchy of hate crime is undermining confidence in the law" 12 October 2016, available at: https://www.equalityhumanrights.com/en/our-work/news/hierarchy-hate-crime-undermining-confidence-law.

framework is not easily understood by those working with the law or affected by it.

Developing a more inclusive model

It has been argued that current hate crime laws were historically predicated on the nature of race-based hatred, and that, in particular, they are ill-equipped to address the bulk of crime experienced by people with disabilities. For example, whereas hate crime is currently built on a model of the perpetrator being motivated by or demonstrating hostility towards a particular characteristic, it has been suggested that disabled people are more likely to experience contempt and derision or exploitation, rather than outright hostility.

Evaluating existing components of the hate crime framework

The review will necessarily include assessment of the existing approaches to hate crime laws and evaluating their success. The UK has been described as having "one of the strongest legislative frameworks to tackle hate crime in the world".[12] However, key questions will include whether the current hostility model is the right test, and whether there is a need for both aggravated offences and enhanced sentencing, and if not, which approach is preferable. In addition, any interrogation of the stirring up hatred offences will undoubtedly include consideration of the rarity of prosecutions[13] and freedom of expression concerns.

Beyond the law

While the review is limited to the hate crime legislation itself, any proposed reforms must be placed in a wider context, including the application and enforcement of the law by police and other components of the criminal justice system. Particular considerations include the scale of offending, especially of hate crimes committed in the online context; the extent of regional inconsistency between police forces; the distinction between anti-social and criminal behaviour; and alternatives to prosecution including out of court disposals and restorative justice.

Next steps for the review

Following publication of the consultation paper in spring 2020, the Law Commission will hold a three-month public consultation period. The final report for this review is scheduled for early 2021. For further information, please see: https://www.lawcom.gov.uk/project/hate-crime/ or email hate.crime@lawcommission.gov.uk.

12 Home Office, "Action Against Hate: The UK Government's plan for tackling hate crime" July 2016, at para. 10, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543679/Action_Against_Hate_-_UK_Government_s_Plan_to_Tackle_Hate_Crime_2016.pdf.

13 There were nine prosecutions for stirring up hatred offences in 2017-18, eight of which resulted in conviction: Crown Prosecution Service, "Hate Crime Annual Report: 2017-18" October 2018, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-hate-crime-report-2018.pdf

The role of the Victim Personal Statement in Sentencing

By Sarah Bergstrom and Umar Azmeh[1]

This article considers how the role and scope of the Victim Personal Statement (VPS[2]) has changed from what many initially regarded as a victim focused therapeutic tool, to become an integral evidential part of the sentencing process.

Background to the VPS

A VPS is a statement that victims of crime may give to the police explaining the impact of a crime upon them, whether physically, emotionally, psychologically, financially or in any other way.[3] Over time these statements have had at least three labels, having previously been known as Victim Impact Statements (VIS) or Family Impact Statements. The terms VIS and VPS have been used interchangeably by the courts,[4] but VPS is now the term were always consistently used in the Victims' Code and the Criminal Practice Direction. VPS were always potentially relevant at sentencing. They may also be relevant at the Parole Board stage, but this falls outside the scope of this article.

The origins of VPS in England and Wales can be traced back to the 1996 Home Office Victims' Charter, according to which victims could "expect the chance to explain how the crime has affected [them] and [their] interests to be taken into account."[5] Following various pilots, a 2001 VPS scheme was introduced nationwide.[6] In 2006 the Victims' Charter was replaced by the Code of Practice for Victims' of Crime, known as the "Victims' Code."[7] As originally drafted, the Victims' Code contained no right to make a VPS, and if one was made the courts were left to self-regulate the procedure. In 2007, the Crown Prosecution Service (CPS) introduced the Victim Focus Scheme,[8] which entitled family members of murder or manslaughter victims to make a single VPS on behalf of the family, which could be read to the court prior to sentence.

A revised Victims' Code in 2013[9] conferred on the victim the entitlement to make a VPS and a further change allowed a victim to read their VPS in court prior to sentence or to ask that their VPS be read out aloud, usually by the

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2 This acronym is used for both the singular and the plural in this article.

3 Ministry of Justice, *Making a Victim Personal Statement* (2013), p.3 - available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264625/victims-vps-guidance.pdf (accessed 25 June 2019).

4 In *Perkins* [2013] 2 Cr.App.R. (S.) 72, the court uses the term victim impact statement at para.50, but VPS predominantly throughout the rest of the judgment.

5 H Fenwick, "Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process" (1997) 60 *MLR* 317.

6 JV Roberts and M Manikis, "Victim Personal Statements – A Review of Empirical Research, Report for the Commissioner for Victims and Witnesses in England and Wales" (2011), p.8 - available at https://www.justice.gov.uk/downloads/news/press-releases/victims-com/vps-research.pdf (accessed 25 June 2019).

7 A change made by Pt.3 of the Domestic Violence, Crime and Victims Act 2004.

8 http://www.cadd.org.uk/docs/Victim%20Focus%20Scheme%20Leaflet%2017%2009%2007.pdf (accessed 25 June 2019).

9 Giving effect to the EU Directive for Victims of Crime 2012/29/EU.

prosecutor, with the agreement of the court. Then in 2015 the Victims' Code was amended yet again,[10] with enhanced rights given to victims in certain categories of case, particularly to victims of the most serious crime, persistently targeted victims, and vulnerable or intimidated victims, as these categories of victim were deemed to be more likely to require enhanced support and services through the criminal justice process.

Notwithstanding these developments and the concomitant increase in the importance of the VPS, there is still a clear political imperative further to improve the treatment of victims by criminal justice agencies. To that end, the government has recently published its Victim's Strategy, setting out its commitment to amend and strengthen the Victims' Code and to give victims greater support.[11] This support would include "improved police training, including guidance on conducting interviews and collecting evidence".[12]

The initial purpose of the VPS

VPS fall within one of two different models depending on the jurisdiction: expressive or instrumental. Within the former model, the purpose of the VPS is expressive and communicative:

> it serves to express the victim's view of the harm created by the offence, a view which is communicated to the court and possibly also the offender.[13]

Importantly, this model does not require a nexus between the VPS and the appropriate sentence, which essentially means that the victim's preferences or suggestions as to sentence are not formal parts of the model. The instrumental model, on the other hand, entitles the victim to attempt to influence the judge's decision in order to secure a higher sentence. England and Wales use the expressive model.[14]

Victims are not a party to criminal proceedings in England and Wales. The prosecution does not represent them in the same manner in which a defence advocate represents a defendant and furthermore, court proceedings can be somewhat esoteric to a layperson. As a result, the victim and their family may feel disconnected from the process and "that they have no control over anything taking place around them.[15] Indeed, the experience of victims in the Crown Court has been described as "alienating", in which they have a "marginalised outsider status".[16]

The VPS process was no doubt intended to address the issue of exclusion. Indeed, the Victims' Code provides that the purpose of the VPS is to give "victims a voice and explain in their own words how a crime has affected them[17]." That said, however, its success in doing so thus far is not universally accepted.

According to some critics,

> ... political imperative to do *something* for victims (…) has meant that the VPS Scheme is unclear in its aims and justifications, with the victim left inexorably an ambiguous participant.[18]

Giving a VPS can be deeply personal: it humanises the effect of a criminal offence. When it is read out loud, it forces the offender (who is in court awaiting sentence) to listen to the consequences of their actions. The impact of the offending can tangibly be heard and then assessed by the sentencing court. Many victims are thought to benefit from this more emotive facet of a VPS, which is why the VPS is often seen as having multiple purposes. On the one hand, it assists the sentencing judge in assessing the impact of an offence, and on the other, it serves to empower the victim by recognising them and allowing their voice tangibly to be heard in the criminal justice system (if the proper procedure is followed).

Problems within the VPS scheme

In November 2015, the Victims' Commissioner for England and Wales published a report entitled *The Silenced Victim: A Review of the Victim Personal Statement* (note 15 above). The report found that many victims had negative experiences of the VPS scheme, including uncertainty as to what difference their VPS may make, and not understanding why their request to read their VPS aloud was refused by the judge. The report also identified a systemic failure in that most victims did not recall being offered the opportunity to make a VPS. That said, most victims did value their right to make a VPS.

Following the 2015 Report, a joint guide was developed between the police, the CPS, Her Majesty's Courts and Tribunals Service (HMCTS), and other crime agencies, in order to "… provide practical advice to anyone who might be involved in the VPS process" and to help police officers "to understand what information they should provide to victims if they choose to make a VPS."[19] Each agency party to this guide agreed to incorporate it into their victim-focused policies, and where relevant, to establish processes to monitor compliance under the Victims' Code in relation to VPS.[20]

Beneficial as these changes may have been, one issue that has not been resolved with clarity is the right, or otherwise, of the victim to read their statement aloud in court.

The 2013 revisions to the Victims' Code permitted a victim to read their own VPS (or to have it read on their behalf) prior to sentencing with the agreement of the court.[21] The extent to which a victim is permitted to read their VPS in court (as well as the use made of the VPS in sentencing generally) is currently the subject of a consultation exercise being carried out by the Ministry of Justice in consultation with HMCTS.[22]

As readers will note, a particular problem with the scheme as currently conceived is that it accords the sentencing judge

10 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF (accessed 25 June 2019).

11 *https://www.gov.uk/government/publications/victims-strategy* (accessed 13 October 2019).

12 Ibid Ch 3.

13 See footnote 9, at p.9.

14 JV Roberts and E Erez, "Victim Impact Statements at Sentencing: Expressive and Instrumental Purposes", in JV Roberts and T Bottoms (eds.) *Hearing the Victim: Adversarial Justice, Crime Victims, and the State* (Willan Publishing, 2010).

15 Victims' Commissioner for England and Wales, *The Silenced Victim: A Review of the Victim Personal Statement* (2015). Available at: https://s3-eu-west-2.amazonaws.com/victcomm2-prod-storage-119w3o4kq2z48/uploads/2019/02/VC-Silenced-Victim-Personal-Statement-Review-2015.pdf (accessed 25 June 2019).

16 See J Jacobson, G Hunter and A Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Policy Press, 2015).

17 At para.1.12.

18 "An Ambiguous Participant: The Crime, Victim and Criminal Justice Decision-Making", I Edwards (2004) *British Journal of Criminology* 44, 967-982.

19 *Joint Agency Guide to the Victim Personal Statement – A guide for all criminal justice practitioners*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740196/joint-agency-guide-victim-personal-statement.pdf (accessed 25 June 2019).

20 See p.1.

21 Guidance in *Archbold* also notes that the courts are increasingly frequently allowing victims or their families to read out VPS in court (see *Archbold* 2019 at 5A-305).

22 See para.2.7 of the Proposals for revising the Code of Practice for Victims of Crime, available at: https://consult.justice.gov.uk/.

essentially open-ended discretion as to whether or not a VPS may be read out aloud in court, with the victim not knowing in advance what the judge will decide.

Development of the caselaw and the Criminal Practice Direction

In *Perks*[23] the Court of Appeal considered the evidential status and admissibility of the VPS, Garland J drawing the following propositions from the authorities (at [72]):

(i) A sentencer must not make assumptions, unsupported by evidence, about the effect of an offence on the victim.

(ii) If an offence has had a particularly damaging or distressing effect upon a victim, this should be known to and taken into account by the court when passing sentence.

(iii) Evidence of the effects of an offence on the victim must be in proper form, a section 9 witness statement, an expert's report or otherwise, duly served upon the defendant or his representatives prior to sentence.

(iv) Evidence of the victim alone should be approached with care, the more so if it relates to matters which the defence cannot realistically be expected to investigate.

(v) The opinions of the victim and the victim's close relatives on the appropriate level of sentence should not be taken into account. The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender subject to two exceptions: (i) Where the sentence passed on the offender is aggravating the victim's distress, the sentence may be moderated to some degree. (ii) Where the victim's forgiveness or unwillingness to press charges provides evidence that his or her psychological or mental suffering must be very much less than would normally be the case.

In *Perkins,*[24] the Court gave further guidance on the use of VPS. Lord Judge CJ concluding:[25]

(i) Decisions as to whether to make a VPS must be made by the victim personally. They must be informed of their right, and allowed to exercise it as they wish.

(ii) When the decision whether or not to make a VPS is being made, it should clearly be understood that the victim's opinion about the type and level of sentence should not be included.

(iii) The VPS constitutes evidence and must therefore be treated as such. It may be challenged in cross-examination, and it may give rise to disclosure obligations.

(iv) Responsibility for presenting the VPS lies with the Prosecution.

(v) Properly formulated VPS provide real assistance for the sentencer, and experience has shown that in the overwhelming majority of cases they are put before the court in the usual way. The judge will always have read the VPS.

Some of this guidance was later incorporated into the Criminal Practice Directions.[26] Further and updated guidance on VPS can now be found in the current Criminal Practice Directions,[27] with paragraph F.1 setting out the general entitlement of victims to make a VPS, and stating that the court "will take the statement into account when determining sentence", F.2 stating how the police should go about informing a victim of crime of the scheme, and how and when a VPS should be taken, and F3 summarising the key guidance from *Perkins*.

In *Gregory,*[28] Thirlwall J affirmed the general principle that responsibility for sentencing rests solely with the sentencing judge, and that the victim should not be asked about the nature of the sentence which should be imposed on the applicant – following England and Wales's expressive model of VPS.

The statutory sentencing framework

When sentencing a defendant aged 18 or over, the court must have regard to the purposes of sentencing contained in s.142(1) of the Criminal Justice Act 2003: (i) the punishment of offenders, (ii) the reduction of crime (including by deterrence), (iii) reform and rehabilitation, (iv) public protection, and (v) reparation. There is no indication in the statute as to which purpose takes priority and therefore the sentencer must decide what weight to accord one or more of those purposes in any particular sentencing exercise.

A basic principle of sentencing is that the courts are required to pass a sentence that is commensurate with the seriousness of the offence.[29] The Sentencing Guideline Council's *Definitive Guideline on Overarching Principles: Seriousness* notes that the assessment of seriousness will determine which of the sentencing thresholds have been crossed, what type of sentence is most appropriate, and will also be the key factor in determining the length of a custodial sentence, the onerousness of a community order, or the amount of any fine.[30] The underlying notion here is proportionality, whereby like cases must be treated alike, and cases of different seriousness cannot be treated with equal severity.[31]

Section 143(1) of the Criminal Justice Act 2003 provides:

> In determining the seriousness of any offence, the court must consider the offender's culpability in committing the offence and *any harm which the offence caused, was intended to cause or might foreseeably have caused.* [emphasis added]

The same language is now used in the Sentencing Council's new General Guideline and the explanations that accompany it.

From this it follows that a VPS will be most useful to the sentencing court in assessing the harm caused to a victim. Culpability, by contrast, will generally focus on factors concerning the defendant, for example whether or not they acted intentionally, recklessly, negligently, etc. In respect of harm, the *Definitive Guideline on Seriousness* says this[32]:

> The nature of harm will depend on personal characteristics and circumstances of the victim and the court's assessment of harm will be an effective and important way of taking into consideration the impact of a particular crime on the victim.

23 [2001] 1 Cr.App.R. (S). 19.
24 [2013] EWCA Crim 323, [2013] 2 Cr.App.R. (S.) 72.
25 See para.9 of the judgment. The passage has been paraphrased for the purposes of this article.
26 [2013] EWCA Crim. 1631.
27 [2015] EWCA Crim. 1567.
28 [2015] EWCA Crim. 1708, at [13].
29 A principle first clearly established by the Criminal Justice Act 1991: see J V Roberts (ed.) *Mitigation and Aggravation at Sentencing* (*Cambridge University Press*, 2011), page viii.
30 https://www.sentencingcouncil.org.uk/wp-content/uploads/Seriousness-guideline.pdf at p.3 (accessed 25 June 2019), This Guideline was replaced on 1 October 2019 by the new *General Guideline*, which adopts the same language.
31 For example, A Ashworth and A von Hirsch, *Proportionate Sentencing* (Oxford University Press, 2005).
32 See p.4. This Guideline was replaced on 1 October 2019 by the new *General Guideline*, which adopts the same language.

With this in mind, the courts have consistently recognised the value of the VPS in sentencing, and were doing so even before harm was expressly to be taken into account by virtue of the 2003 statutory provisions.

Section 121(3)(b) of the Coroners and Justice Act 2009 stipulates that, in developing sentencing guidelines, the Sentencing Council should refer to, inter alia "… the harm caused, or intended to be caused or which might foreseeably have been caused, by the offence".

As a result, the assessment of harm is embedded in all of the Sentencing Council's Definitive Guidelines at Step 1, which determines an offence category through culpability and harm.

Thus, in the *Overarching Principles: Domestic Abuse Definitive Guideline*, one of the aggravating factors of particular relevance to offences committed in a domestic context is whether the victim is "forced to leave home", or that "steps have to be taken to exclude the offender from the home to ensure the victim's safety".[33] This may be a factor indicating a significantly high degree of harm, potentially resulting in a material difference to sentence. The manner in which a sentencing judge would come to know about that material fact, particularly if the defendant had pleaded guilty, would be via a VPS. Similarly, in the context of a domestic burglary, the *Definitive Guideline* indicates that where items of "… sentimental or personal value" have been stolen or damaged, the offence will involve "greater harm"[34]; statements to similar effect can be found in the *Definitive Guideline* in relation to theft from the person.[35] The VPS would be the appropriate vehicle for communicating these matters to the sentencing court, and accordingly a sentencing judge might require a VPS to highlight the extent of harm caused by the offending in order to impose a sentence that is just and proportionate.

It is also worth noting that there is nothing in the rules that would prevent a judge from asking for a VPS if none was taken, or indeed asking for an updated VPS if the one in front of them does not, in the judge's view, contain all the information they require for sentence. This is of course subject to the victim's right to refuse to make a VPS. In these circumstances, judges must also be wary of applying undue pressure on a victim to make a VPS: as noted above, Lord Judge CJ in *Perkins* made it clear that decisions as to whether to make a VPS are solely matters for the victim personally, and they must be allowed to exercise this right as they wish (or not to, as the case may be). Courts must also beware of minimising harm in cases where there is no VPS; this may be, for example, because the victim is too traumatised to make a VPS. It is worth noting that it is always the responsibility of the prosecution to present admissible evidence relevant to sentencing.[36]

Practical impact of VPS at sentencing

The practical use of VPS at sentencing was explored in *Chall*.[37] In each of the combined appeals the sentencing judge had found that the complainant had suffered severe psychological harm as a result of the offence(s), and had placed the defendant in a higher sentencing category as a result. Each appellant complained that the sentencing judge had used a VPS to make a finding of severe psychological harm in the absence of any other evidence such as a psychological report. Counsel for the appellants initially submitted that consideration should be given to obtaining a clinical assessment of the psychological state of a victim whenever there is scope for argument as to the degree of psychological harm. That submission was modified orally where it was submitted that in the absence of expert evidence, a judge has no benchmark against which to assess whether psychological harm is severe. There was no guidance as to whether, for example, such an assessment could be made on the basis of a single adverse psychological impact or whether a combination of psychological impacts is necessary.

The Court rejected those arguments. A sentencing judge, it said, is not called upon to make a medical judgement as to where the victim sits in the range of clinical assessments of psychological harm but is making a factual assessment as to whether the victim has suffered psychological harm, and if so, how severely. The objection that the judge was making an expert assessment without the necessary expertise was therefore misconceived.[38]

At [31] and [32] the Court also discussed the manner in which a sentencing judge may assess a VPS, mentioning that an updated VPS may be served at any time prior to the disposal of the case, and stressing the intensely personal nature of a VPS.

Conclusion

As the Court of Appeal said in *Perkins*:

> Except where inferences can properly be drawn from the nature of or circumstances surrounding the offence, a sentencer must not make assumptions unsupported by evidence about the effects of an offence on the victim.[39]

The evidential value of the VPS is that in many cases it will give the sentencing court the evidence it requires to understand, assess and categorise the harm caused by a particular offence: this will allow the court fully to gauge the seriousness of the offence and impose a just and proportionate sentence.

An assessment of the harm caused by the offending is a step that is embedded in the Definitive Guidelines compiled by the Sentencing Council, a structure reflected in s.121(3)(b) of the Coroners and Justice Act 2009. In sentencing an offender, the statute requires the sentencing court to follow those Guidelines.[40]

As the Sentencing Council continues to produce more Definitive Guidelines which categorise culpability and harm, the assessment of harm becomes more structured and transparent. The evidential role of the VPS is clearer to see, and *Chall* demonstrates that the VPS can often be integral to that assessment. So if the VPS was initially introduced with a rather loosely defined aim of giving victims a voice and a role in sentencing, it now clearly serves a more defined legal purpose.

It is hoped that the Victims' Strategy published in September 2018 will lead to improved communication to victims and their families, especially as to their entitlement to make a VPS. It is also hoped that it will clarify for them the use the sentencing court may properly make of it, and also help ensure that VPS address the factors relevant to the Definitive Guideline applicable to the offence in question.

33 https://www.sentencingcouncil.org.uk/wp-content/uploads/Overarching-Principles-Domestic-Abuse-definitive-guideline-Web.pdf at p.3 - (accessed 25 June 2019).
34 https://www.sentencingcouncil.org.uk/wp-content/uploads/Burglary-definitive-guideline-Web.pdf at p.4 (accessed 25 June 2019).
35 https://www.sentencingcouncil.org.uk/wp-content/uploads/Theft-offences-definitive-guideline-Web.pdf at p.4 (accessed 25 June 2019).
36 See *Perkins* at [9].
37 [2019] EWCA Crim. 865.
38 Per Holroyde LJ at [10] and [12].
39 Note 22 above, at [5].
40 Section 125(1) of the Coroners and Justice Act 2009.

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