Historic Sexual Abuse

Legal Aid

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CRIMINAL BAR QUARTERLY

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FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

Alternative Venues

EDITOR **John Cooper QC**

The latest suggestions to come out of government that some courts should sit at alternative venues to make way for the impending court closures is interesting and worth consideration.

After all, it will not be the first time that courts of law have sat in the most unlikely of places. Coroners Courts would regularly sit at the local pub and whilst the present suggestions have not mentioned sitting days "down the local", they have floated the idea of courts sitting at local authority properties as well as libraries.

With courts being closed, we should do what we can to preserve local justice facilities, access to justice means physical access as well as the availability of public funds when appropriate and if some court buildings do have to close then convenient and local venues will be vital to fill the vacuum.

Many of those in the community who need to attend court rely on public transport, have child care commitments or are otherwise unable to take lengthy journeys to court and local provision is essential not only to maintain accessibility but also to establish a presence in every local area.

Of course, any court centre must be able to comply with whatever safety and security requirements are needed given the type of court being established, but who knows, setting up a court in a local authority office might well solve another insidious development in the criminal justice system … the closure of the court cafeteria.

This issue brings together Dexter Dias QC on UVAs and the new dangers they bring; The Law Commission writing on their reforms to the Offences Against the Person Act and Richard Gibbs on misogyny within the CJA. Finally, Dan Bunting writing on the legal aid dilemas. Enjoy the read. ■

25 Bedford Row. *The views expresed here are not necessarily the views of the Criminal Bar Association.*

Glass Half Full

CHAIRMAN'S COLUMN

Mark Fenhalls QC

I was talking to a student the other day and faced the usual questions about what life was like at the criminal Bar. Each of us who has fielded such a question in the last decade has probably wondered how gloomy we should sound. Somewhat to my surprise I heard myself sounded more optimistic than I had been for some years.

There are several reasons. First and most immediately, the Government decision not to proceed with "two tier" procurement for duty work schemes is a huge relief. One existential threat to the self-employed Bar has gone. But reasons for hope go wider.

Our world is changing at a remarkable pace. My pupillage was in 1992/3. Pink and white ribbon was everywhere; the clerks wrote the diary by hand in pencil and everyone was in chambers at the end of each day to collect their papers for the following day. My briefs were usually a few pages sent by fax machine. Few, if any, had mobile phones. Pupils did not make personal calls from chambers. I kept a ready supply of 10p pieces to use in phone boxes by the RCJ and at train stations and in robing rooms.

Slim cases soon disappeared. The amount of paper exploded by the turn of the millennium and we have spent many of the intervening years trying to cope with increasingly unmanageable quantity of paper and data stored on increasingly elegant and slim electronic devices. Our current payment scheme was designed in a mid-90s world when paper was still king. Governments and the CPS have responded to technological change and the explosion of paper by simply salami slicing fees.

All parts of the CJS have suffered severe cuts in recent years. The data shows that the incomes of those barristers who specialise in publicly funded work have fallen significantly. And yet there is hope.

The spending review in the autumn was not the further meltdown some of us had anticipated. Budgets continue to be squeezed and/ or fixed. But the sums secured to pay for the digital reform of the Courts Service were not taken away and we have all embarked on a scheme of reform that I think gives us hope that the self employed Bar can flourish in the 21st Century.

Lord Justice Fulford summarised it thus at a recent lecture to the CBA at the Old Bailey:

"At the heart of the changes is the idea to design a system for each jurisdiction – a way of working – which enables every case to be initiated, progressed and case-managed on line, with all the papers being served or made available in electronic format. It is so easy to deliver that neat little sentence and it is in danger of slipping by unnoticed, but in truth it reveals a profound revolution. Cases will all be done on computer. Information will only be keyed in once, whether by a police officer in a criminal case or by a legal executive or a litigant in person in other jurisdictions. It will then be passed down the line in digital format, being bundled and stored electronically."

Courts, chambers and advocates lives are going to change. Rooms groaning under the weight of files and papers are going to be purged. Publishers all say that eBooks are not the end and that people are going back to books. I am sure that will not hold true for us save for special occasions – for example most of us probably think that it is impossible to prosecute or defend a fraud case without a paper bundle for the jury to highlight or write on. And I for one will only believe otherwise when I am convinced that every juror in any given trial is completely comfortable in writing notes or highlighting on whatever tablet the jury has been given.

We are all going to have to learn new tricks. Many Judges and advocates are understandably very nervous about this. But if (and it is a huge if) the papers are sensibly assembled and presented in electronic format we can do it. Judges who have been using the system for several months report that they are surprisingly easy to use. Similarly, barristers report that when cases and evidence is prepared and served electronically as required by the CPR then the new system can be a joy. Even NOMS which runs the prisons says it is wholly committed to the process of making it commonplace for us to take our loaded tablets or laptops into prisons.

These changes should enable us to produce a far better and considerably less expensive justice system and avoid another ghastly round of cost cutting in a system where the fat, flesh and sinew has already been cut and we are already done to the bone.

Everyone should be sceptical. We all know how poor government procurement can be. We are all cynical about the possibility of Wi-Fi crashing and lack of IT support, but the powers that be are committed to this process, understand these pitfalls and will do everything they can to avoid them. We simply have to give it our best shot.

I return to the words of Fulford LJ:

"If this works, we will have created a brand new justice system that will meet – it may even exceed – the expectations of the public and the litigants, and which has the potential to save the government eye-watering amounts of money. This is a once-in-a-generation opportunity that will ultimately affect all of us. If all goes well, in about five years we will be in a justice system in which the process of doing cases will have changed beyond all recognition. But the effects will be incremental, with a good deal of the benefits and changes having become available piece by piece as time passes."

Chief among our ambitions for such benefits are to bring about the earliest possible end to warned lists in as many areas of the country as possible. If some areas can do it (and they already do) then everyone must be able to.

Finally, I would like to draw your attention to a paper published by the MoJ at the end of 2015 (https://www.gov.uk/government/publications/composition-and-remuneration-of-junior-barristers-under-the-advocates-graduated-fee-scheme-in-criminal-legal-aid) which underpins our current discussions with the MoJ about the replacement of AGFS to bring us into the digital age and create a system of remuneration that fits and works with the Better Case Management regime. First something of a history lesson.

There is a long history of reforms being made to the way in which criminal defence advocacy is funded under the Advocates Graduated Fees Scheme. This scheme which started in 1996 now covers almost all Crown Court work and therefore determines the greater part of the fee income of specialist defence advocates. There was a very poor understanding of the impact of fee changes on this group of specialists beyond anecdotal evidence which, while powerful, does not help very much when it comes to having a foundation to change policy. One was that LAA and MoJ records systems did not distinguish between such specialists (who broadly speaking work defend full time), and the substantially larger number of advocates (both barristers and HCAs) who do very limited criminal defence work. The notion of "average" fee earnings has been hugely distorted by the large number of suppliers who do very few cases – or worse are only involved in work that is peripheral to the main trial.

The research project set about combining the MoJ records with Bar Council membership records so that the gender, age, experience, seniority and ethnicity of each specialist could be determined. In that way it has been possible not only to look at how the fee earnings of specialists as a whole group have been affected over time, but how different groups of specialists (women or BME, or experienced) specialists have fared.

Putting these ideas into practice is complicated and there is no substitute for reading the full paper. The group sought to define such specialists by reference to the total volume and value or work they contribute, over a three-year period. In the report the terms used are "most engaged" and "notionally full time". These are not ideal but capture the idea of identifying practitioners who are very involved in the criminal defence work – to the extent that it is probably their largest, or only, area of practice.

The picture that emerges is that the specialist criminal defence advocates have suffered significant fee cuts in recent year. That is important to know from a policy perspective because it impinges on the sustainability of the specialist profession.

The findings about a lack of experience/seniority gradient are both unexpected and important. This is probably an unintended consequence of past rebalancing of fees (that has always tended to target for the biggest cuts the more expensive serious cases that experienced advocates undertake). It is certainly something that has to change in the future.

The lack of any obvious discrepancies in fees across different gender and ethnicity may be a source of comfort but the figures are complex and require very careful thought. It should be noted however that the increasing gender balance in the profession is not being reflected yet in specialist criminal defence advocacy and we may need to ask ourselves some difficult questions about why this is so. Personally I hope that the end of warned lists may make a significant positive impact in this area. ■

The Year Ahead: New Opportunities, New Offences

Preface

Unmanned Aerial Vehicles – the new danger and other offences for 2016

Contributor

Dexter Dias QC

As 2016 unfolds around us, there are sinister shapes in the sky. These are not just the portents of yet more fierce fighting around public funding, but something more tangible: UAVs.

In a triumph of disposable consumerism, we have seen the dawn of a world in which almost anyone can own their own aircraft. These cheap consumables, Unmanned Aerial Vehicles – drones to you and me – became one of the must-have presents at Christmas. However, both the police and the Civil Aviation Authority have issued stark warnings. They cautioned about the danger posed to unsuspecting dog-walkers, gardeners and joggers from strangely rotor-bladed objects falling from the sky. Nevertheless sales rocketed. Various nationals were able to report (inevitably) that drones were "flying" off the shelves. All this may well provide gainful employment for criminal practitioners in the near future. Indeed, 2015 saw what was believed to be the first prosecution under the Air Navigation Order 2009.

Nigel Wilson from Bingham, Nottingham, was fined £1,800 at the Westminster Magistrates' Court for flying drones over iconic London landmarks and football matches featuring Arsenal, Tottenham and Liverpool. Horses, it was said in court, were startled. Wilson was also banned from buying or flying a drone for two years. Beyond this, however, the supersized versions of these increasingly in-demand consumables have caused considerable legal controversy and further fuelled the heated debate around the appropriate balance between public safety from terrorism and international standards of human rights.

In October 2015, Amnesty International forcefully queried the legality in international law of drone strikes in the Middle East. In another act of whistleblowing - the disclosure of what has come to be known as The Drone Papers – there was a series of leaks about United States' "kill list", its "assassination program in Afghanistan, Yemen and Somalia". For its part, the United Kingdom has also been using drones. In November, British national Mohammed Emwazi – dubbed Jihadi John – was killed in a drone strike in Raqqa, Syria. Although it is believed that an American drone delivered the fatal fire, Emwazi's movements in the ISIL capital had been tracked by a British drone operated from Lincolnshire.

An NGO, Rights Watch, has issued legal proceedings against the Attorney-General's refusal to publish his advice

to the government on the basis in international law of the drone policy. Watch this (air)space.

Female Genital Mutilation

Last year saw the long-awaited, much-heralded, historic first prosecution for Female Genital Mutilation (FGM). It was widely perceived to have failed.

The jury took 30 minutes to acquit Dr Dhanuson Dharmasena who had stitched a woman's labia following her giving birth at the Whittington in London in 2012. Following the verdict, a stream of criticism was voiced about the decision by DPP Alison Saunders to proceed. Such rebuke is misconceived for two reasons.

First, an acquittal after a Crown Court trial is not necessarily a "failure". To recapitulate: the woman had undergone "Type 3" FGM as a child in her native Somalia. This involves the sewing of part of the labia. During labour, the doctor made two incisions to ease the birth. Thereafter he sewed her back up. Was restoring the patient to the condition he found her in an act of FGM? This was therefore a highly fact-sensitive and difficult decision. Indeed the court (ultimately Sweeney J) had on three occasions rejected applications by the defence to dismiss.

Secondly, it is unquestionably the case that the mere fact that a prosecution was brought possesses significant symbolic value. Those of us who work closely with FGM survivors, can confirm that the fact of the prosecution itself has radiated through affected communities. Whereas in the past Britain has been seen as something of a "soft touch" compared to countries such as France, where there have been over 100 prosecutions, the legal and cultural climate is beginning to change. Frontline services, such as health, education and social services are becoming sensitised to the issues around FGM. This is an ongoing and iterative process and members of the Bar are active in the dissemination of legal guidance and human rights frameworks.

As I write this, we are approaching the UN's international day of zero tolerance for FGM. The latest data published by the Health and Social Services Information Centre reveal that in the April-September period last year 2,421 cases of FGM were reported in the UK (785 in London). Many are historic: women who have endured the legacy of this harmful practice coming forward after enduring years of pain, suffering and trauma. But the statistics help crystallise a clearer picture of the scale of the problem in the UK. Internationally UNICEF has upgraded previous estimates of the number of young women and girls who have suffered FGM worldwide from 130 million to 200 million. These figures confirm what those of us who have been active in the area have long said: the scale of this crime is significant not only globally but in this country also.

Two things remain certain. First, that there are likely to be more prosecutions domestically. Secondly, however, the complex socio-cultural drivers of the phenomenon require imaginative, proactive – and properly funded – interventions beyond the punitive. Indeed, there remains the real risk that an over-emphasis on a prosecutorial approach will have the counterproductive effect of driving the practice further underground. If the ultimate objective is to enhance the protection of at-risk young women and girls, we need to reverse-engineer our suite of interventions to optimise the efficacy of the limited resources we are devoting to this area.

That said, progress has been made. The courts have been intervening. Along with colleagues in the Bar Human Rights Committee, we advised Parliament to create FGM Protection Orders to provide a range of preventative legal powers to protect at-risk girls before they are mutilated. These include the confiscation of passports and prohibition from removal from the jurisdiction. The Government not only accepted our recommendation, but accelerated its implementation. A number of cases have already come before the High Court. I am proud to say that the Bar played a pivotal part in drafting the legislation and advising on its Parliamentary passage. So Protection Orders have been made: girls who would have been mutilated just two years ago have now been brought under the protective shield of the court.

Much more needs to be done. But the direction of travel is the right one. We must remain resolute in countering arguments of cultural relativism with an unswerving commitment to the vindication of the rights of at-risk girls. FGM is and remains an egregious violation of human rights, a form of social control and violence against women, and a crime. It has nothing to commend it.

Coercive control

In another area of gender-based violence, the end of 2015 saw the coming into force of a new offence of Controlling or Coercive Behaviour in an Intimate or Family Relationship. While the provisions under the Serious Crime Act 2015 have been drafted in a gender-neutral fashion, the empirical realities of the social problem are plain. In the 2014-15 period, 84 *per cent* of victims of coercion were women. These are often hidden crimes, but as with other forms of silent suffering such as FGM and sexual abuse, there is a slow shift

towards a greater understanding of the sheer extent of its prevalence.

In December, Citizens Advice reported an annual increase of 24 *per cent* in the number of people seeking their help around domestic abuse issues, amounting to over 5,400 referrals. This coincides with the HM Constabulary report the same month that the number of domestic abuse cases in England and Wales had risen by 31 *per cent* in the last two years (353,000 in the year to March 2015).

Therefore the principle of extending the criminal law to penalise a range of oppressive and exploitative behaviours which while stopping short of serious physical violence nevertheless act to severely damage the lives of vulnerable people isolated within families and abusive relationships is to be welcomed. The law is directed at providing some relief from patterns of sustained humiliation, threats and intimidation that destroy the confidence, independence and self-esteem of some of society's most vulnerable and abused people. It will be sufficiently flexible to encompass modern forms of domination such as controlling social media accounts or surveillance through apps. It carries a maximum sentence of five years' imprisonment.

However, unlike the regime around the Modern Slavery Act, it does not provide victims with a recognised statutory respite from being prosecuted where they have committed an offence arising from being coerced. This raises the possibility of an inbuilt structural deterrent against certain victims reporting their abuse. Plainly the prosecuting authorities will have public interest tests to apply, but it would have been preferable to have had protections for victims coerced into crime placed on a transparent statutory basis. Experienced practitioners know all too well the formidable obstacles presented by running a duress defence.

The fact is that one can be imprisoned behind bars that are visible and those that are not. A prison is not just a place, but a debilitating state of mind. The kind of conduct criminalised by the new law has created the social incarceration of thousands of vulnerable women, whose misery finds its expression in a slew of serious mental health problems, substance abuse and self-harm. This legislation is important and necessary. Due to the specific characteristics of our evolved physiognomy and psychology, human beings tend to live within families and bonded pairs. We live within them, but we can be lost within them also. These laws need to be both used and strengthened.

International esteem

Finally, with the ongoing uncertainty around two-tier contracts, the exact extent of the existential threat to the criminal bar remains unclear. However, none of us can be under any illusion but that further battles loom on our drone-shadowed horizons.

Yet when we are embroiled in the mundane infuriations of simply claiming reasonable travel expenses to Sheffield or Sheerness – let alone fair payment for the countless antisocial hours of painstaking work on telephonic evidence served electronically (but I mustn't get you started) – it is easy to lose sight of what we are and what we do. It is here that a little continental and conceptual distance is refreshing and restorative.

"The fact is that one can be imprisoned behind bars that are visible and those that are not. A prison is not just a place, but a debilitating state of mind."

During 2015, I travelled to both West and Central Africa in relation to a number of human trafficking and gender-based violence issues. In particular, on behalf of the Bar Human Rights Committee (and in collaboration with UNICEF) I was able to experience first-hand the dire human consequences of the civil war in the Central African Republic. Our ambition is to use the expertise and experience that we as legal practitioners have to provide advice on both better protective mechanisms for victims of sexual and serious violence and capacity building to enhance the rule of law and respect for human rights.

I have to tell you that our criminal bar and our criminal practitioners – you – are held in the highest international esteem. They are valorised for their professional integrity, unsurpassed advocacy expertise and unfailing commitment to social justice and human rights initiatives (often pro bono) across the globe.

They are one of the prime assets of the legal profession in the UK. You are. I wish you well in 2016. ■

Dexter Dias QC practises in criminal and human rights law from Garden Court Chambers (London) and has been conducting research at Cambridge and Harvard Universities. Follow @DexterDiasQC

Overhaul of Offences Against the Person

Preface

Reforming the Offences Against the Person Act 1861

Contributors

Law Commission Contributed

On November 3, 2015 the Law Commission published a scoping report entitled "Reform of Offences Against the Person" (Law Com No.361), calling for a comprehensive overhaul of the law on non-fatal crimes of violence. The present law is largely set out in the Offences Against the Person Act 1861, though the review also covers assault and battery, which are common law offences, and assault on a constable in the execution of his duty, contrary to the Police Act 1996, s.89.

Problems in the Existing Law

The most obvious problem with the 1861 Act is its lack of accessibility. It is written in Victorian (sometimes pre-Victorian) legalese, and many of the sections set out so many overlapping requirements and alternatives that it is difficult to work out either how many offences the section creates or whether any particular factual situation is caught. Crucially important terms such as "inflict" and "maliciously" have no clear meaning and are overlaid by several layers of judicial interpretation, each different from the last. The Act still refers to obsolete concepts such as "felony" and "penal servitude" and fails to state the penalty for several of the offences: this has to be worked out from references in an interlocking series of other statutes. As argued in the report, the Act is in effect written in code and gives victims and defendants no guidance on what the law actually is.

Secondly, the 1861 Act contains many narrowly-defined offences which are either never used or fully covered by more general offences. Examples are attempting to choke with intent to commit an offence, assault on a magistrate preserving a wreck and failing to feed servants and apprentices.

Last and most importantly, the 1861 Act as it now stands does not provide a logical grading of offences. The offence of assault occasioning actual bodily harm under s.47 ("ABH") is meant to stand mid-way between common assault and the offence of maliciously inflicting grievous bodily harm under s.20 ("GBH"). However, the maximum sentence for ABH is five years, the same as for GBH; even though, for ABH, the defendant need not intend or foresee any harm to the victim. By contrast, the maximum sentence for common assault is six months.

One effect of this is that a huge swath of cases involving low level injuries are not catered for at an appropriate level: under the present law they are inevitably either under-charged or over-charged:

The CPS charging standard recommends that, if the injury caused is of such a low level that the likely sentence would be six months or less, the case should be charged as common assault rather than as ABH. This ensures that the case remains in the magistrates' court; but the fact of injury will not appear on the record and victims will often, and understandably, feel that the criminal justice system has not taken their injuries seriously.

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If charged as ABH, many of these cases end up in the Crown Court, even though on conviction the defendant is likely to receive a sentence of six months or less, which could have been imposed by a magistrates' court. The sentencing statistics for 2014 show that **34.5% of all sentences for ABH passed by the Crown Court were for six months or less** (including suspended sentences of six months or less and non-custodial disposals). This represents an enormous waste of expensive Crown Court resources for cases which should never have been allowed to reach that court. It also shows that the CPS charging standard, which should have diverted most of these cases into the magistrates' court, is not effective for that purpose.

The Recommendations

The Law Commission's report is the latest in a long series of proposals for reform of this area of law, dating from the 1970s and including a draft Bill published by the Home Office in 1998. The report recommends enacting that Bill, with some changes designed to reflect subsequent developments in criminal law and practice. The principal offences recommended in the report are as follows:

- **Clause 1: intentionally causing serious injury**. This corresponds to the existing offence under s.18, of wounding or causing grievous bodily harm with intent. Like the existing offence, it will carry a maximum life sentence. The major changes are:
  - The new offence is defined solely by reference to the causing of serious injury and does not mention wounding. A wound will be caught if and only if it amounts to a serious injury.
  - The causing of serious injury with intent to resist arrest, at present one branch of the s.18 offence, becomes a separate offence. The Law Commission suggest a fixed maximum sentence, of more than seven years but less than life.
- **Clause 2: recklessly causing serious injury**. This covers the more serious cases now included in the s.20 offence (GBH). As at present, the reckless transmission of infections such as HIV is in principle included, though the report acknowledges that there is pressure for these cases to be de-criminalised and suggests a wider review to consider the medical aspects. The major changes are:
  - In the s.20 offence (GBH), it is sufficient that the defendant foresaw the risk of some harm. In the new offence, it will be a requirement that the defendant foresaw a risk of *serious* injury. In other words, the harm required to be foreseen will match the harm required to be done.
  - Like the cl.1 offence, the cl.2 offence does not mention wounding, and only covers those wounds that amount to a serious injury.
  - The proposed maximum sentence is seven years, instead of five years as at present.
- **Clause 3: intentionally or recklessly causing injury**. This is the general injury offence. It covers all cases excluded from the first two offences, either because the injury caused was not serious in fact or because the defendant did not foresee that the injury could be serious. However, unlike in the existing ABH offence, the defendant must foresee the risk of *some* injury. In practice, this offence will cover the less serious cases now included in GBH and the more serious cases now included in ABH. The proposed maximum sentence is five years.
- **Aggravated assault**. This offence has no clause number, as it was not included in the 1998 draft Bill. It is based on the existing ABH offence, in that it consists of any assault that in fact causes injury, whether or not that injury was intended or foreseen. However, it will be triable summarily only, and the maximum penalty will be 12 months. It will be used for the following cases:
  - The less serious cases now included in ABH; that is, where a sentence of no more than 12 months is foreseen if the defendant is convicted.
  - Cases where some injury is caused but which at present are charged as common assault, following the CPS charging standard.
  - Cases where injury is caused but which cannot be charged under cl.3 because it cannot be proved that the defendant intended or foresaw any injury.
- **Physical assault**, corresponding to the existing offence of battery, and **threatened assault**, covering those assaults which do not amount to battery (for example, blows that miss and verbal threats).

Other changes are that offences involving poisons, explosives and railways are simplified, the offence of threatening to kill is expanded to include threats to cause serious injury or to rape, and several little-used offences (such as impeding escape from a shipwreck and failing to feed servants and apprentices) are abolished. The offence of assaulting a police constable would be revised to require that the defendant either knew that the victim was a police constable or was reckless as to whether or not the victim was a police constable.

Sentencing

The new offence of aggravated assault, though triable only in the magistrates' court, would have a maximum sentence of 12 months, as would the revised offence of assaulting a police constable. This would have two important consequences.

One is that many more cases would be tried in the magistrates' court. The definition of a low level injury, in the CPS charging standard, would be any injury where the likely sentence is 12 months or less (instead of six); and the recommended charge in these cases will be aggravated assault rather than common assault. This would lead to considerable financial savings. The sentencing statistics for 2014 show that, out of all sentences passed by the Crown Court for ABH, **73.5 *per cent* were for 12 months or less**. Under the new system, all or most of these cases would be tried in the magistrates' court as aggravated assault.

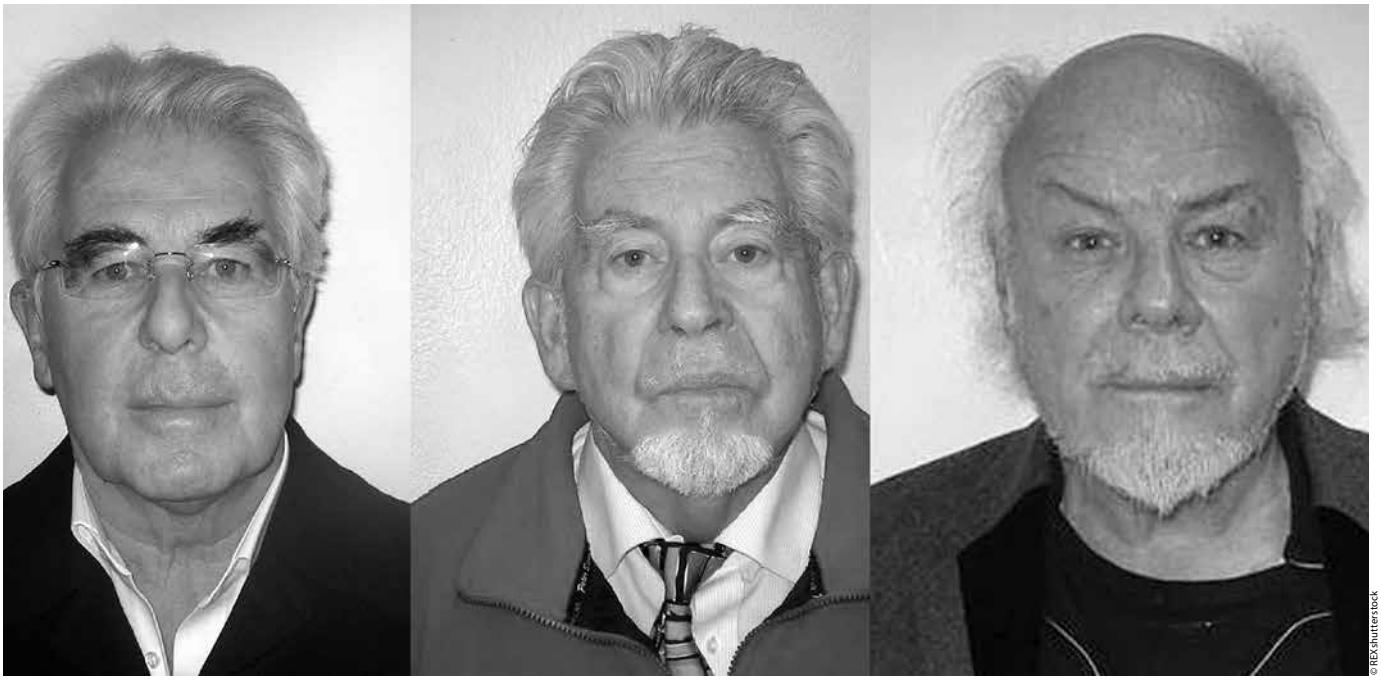
The other is the need for an exception to the existing sentencing provisions. Under the Powers of Criminal Courts (Sentencing) Act 2000, s.78, a magistrates' court has no power to impose imprisonment for more than six months for any one offence, unless this limit is expressly excluded by statute. The Criminal Justice Act 2003, s.154 re-enacts this section in almost identical terms but with a limit of 12 months instead of six, but this new section has not yet been commenced. The recommendation is that the new offence of aggravated assault should have a 12 month maximum sentence whether or not s.154 has been commenced. If it has not, the sections creating the new offences of aggravated assault and assault on a police constable should contain an express exclusion of the six month limit in the 2000 Act.

Conclusion

In short, the advantages of the scheme proposed by the Law Commission in their report are twofold. First, the cumbersome and archaic Act of 1861 will be replaced by a modern code that is easy to understand and navigate and which arranges the offences in a coherent system of grading. Secondly, as recommended by the Leveson Review of Efficiency in Criminal Cases at the beginning of this year, the expensive and time-consuming procedures of the Crown Court will no longer be used for the numerous simple cases of low level injuries with which the magistrates' court is fully equipped to deal. ■

Law Commission link: http://www.lawcom.gov.uk/offences-against-the-person-modernising-the-law-on-violence-2/.

Historic Sexual Abuse



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Preface

Misogyny within the criminal justice system or a different societal perspective of accusations?

Contributor

Richard Gibbs

Every era, it would seem, has its scares and bogeymen. In the middle and dark ages it was witches, witchcraft and black magic. In postwar America it was McCarthyism and the almost hysterical tsunami of accusations which were hurled at those suspected of being communists or supporters of the Soviet Union. Its hard to imagine that historians of the future, looking back at the current era, will not in some way consider that the very real problems produced by the way in which the sexual abuse of children and others, in the 1970s, 80s and into the 90s was ignored, is the foundation of a modern series of bogeymen and societal fears.

The Wrongs of The Past

There appears little doubt that over the last 40 years, and probably longer, there has been a serious shortcoming in the way that the police and others investigated accusations of sexual assault and rape. Whether it was an inherent misogyny within the criminal justice system or a different societal perspective of accusations perhaps matters less than does a recognition that people were abused, mentally and physically, and those in positions of authority and control did little to nothing to deal with it; they didn't take it seriously, they didn't address it and for those of us in the criminal justice system today, it seems evident that there were real miscarriages of justice because of this. There has been a grim roll call of celebrities convicted of sexual offences in recent years; Rolf Harris, Max Clifford, Paul Gadd (AKA Gary Glitter), Ian Watkins, Stuart Hall, Jonathan King, Chris Denning and Fred Talbot among them; many were household names and most were considered at the time of their trials and convictions to have been powerful figures within the world of entertainment and broadcasting, so powerful in fact that it had not been possible for many of their hitherto accusers to come forward with their complaints.

Anybody who says that such complaints should not have been investigated and investigated thoroughly, is surely wrong. The passage of time should not of itself provide an automatic barrier to prosecution and those who have been abused should feel able to make their complaints with the expectation that they will be listened to and any necessary investigations made.

A Pendulum in Danger of Swinging Too Far?

That said, we have to recognise the means by which this end is reached. That, of course, is ultimately arrest of suspects and their subjection to questioning; resulting in possible charge, trial, conviction and potentially prison. All of which is as it should be, just as it should be for any criminal matter. But let those of us who see the court system processing these matters be honest with ourselves and with everyone else;

these crimes, alleged or actual, are not like others. They are in a different category of societal judgment to others. They have a resonance and an impact greater than nearly any other crime and that brings with it an attitudinal difference in those involved in the investigation and management of those cases. Again, perhaps that is as it should be; the criminal justice system, from the police officer making the initial arrest through to the Judge passing sentence after a jury have adjudicated the facts, is a human system and not an engineering construct. That means it has all the strengths of human ingenuity and thought but all of the inherent weaknesses of the human condition. Perhaps in the field of historical sexual crimes, we see these strengths and weaknesses played out in greater detail than anywhere else.

The Police across England and Wales report an increase in the number of historical sexual allegations and the Commissioner of the Metropolitan Police, Sir Bernard Hogan-Howe, has rightly remarked – in his announcement of the Henriques inquiry – that this is the most difficult area of modern policing. It is a new challenge for the courts and one that the judiciary and advocates alike have been hugely aware of for some time.

Victims v Complainants

But perhaps the time has come for a degree of caution. These accusations, when proven, rightly have a serious and long lasting effect. But when such accusations are fabricated or malicious, they have an equally long lasting effect. It cannot have been right that the victims of Rolf Harris and the others were left to suffer because the Police and the authorities refused to question matters; equally it must be wrong that men such as Lord Brittan went to his grave not knowing he had been cleared of rape allegations, again because the police were slow to see what was infront of them and to publically proclaim it.

A Need For Some Bravery

Had the police been stronger in the 1970s, and over the last 30-40 years in standing up for the conclusions borne out by the evidence and not simply going with the prevailing tide of opinion, it stands to reason that many of the terrible acts of convicted abusers such as Stuart Hall and Max Clifford, would not have gone unpunished for decades. But we now seem to have entered a dangerously Kafkaesque world in which any allegation – even if evidentially deeply flawed – is taken at face value and little, if any police discretion or judgment is applied. Nobody would say it was right for an assault or murder investigation to be mounted beyond the preliminary stages when the only evidence was an unsubstantiated and uncorroborated allegation from someone who lacked credibility, so why should that not be the case in sexual allegations also? Of course some will say this is to say that true victims will not be believed and that their suffering will go on, but that is not the case.

Why can we not expect the police to exercise judgment and objectivity; to investigate a case where the evidence leads and not to force prosecutions where the very tests set down by the CPS simply is not met? And why can we not expect the police to apologise when they get it wrong, as sometimes they always will?

The answer probably lies somewhere in the philosophy which underpins the Orwellian logic of calling a complainant a "victim" from the outset; seeking to have investigations lead by the said "victim" and not by the evidence and a growing institutional inability to acknowledge error.

In doing this, there is a grave danger that we are repeating the past; allowing people to be victimized rather than protected and doing so because we fear to put our heads above the parapet and say when we have got it wrong. Simply making an allegation should not be something that almost automatically leads to reputational destruction.

Field Marshall Lord Bramall will always be remembered through the prism of the allegations made by someone who's true identity (and the nature of the allegations) he never knew. The fact that the investigation was terminated, his innocence left intact, will not remove that stain. We must be careful of drifting into McCarthyism when what we need is a calmer, sympathetic but objective approach.

> "The fact is that one can be imprisoned behind bars that are visible and those that are not. A prison is not just a place, but a debilitating state of mind."

Our history is one of ignoring genuine complainants and allowing wrongdoing to take place on a horrendous scale, fearing the strength of "the establishment". We must not seek now to remedy that by fearing the growing "victim" establishment and fearing to follow the evidence rather than simply assuming that an accusation is as good as empirical fact. If we do that, we will find – as is always the case – that history only repeats itself as farce and that we will simply swap one set of victims for another; instead of ignored victims of abuse, there will be those who have been branded child abusers, rapists and pedophiles and they will be left with a legacy in many ways just as bad.

An Apology May Be A Good Start?

A good start in keeping our heads would be for the police to stop trying to be in the vanguard of the rush to be seen to be doing something but instead to rely on their judgment and have the courage to follow the evidence and not just the dogma of the complainant always being right. Language has an important part to play in this; complainants are sometimes victims, but not always and not automatically so. Admitting error is the first step to correcting fault; we in the criminal justice system have admitted error in the way we dealt with sexual assault allegations in the past. Now is the time for the Police to admit that in the shambolic Operation Midland, they have – with the best of intentions – made grave errors in their current approach.

Over to you Sir Bernard; apologizing can be a sign of strength and judgment. ■

Barrister, No 5 Chambers

Legal aid – This Government Does Like to Tease

Preface
Comment

Contributor
Dan Bunting

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Following delay, deferment, and several (probably unlawful) extensions of the 2010 Legal Aid Contract, the MoJ have given up the fight against the current proposals to introduce competitive tendering in the Criminal Legal Aid market.

How did we get here? Faced with the (self-imposed) dilemma of how to make further cuts to firms that have already been cut to the bone, the only way of squaring that particular circle was to force consolidation.

The first proposal, PCT, relatively quickly died a death. The next, Two Tier, was more subtle. It allowed every firm to stay in the Legal Aid market, but limited the number of firms that could do duty solicitor work by only granting 527 contracts (which would leave fewer than 527 firms, as some would end up with multiple contracts).

This proposal had failed once on procedural grounds on a Judicial Review, although the next version survived a further High Court challenge. It also managed to survive several strike attempts. The MoJ remained committed.

Nonetheless, it was put back, and put back. July 14, 2015 (supposedly the final end date of the 2010 contracts) came and went with existing contracts being extended, and extended again.

On October 15, 2015 the applicants for the new duty contracts discovered their fate. What followed was an immediate deluge of further litigation – a Judicial Review of the scheme, followed by 99 individual procurement challenges in most areas of England and Wales.

The MoJ announced that these would be rigorously defended. Directions were made, disclosure was ordered, and we looked set for a Spring hearing date (and a further extension to the existing contracts). And then, not quite out of the blue, the plug was pulled on January 28, 2016.

Most people cheered the outcome, but after the initial jubilation wears off, there is still not any level of certainty. The existing arrangements (actually the pre-January 15, 2016 arrangements, which won't mean much to you unless you are a duty solicitor) are to continue whilst the replacement scheme is devised and announced.

We are told that this will be coming in September, but on past experience, don't hold your breath. The MoJ have a choice as to whether they will undertake a competitive or non-competitive procurement round, and within that there are a wide variety of possible models. What will they do? That remains to be seen.

After several years of almost constant revolution, we are back where we were. Will the experiences of the last few years scare the MoJ off any new scheme, or will they want revenge for what is, however it is couched, an embarrassing backdown?

They have a luxury, and that is that there is no need to make any cuts. The legal aid budget has shrunk at a much greater rate than other areas of spending. Additionally, processed crime is falling, and the pushing of guilty pleas as early as possible is carrying on unabated, with consequential savings.

It was these savings that allowed Mr Gove to not only scrap two tier, but cancel the proposed further cuts to solicitors (and some barristers) fees, without there being any increase to his ministerial budget.

This is all to be celebrated, but we should be careful not to be too self-congratulatory. Even if we ignore inflation, the last few years have seen cuts to solicitors and assigned counsels fees, and there is no sign of any reversal of that. Further, for criminal legal aid lawyers, there is no chance of remuneration going up. Which means an effective pay cut year on year.

And so we wait as to what is coming next. We know that there are changes to the AGFS and LGFS in the pipeline, as well as something happening on the limits of inhouse advocacy. What does this all mean? Where will we be in twelve months? What will the legal aid market look like in five years? At the moment, to those vital questions we are none the wiser.

"*May you live in interesting times*" is supposedly an old Chinese curse. Legal Aid lawyers know the meaning of this all too well, and after many turbulent years, we could be forgiven if we yearned for a year without change. Sadly, there is little chance of that. ■

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The Safest Shield: Lectures, Speeches and Essays

Author: Lord Judge

ISBN: 9781509901890.
Price £22.50

During and after his six years as Lord Chief Justice, Lord Judge delivered numerous speeches and lectures – to fellow Judges, to the Judicial College, at the Lord Mayor's Banquet, in his Inn and in his native Malta. The texts of many of these talks have now been gathered together in this volume. They include a number of issues he felt deeply about, from the role of the Judges to the independence of the judiciary and the rule of law; from the separation of powers to the accreditation of expert witnesses; from telling Judges what their duties and responsibilities are to explaining to the outside world the difficulties Judges have in discharging those duties; and most especially sentencing. The title is taken from Sir Edward Coke ("The law is the safest helmet; under the shield of the law no one is deceived"). Sad to say, Coke wound up in the Tower for refusing "to see his responsibilities in quite the same way as King James I".

The book is broadly divided into six sections – towards a constitution, continuing constitutional concerns, liberties and rights, administration of justice, the judiciary and personal reflections – but the themes overlap. Unlike Coke, Lord Judge did not have to worry about a monarch who felt herself to be above the law. He did, however, have to cope with an over-active Executive. He was on the Bench when the government announced the abolition, without prior consultation, of the role of the Lord Chancellor. Earlier, in 2001, he was one of the team that had to explain to Tony Blair that putting the courts under the Home Office was absurd. To the end he waged such campaign as he could against Henry VIII clauses.

Lord Judge discusses how much has changed in the course of his own judicial career. When he became a Recorder in 1976 he received no training because no judicial training existed. After two years he was called into a seminar chaired by a Lord Justice (later Law Lord) and assured that, "the Judge could run the trial on the basis that provided he repeated and emphasised that the jury was entitled to reject any comment made by him, he could make virtually any comment he liked. That is not how we do it these days". The dictum of Lord Goddard in 1958 that no jury could put weight on the evidence of a small child was then good law and remained so. In 2010 in *R. v. B* Lord Judge presided over a Court of Appeal that forever changed the way in which we look at children's evidence. He repeated this in his 2013 Toulmin Lecture: "We should be considering each individual child as the individual he or she is, at the age and with the level of the maturity that he or she has." He looked forward to the time when no child witness would need to go into a court building.

Perhaps most striking is his recognition of how things could be better. In an IT age, why should jurors only be presented evidence as if we still lived in the age of hard copies? "I do not understand why justice is less likely to be delivered in a criminal trial if a fair timetable is imposed and the advocates are required to stick to the points that matter, instead of travelling over every bit of land without a stopping place." His crusade to get advocates to ask questions rather than to make statements ending with "Didn't you?" is ongoing. Even his colleagues are not immune. "The day should come when everyone who is appointed a full-time Judge should have been appraised when sitting as a part-time Judge."

The issues Lord Judge deals with are still with us. The text is never less than beautifully written. **David Wurtzel** ■

This review was first published in *Counsel's* February 2016 issue.

Justice in a Time of Moral Panic

The Justice Gap

Available online: http://thejusticegap.com/proof-magazine-justice-in-a-time-of-moral-panic/ Price £15

"Never again" is the mantra. Whether this is the latest high profile miscarriage of justice, or the news that we failed to expose the darker side of a national treasure whilst he was still alive, this is an often heard refrain from all sides. But do we ever learn? Or are we condemned to repeat the mistakes of the past, albeit in a different form? These are a few of the questions that The Justice Gap looks at in the first issue of their magazine – *Proof.* Sub-titled *Justice in a time of Moral Panic*, the magazine is a collection of essays on that theme. Unsurprisingly, given the current political climate, much of these are focussed on sexual offences, especially historical ones. The majority of essays seem to be "swimming against the tide" in suggesting that the moral panic that has ensued has over-ridden our principles of justice.

But it is not just sexual offences. When the "Irish" cases of the 70s began to unravel, this shook the faith in British justice to its core, and lead to many changes. But have the problems been solved? A question asked here is whether Muslims are the New Irish? And the answer is a tentative (and worrying) "yes".

An underlying link can be seen. Just as "innocent until proved Irish" was a joke with a telling subtext in it, alleged Muslim terrorists (and terrorist sympathisers) and those accused of sexual offences (many allegedly committed many years ago), can often feel that they are having to prove their innocence. There is also a sense of *deja vu* identified with sexual offences. The history of various "care home" scandals such as Bryn Estyn are traced, and a compelling case is made for a more sceptical, or at least more balanced, approached to the issues. The essays are not all one sided. There are pieces written by the DPP and others who would normally be seen as people who take a contrary view. These put the case for the opposing view, and the magazine is all the better for that.

As Ms Saunders says; "I don't want to see new myths replace old", which is a view with which I suspect all the authors in the magazine would agree with, except they may mean different things by it their agreement.

It is a full length magazine that makes an invaluable contribution to the debate and presents a variety of views, all of which are well-written. And as such, it is worth the price. **Dan Bunting** ■

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