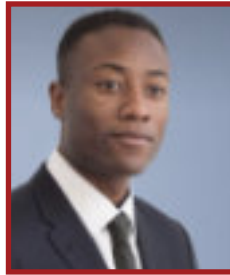


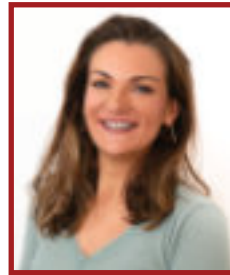
A Fine Example of a Broken System

Though it's approaching four years since the world as we then knew, was plunged into chaos, think back to March 2020 and just how quickly everything changed almost overnight. There was an outbreak of a worldwide virus and the postulation at that time was that nobody was safe. It sounds like the film set of a Hollywood dystopian movie, rather this wasn't limited to Hollywood, this was everywhere, including England and Wales. England and Wales like many a place has a wide-ranging diaspora, varied tiers of economic class, a democratic state with comprehensive beliefs. Nevertheless, the government was presented with the challenging task of trying to keep each one of us safe amidst an uncharted sea of uncertainty.

The principal way of achieving this was the implementation of a national lockdown. On 23 March 2020, the then Prime Minister, Boris Johnson announced a nationwide lockdown in an attempt to restrain a



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rapidly spreading outbreak of COVID-19. This required the halting of many sectors and ordering the public to stay at home. This was incrementally lifted and reintroduced over 2020 and 2021 in accordance with the fluctuation of infection rates.

An undoubtably flashbulb memory for us all would be the

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How the Bar Standards Board could Accelerate Innovation at the Bar

Back in September 2020, we forecast the increased emergence of genuine 'Bar firms' which emulate firms of solicitors but are owned and managed by barristers and non-authorised persons. Such Bar firms, we predicted, would seize upon the regulatory regime introduced by the Bar Standards Board (BSB), after it became a licensing authority in 2016, to be licensed and regulated as BSB entities, more commonly known as alternative business structures (ABSs). According to the BSB's Entities Register, last updated on 9th February 2024, there are only 13 BSB licensed bodies, most of which are either solely owned by a previously self-employed barrister, or jointly owned with their spouse. That being said, we acted for a client who was licensed by the BSB effective 12th June

2023, and our client still does not appear on the Entities Register anywhere. So, it's possible there are a few more BSB entities out there which also do not appear on the Entities Register. Still, it begs the question, "why has the take-up been so slow?" Undoubtedly the answer is multifaceted, but I offer my twopence worth as a solicitor who specialises in legal services regulation and who, once upon a time, completed the Bar Professional Training Course (as it was called then), attended my dining sessions at my Inn, trundled behind counsel on mini pupillages, shadowed judges, and was called to the Bar by Inner Temple in 2012. The experience I garnered from that training period helps inform the advice I deliver to barristers, chambers and BSB entities. Looking through that prism, I also see that the issue here is not endemic non-acceptance by the Bar, but the regulatory framework for licensing BSB entities implemented by the BSB. I believe the following changes to the BSB's framework for licensing BSB entities would stimulate innovation and appetite for the Bar to embrace BSB entity regulation:

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Features

11 The State of English Justice

"Oh dear, how sad, never mind." This is the almost sotto voce retort from anyone in power with responsibility for every aspect of the Criminal Justice System for the last 15 years. They don't care and they aren't interested. It's not a justice system anymore because there is no justice.

By **Charles Blatchford**, Barrister at St Philips Chambers

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Life as a Law Reporter

Law reporters play a crucial role in documenting legal precedents

I came to law reporting looking for a change.

Having worked as a paralegal with a view to qualifying as a barrister, I was seeking other avenues of work where I could develop my skill set but do something a bit different. Law reporting appealed to me because it was an opportunity to be in court and close to legal developments.

Law reporters play a crucial role in documenting legal precedents. They provide a comprehensive and detailed account of the facts, legal arguments, and the reasoning behind judicial decisions. This aids in establishing and maintaining a consistent body of legal principles that can be relied upon by practitioners and courts alike.

There are several reasons I enjoy law reporting at ICLR. Firstly, the work is endlessly varied. No two days are the same. There may be a new point of law being established or precedent set. Sometimes a really important procedural point will come up that somehow no one had thought of before. Secondly, as a law reporter you spend time in court. Going to the Royal Courts of Justice and sitting in on cases that will shape the law, and people's lives, is a real privilege. Furthermore, you are privy to judicial intervention and reasoning, which also challenges you to think about how things "ought to be". Thirdly, working at ICLR offers continuous learning. Engaging with a diverse range of cases and legal issues provides an opportunity to deepen one's understanding of the law.

I have reported cases across so many different practice areas e.g.:

1. **Al-Masarir v Kingdom of Saudi Arabia** considered whether someone can claim for personal injury as a result of harm suffered from the installation of spy software on their electronic devices.

2. **R (AA) v National Health Service Commissioning Board** explored whether the NHS has a statutory duty to provide gender identity services within a specific timeframe.

3. **R (JJ) v Spectrum Community Health Community Interest Co** determined that a quadriplegic prisoner did not have a right to be fed boiled sweets contrary to medical advice.

Finally, ICLR has a collegial atmosphere in the truest sense. You are working with a variety of legal professionals and dedicated editors. Many of your colleagues had previous careers as barristers or solicitors. Some have a background in publishing. They all bring a huge wealth of knowledge and curiosity. Questions are encouraged because the detail really does matter. Whether it is a stylistic point or a more substantive one - ask away! Even barristers and judges do not always get it right, so it is your job to do so.

The law reports are valuable in all the different parts of the legal profession and provide accurate, accessible and objective accounts of the state of the law in any given area. If you are curious about the law, whatever stage you are at in your career, I can wholeheartedly recommend becoming a law reporter at ICLR.

Article by Agatha Barta, Law Reporter in the Court of Appeal (Civil) Division.

If you would like more information about a career as a law reporter please email ICLR at

enquiries@iclr.co.uk



Bar Council and PIBA secure fixed recoverable costs uplift

The Bar Council and Personal Injuries Bar Association (PIBA) have hailed changes to the fixed recoverable costs for advocacy fees in civil cases that will see a 23.5% increase in fees.

The changes come after the Bar Council and PIBA argued first that advocates must be paid for work done when cases are vacated or settled close to trial, and second, that fees had fallen far behind where they should be as they had not been updated in line with inflation for over a decade.

The Government has announced that the changes, to be brought in through two Civil Procedure Rules statutory instruments (one that came into force last October and one that will come into force this April), will uprate fees in line with inflation calculated from 2013 to January 2023. Initially, the Government proposed an increase from 2016, but the Bar Council and PIBA argued it must be backdated to 2013 when the fees were last fixed.

In addition, the Government has agreed to introduce measures to make

sure barristers are paid for work done in cases that are vacated or settled late:

- On the fast track (cases of up to £25,000 in value), advocacy fees can be recovered at 100% on the day of the trial and the day before, and 75% two days before trial.
- On the intermediate track (cases of up to £100,000 in value), advocacy fees can be recovered at 100% on the day of the trial and the day before, and 75% up to five days before trial.

Sam Townend KC, Chair of the Bar Council, said:

“The increase in fees and widening scope of fee recovery in cases that are vacated or settled shortly before trial is long overdue and welcome.

“In securing these changes, we argued that barristers should be paid a reasonable fee for work done, and that the costs regime should help, not hinder, settlement and getting the backlogs in the county courts down. We continue to work to secure a



commitment to automatic annual inflation-linked uprating.

“We are really pleased with today’s announcement as the fee increases will particularly benefit more junior barristers who generally carry out this work. As in crime and family work, we need a pipeline of excellent court advocates in order to ensure a workforce to provide good quality access to justice for the public. These changes are a good step in the right direction. We hope that more can now be done on legal aid in crime and family matters to help make a career in these areas of work become sustainable.”

In June 2023 the Bar Council issued a letter before action when Government proposals stopped short of rectifying the problems identified by the Bar Council. In September 2023 the *Bar Council and PIBA submitted a strong response to the Government consultation calling for the system to be reformed*



New data on wellbeing at the Bar

The Bar Council has published the Wellbeing at the Bar Report 2024. The data shows some improvements in wellbeing at the Bar.

Dr Darren Van Laar at Portsmouth University produced the report, and it is based on data from 2023. The survey was distributed to the whole population of UK practising barristers.

The key findings include -

- Overall, barristers reported higher levels of work satisfaction and wellbeing in 2023 when compared to 2021. This was in terms of their psychological wellbeing, workload management

and supportive work environment.

- 73% of respondents agreed they had supportive colleagues and/or work environment, a rise of 6% compared to 2021.
- 61% of respondents felt they were satisfied with their job, the same percentage as in 2021.
- 60% of respondents agreed they tended to have a good mood, 34.9% indicated they tended to feel down or in low spirits and of these, 23.7% reported low psychological wellbeing.
- 49% of respondents reported they were managing their workloads well, but a third (31.4%) indicated they weren’t coping.
- Women, barristers from an ethnic minority background, and those who are younger and more junior had lower overall wellbeing.
- Barristers working in family law had significantly lower overall wellbeing compared to all other practice areas, except for the criminal Bar. Barristers practising in commercial law reported the highest average overall wellbeing.

Chair of the Bar Council, Sam

Townend KC, said: “The latest data reflects an improvement in some aspects of wellbeing at the Bar. This deserves recognition. Notwithstanding the challenges of pay and conditions for parts of the Bar, in particular, in publicly funded work, it is good to see these improvements being made. The publication of this report offers an opportunity to acknowledge the excellent work on wellbeing carried out by some at the Bar, clerks and staff. “Concerningly, younger, more junior barristers, women and barristers from an ethnic minority background reported lower levels of overall wellbeing as did barristers working in criminal and family law. These are the areas we will continue to focus on in terms of personal wellbeing and working condition.”



Investment needed to stop exodus of specialist rape counsel

A new survey of barristers who work on rape and serious sexual offence (RASSO) cases warns that the shortage of specialist barristers qualified to do this work will increase as more practitioners opt out of this type of work.

The survey, conducted by the Criminal Bar Association (CBA), found that 64% of prosecutors said they will not be reapplying to be on the RASSO list, and 66% of defence counsel said they no longer wanted to conduct RASSO cases.

Six out of ten of those surveyed cited poor fee levels as a reason and half pointed to the impact on their wellbeing.

Commenting, Chair of the Bar Council Sam Townend KC, said:

“Rape and serious sexual offence cases are amongst the most challenging of cases for any barrister practising in criminal work. Horrifying personal experiences lie behind each one. This takes its toll on anyone doing the essential work to put these cases to a fair trial. The publicly funded criminal Bar does brilliant work in hugely difficult circumstances.

“The results of the CBA survey provide a clear picture why this workforce is declining in numbers: poor pay, unpredictable working times and

locations, and depressed wellbeing. It is highly significant that over three quarters of barristers under five years of experience surveyed have said they will not consider working in this area.

“The Bar Council will work with the Government and the CBA to seek to do whatever is needed to support and grow this limited group of barristers doing this important work. Financial investment in what is a fundamental public service is, however, an essential part of any solution.”



New ICO standard for lawyers will become “default requirement”, barrister predicts

The new legal standard approved by the Information Commissioner’s Office (ICO) on the 13th of February, will rapidly become the default requirement for law firms and chambers seeking public sector and other work, a specialist barrister said today.

Orlagh Kelly, CEO of legal compliance business Briefed, has been authorised to implement LOCS:23 – the ICO’s first sector-specific certification – and says it means that all those working in and supplying the legal profession now know what standard of GDPR compliance they need to meet.

As with Cyber Essentials – the government-backed accreditation scheme to help organisations protect themselves against common online security threats – Ms Kelly predicts public bodies will soon require compliance with the LOCS:23 standard as a precondition for tendering for work.

Given the importance of GDPR compliance within supply chains, many in the private sector, especially

financial institutions, are likely to follow suit.

As the standard applies to any business that handles a client’s data – such as digital dictation companies and IT service providers – it is likely to become a pre-requisite for law firms and chambers’ own supply chains too.

Ms Kelly says: “The good news is that most law firms and chambers have been working hard to comply with GDPR, albeit without knowing what level to reach. That means achieving certification may not be as daunting as it first appears when reading the 80 pages of requirements.

“It’s not asking you to do any more than you already should be doing; rather, it creates a framework to make sure you have every base covered.”

The legal profession has fallen foul of the ICO many times over the years, most strikingly in March 2022, when leading criminal law firm Tuckers was fined £98,000 after a ransomware attack that exploited its “negligent

security practices”. Ms Kelly says this shows lawyers are not given any special treatment because of their professional status or regulation.

Ms Kelly continues: “The standard will not stop hackers targeting lawyers. But complying with it will ensure they are better protected and more able to manage a data breach. It will also be a major mitigating factor in the event of a breach and an ICO investigation.”

Recertification with the standard is required every three years but part of that process will be providing evidence that training and auditing have been carried out every year.

Ms Kelly says: “The reality is that people are still the biggest risk but with proper training they become the first line of defence and that is a key part of the requirements.”

She concludes: “Law firms and chambers will need to make some upfront investment to achieve certification but it will reduce cost overall, both in demonstrating security to others and warding off costly breaches. The standard will rapidly become everyday business compliance in the legal sector.”

Briefed is one of the first specialist businesses approved to help law firms and chambers prepare for certification.

LSB should renew focus on its core activities

The Legal Services Board (LSB) should renew focus on its core activities, the Law Society of England and Wales said in response to its 2024/2025 business plan consultation.

“We would strongly encourage the LSB to renew focus on its core activities and only take on more workstreams based on regulatory need or gaps in responding to consumer needs,” Law Society president Nick Emmerson said.

“Care should be taken to ensure work isn’t being duplicated by other stakeholders already engaged in research and policy development on common strategic priorities such as access to justice, upholding the rule of law and ethics.

“The LSB’s continued work on equality, diversity and inclusion (EDI) aligns with the Law Society’s priorities.

“The oversight regulator has listened to our feedback and plans to have a greater focus on its core function of protecting and promoting the public



interest, supporting the rule of law and maintaining the professional principles.

“It should also focus on the performance issues of the Legal Ombudsman and increased monitoring and evaluation of the Office for Legal Complaints, to ensure they are fair, transparent and consumers and the profession have confidence in seeking redress.”

On proposed workstreams for 2024/2025, Nick Emmerson said: “The LSB should have the necessary capacity and capability to conduct its work as part of its core oversight functions.

“However, the resources required to manage the dispute between the Chartered Institute of Legal Executives and CILEx Regulation and its independent review of the Solicitors Regulation Authority’s (SRA) intervention into Axiom Ince are not necessarily representative of the usual work undertaken by the LSB. Any increase in their work remit and

resources should be kept under review.”

On access to justice and the rule of law, Nick Emmerson concluded: “We are pleased access to justice is front and centre of this year’s business plan.

“The LSB can provide a useful voice to highlight the issue of access to justice to government, especially as it has become progressively worse over time. The continued freeze in legal aid rates is accelerating an exodus out of legal aid practice, resulting in advice deserts* across the country.

“We encourage the oversight regulator to consider its role in market surveillance and addressing the risk of market failure as a matter of urgency.

“We would be keen to have further discussions about how legal service regulation can support the rule of law beyond setting professional rules and ensuring a robust system for determining complaints against legal professionals.

“We look forward to working closely with the LSB the SRA and others on the delivery of the business plan to help address some of the challenges the profession and the sector are facing.”

People in limbo as criminal court delays worsen

New data released shows the number of open cases in the magistrates’ courts continue to pile up, the Law Society of England and Wales has said.

HM Courts and Tribunals Service (HMCTS) management information reveals that a further 13,420 cases were added to the backlog of cases waiting to be dealt with in the Magistrates’ Court from the last quarter.

Compared to the same time in the

previous year, the open caseload in the Magistrates’ Court has increased by 10.4%, standing at 379,380 by the end of 2023.

Crown Court outstanding caseloads show a year-on-year increase of 7%, from 61,092 to 65,248.

President of the Law Society Nick Emmerson said: “It is clear that the government aim of reducing the Crown Court backlog to 53,000 by March 2025 is wishful thinking.

“Too many are joining the towering backlog of victims, defendants and their families who are waiting in limbo for justice. Our chronically underfunded and overwhelmed criminal justice system cannot meet the demand.

“Urgent investment into all parts of criminal justice is needed to fix this, including criminal legal aid. Defence

solicitors are an integral part of tackling the courts backlog.

“It is the public who will lose out in custody suites and courtrooms across the country unless the government takes immediate action.”



The Law Society
of England and Wales

p1 initial announcement made by BoJo, on 23 March 2020 at 8:30pm, that there was to be a stay-at-home order effective immediately, though only legally effective from 1:00pm on 26 March 2020, through The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

You'll recall the slogan, *Stay Home, Protect the NHS, Save Lives used across England*, most notably across news bulletins, bus stops and adorning the front of the infamous lectern where Johnson and then, Chief Medical Officer, Chris Whitty provided nationwide updates. All non-essential shops and services were ordered to close, and police were granted powers to issue fines, send people home and the ability to break up gatherings of people not from the same household or "support bubble".

The British population was mandated to stay home, except for exercise once a day, shopping for essential items, any medical need, providing care to a vulnerable person, or travelling to work where the work in question was considered essential and could not be performed from home.

Unfairly targeted

However, it would seem that not all laws are created equal. A study, considered by The Guardian, was based on in-depth interviews conducted by the University of Liverpool, as well as report was commissioned by the National Police Chiefs' Council (NPCC) and conducted by academics at the University of Edinburgh.

The study lends itself to findings that institutional racism probably affects how the pandemic powers were executed in some instances. Ironically, this was taking place in and around the time of the height of the Black Lives Matter movement, following the unnecessary murder of George Floyd.

Officers had been equipped with hastily drafted powers to fine people without good excuse for not being at home as instructed by the government. Some officers (thinking in a similar vein to stop and search) spoke of believing certain minority ethnic groups of being more likely to defy the rules, without having any foundation for this belief. Some officers also focused on minority ethnic groups more usually on the receiving end of police attention as potential suspects.

Last resort or lasting legacy?

It has been suggested that police chiefs wanted fines issued as a last resort, with people coming under suspicion

encouraged to obey the rules before any fine was issued. The approach police took, according to the study, "legitimised a differential approach to enforcement that reflected pre-existing biases in policing, including biases in beliefs about which types of people are more likely to break the rules and *deserve and require punishment to secure their compliance with the restrictions*, yet the vast majority of Covid fines were issued to young people, with students and ethnic minorities disproportionately affected.

An argument has been made that minority ethnic people were more visible to police because they lived in "poor" or "problematic" areas where police presence tends to be higher. In addition, more likely to live in smaller, overcrowded homes, with less outdoor spaces. So, when it is easier to find what you're looking for, did it become easier to *fine* what you're looking for?

Despite the figures indicating that a total of 124,771 fines were issued up to October 2023 for violation of pandemic rules, almost half - 54,122 - remain unpaid, totalling £16.7 million in fines. In some cases, individuals owing more than £10,000, with their cases pursued through the courts and via bailiffs.

But it is not necessarily about whether the fines themselves were too high or disproportionate, and there is certainly an argument to be made for that. But attention must be given in respect of just who was systematically more likely to be issued a fine. The ideology is that law is the law, and it governs the land, therefore its enforceability should span the breadth of that same land. So why is it that *'Fines for breaking Covid rules were three times more likely to be handed to black people than white people, and seven times more likely to be issued in the poorest areas than the richest'* - *The Guardian, 31 May 2023*. Food for thought perhaps, or simply a reflection of entrenched views of certain communities by law enforcement.

Time has since revealed that some of our elected government officials on occasion were flagrantly defying the very rules they edicted, the same rules they made sanctionable. However, did they feel the same impact of sanctions as those from the poorest areas? Think of it this way, the strike of the iron fist is more devastating when striking against wood as opposed to striking against concrete.

Now think about it even further, how much more impactful is such a hefty fine for someone who can't afford it in the first place, the Guardian describing that *'those in the poorest areas were seven times more likely to be fined'*, meaning in a roundabout way, even more funds removed from the communities who need it most,



especially when members of those communities may be in receipt of low incomes and/or undertake low paid employment.

The law applies equally to everyone

Surely, this is contrary to the rule of law. Whilst there are variations on the definition of the rule, the principle remains steadfast. On Monday 10 July 2023, the Attorney General Victoria Prentis KC MP delivered a speech to the Institute for Government titled 'The Rule of Law and Effective Government', and described "*The rule of law is the principle that the law applies equally to everyone, that no one is above the law, and, in particular, that the Government must comply with the law and that power is not exercised arbitrarily. It requires that all persons have access to courts that are independent. These courts must resolve disputes objectively in accordance with legal principles. Laws should be accessible, intelligible, clear, and predictable.*"

In its simplest form, the rule of law means that "no one is above the law". For the rule of law to be effective, there must be equality under the law, the management (or mismanagement depending on how you wish to view it) of Covid sanctions does not strike as in keeping with rule above.

Dr. Martin Luther King said: "*Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality tied in a single garment of destiny.*" Spoken in 1963, but still as relevant today.

Jamil Mohammed and Christina Warner, 33 Bedford Row

The barrister magazine will not accept responsibility for information supplied by other parties, views expressed may not necessarily be that of the editor or publishers.



Angela Gifford of Able Community Care Congratulates The Barrister on Edition 100

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1 Make the BSB's discretion a little less discretionary –

according to its Entity Regulation Policy Statement, “in each case, the BSB retains a discretion to grant or refuse authorisation in light of its overall consideration of the risks posed by the entity, the regulatory objectives, and the BSB’s policy objectives”. Although discretion offers the means for a structure which does not exactly fit the licensing criteria to become authorised, it does not provide the certainty to applicants and any external investors that their proposed structure will be approved. After all, who would want to secure funding, put together a detailed business plan and financial forecasts, obtain indicative professional indemnity insurance terms, and incur legal and application costs only to lose it all on a roll of the dice with the BSB? To encourage practitioners and funders into this space, the eligibility criteria need to be fixed but also welcoming of truly alternative business models and ownership structures.

2 Relax the rules on owners and managers –

the BSB wants all owners to be individuals and managers of the business. In addition, the BSB would prefer that at least 50% of owners and managers are entitled to exercise rights of audience in the Higher Courts, and that 75% of owners and managers are authorised individuals. Confused? I bet you are. The upshots are that group structuring and private equity investment from non-authorised persons are both out of the question, which also means the pool of buyers for a capital event is severely restricted. These overly restrictive ownership rules also create illogical circumstances and put businesses at considerable cost when undertaking group structuring and share allotment exercises, even when the governance documents mandate that all regulatory decisions must be made by a barrister. In my view, a better approach would be to focus on the character and suitability of the owners and managers so, even where an entity is wholly owned by a non-authorised person, the regulatory objectives can still be met, and clients are not exposed to harm.

3 Allow BSB entities to hold client money –

as the recent situation with Axiom Ince illustrates, the protection of client money and assets is, of course, of utmost importance, and so my points here are not made lightly. Once licensed, BSB entities may carry on reserved instrument activities, probate activities, administration of oaths, immigration work, and, with the right extension, litigation, all on a direct access basis and on instructions from professional clients. That sounds great, but you can’t effectively litigate, or buy or sell property if you can’t hold client money or give undertakings. Sure, BSB entities are free to use a third party managed account (TPMA), usually a Financial Conduct Authority authorised payment service provider; however, the BSB entity will need to have appropriate systems and controls to



monitor the TPMA, the ability to access client money quickly might be constrained, and it will be an extra expense for the business. My view is that the BSB uses the excuse of client protection to conceal an unwillingness and inability to establish and operate a compensation fund. If BSB entities were permitted to hold client money, they could meaningfully carry on the breadth of reserved activities under their licences and genuinely compete with their Solicitors Regulation Authority (SRA) authorised counterparts, distinguished from them by the ability to deliver high-fidelity advocacy and expert legal opinion.

4 Permit multi-disciplinary practices (MDPs) –

MDPs provide a blend of reserved legal services and other professional services associated with other non-legal professionals. The Thomson Reuters Institute’s 2020 Report on the State of the Legal Market concluded that clients would “continue to drive all service providers, including law firms, toward multi-disciplinary practice-type services designed to provide integrated solutions to business problems” with a warning that “the fundamental choice that most law firms face is to adjust to the new realities of the marketplace or face an increasing erosion of their abilities to compete effectively”. The SRA allows ABSs to operate as MDPs, so it is difficult to reconcile the prohibition by the BSB of MDPs within its regulatory framework. To be fair to the BSB, its Entity Regulation Policy Statement explains that “as both the BSB and those it regulates gain experience, and as the market develops, the BSB will consider whether it would be in the public interest for it to widen the scope of its entity regulation and, if so, it will publish a revised policy statement.” I

suggest this takes place sooner rather than later.

I accept that the BSB is a specialist legal services regulator which focuses on the delivery of advocacy, related litigation services, and expert legal advice, all of which is true; and I’m not on a BSB bashing crusade just for the sake of it. I genuinely want to see the BSB pull its socks up and adapt to allow the consummate professionals that operate within its framework to innovate and grow with the rest of the legal services sector. Because, given the comment made by Matthew Hill, CEO of the Legal Services Board, that there is a strong argument in favour of a BSB and SRA merger, and while the SRA currently makes plans to assume oversight of legal executives, there is a real danger that, by failing to support genuine innovation at the Bar, the BSB will be subsumed by the SRA in the push for a single legal services regulator. And take it from me, an SRA regulated individual, this is something which the Bar should avoid at all costs.

Josh Bates is an Associate Solicitor at O’Connors Legal Services Limited, an award-winning firm of lawyers and business advisers. His work for barristers and barristers’ chambers includes providing advice on the structuring, funding and authorisation of BSB and SRA authorised bodies; assistance with the preparation of BSB and SRA authorisation applications and accompanying business plans; drafting of entity governance documents; and supplying compliance advice.



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UN's General Comment 26 – the link between children's rights and animal protection

The United Nation's General Comment 26 ('the General Comment') has been ground-breaking. It is the first time in history where animal abuse has been referenced in a legally binding human rights charter of the United Nations, one which places strict obligations on all state parties to comply. General Comment No.26 is the United Nations Committee on the Rights of the Child's authoritative guidance on how children's rights are impacted by the environmental crisis and what governments must do to uphold these rights to ensure that children live in a clean, healthy and sustainable world.

By **Christina Warner**, 33 Bedford Row

Its significance is such that it acknowledges and addresses the link between violence inflicted on animals and its impact on children's well-being as recognised by the UN Committee on the Rights of the Child. Emphasising the need for nations to act in changing policies to ensure the protection of children from witnessing such violence. This means that laws must be created on a domestic level to protect children experiencing any violence inflicted on an animal, whether in the home or in wider society. Published on 22 August 2023, the General Comment was issued by the Committee responsible for interpreting the Convention on the Rights of the Child ('CRC'). As the Committee also explained; children's rights under the CRC apply to environmental protection meaning that the General Comment gives children a stronger basis to enforce their right to a healthy environment as well as not witness animal abuse, neglect or cruelty.

Philip Jaffé, member of the United Nations' Committee on the Rights of the Child, stated that "Children worldwide have been leading the fight against climate change; calling on their governments and corporations to take action to protect the planet and their future." Going on to say that "[the General Comment] not only echoes and amplifies children's voices, but also clearly defines the rights of children in relation to the environment".

Wider implications

The General Comment will inevitably have wide reaching consequences, especially for state parties whose domestic animal welfare laws are lacking. For some nations this means address-



ing wider societal issues such as the management of homeless animal populations by killing animals in public who must now cease the practices or risk being in breach of their obligations to the UN. The Comment's interpretation may also empower NGOs worldwide to demand government compliance by implementing policies addressing traditions or customary practices exposing children to violence against animals. This also means the practices of animal abuse under the guise of customary or cultural traditions such as wild bird hunting, bullfighting, trophy hunting or animal sacrifice traditions are now prohibited where there is involvement by children such as their participation in or witnessing of the cat and dog meat industry or whale or dolphin hunting.

Interconnected benefits

The Committee has declared to "Increase efforts to change violent traditions and practices that negatively affect the well-being of children [...]". The impact of this is that millions of animals are set to be protected as well

as a new generation of children growing up to understand that violence and abuse against animals is not acceptable nor justifiable. Aside from issuing protective measures for children the General Comment also highlights topics of the harmful effects on children of witnessing animal abuse; including empathy erosion and the normalisation of violence and proposes that introducing laws compliant with UN's CRC the General Comment could enhance protection. The research undertaken in preparation for the General Comment's publication also aimed to assess how introducing laws which could potentially address associated abuses like spousal, child, or elder abuse gives the General Comment an even broader and more powerful scope. The UN's CRC Committee also acknowledged the positive benefits of children engaging with the animal world:

'Section C: Right to life, survival and development includes the statement at paragraph 23 that:

'The developmental benefits of a healthy environment include those linked to opportunities.

...to experience outdoor activities and to interact with and play in natural environments, including the animal world.'

And

'Section G: Right to freedom from all forms of violence (art. 19) states at paragraph 35 that:

'Children must be protected from all forms of physical and psychological violence and from exposure to violence, such as domestic violence or violence inflicted on animals.'

“...respect, protect and fulfil... collectively and urgently!”

The explicit nature of the General Comment has brought the tendrils together of psychological, sociological, and psychiatric studies of the impact on child witnesses of animal abuse or neglect. Anchored by concerns as to child welfare, there is substantial evidence indicating that animal cruelty offenders often engage in other serious crimes. A study conducted on behalf of the NSPCC revealed that children of companion animal abusers are more vulnerable to neglect or abuse themselves.¹ There is substantial evidence indicating that animal cruelty offenders often engage in other serious crimes. One in five intentional animal cruelty incidents is associated with another crime, and nearly 40% of these additional offences involve interpersonal violence, according to recently available police data.² Studies have further gone on to find that 70% of all animal abusers have committed at least one other criminal offence, and almost 40% have committed violent

crimes against people. Among men who have committed crimes of aggression, 63.3% admitted to cruelty to animals.³

As of 2022, 196 countries are parties to the CRC treaty. This includes every member of the UN, except the United States, has either ratified or accepted the rights articulated for the child under eighteen or below the age of majority in that state. The Committee urged State Parties “to eliminate violent traditions and practices, such as shooting dogs in public, and raise awareness among State officials, the media and the public about the negative effects on children of exposure to such practices”. Such comments stress the need to understand that protecting children from violence inflicted on animals is essential for upholding child rights. This also places an obligation on state parties to scrutinise and educate their nation’s population, law enforcement and public bodies as to the need to understand and uphold the same responsibilities. The matters to be addressed within the General Com-

ment are clear and immediate. As outlined by Jaffé, “State Parties should respect, protect and fulfil... collectively and urgently!”

Christina Warner, 33 Bedford Row

¹ NSPCC Case Reviews Published in 2023, as updated on 12 January 2024: <https://learning.nspcc.org.uk/case-reviews/recently-published-case-reviews/>

² Charlie Robinson, M.A., M. S., and Victoria Clausan, M.A., *The Link Between Animal Cruelty and Human Violence*, 10 August 2021

³ Cynthia Hodges, *The Link: Cruelty to Animals and Violence Towards People*, 2008, *Animal Legal & Historical Center*, Michigan State University.

The State of English Justice

“Oh dear, how sad, never mind.” This is the almost sotto voce retort from anyone in power with responsibility for every aspect of the Criminal Justice System for the last 15 years. They don’t care and they aren’t interested. It’s not a justice system anymore because there is no justice.

By **Charles Blatchford**, Barrister at St Philips Chambers

The police aren’t coming. If you are a victim of crime unless it is violence or sexual violence or perhaps drugs you are unlikely to see a policeman. If burgled, you will be lucky to see a policeman. If you do, it is to give you a crime number to hand to your insurance company. You are highly unlikely to see Scenes of Crime to take fingerprints or forensic evidence. And, even if they do attend, then unless a culprit falls into their lap – blood at the scene giving a DNA match there will be, I can guarantee, no proactive police investigation. The police are under resourced and under-staffed.

There are no votes in criminal justice. And by the time there will be votes in it it will be too late. It’s probably too late already but we, as a society, haven’t yet noticed or got angry enough collectively to make the politicians do something.

“Crime is down” heralds each Home Secretary. What utter rubbish. If you take a survey and only listen to those who agree with you then statistics and numbers can be spun any which way you want. The respected National Crime Survey says crime is down – but if only 4 in 10 crimes is reported how



can these conclusions be relied upon. Think of the anti-social behaviour in the streets – parents aren’t doing anything and there is no deterrent by visible policing. The Co-op recorded a 34% increase in violent assaults on their staff last year – 1325 incidents against staff. No police response in 71% of them. We pay in what we buy for the security guards in every supermarket or corner shop.

A personal experience was being threatened by a man in a car park – he threatened to stab me. He fled when I

phoned the police. They had his vehicle registration number. The officer who I spoke to acknowledged that he is known to them. But the police recorded that as a neighbour dispute. Not a crime. I didn’t know him, and he wasn’t my neighbour. I pity the next poor person who really upsets him.

The types of crime have diversified with the use of technology – the internet and mobile phones – these are evidentially heavy cases and need manpower. But the drunks on the

street, the domestic abusers, the burglars, sex offenders, fraudsters, drug dealers and vandals all still need policing and investigating. The only time there is a proper investigation is if there is a murder.

In a rush to make up numbers there are corners cut in terms of recruitment and training of new police. Short training periods doesn't allow for those with questionable judgement, motivation or morals to be weeded out.

So, there are poorly trained questionable police out there. The number of police and the quality and length of their training needs to be increased significantly – both need doubling nationally.

Don't get me wrong there are some excellent, dedicated, honest, outstanding policemen out there but the proportion of bad apples is getting bigger – sometimes because of the pressure of time and volume of work they have to get a result – this leads to corners being cut, investigations not been conducted properly and sometimes deliberate hiding of evidence or lying to secure a conviction. If they arrest you, they want to convict you – they are not interested in investigating it further, finding out if someone else is responsible or if you are innocent. Accept nothing, Believe no-one, Challenge everything. ABC. The ABC of detective work. In a recent trial I asked a detective about this and was told that that had been scrapped. Not enough time to investigate possible alibis – not enough time to check if the person arrested and accused might be the wrong person. They have made an arrest, they have points they need to prove to secure a conviction and that is what they look for. If you are arrested these days you will have to prove your innocence.

Then comes the Crown Prosecution Service (CPS). If any of you, dear reader, work at the CPS then you won't like what is coming – but don't blame me – look yourself in the mirror and tell yourself the truth.

Like the police there are good people in the CPS – but then there are the others. I know of a prosecutor who joined the CPS having practiced exclusively in family law (**not crime**) for 4 years. Appointed a Senior Crown Prosecutor – they accept that even after one year of CPS work and on the job training, they really don't know what they are doing. And they are now on the RASSO (Rape & Serious Sexual Offences) team. The CPS show little and poor judgment on cases, they will over-charge cases. They will run cases to trial that have little or no evidence because they don't want to be criticised in the media. When they do make correct but difficult decisions (the appalling crimes of Valdo Calocane) they are criticised. He is unwell – all doctors agreed. He will never be released. If he'd been sentenced for murder he would eventually be back on the streets. But the ill-informed about the law and the press harry the CPS. As a society we have to be careful about the balance between justice,

punishment and emotionally charged vengeance.

At the other end of the scale the CPS will decline charge in cases where there is clearly sufficient evidence. Or offer a community resolution (driver awareness courses) where a driver has caused damage and simply driven off – leaving the victim more out of pocket than the offender.

The general day to day dealings with the CPS are shocking. In trying to communicate with them there is a general email address, and it can be weeks before there is any response, if ever.

The CPS is no longer fit for purpose. It has become an obstruction to justice not a facilitator of it.

Under the last LCJ the process of Better Case Management was introduced with date deadlines for both prosecution and defence to respond to.

On almost every case I am involved in currently the CPS have failed to meet their deadline for serving the evidence and/or don't serve the entirety of what they should. They ask for an extension from the court and it's granted. If the defence are a few days late serving a defence statement (setting out their case so there is no ambush on the prosecution at trial) there can be a court hearing for non-compliance and threats from the court of wasted costs against the defence. Fundamental principles – (1) the prosecution must prove their case and (2) a defendant has a right to silence. The defence statement also sets out any disclosure requests or enquiries they would like the police to make – these are almost universally ignored by the CPS until the start of the trial. Judges are bullying the defence and defendant to come up with a credible defence or there is unpleasantness and sometimes ridicule of their barrister in open court. Some of the Judges seems to have forgotten what it is like with incalcitrant defendants who want to delay the day they finally have to go to prison as long as possible – despite there being a discount for pleading earlier. Also juries do weird things. Juries can and do acquit people in the face of overwhelming evidence – so some defendants want to take their chances with a jury – that is their right.

In trials Judges are overlooking failures by the CPS and are blind to some of their sleight of hand even when it is pointed out – and nowadays they rarely rule in favour of the defence on issues of hearsay or admitting evidence of others wrongdoing which might exonerate a defendant – the Judges need to get conviction rates higher. Every summing up in a trial is a prosecution recitation of the prosecution case with scorn on what a defendant has said. For the prosecution there is the mechanism and infrastructure of the state – for a defendant a single solicitor and a single barrister.

There are people who are wrongly accused and, on the nights, where I'm

not awake working generally these cases – the frustration and unjustness of them, keep me awake. If someone is to be convicted, it must be done fairly. A conviction at the Crown Court is where that must happen because the Court of Appeal don't appear to be interested in justice. A regular joke at the Criminal Bar now is that it should be called the Court of No Appeal. Fewer cases being given permission to appeal, and fewer appeals granted.

The Judges are under pressure to get the backlog down. I don't see why some get so stressed about it – they have a decent salary, an excellent pension, reading days, sick pay, annual leave – and the backlog, which they won't single-handedly reduce, isn't going anywhere. In the last 2 months I have been in trials where the allegations date back to 2015. Nothing to do with Covid or the barrister strike. There simply haven't been the courtrooms or Judges available to hear them – and now there is a shortage of criminal barristers. But giving Judges a pay rise won't sort the problem. The Judges need to speak truth to the Ministry of Justice.

The same can be said for some of the those who engage and have engaged with the government over the last few years from the Bar – they are too concerned about their own career progression. They fear they won't be appointed a Judge if they rock the boat. As per Abraham Lincoln "To sin by silence, when they should protest, makes cowards of men."

Please don't confuse loyal dissent with disloyalty – I know the Justice System has flaws – no system will ever be perfect but if we act like sheep, we get a system run by wolves. I want it to be better.

The situation is almost terminal – but it can be reversed.

The Criminal Bar is being overwhelmed with extra work brought about by endless new protocols and paperwork outside of the court – none of which we get paid for – on top of low fees generally and cuts in fees in real terms over the last 15 years. No salary, no sick pay, no annual leave, no pension – we're self-employed. However, that does give us some freedom and criminal barristers are voting with their feet – leaving the professional in their droves and many of those remaining are refusing to do RASSO work.

The warning signs are all there – but I suspect that those responsible think we're waving. Believe me, we're not – we're drowning.

I'll probably end up in Room 101 for the above – but with the way the system is currently it feels like I'm already there.

Charles Blatchford, Barrister at St Philips Chambers

The views expressed are the authors personal opinion



JORDAN LYNCH

PRIVATE FINANCE

Barrister mortgages, your questions answered

by Jordan Lynch
Private Finance

Barristers often require a bespoke mortgage arrangement that factors in their enhanced earnings potential and net worth. This can make applying for a mortgage challenging, and means finding the right mortgage broker that can offer tailored advice and an extensive network of lenders is vital for success.

Jordan Lynch have been arranging mortgages for barristers ever since we were formed in Manchester's chambers district in 2006. We have an expert team of advisers who provide a premium service to barristers, KC's and High Court Judges in a time efficient manner.

Tim Lynch, Founder and Principal Director of Jordan Lynch, provides answers to some of the most common questions asked by barristers.



Can I get a mortgage during pupillage? Yes, we can agree non-standard terms with a few select lenders that will use a projection of your first year's earnings as a tenant and use this projection when carrying out their affordability assessment. The projection must come from the chambers' clerk and is normally based on what past pupils have earned in their first full year as a member of the chambers.

Can I still get a mortgage with one year's accounts or using forecast income? Depending on how much you need to borrow, we're able to negotiate terms with certain lenders where they'll either use your first full year's earnings towards affordability, or a projection of your future earnings if this is significantly higher and required to meet the desired loan amount. The projection needs to be backed up by a letter from your chambers clerk, receipt of payments into your bank account and billed work.

What if I haven't been paid for the majority of my invoiced work yet? As long as there's a track record of similar earnings, or your chambers clerk can support your income projection based on billed earnings, we're able to agree terms with lenders that will base affordability on billed, as well as received, earnings.

Can I get a mortgage to pay a tax bill? We've arranged many mortgages for barristers that require funding for tax purposes. These mortgages are not commonly available on the high street but we work with specialist lenders who recognise that barristers can encounter liquidity constraints due to their aged debt and will allow capital raising for tax purposes.

Will I have access to exclusive products because of my profession? We have access to lenders that will allow an income multiple of up to 6x annual earnings for barristers which can make a real difference if you've been turned down by a high street lender and need a higher income multiple to borrow the amount you need.

Is it possible to get a mortgage on a second home near my chambers? Yes, the ability to do this hinges on the lender assessing affordability and plausibility of running two residential mortgages at once. We've had success explaining to underwriters that purchasing a second property is more convenient and time-efficient than a burdensome long commute, whilst also acting as a good long-term investment.

Can I get a mortgage term beyond state retirement age? Yes, most underwriters are aware that barristers and KCs often work beyond the current state retirement age. We have relationships with many lenders who will consider a mortgage application up to age 75 or even 80, without requiring evidence of retirement income. Additionally, we can help secure a retirement interest-only mortgage to make provisions for an income reduction as you approach retirement.

Do you advise on mortgage-related insurance policies? Yes, we offer a fee free review of your insurance requirements as part of our mortgage advisory service. We can arrange buildings and contents insurance, life insurance, serious illness cover and income protection policies with all the UK's leading insurers.

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Young People, Past Failures, Change, and New Hope

By **Bruce Houlder** CB KC



Starting a new charity is not for the faint-hearted. For me it has been a life changing experience. Fighting Knife Crime London (FKCL) launched on 1st June 2021, to much press fanfare, and in part due to help from Joshua Rosenberg and Danny Shaw who I had got to know during my time as public affairs spokesman for the Bar. On the same day I was invited to No 10 Downing Street to speak about what I planned. There were many others who encouraged me, and after about 2 years of intensive preparatory work and fund-raising, my one-stop shop for information to help young people and those who care for them, was up and running. One of the most stimulating aspects of doing this was meeting, and continuing to meet through talks and webinars, so many inspirational people. Most of these new friendships are among people who have spent years of their lives working directly to change the lives of young people and had so much to teach me. The multifaceted nature of the website that resulted is www.fightingknife crime.london. Our social media presence, the tools available for self-help and new pathways to professionals and young people alike are best seen by visiting the site itself. Please do so.

As a criminal barrister, I had spent 52 years trying my best to deal with failure, for that surprisingly is the

work that the criminal justice system is engaged upon. It is of course necessary work. But I had been working for too long at the wrong end, and, naively perhaps, I thought there was something I could do to change that. 34 years of my time as lawyer was spent as a Recorder, and 20 years as a facilitator for Judicial College courses (formerly JSB). I had seen how sentencing guidelines, and now codes, were being politically driven to a point where longer prison sentences were seen increasingly as a solution, rather than the more imaginative early intervention and diversionary approaches which we are coming rather too late to appreciate. Too little was being done too to make the communities which provide most work for our justice system better places in which to live and grow up.

Judges too saw their discretion in sentencing increasingly removed. Some politicians still fail to see political capital in prison reform, despite that the HMI Prisons Report for 2023 showed only one prison achieving 'Good' across all four healthy prison tests, but finding that 71% of prisons were 'Not Sufficiently Good' or 'Poor' for Purposeful Activity, and 42% of prisons were 'Not Sufficiently Good' or 'Poor' for Rehabilitation and Release Planning.

So young people who carry knives, or those who might be thinking about it became my main concern. There are some pretty general views about why these young people might think of such a thing. There are some pretty terrible personal stories and home lives, involving drug and alcohol abuse and violence. Young people are assailed in a way that my post-war generation never were, by competing and often negative value sets, where gender, racial identity, and overwhelming pressures imposed by social media and their peers simply overwhelm them. Then there is the dilution of informed debate into what often seems to be a completely unaccommodating and intentionally hurtful online messages, about who is in and who is out and who to fear and who to trust. Social deprivation is a word that covers so much, but still lies at the centre of why things are getting worse. Add to that the changes that take place within the brains of young people during these formative teenage years, and we have a problem.

Dangerous, and angry messages are promoted by social media, hate is disseminated sometimes at the school gate or by simple Chinese whispers. It leaches into the lives of children through bullying and worse. Sometimes even by something that should be as life enhancing as music can become a messenger of death. For those unlucky

enough never to have had the home life or any of the advantages which most of us have at least to some small extent, the feeling must be that the good things of this life have left them behind and will never be achieved; that life offers little or nothing for them, and that life itself is cheap. The voices of authority are no longer on their side, and often provide no example for them, nor any evidence they understand them. Even low level poorly monitored non-custodial sentences and orders restricting activities and freedoms hold not the slightest fear for many young people. Nor can they see how this helps anyone, least of all improve their lives.

Strong communities are a good part of the answer, but that does not absolve central and local government from their duty to support these efforts and not to act simply as the givers and takers away of tax payer's largesse. The machinery of government can be put to better purposes than that. Although I have written and spoken about that, there is not the space here to expand. Suffice it to say, a short tour of the research section of our website here <https://www.fightingknifecrime.london/resources> will show you that the answers have been provided, and that we have a high level of consensus in recommendations made for change, but seem to lack the serious determination from government to see that the changes happen that the best informed have identified as necessary. None of these recommendations look towards the criminal justice system as the solution.

Some of the newer police and YOT alternative solutions do not now even involve the courts. It is instructive to see that those who are learning to understand this most are the police forces that have been encouraged by more thoughtful senior officers, who have heeded the experience of their community based officers, and see the benefit of the wide range of diversionary opportunities. Many of these opportunities in London are listed in the borough directory of FKCL's website and our other resources.

In November 2023, the College of Policing Report into 'Imprisonment and other custodial sanctions' declared their '...findings are in line with a **2019 Ministry of Justice study** <https://assets.publishing.service.gov.uk/media/5d1c732ee5274a08c4be45c4/impact-short-custodial-sentences.pdf> This found that 'custodial sentences of under 12 months with supervision on release are associated with higher levels of reoffending than sentences served in the community via court orders (community orders and suspended sentence orders.'

The present Lord Chancellor, Rt Hon Alex Chalk KC MP appears to see the advantage of a more imaginative

approach to sentencing, and it is to be hoped that his approach will be followed up by any successor in the emphasis given to community rather than increasing penal solutions. Part of Labour's new proposals include the creation of bodies modelled on the Office for Budget Responsibility (OBR) would publicly hold ministers to account for progress against key Labour goals under plans being looked at by some close to Sir Keir Starmer KC. This kind of thing is something I have been advocating for some time. Now we don't know how far this might go yet, but it seems to me that this kind of thinking is key to reducing the issues around youth disengagement and youth criminality and violence.

I am no soft touch here and acts of serious violence and threats of violence must be met with custody in most cases. But, we must heed the growing body of evidence that solutions can be even more successful where low-level offending is taken out of the court system altogether whenever the benefit to society and the offender outweighs the now petty well-established disadvantages of a court solution.

But, as I see it at least, failure runs deeper than that. Too little is done to act on research that shows that 80% of young people carry knives for their own protection. Recent research from the Youth Endowment Fund showed that 47% of children reported that violence and the fear of violence impacted their day-to-day lives and 20% of children said they'd skipped school due to feeling unsafe, and those were the ones most likely to be exposed to greater dangers. Worse still, 62% of children thought that drugs were a major factor, and half thought gangs were amongst the two highest drivers of fear and violence. Sentencing policy had not provided an answer. Something has gone badly wrong. We have as a society got things completely upside down.

As criminal practitioners we are often held back from closer engagement with the root causes of crime, by the relentless life we live as criminal practitioners, trying to keep the system on its feet after the depredations of successive secretaries of state, and the increasing demands made upon our time fulfilling tasks to make the lives of others less burdensome. The almost visceral feeling I had after years of practice in the criminal justice system, is that so many of our young people were being, and had already been abandoned by a society that saw criminal justice as the central agency in social reform. Too little was being done to support our young people during the most difficult period of their lives. None of this was surprising as several studies showed that 75% of our youth services had been removed in the 10 years between 2011 and 2019

with the loss of 8000 youth workers over the same period. It was scarcely surprising to find that in the year ending March 2022 more people had died at the point of a knife since records began in 1946; and now again we see deaths of teenagers in 2023 higher than in 2022.

So FKCL is on a journey, both to influence and inform, and to provide an ever-expanding list of pathways to help young people. I owe a debt to those who many who inspired this work. We should recognise that others too from my former profession, are heavily engaged to make this change work. For example, Honour Judge Sarah Munro KC, a Judge at The Central Criminal Court, and now Sheriff Broniek Masojada, are hosting roundtable discussions with Joe Lyons, the dynamic CEO of the West Ham Foundation, which already does so much work in the community. I joined one of these sessions recently where we focussed on tackling the growing rates of youth violence and anti-social behaviour. These events bring together a sector-diverse group of organisations and leaders, providing a platform to explore solutions, share knowledge, to identify root causes, and hopefully reduce the numbers of young people involved in gang crime. Work too by the criminal barrister Stephen Akinsanya too is accelerating this change through the use of every modern means of influence, some of which we feature on FKCL's website (see Stephen's work here <https://www.lifeoffocus.co.uk/about>). This kind of material is increasingly being used by educationalists to change the future for our young people.

My only interest is to be part of this, to help to draw together the organisations doing most and working most innovatively in ever greater collaboration. For this reason, on May 14th this year we are hosting a major London conference at the Congress Centre in Gt Russell St, titled "Being Greater than Ourselves". You can sign up here -<https://www.fightingknifecrime.london/conference>. Please come along, and learn what you might do to be part of the change that is already on the way. Our profession has a big part to play in this.

Bruce Houlder CB KC



Private Prosecutions in the Public Eye

Since the dramatised Post Office “scandal” aired on ITV and humanised the negatives of these particular private prosecutions, the practice has been thrust into the public eye, provoking national debate. Although it is an important right for all individuals to be able to bring private prosecutions, this should not be unfettered and there is understandable and growing public concern about disclosure, oversight, and inbuilt vested interest. This article will detail the existing checks in place and highlight key areas to focus on if instructed in such a case.

By **Alicia Doble**, Barrister at Queen Square Chambers

Background to private prosecutions

All private prosecutions commence with an application for a summons, which is commonly heard by Magistrates. This is the first potential safeguard in which the court must assess whether there is a prima facie case that the elements of the offence are made out (*R. (on the application of Kay) v Leeds Magistrates’ Court* [2018] EWHC 1233 (Admin)).

Every individual is entitled to bring a private prosecution, enshrined in section 6(1) of the Prosecution of Offences Act 1985 (“POA”). This has long been considered an important right, providing a safeguard against oversights by public prosecutors, but it is necessary that this comes with careful precautions, checks and regulations. Otherwise as depicted in the Post Office drama, injustice and issues can occur.

When a case is brought to the public prosecutor’s attention, they have the power under section 6(2) POA to either take over the case, if there is “particular” need for the CPS to take over, or if the full code test is not met, they can take over the case in order to discontinue proceedings. However, the CPS website sets out that “In general, the CPS will not take over a private prosecution because of misconduct or alleged misconduct by the private prosecutor. It is not the role of the CPS to discipline private prosecutors but rather it is for the courts to control private prosecutors.”

Alarming, between 2019 and 2020, the CPS took over 33 private prosecutions, and of these 30 were discontinued, perhaps indicative of the number of private prosecutions being brought without proper consideration of the full code test.

Disclosure issues

A key issue is how a private prosecutor manages disclosure. The CPS employs a disclosure officer who remains impartial and objective, but this would be difficult for a private prosecutor who, by the nature of the case being brought, has a private interest. One solution is to employ the services of an independent party for the process of



disclosure and production of an unused material schedule. This, however, is likely to be costly and the private prosecutor will still face the issue of lacking investigatory powers and the authority of the CPS to compel third parties to share documents.

If the police hold information that may need to be disclosed, the private prosecutor does not have a given right to this information and largely this material will be confidential.

Costs

If costs are incurred to either party due to an “improper act or omission” by the other party, then those responsible for the act or omission will pay the costs. This has been extended to bringing a private prosecution where there are failures to disclose important documents or in circumstances where there is no realistic prospect of conviction (*R (on the application of Ayodeji Holloway* [2019] EWHC 1731 (Admin)).

Lack of regulations/oversight

There is currently no binding regulatory framework for private prosecutions. Private prosecutors do however have the same duty as public prosecutors to undertake an independent and objective analysis of the evidence before commencing proceedings to determine whether there is a realistic prospect of a conviction.

Public prosecutors are subject to various forms of scrutiny, including Her Majesty’s Crown Prosecution Service Inspectorate and accountability to Parliament through the Attorney General, whereas private prosecutors are only subject to scrutiny by judicial review. However, because private prosecutors invariably have private interests in the case, where there is scrutiny, this is bound to be greater.

Recommendations

There have been various recommendations to try and ensure justice in

private prosecutions. One of these is to cap the recovery of costs at legal aid rates. There is currently no costs consequence if the private prosecutor is unsuccessful, and the costs paid to them come largely from central funds, although a defendant can also be ordered to pay a contribution to costs.

One key recommendation is a binding code of standards enforced by a regulator. Although, it is not clear who said regulator would be and it would surely not be feasible for each case to have oversight. It is also recommended that the CPS should be informed when a private prosecution commences. Since the 'Horizon' scandal, reforms to private prosecutions which were not adopted following a Justice Select Committee in 2020 have been discussed but no formal decision has been taken by the government.

What can we, as barristers do?

With all of this in mind, what can we, as barristers do?

Although the Post Office inquiry is not yet complete, Richard Moorhead, a member of the Horizon Compensation Advisory Board says the inquiry has shone a glaring spotlight on the independence and integrity of the legal profession and the management of legal risk in the corporate world. He says 'What the evidence so far suggests is there have been problems with competence, ethical and professional conduct over many years – in-house, in private practice, both junior and senior lawyers', he says.

If instructed for the private prosecutor, it will be important to strongly advise of the potential costs implica-

tions and that full and frank disclosure is imperative. It is advisable, given the costs consequences and safeguards at an early stage, to have the case effectively trial ready prior to the application for a summons.

It is crucial, that advocates who have conduct of private prosecutions observe the highest standards of integrity, of regard for the public interest and duty to act as a minister of justice (as described by Farquharson LJ) in preference to the interests of the client who has instructed them to bring the prosecution.' *R v Zinga* [2014] 1 Cr. App. R. 27

It is clear that a key focus will therefore be advising on disclosure and ensuring that this is diligently complied with in an objective, independent manner, and any issues are highlighted swiftly and clearly.

If instructed for the defendant, it would often be advisable to refer the case to the DPP for consideration of the case being taken over by the public prosecutors. This is likely to lead to a more impartial and objective investigation and removes the risk of uncapped fees and therefore perhaps significant cost consequences.

These are well established principles, but in cases of private prosecutions where any scrutiny is even higher, this needs to be at the forefront of advocates minds.

If we view the CPS as the 'market leader' and private prosecutions as the 'own brand' equivalent, with correct procedures are applied, you shouldn't be able to tell the difference; but is this realistic with the inherent vested interest?

Alicia Doble, Barrister at Queen Square Chambers



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The Bigger Picture

How many cases do you have that involve CCTV evidence or Body Worn Video (BWV)? I would expect quite a few as video evidence is one of the most common forms of physical exhibit. The commonality, however, brings with it many dangers and I have written about these several times over the years.

By **David Spreadborough**, Certified Forensic Video Analyst & International Trainer at Amped Software



We are now, though, at a pivotal moment where I, and many other Forensic Video Analysts, fear that mistakes will be made in the courtrooms that could lead to miscarriages of justice. All because the video was dealt with as video, and not as volatile digital data.

Looking back over my 22 years of working with video evidence, it is possible to identify key industry moments. The first, and very significant, was the tape-to-file switchover that followed the technology shift in saving analog video signals into computer data. This change wasn't dealt with very well and our position today can be traced back to this point.

What went wrong at the start?

With analog tape, there were very strict technical limitations and only a single method to play back the video signal. When manufacturers were allowed to capture the signal digitally, there were no regulations put to this. They had free reign to capture, process, and playback the footage any way they wanted and, worryingly, still do.

From the investigation side, this caused several challenges. Recognising that data must be handled as digital

evidence took many years to identify and processes evolved due to their ease, rather than their evidential foundation. Education, and the development of scientific-based guidance, were slow to form due to very minimal research. Most learning was completed on a case-by-case basis.

These are just two of the catalysts to our current state and they have allowed an unusual amount of flexibility to permeate through the Criminal Justice System (CJS) when it comes to bringing this evidence into the courtroom. I am unable to find any other form of evidence where the methods of acquisition, processing, interpretation, and presentation have such a broad range of forensic rigor.

It is this flexibility that causes many analysts, including myself, to believe that mistakes are inevitable. We must now look at 'the bigger picture' if we are to ensure the accuracy of the evidence presented so those making the decisions can interpret it correctly.

When dealing with digital evidence, there is a forensic line. This is the point at which it requires a person with competency to analyse, interpret, and report on the questions being asked.

If a video is brought into evidence, and after viewing there are questions, it has stepped across the forensic line:

"...Is it?"
"It could be..."
"I'm not sure..."
"It looks like..."

At this point, the video requires forensic analysis to identify the reliability of the visual information, as it's these questions that could be argued over in a court.

I am lucky, or some may say unlucky, to review many video-related cases. By far, the most common problem is the absence of any analysis of the data being relied upon and then a failure to identify the forensic requirements. The video is trusted as it is, and the interpretation comes down to the viewer's own subjective bias. This is very dangerous as video is constructed using methods specifically designed to fool the eye and brain.

Let us take a step back and highlight some important points that must be considered.

The first is that we are starting with digital data and, as such, the verification of two key facts is vital.

The **integrity** of the data and then the **authenticity** of the produced visual image.

Integrity

Establishing the integrity of the data ensures that it has not changed since it was first created. This is **NOT** the

integrity of the exhibit, which relates to when it was acquired or retained as evidence.

Let me give you a very common example of where this goes wrong.

A store captures footage of an incident on its CCTV system. This is the data that is required as evidence and the local police have shared an upload link with the store manager to negate the need for an officer to attend.

The manager accesses the CCTV System from their home computer and downloads the footage as a series of digital files that are then shared with the police.

Here we have problem one.

Remember that I detailed earlier about how no standards were set for the security industry?

Well, unbeknown to the manager, the version they downloaded looks OK, but the data is completely different from what is on the video surveillance system. As immediate intelligence, it may be sufficient, but as evidence that must be analyzed forensically, the details required have been removed in the method of acquisition.

When that footage is ingested into the police IT system, the procedures are a bit of a grey area.

Most forces in the UK now manage their digital evidence with software. How this software identifies, individualizes, and then manages the data can vary. There appears to be no independent oversight to ensure the evidence is handled according to forensic video best practices.

Even the automated renaming and restructuring of folders can cause challenges when attempting to verify integrity.

This leads us to the second problem.

With an estimated 7-10,000 different formats of CCTV, correctly decoding them is quite a challenge and requires very careful data handling. There are a few systems that utilise forensic video decoding. However, if standard conversion is completed to aid playback and review, what has changed? Does it have the timestamp, has it extracted all camera views, was there audio? Lastly, even if it has decoded the file correctly, is the viewer seeing what was decoded, or simply a reduced-quality version of it?

Does the viewer realise that what was sent to the police is not the best evidence and it may not be possible to answer the required questions? If these errors are not identified quickly, the original footage could be overwritten.

Authenticity

A common misunderstanding is that this always relates to 'fake' videos or images. This is not the case, but I will be coming back to those later. Establishing authenticity allows a video

to be presented accurately to ensure the correct interpretation.

Think back to some of the challenges being faced by the police when it comes to correct acquisition, storage, and playback for initial review.

If it has not been acquired correctly, it may have been changed before submission. Then, if processed incorrectly to enable viewing, decisions on **small details** are being made on evidence that may not be authentic. It may not be a true and accurate representation of the scene, object, or person. The ability to correct footage through restoration and enhancement is also significantly reduced if the information required to do so has been destroyed.

The important point here is the reference to the 'small details'. It is these small details that are most commonly changed and lost through incorrect acquisition and handling.

From forensic collision and reconstruction, through suspect height estimation and comparative analysis, all the way to the courtroom presentation of visual facts, it is always these small details that are being questioned. Therefore, we must ensure the preservation of those details from the very start.

This has been going on for several years. So why must we now put a higher priority to dealing with video as digital evidence?

Video Manipulation

We are going through a monumental shift change in how video is created, processed, edited, and presented. Technology has advanced at a remarkable rate and, although in many respects it can assist us, it can also give us a false sense of security.

Looking back again to the analog world, the video was once referred to as the silent witness, but those days have long gone. When answering questions on the reliability of small details, the human eye is not enough, and they must be evaluated correctly to ensure they can be trusted in a courtroom.

It does not matter whether the manipulation is conducted unknowingly, through user error during acquisition or processing, or maliciously through video editing and the use of artificial intelligence. Having solid evidential foundations is crucial to avoid challenges and unnecessary hurdles.

Now is the time to put the brakes on. Blindly relying on what you see is not enough. I have been analyzing videos for over 20 years and weekly I identify videos that are not original. Often, it may just be the timing data, but if the

question is surrounding body mechanics or speed analysis, this timing is highly relevant. The data has no integrity and as such the timing is not authentic.

By making this change now, we can ensure that incorrect, unreliable, or even fake video is identified early on in an investigation.

Evidence

If your case involves CCTV or video then deal with it as evidence, not just as moving images in the same way as you would watch the latest viral video on YouTube. Ask yourself these questions:

Have I got the original evidence obtained from that location? You may have been sent a 'version' of it, or a 'clip' to view, but that is not the original data that must be available for analysis.

Have I got statements related to that device and the acquisition of that data? Following on from these, do you have statements regarding the creation of other versions or clips.

Has the original data been analyzed for integrity and authenticity? Without this key step, there could be problems with created clips or compilations.

It may not be necessary for you to interpret all this information, that is the responsibility of a Forensic Video Technician or Analyst. However, ensuring that it is easily available and sharable will again avoid problems, challenges and unnecessary delays.

Finally, for more complex video and CCTV investigations, having a diagrammatic overview of the original evidence, and then the creation of further demonstrative evidence, is of huge benefit to identify evidential gaps.

For every task related to digital imagery data, and every possible question asked of video evidence, if it is dealt with as volatile digital data, and is accompanied by full documentary continuity, there is very little to go wrong. By looking at the bigger picture, everyone involved can easily see what data was obtained at the start and be fully aware of its limitations and use within the investigation. Regardless of prosecution or defense, if we continue to accept video as it is, when attempting to answer questions on the small details, it's only a matter of time until things go wrong.

David Spreadborough, Certified Forensic Video Analyst & International Trainer at Amped Software



Developments in the public interest defence in defamation

The impact of the rapid development of the digital technology on data usage and its distribution has become one of the central topics of discussion in modern society. Media has evolved to become one of the main, sometimes the only, aid to remedy a perceived shortfall in other's characters, be it true, false or speculative in nature. The power of media highlights the seemingly powerful rights conferred under Article 10 of the European Court of Human Rights ("ECHR"). But what are the limits to this power?

By Dr Anton van Dellen, and Nozima Rakhimjonova, Fraser Chambers

Let's imagine a restaurant manager receiving a complaint about the service provided to a customer. Before the manager even gets a chance to get to the bottom of the issue, it is increasingly likely that the customer will not take long to have the same complaint published on the internet, either on social media or on certain platforms that provide the "feedback or a review" options for restaurant services, such as Trustpilot, Google Review, etc. It all seems quite straightforward as to who is right and who is wrong, is it not?

While the above example may be a momentary action or reaction to the circumstances, it has the potential to lead to a complex legal battle in a claim for defamation. Understanding the available defences and their use by the defendant is equally important to both litigating parties.

The Defamation Act 2013 came into force on 1 January 2014 and has made significant changes to the law and practice in treating the publications. The defence of public interest is highlighted in section 4 of the 2013 Act and reads as follows:

s4. Publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that—

- (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
- (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

The defence of public interest has its origin originally in the form of the previous *Reynolds* defence. The *Reynolds* defence was a defence available to a publisher of a defamatory statement who could prove that publication was in the public interest and that the publisher acted responsibly (*Reynolds v Times Newspapers* [1999] All ER (D) 1172). With the adoption of the 2013 Act, the concept of *Reynolds* defence (and the notion of "responsible journalism") was explicitly abolished and was replaced by section 4 of the 2013 Act. The defendant that would usually avail themselves of this defence would be a journalist who publishes a piece of investigative journalism, whilst the usual claimant will be a public figure, such as politician or a celebrity. It may, however, equally also be available to "citizen journalists." The defence under s4 has two limbs: *public interest* and *reasonable belief*.

Serafin v Malkiewicz [2020] UKSC 23 is the key case that clarified the approach to be taken to section 4 and the public interest defence. *Serafin* analysed the potential relationship between *Reynolds* and new section 4(2). In considering the case, the Supreme Court acknowledged that the draft defamation bill included a list of factors similar to the list as set out by Lord Nicholls in *Reynolds*. However, the list was expressly abandoned, being replaced with s4(2), as it now reads now. In its deliberating on the matter, the Supreme Court highlighted that parliament did

not intend to equate the new defence with its old common law equivalent, drawing a clear distinction between the two and effectively abandoning the concept of responsible journalism that was so integral to the *Reynolds* defence. The Supreme Court highlighted the following factors to be relevant when assessing a section 4 defence:

- To make out the defence under s4, the defence should not violate the operation of Article 8 and/10 of the ECHR.
- The first question to be asked is "whether the statement was on a matter of public interest" (s4(1)(a)) and not "whether the article was in the public interest" (s4(1)(b)). These concepts have an obvious difference in their respective drafting and the former should be satisfied first.
- The list in the *Reynolds* defence is not a mandatory list and it may not always be appropriate to apply it when considering whether the article/statement was "in the public interest". The *Reynolds* defence is materially different from that under section 4. References to acting "responsibly" were best avoided given that that concept had been excluded from section 4.
- Publishers are not required to give claimants the opportunity to comment before publication, as it was the case in *Yeo v Times Newspapers Ltd* [2015] EWHC 3375 ("*Yeo*") and in number of other cases preceding *Serafin*. Although failure to give an opportunity will be relevant to s4(1)(b), the Supreme Court ruled that it was not a requirement. (paras 52-58, 65, 68-69, 70-78)

The balancing exercise of Articles 8 and 10 ECHR offered further room for deliberation and manoeuvre. The 2013 Act requires balancing exercise with the Articles 8 and 10 ECHR, especially where claimant is a public figure, such as a politician in *Yeo*. The court will ask questions: (a) whether the Article 10 ECHR right is valuable than the Article 8 ECHR right (the classic balancing exercise); and (b) whether publication undermines 'personal integrity' as opposed to merely harming the reputation? In *Yeo*, the claimant was an MP and a Committee Chair at the time the statements/articles were published. His actions were wholly and exclusively related to his public conduct as a public figure and had no connection to his personal life, removing the need to consider a breach of his right to private life. Therefore, the defendant's Article 10 ECHR right of freedom of speech prevailed.

While the defence under section 4 is very well known and frequently utilised in the world of journalism, there are also instances where an individual can rely on its defence if they can demonstrate that they hold the role of a "source" or a "contributor" to the statement. In *Economou v De Freitas* [2018] EWCA Civ 2591 and, more re-



der their feet, as occurred in *Banks v Cadwalladr* ([2022] 2023] EWCA Civ 219. The courts are also wary of automatically conferring the mantle of being a citizen journalist on a self-publisher, as seen in *Aaronson v Stones* [2023] EWHC 2399, with Julian Knowles J characterising the defendant’s role as a quasi-reporter, or doing a “reporter (*sic*) kind of role” [385] with a lack of journalistic standards (including verifying the claims) [402], failure to put the story to the claimant [407] and no established urgency to the matter [406]. Given those findings, the Judge unsurprisingly held that the public interest defence was not made out.

Returning to our hypothetical restaurant manager and their complaining (and self-publishing) customer. It is immediately obvious which party succeeds in this hypothetical claim and whether a section 4 defence is realistic. If the customer warned of a risk to public health from the restaurant, it may well be in the public interest. The customer’s publication is also likely to be regarded as being made by a citizen journalist, arguably lowering the threshold for the defence to be successful. But how reasonable was the belief that there was a threat to public health, if the only real threat is to the ego of the customer from poor service?

Dr Anton van Dellen, Nozima Rakhimjonova, Fraser Chambers

cently, in *Packham v Wightman* [2023] EWHC 1256 (KB), the Court examined the concept of the defendant being a “citizen journalist”. Although the defence under section 4 failed in the latter case, the Court in *Economou* confirmed that the same standard is not applicable when the defendant is a citizen journalist. The Court instead held that the public interest defence was more nuanced in favour of Mr De Freitas.

In most circumstances, it might be relatively easy to establish limb 1: that statement was on a matter of public interest. However, Limb 2, i.e. “reasonable belief”, will inevitably involve a deeper analysis of the matter as it is

not only involves a finding as to the subjective state of mind of the publisher but also an objective assessment of the reasonableness of the belief found to be held. There also remains consideration of section 4(2): “all the circumstances of the case”. The reasonable belief test has also proven to be circumstantial, as in *Hay v Cresswell* [2023] EWHC 882. Dismissing the claim, Williams J found that it would have been *unreasonable* to expect the defendant to seek comments from the claimant where the defendant was writing about her own experience.

Citizen journalists should also be wary, as changing circumstances may strip a public interest defence away from un-

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Risky business?

Sexual Risk Orders (SRO) are a relatively new addition to the Sexual Offences Act 2003. They were introduced by parliament and incorporated into the Sexual Offences Act 2003 under section 122A. The introduction of this order came into effect in 2014, allowing applications by the Chief Officer of a Police Constabulary, or Director General of the National Crime Agency, to apply for an SRO exclusively in the Magistrates Court.

By **George Joseph**, Cornwall Street Barristers

SRO's, by and large, work in a very similar way to Sexual Harm Prevention Orders (SHPO), which can put restrictions and prohibitions on their use of electronics, contact conditions regarding other people, and travel to foreign jurisdictions. Unlike the imposition of a SHPO, no sexual offence needs to have been committed, only an act of a sexual nature.

The two-stage test for whether the Court should impose an SRO is relatively straightforward but quite broad:

1. Has the defendant, on balance, done one or more of the acts of a sexual nature alleged; &
2. Whether the Court is satisfied, on balance, that it is necessary to make such an order for the purposes of protecting the public [or particular members of the public].

When this order came into effect, the first step of the test was assessed to the criminal standard, and the second step was assessed to the civil standard. That changed in November 2022 with the introduction of section 174 of the Police, Crime, Sentencing and Courts Act 2022.

From this point, both elements of the test were assessed on the civil standard of proof. This would, of course, make granting these applications far easier. But this change only follows the trend of other sexual-related orders in that they are becoming broader in scope and easier to apply for. Examples of these changes can be shown when Sexual Harm Prevention Orders replaced Sexual Offence Protection Orders. The changes in this transition were that the risk of "serious sexual harm" was replaced with the risk of "sexual harm".

SHPOs, unlike SOPOs, can also protect parties abroad by prohibiting foreign travel. This effectively amalgamated Foreign Travel Orders into the order mentioned above. Now, the range in which these prohibitions can be applied has been broadened by the change in the standard of proof with SROs. An SRO must be imposed for at least two years but can be imposed indefinitely. If foreign travel is prohibited, the respondent's passport must normally be surrendered within 3 days.



What may seem irregular to criminal practitioners is the first element of the test in that an act of a sexual nature, has to be done. There is no definition as to what constitutes a sexual act, but whatever the sexual act being assessed is, it does not need to be illegal. The case law on this topic is limited, but generally, it is a matter of common sense. Acts like giving condoms to a youth could be considered an act of a sexual nature. Other, more precise and understandable examples can be in the case of Norman O'Neil, where an SRO was imposed due to him having sex with vulnerable woman without informing them of his HIV status¹. Although the latter is not inherently criminal until HIV is transmitted, imposing an SRO could be an appropriate way to manage risk in this instance.

There is limited guidance on how these orders should be pursued. One helpful piece of guidance is the *Home Office Guidance (part 2) of the Sexual Offences Act 2003*². We can see from the guidance that there is an emphasis on these orders relating to foreign travel, grooming and Child Abduction Warning Notices (CAWNs). All of these would seem to indicate that the use of these orders, as does the case law, suggests that they are envisioned to be used to deal with issues in foreign jurisdictions to prevent and tackle sex tourism, as well as large-scale grooming gangs where the complainants do not have

the mental faculties to give evidence in Court, even with adopting the s.28 procedures.

The above examples are appropriate to make an application for an SRO. But the Home Office guidance states explicitly: "The overriding principle is that an SRO should never be pursued in the alternative to a prosecution where conduct is criminal".

Having opposed an SRO recently on behalf of a young man who was previously unanimously acquitted of rape, the Constabulary applied for an SRO, which put in place social media and device prohibitions as well as contact conditions with women. My core submission was that this application was being used as a 'backup' or 'alternative' to a criminal prosecution, which resulted in his acquittal. The police and CPS had pursued a criminal prosecution against the respondent, and bringing forward an application for an SRO was contrary to the guidance. The District Judge ultimately rejected this.

As the CPS do not drive the applications, you have police officers acting as litigators instead of caseworkers and reviewing lawyers. In the application I opposed, the officer in the case who made the application for an SRO did so on the basis that it was "pure luck" that the defendants had been acquitted and that they still posed a sexual threat.

Yet, the respondent had no previous convictions of a sexual nature and had demonstrated no continuation or escalation of risk in the three and a half years since the index offences were first alleged. My suggestion that the order was therefore unnecessary was again rejected.

The hearing itself, which lasted a day and a half, felt alien due to the admissibility of hearsay evidence. Instead of bringing the complainant to Court, the police obtained the transcripts of the complainant's examination in chief and cross-examination. This served as her evidence and the bulk of the appellant's case. The respondent could not fathom why this was happening even though he was unanimously acquitted. I, too, was surprised. But I understood, as did the respondent eventually, that this was a civil application and did not contradict what he understood to be double jeopardy.

Once the SRO was granted, what followed was an extremely comprehensive order that prohibited the respondent from being in the company of women (save for family) with his co-respondents, as well as conditions to install anti-forensic software and a condition to make the respondent register all devices capable of using social media with the police, as well as having to re-

quest permission to make any social media accounts. The SRO was granted for a period of 3 years.

Despite what the Home Office suggests in the guidance, there seems to be some precedent for imposing SRO even after an acquittal. The latest edition of Rook and Ward refers to an article in The Independent newspaper about a man called John O'Neil who was, like my respondent, acquitted of rape. Still, an SRO was imposed, and an unusual condition formed part of that order for him to notify the police within 24 hours of whether he was to have sex with a woman. This was to allow the police time to contact the other party and brief them on who Mr O'Neil was. On application, this time frame was revised to make Mr O'Neil inform the police as soon as *reasonably practicable*³.

A breach of this order can be punishable by up to 5 years imprisonment, and the problem is that it adds credence to the idea that "there is no smoke without fire". Despite not being convicted or doing any illegal act, a court order can be imposed against a respondent, and they can go to prison if they breach it. The guidance that exists is, at times, at cross purposes. A supporter of the existence of this order is that they are an essential tool to protect the public and vulnerable, espe-

cially those in foreign jurisdictions or where complainants are so ill-equipped to give evidence that a Crown Court trial becomes impossible. Regarding these instances, SROs are an appropriate and measured tool to manage risk. Still, a cynic would no doubt say they are being improperly used and allow the authorities a 'second crack of the whip'. However, because SROs are technically civil orders, they fall short of *autrefois acquit*.

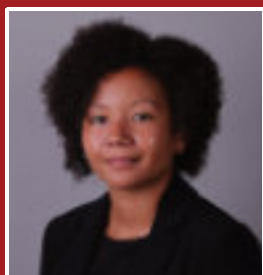
Given the legislative changes to SHPOs and SROs, it is unlikely that the trajectory of these orders will change, that they may become easier to apply for, and that their remit will expand. But it would no doubt assist if the government could publish further guidance to set the parameters for when these orders can be applied for.

George Joseph, Cornwall Street Barristers'

¹ Rook & Ward, page 1927

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1148607/Part_2_Guidance_March_2023_FINAL_3003.pdf

³ Rook & Ward, page 1927



It's A Matter for You – Making the Transition from Magistrates' Court Legal Adviser to Pupil Criminal Barrister

"It's a matter for you." If you've spent quite a bit of time in magistrates' courts, this is likely to be a phrase that you are familiar with. You are in a hearing or trial with a lay bench and a legal adviser and there comes a time where the latter advises the former in open court. The phrase is a tag on at the end, a stylistic flourish to tidy things up. When I used it, it brought me satisfaction and, usually, a feeling of a job well done. The magistrates would thank me for my advice, have a quick glance around court to check if the advocates had anything more to say, and then, if the decision required it, rise to deliberate in their retiring room.

By **Georgia-Mae Chung**, Pupil Barrister at Mountford Chambers

I would usually wait for five minutes before going to join them or, if it was a trial court, longer. This suited me, as it meant that I could stay in the courtroom and get on with other things. Being a legal adviser is all about multitasking. For instance, I would speak to the list caller about which case would be called on next, answer queries from colleagues, and read up on the law. What I enjoyed the most during these times, however, was talking to the advocates in the room.

I was a legal adviser for just short of two years in what has been called the

busiest magistrates' court in the country. This gave me ample time to have these interactions and, accordingly, I got to know hundreds of advocates. My experience with each was different. There were people who I saw often and those who I met only once. Some interactions were much briefer than others. But I was able to gauge a few things: Their personalities, their skills, and what they really liked about their jobs. What made them tick.

There was variation in the answers to this, but some parts were consistent. The common threads were a

structured and tactical mind, a love of adrenaline, and a desire to speak on behalf of others and tell their stories. I felt that I had had these traits prior to becoming a legal adviser. Yet, doing the job had made me more aware of it. The nature of the role meant that they were advantageous and my day-to-day work brought them into sharp focus.

The role of a legal adviser is, in my opinion, little talked about and often misunderstood. There are, however, numerous assumptions about it. Two, in particular, have struck me. Before I started, and perhaps understandably,

given the title, I thought the job was confined to giving the magistrates advice. Others, it seems, have the rather unfortunate view that many of those who are legal advisers are so because of their inability to become practising barristers or solicitors. In reality, the first of these assumptions, my one about the nature of the job, is not true. It is, perhaps, for that reason that the second assumption also isn't true. My understanding is that being a legal adviser is not something that people settle for. It is a qualification with an art to it that is aspired towards in its own right.

Why is this? As I came to learn during my training, a legal adviser is a bit like the ringmaster in a circus. Circus has a lot of interesting and key performers, much like there are many important people in courtrooms: The magistrates or judge, the advocates, the list caller, the defendant, witnesses, and probation officers to name a few. Legal advisers are there to make sure that everything runs smoothly in what can otherwise be a chaotic environment. For me, that was certainly an attractive prospect in itself. Even more so now because the actions and abilities that it necessitates are so translatable to the role of a criminal barrister.

Multitasking

As I highlighted before, being a legal adviser is all about multitasking. They have a number of responsibilities in the courtroom, in addition to giving advice and conducting research. When a defendant first enters and their case is called on, the legal adviser must identify them and put any relevant charges so that pleas can be entered. They are responsible for checking that case management forms have been filled out correctly, taking a note of what happens in each hearing, and finding new hearing dates. More generally, they must keep a constant eye on what is happening in the courtroom. They will often be the first to spot any disturbances and will deal with queries from their list caller, probation officers, colleagues, and advocates.

Adaptation and Processing Information

Before the court session starts, legal advisers must undertake a pre-court briefing with their magistrates to give an overview of the cases that are on their list for that day. However, even then, there is no guarantee that the list that they are supplied with that morning will be representative of what they eventually deal with. Circumstances change. Trials crack. Hearings cannot go ahead. The police bring custodies late in the day. Cases are taken from other courts. The list goes on. When a legal adviser is faced with a new case to get to grips with, new law to get up to speed with, and a new defendant to meet, they must simply adapt.

This is one of the times when the difference in position between legal advisers and defence advocates is most

stark. It is well known that advocates often receive last minute instructions and that, of course, carries its own difficulties. But, with the exception of duty solicitors, when they arrive at court, they usually have one or two cases to focus on. Legal advisers deal with several cases in one day and, for the sake of limited court time if nothing else, must switch seamlessly from one to another. It was not uncommon for me to juggle more than thirty cases during a day in a remand court.

Initiating and Navigating Conflict

It goes without saying that it is very important for legal advisers to get the law right. Magistrates are unqualified and, if they apply the law wrongly in their decisions, it is the behaviour of their legal adviser that is scrutinised. The buck stops with them, so to speak. Often though, it is not just the representation of the law in their advice to the magistrates that legal advisers think about. They will also scrutinise the submissions that advocates make to their bench. They want to make sure that the magistrates get an accurate picture of the relevant law.

How they achieve this varies. Much like advocates, legal advisers have different styles. Some are active and some are passive. Over time, I came to fall into the former category. I would not wait until I gave the bulk of my advice just before my magistrates considered their decision. I would clarify the law throughout hearings when necessary. This included asking follow up questions of advocates or, more occasionally, interjecting during their submissions. I would do this if I had concerns and wished to correct what was being said or if I felt that my bench would benefit from further clarification. It is important that these interventions are performed in a polite yet assertive way and getting the balance right is not always easy. Unsurprisingly, courtrooms are full of strong personalities and those who are driven to get the best outcomes in their work. Fiery interactions build thick skins on both sides.

Discussing Legal Concepts with the Judiciary

It is worth noting that legal advisers do not always sit with magistrates. I also spent a significant amount of time with district judges and deputy district judges. Although I was not required to give legal advice in the same way as I did to a lay bench, I would have discussions with judges before, between, and after cases. This was a great opportunity to understand their approaches to their decisions and build my own knowledge. Moreover, I would frequently be asked for my opinion on decisions that had been or were to be made, which kept me on my toes.

Assisting Unrepresented Defendants and Recognising Their Limits

A final, and often overlooked, point is that legal advisers must assist self-represented defendants. The majority

of defendants will have representation, if not through an advocate secured before their hearing, then through the courtroom's duty solicitor. Nevertheless, there are times when this is not possible. This may be because the offence is deemed to be too minor for a duty solicitor's assistance or the defendant has refused to take that help. Help could be refused for a variety of reasons. For example, the defendant may insist that they are capable of representing themselves. Alternatively, they might have initially spoken to a duty solicitor who has then had to withdraw.

In this situation, it falls to the legal adviser to attempt to speak to the defendant and assist them. Since they are legal advisers and not advocates, they must do this whilst being careful not to stray into the area of advice. This often involves explaining the court process and having firm and frank discussions with them. If this is in the context of a hearing where a plea is to be entered, the content of the discussions will focus on the consequences of that. If a defendant wants to plead guilty, then this could be about their potential sentence and any relevant mitigation. If they intend to enter a not guilty plea, this will usually include an honest assessment of their prospects of success at trial. If the defendant did pursue that course of action, the legal adviser would then help them to complete their part of the relevant case management form. If the defendant is representing themselves at a trial, the legal adviser will guide them through their evidence in chief by asking relevant questions.

Needless to say, this can involve speaking to defendants who are stressed, frustrated, or upset. Some may exhibit mental health issues or be going through withdrawal. Having those important conversations with them requires a level of patience and understanding, as well as having the confidence to remain in charge of the discussion's direction. It is a crash course in employing soft skills to volatile situations.

Overall, I feel that being a legal adviser has stood me in good stead for my role as a pupil criminal barrister. It has nurtured a particular set of skills that will be useful for my first few cases in the magistrates' court and beyond. I hope that this article is also a reminder of how indispensable legal advisers are. I certainly enjoyed my time as one and, if I had not always wanted to be a criminal barrister, I have little doubt that I would have stayed in the role long-term.

Georgia-Mae Chung, Pupil Barrister at Mountford Chambers. ISCRE Trustee and Sentencing Academy Consultant. Former Magistrates' Court Legal Adviser



The road to cognition: Using generative AI in legal practice

By Mike Taylor, Managing Director, i-Lit Limited

Introduction

Professor Karim Lakhani of Harvard Business School helpfully contextualises AI technology when he states, “Just as the internet has drastically lowered the cost of information transmission, AI will lower the cost of cognition.”

On 30th January 2024 the Information and Technology Panel of the Bar Council released a document called “Considerations when using ChatGPT and generative artificial intelligence software based on large language models”. Its purpose was to “assist barristers in understanding the technological basis and risks in the use of such generative LLM systems” and to “provide a useful summary of considerations for barristers if they decide to use ChatGPT or any similar LLM software”.¹

Definitions

• User Interface

What most people would refer to as a generative AI or an LLM. ChatGPT (OpenAi), Gemini (Google), Claude (Anthropic), and Llama (Meta) are all examples. They are not the actual artificial intelligence but the way in which users interact with the artificial intelligence.

• LLM – Large language Model

This is the artificial intelligence. As the Bar council guidance states LLMs are “trained on huge amounts of data, which is processed through

a neural network made up of multiple nodes and layers. These networks continually adjust the way they interpret and make sense of data based on a host of factors, including the results of previous trial and error.”

• Context Window

The LLMs context window is its temporary memory like a whiteboard in a classroom. All user prompts are placed on the context window and all LLM responses are produced to the context window.

• API - Application Programming Interface.

A piece of software that allows two computers to communicate with each other.

The aim of this article is to provide some clarity surrounding the different ways LLMs are accessed, an explanation of what (if any) data user interfaces and LLMs store, and consequently what the real risks are in terms of Confidential Information and Data Protection Compliance as outlined in the stern warnings given at paragraph 19 of the Bar Council Guidance.

The Bar Council Guidance

Paragraph 19 of the guidance states,

“Be extremely vigilant not to share with a generative LLM system any legally privileged or confidential information (including trade secrets), or any personal data, as the input information

provided is likely to be used to generate future outputs and could therefore be publicly shared with other users”

This statement is complex and gives an inaccurate impression of the consequences of using LLM technology. The guidance consistently conflates the user interface of an LLM and the LLM itself. When the guidance states,

“Be extremely vigilant not to share with a generative LLM system any legally privileged or confidential information (including trade secrets), or any personal data.”

It may be more accurate (but still not accurate all of the time) to say

“Be extremely vigilant not to share with a generative LLM systems interface...”

this is because when a user inputs a prompt into, for example, ChatGPT the prompt is placed (and potentially) stored within ChatGPT which is a user interface. The interface then places the prompt into the LLMs context window where the prompt is read by the LLM (so shared but not ingested) and the response is then produced into the same context window. When a user logs out of the interface the information in the context window (both the prompts and the responses) is lost to the LLM. Like wiping the classroom white board clean. The prompts and responses may (but not necessarily) be stored within ChatGPT (the user interface).

Producers of LLMs realise that a user’s chat history may be useful both for users (who can refer to their own chat history) and for the LLM as a useful learning tool for future iterations of the LLM as the history is a real-world use case and so makes a high-quality training resource.

However, following the concerns raised by the Italian authorities’ producers of LLMs have also recognised that they have an obligation to allow their users to opt out of that data collection process. Resultantly users can turn off the memory feature of Chat GPT, in those circumstances the conversation history is removed from the users view but it is retained in the background for “abuse-monitoring” for a period of 30 days. Even if the LLM is updated during that 30-day period the information in the “disabled” memory of users who have opted out will not be used to educate the LLM.

Abuse monitoring (in the context of Chat GPT) consists of 4 steps,

- 1. **Content Classification** - Algorithms analyse the language used in both the prompts and responses to detect harmful language and/or images. The system then categorises the harms as defined

by the LLM and assigns a severity level.

2. **Abuse Pattern Capture** - Abuse monitoring looks at customer usage patterns and employs algorithms and heuristics to detect indicators of potential abuse. A high frequency severe harm user will be flagged as of more concern than someone who has once put in an abusive prompt.
3. **Human Review and Decision:** If someone is regularly using high severity prompts (or regularly causing high severity level responses) authorised Microsoft employees may assess the flagged content, and either confirm or correct the classification or determination based on predefined guidelines and policies. Data can be accessed for human review only by authorized Microsoft employees via Secure Access Workstations (SAWs) with Just-In-Time (JIT) request approval granted by team managers.
4. **Notification and Action:** When a threshold of abusive behaviour has been confirmed based on the preceding three steps, the customer is informed of the determination by email. Except in cases of severe or recurring abuse, customers typically are given an opportunity to explain or remediate—and implement mechanisms to prevent recurrence of—the abusive behaviour. Failure to address the behaviour—or recurring or severe abuse—may result in suspension or termination of the customer’s access to Azure OpenAI resources and/or capabilities.

To summarise if you turn off the memory function of ChatGPT (you should always educate yourself on the particular features of alternative free LLM user interfaces) you can be sure that even though the history is saved behind the scenes (for 30 days) it is exceptionally unlikely to ever be viewed and will never be used for educating the LLM.

Paragraph 19 continues,

the input information provided is likely to be used to generate future outputs

This again gives an inaccurate impression of what is going on. The user “inputs” the information into the user interface (ChatGPT for example). ChatGPT then temporarily places that information into the LLMs context window, the LLM reads and responds to that prompt (but doesn’t ingest/save the prompt or response).

The context window is not somewhere that LLMs can learn or retain information from. LLMs are trained on information gleaned from the Internet using an entirely different process.

LLMs simply cannot absorb new information sent to the context window. Their “knowledge” is based solely on prior training.

The LLM will even tell you this, ask ChatGPT who the current UK prime minister is, and it states,

“As of my last knowledge update in January 2022, the Prime Minister of the United Kingdom was Boris Johnson. However, please note that my information might be outdated, and it's advisable to check the latest sources for the most current information.”

If a user then corrects the LLM by saying “I think you’ll find it’s Rishi Sunak” the response is,

“I apologize for any confusion. However, as of my last update in January 2022, Boris Johnson was serving as the UK Prime Minister. If Rishi Sunak has become Prime Minister since then, I appreciate the update. It's essential to verify the current Prime Minister with up-to-date sources, as political positions can change.”

If the user then asks again “Who is the current UK Prime minister?” the response is,

“As of my last update in January 2022, Boris Johnson was the Prime Minister of the United Kingdom. However, for the most current and accurate information, I recommend checking a reliable news source as political positions can change.”

demonstrating that the LLM simply has not learnt or “updated” itself with the correction that was entered into the context window. LLMs do not “learn” on-the-fly.

Paragraph 19 continues,

and could therefore be publicly shared with other users.

As explained above the chat history (which can and should be disabled) is stored in the user interface. Users who do not disable their chat history do run the risk of a data breach exposing their chat history (as happened in Italy) and also consent to their chat history being used as a training resource for future iterations of the LLM but the impression given, that the LLM will regurgitate your prompts and its responses to other users is completely inaccurate.

Paragraph 19 finishes by saying,

Any such sharing of confidential information is likely to be a breach of Core Duty 6 and rule rC15.5 of the Code of Conduct, which could also result in disciplinary proceedings and/or legal liability.

Core Duty 6 and rule rC15.5 require you to preserve the confidentiality of

your lay client’s affairs. If you turn off the memory function of ChatGPT (you should always educate yourself on the features of alternative free LLM user interfaces) you can be sure that even though the history is saved behind the scenes (for 30 days) it is exceptionally unlikely to ever be viewed and will never be used for educating the LLM and consequently confidentiality is not breached.

The use of free LLM technology can therefore be made safe (or at least significantly safer than the Bar Council guidance suggests) when it comes to maintaining the confidentiality of the prompts input into the LLM via the user interface; however, notwithstanding that the guidance is correct when it outlines the risks associated with hallucinations, information disorder, bias in training and mistakes. Commercially minded practitioners could of course obtain the express consent of their lay clients to use LLM technology to reduce the time needed to work on their case, whilst being mindful of the risks.

Free LLM technology should not be confused with commercially available LLM technology.

Many litigation support tools are developing and releasing generative AI features as part of their product offering and there is absolutely no reason to be concerned about the use of commercially available LLMs in those settings because,

- The LLM is accessed using an API, this means that your prompts and conversation history are stored within the litigation support tool (commonly only accessed through two factor authentication). In effect the (secure) litigation support tool becomes your user interface.

- Customers who access the LLM system directly through the API benefit from Microsoft’s Service Terms: Microsoft offers this statement regarding its OpenAI services:

“Your prompts (inputs) and completions (outputs), your embeddings, and your training data:

- are NOT available to other customers.
- are NOT available to OpenAI.
- are NOT used to improve OpenAI models.
- are NOT used to improve any Microsoft or 3rd party products or services.
- are NOT used for automatically improving Azure OpenAI models for your use in your resource (The models are stateless, unless you explicitly fine-tune models with your training data).
- Your fine-tuned Azure OpenAI models are available exclusively for your use.

The Azure OpenAI Service is fully controlled by Microsoft; Microsoft hosts the OpenAI models in Microsoft's Azure environment and the Service does NOT interact with any services operated by OpenAI (e.g. ChatGPT, or the OpenAI API)."

- When accessing the LLM through a litigation support tool questions are asked in relation to the documents within the litigation support tool and answers are given referencing those documents (and those documents only) and so issues surrounding hallucinations, information disorder, bias in training, and mistakes, are also minimised if not completely removed.

This is new technology and practitioners, and the Bar Council are right to pay close attention to the way in which the technology works and collects and stores (or otherwise) information but, put simply, the right AI in the right hands has the potential to transform the legal industry and particularly practice at the Bar.

The headline takeaway from the Bar Council guidance that "the input in-

formation provided is likely to be used to generate future outputs and could therefore be publicly shared with other users" is only partially accurate and only in the very narrowest of circumstances (when chat history is not turned off AND when the user interface suffers a data breach).

The potential for LLM use (specifically in a commercial setting) within legal practice is remarkable. Referenced reports on specific issues within your document collections can be produced in minutes not days, issue specific and matter wide chronologies can be instantly produced, documents can be ranked by relevance to a particular issue in less than a second, multiple transcripts from oral evidence can be interrogated and referenced almost instantaneously.

LLM technology has the potential to significantly shorten the road to cognition but, as Bar Council guidance points out, "LLMs ... complement and augment human processes to improve efficiency but should not be a substitute for the exercise of professional judgment, quality legal analysis and the expertise which clients, courts and society expect from barristers."

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i-Lit Limited is successful, independent, e-disclosure / e-discovery consulting firm that provides consulting and procurement services to law firms, their clients, corporations and government departments on a daily basis

¹ *The full text of the document can be found here <https://www.barcouncilethics.co.uk/wp-content/uploads/2024/01/Considerations-when-using-ChatGPT-and-Generative-AI-Software-based-on-large-language-models-January-2024.pdf>*



From a Crown Court Clerk to Pupil: A View from the Seat Beneath the Bench

In Spring 2022, amid my BPC exams and pupillage interviews, I saw an advert for a 12-month contract as a Crown Court Clerk in Manchester. Irresolute about my chances of securing pupillage, I submitted what felt like my hundredth job application that year. The year transpired to be one of triumph; I was successful in both pursuits and the timing felt auspicious. At the conclusion of my studies, I eagerly embarked on my short career as a court clerk while I awaited the start of my pupillage in September of the following year.

By **Naomi Duckworth**, Pupil Barrister at Lincoln House Chambers

Although I had anticipated that the role would be invaluable to me, I could not have envisaged all the ways in which it would add value to my practice. I knew that it would help demystify the Criminal Litigation modules I had recently studied and allow me to watch advocacy daily. I had not anticipated, however, that I would discover how misunderstood clerks can be by some barristers, or how it is the little things that barristers can do to make a clerk's job easier that can get you a long way. And so, I began to note all the little things I came across so that I could implement them into my practice in the future.

When it was inevitably my time to leave, I left with a profound appreciation and admiration of the

work that clerks do; just like most who work in the failing criminal justice system, they deeply care about the people who find themselves within it. I also left on a promise. A promise to spread appreciation at the Bar of the crucial role clerks play within the system, and to help bridge the gap between the two. Having now stood on both sides, I can attest to the fact that both are doing their absolute best to assist in the delivery of justice for remuneration that does not reflect the physical and emotional labour that each role necessitates.

To keep good on my promise below are my top five insider tips that all barristers irrespective of call, can and should implement to help keep morale high in an environment where, as we

all know, working conditions are only increasing in difficulty.

One: Sign in on the Digital Case System (CCDCS)

Before every hearing, add a comment containing your email, your telephone number, and how you intend to appear. This is incredibly helpful for numerous reasons, but particularly so where you are appearing remotely – it is easy to find yourself unknowingly in the wrong hearing room and without recourse. If your contact details are on the system, clerks can help. As a side note you require prior permission to attend remotely, those without it should be prepared to fend off judicial questions on the same.



You should also endeavour to let clerks know in advance if you require an amendment to the indictment, re-arraignment or any action that requires the input of the clerk. Preferably by using the note function before the hearing (as well as uploading any new indictment in advance), but at least before the hearing starts. This will get you extra points as it allows clerks time to prepare any script and reinput any indictment. With that said, do not put comments on the indictment pages, or add them to plea stamps. The indictment is a legal document, and it is a clerk's role to ensure their compliance. No notes should appear on this page other than those from clerks with any amendments or pleas. Unfortunately, only the author of a note can delete it, therefore if you happen to do this it cannot be corrected by anyone but you.

Two: Introduce yourself and your case and do it every time

I appreciate that it is hard for us barristers to comprehend that we are not immediately recognisable, I certainly would not have come to the Bar but for my ego! It is also hard to digest the fact that we brilliant barristers are forgettable. However, the truth is that in the throes of chaos names often elude us all. It's not personal.

It is therefore incredibly unhelpful to a clerk for a barrister to come into a court and just sit down with no introduction. Providing it to the usher outside offers no assistance to the clerk inside. Court clerks spend their day desperately trying to find a matching wiggery of barristers. This desperation is further compounded when they have no idea who is in their court or why they are there. Barristers can greatly assist by getting into the habit of saying hello with their name and case when they enter. Helping in this way, also vastly improves your chances of getting your case on.

Three: Cross Courting

This leads to the third tip. Before the start of court, inform both the ushers and clerks if you are cross courted. This particularly applies to newer barristers and pupils, as I am told this courtesy has been lost since the Covid-19 pandemic, along with the knowledge that there is an order in which your cases should be heard (the hierarchal judge always taking priority). Those who repeatedly fall foul of this can guarantee that they will have a mark against their name which will inevitably get back to the judiciary.

If you let the clerks know where you will be, the times you are listed, and the names of your cases they can better manage their lists whilst keeping all parties happy. Behind the scenes, they can keep tabs on you and your cases by checking other courts, communicating with the other clerks, assisting you with the hierarchy and appeasing the judge. If you want to avoid a judicial dressing down, get court clerks on your side! If you are polite and respectful, clerks and ushers will move mountains to accommodate you, we are, after all, all in this together. If you get the feeling that you are never accommodated, pay particular attention to tip four below.

Four: Treat Everyone as Your Equals

Court staff always deserve your respect. They are not scapegoats for your mistakes, they are not your minions, and they are certainly not beneath you. Those who own their mistakes and take responsibility for any delays, irrespective of whether it was their fault, gain a reputation as being classy advocates by both the court staff and the Bench. Criminal barristers work with the widest cross-section of society and are taught to communicate in a non-condescending way, and this is the perfect

opportunity to put those skills into practice.

On the rare occasions where this does occur, I do not believe that it is intentional. Rather it comes from being under immense pressure and a lack of understanding of how demanding the role of a clerk is. Unfortunately, there are however a few repeat offenders who treat court staff poorly in comparison to their contemporaries. Those who fall foul of this get a bad reputation. Just as you do not want a bad reputation at the Bar or the Bench, you certainly do not want one with the clerks. You will invariably need many favours from clerks over your career, and their readiness to help you will depend on your reputation.

Five: If you need help ask

Some of the best legal minds I have known were not sitting in the advocate's rows. Those clerks who have worked in the role for decades know the intricacies of the legislation and Criminal Procedure Rules that are simply lost on the majority of us. This is because clerks are responsible for ensuring legal compliance; if a sentence or action is illegal, they cannot sign it off. They also spend their morning preparing cases, not dissimilar to barristers, to assist judges. They have to understand what the case is in for, which requires an understanding of the case history.

Unlike barristers, however, they also have access to more information, and they can be a great source of help. I can recall one case where a barrister was mooting out loud that she was struggling to get to grips with the chronology of the case. I understood her pain, as I had spent most of my morning trying to get to understand it myself. However, when I tried to assist her, my attempts were ignored. The case was called on and she had to admit to the judge that she did not have a grasp of the chronology which was an entirely unnecessary scenario. Clerks are a tool to be utilised, so use them - just so long as you do so in accordance with tip four.

Conclusion

It is not a new sentiment to keep court clerks on your side. We are all told this on our way to the Bar, however, there is very limited practical advice on how to do this. These insider tips are simple yet effective practices that will do just that. I know from my own experience that their implementation into your practice will be greatly received by clerks and are a sure-fire way of ensuring that you have an excellent reputation, and therefore an easier experience in court.

Naomi Duckworth, Pupil Barrister at Lincoln House Chambers



“I’m fine thanks”

The well-worn buzz word “wellbeing”; it encompasses more than just our physical and mental health, it also relates to our social and psychological functioning, a feeling of purpose, some sense of control.

By **Naomi Hartridge**, Barrister, Parklane Plowden Chambers, Leeds

Many professions face similar working challenges to ours in terms of time management, stress, working hours and competing demands. We are far from unique. How we address our own wellbeing is ultimately a matter of personal choice, a choice that will have a continuous impact on our daily lives, but how far is that choice impacted by external pressures that are, or would appear to be, beyond our control?

The Covid 19 pandemic, unlike anything else many of us have ever known, precipitated huge changes in our working lives. It brought with it a noticeable shift in our working patterns, our mental health and our approach, as well as for some, a deeper appreciation of our own and others’ personal lives and responsibilities.

Our work undoubtedly often touches people at a time in their lives when they are at their most vulnerable. We are inevitably impacted by the information that we are exposed to; our outlook and mental health often being deeply affected by the vicarious trauma that we experience. Our working lives are shaped by these influences whether we choose to make the time to address them, or not.

We are also heavily impacted by the quality and timing of our instructions, the people we work alongside and the Judges we appear before.

Barristers across the profession of differing ages and areas of practice from four sets of chambers in Leeds were approached to answer an anonymised questionnaire. This comprised a number of questions exploring where we are post-Covid, the support available to us, the extent to which such support is engaged with, the current issues facing members of the Bar and how we address or could address, those issues.

Responses were received from 59 barristers between forty-six and three years call, spanning all areas of practice.

The issues repeatedly identified as posing the biggest challenges to wellbeing at the Bar were, in order of priority;

- Work/life balance
- Volume/pressure of work
- Stress
- Financial insecurity
- Last minute diary changes
- Judicial bullying

To address these challenges the following suggestions were made by participants, in order of priority;

- More judicial awareness of wellbeing, work/life balance and childcare commitments
- More realistic expectations
- Increased awareness from/training of clerks in respect of wellbeing, diary management including balancing court attendances with preparation time
- Earlier instructions
- More remote attendance
- Changes to attitudes within chambers to reducing workload and taking time off

When looking specifically at how matters of wellbeing have changed post-Covid, the ability to work remotely was ranked as the most positive outcome. Conversely however, the negative impact of isolation resulting from such remote working featured as the second highest response. Another repeated response was that issues relating to wellbeing had not improved as a result of Covid with concerns being raised by some that Covid working patterns and expectations had further blurred the work-life balance.

Looking at the issue of our work-life balance; intrinsically linked to our wellbeing, the majority of participants stated that they habitually worked during the weekend, the highest response being one day every weekend with variations being largely dependent on workload. Some participants recorded efforts to reduce weekend work in line with their wellbeing. The volume and pressure of work has already been noted to be the second biggest wellbeing issue and already accounts for increased working hours during the week.

An almost equal number of participants stated that they hadn’t taken time out of Court as a result of work-related stress or anxiety as those who stated they had done so. Within

the responses from those that hadn’t done so, reference was made to other ways in which they addressed stress and/or anxiety, including limiting any new work and reducing their number of working days.

The majority of participants indicated that they were aware of who could be approached within their chambers for support in relation to wellbeing issues, however in spite of this knowledge the majority of participants indicated that they would be unlikely to seek out such support within chambers. A proportion of participants indicated that they would be concerned that raising such issues within chambers may negatively impact their career.

An almost equal number of participants were aware as those who were not, of what support was available to them outside chambers in respect of wellbeing issues.

The majority of participants stated that they had not raised wellbeing issues with the Court, the second most popular response being that what they had raised had been dismissed; a proportion of participants indicating that they had little confidence in a positive outcome if matters of this nature were raised with the Court.

Of interest then is perhaps how those who participated in the survey share the ways in which they address their own wellbeing in the light of the ongoing challenges at play. Unsurprisingly, the majority focused on sport and exercise with regular holidays and time out being a close second or a combined approach. However, in the light of the previous responses this must be balanced with the negative attitudes that participants refer to in respect of taking annual leave and reducing their number of working days or days in court. Reference is made to counteracting the pressures by simply taking on less work (with the resultant impact on earning capacity), to requesting more days for preparation and to the repeated reliance on time with friends and family and for some, their own self-care.

Whether or not the responses received resonate with your experience of wellbeing at the Bar, they make clear

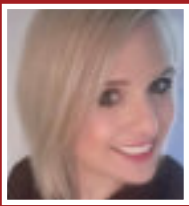
that for many, wellbeing is an ongoing cause for concern. This is reiterated in the recent Bar Council's *Working Lives Survey* published at the end of last year which notes that reported incidents of bullying, harassment and discrimination have increased.¹ Some changes could undoubtedly be put in place to raise awareness of these issues and to address them both inside and outside Court. This article alludes very briefly to some areas that could be pivotal to an increased commitment to and recognition of the ongoing wellbeing issues within our profession. Further initiatives could be explored and further training provided; the increased use of mentoring, training for clerks in aspects of wellbeing awareness and diary management, an increased understanding and commitment within the judiciary to recognise and address issues of wellbeing to sustain morale and productivity, the provision of counselling and/or supervision within chambers on an individual and group basis and wellbeing charters.

However, whatever is put in place and whatever changes we seek and support, we also each surely have a degree of

responsibility to ourselves and to each other to safeguard and promote, to the extent that we are able, our own wellbeing. Unless we collectively and individually prioritise our own wellbeing and support that of our colleagues, both inside and outside court, then we perpetuate a continuing acceptance that our wellbeing has limited value and is not crucial to our inherent ability to undertake and sustain the role we have. In short, we undermine and under-value ourselves and each other.

Naomi Hartridge Parklane Plowden Chambers Leeds

¹ *The Bar Council, Bullying, harassment and discrimination at the Bar; Data from Barristers' Working Lives 2023 and Talk to Spot reports received by the Bar Council 2019-2023.*



Transparency in the Family Court?

Court and tribunal hearings in England and Wales are usually open to the public, as part of the principle of open justice. An exception to this has always been Family Court proceedings, meaning it was not possible to know how Family judges were reaching decisions.

By **Natalie Dean MBA**, Pupil Barrister, Wilberforce Barristers

Last month's expansion of a reporting pilot which covers almost half of the Family Courts in England and Wales sees an opening up of the Family Justice System to a wider audience.

The start of this transparency 'project' within the Family Courts can be traced back to 2019, when the Family Division President Sir Andrew McFarlane made the decision to order a review of transparency within the Family Courts. This review concluded with a twelve-month pilot scheme starting on 30 January 2023 in three locations – Leeds, Cardiff and Carlisle.

This pilot scheme enabled accredited media and legal bloggers to report on the proceedings within Family Courts in these locations. It also enabled reporters to interview lay parties involved in the proceedings, subject to anonymity rules. Anonymity is assured through Transparency Orders, that are made by judges and are there to set out what can and cannot be reported in each case.

Transparency orders

In considering making a Transparency Order, a Family Court judge must consider once an application is made, whether it is right to make a Transparency Order in the case, whether there should be amendments or additions made to the standard order and when the order should start.

Any Transparency Order during the pilot should direct that reporters be provided with a copy of the Transparency Order and be permitted to see and quote from documents such as skeleton arguments, case summaries, position statements and chronologies, for example. These documents are to be provided by the party or advocate who has responsibility for drafting them. It is then the responsibility of the reports to ensure that any quotes they use from the documents are compliant with the Transparency Order.

The first Transparency Order

The first 'Transparency Order' was made by Mr Justice Poole, whilst sitting in Leeds, on 25 January 2023, prior to the initial pilot commencing. This order covered a finding-of-fact that was due to last 11 weeks. Mr Justice Poole stated in his judgment¹ that the pilot was to be adopted from the outset of the hearing and was circulated to all parties before the hearing started. This finding-of-fact involved three different Family law applications that were brought to the court by local authorities, involving three different families. Each involved allegations in relation to a mother "fabricating or inducing illness in one child of each family".

The order made adopted the template 'Transparency Order', that was provided in the guidance from Sir

Andrew MacFarlane, with two variations that Mr Justice Poole thought were necessary for this specific case. The first variation was a condition that no reporting of the proceedings was allowed until the hearing had concluded and possibly longer than this. This variation was made as criminal proceedings were ongoing in relation to three women involved in the case.

The second variation was that there was to be a confidential schedule included in the order with the real names of the family members, to avoid any accidental reporting of any members of the three families. The variation enabled reporters to check the confidential schedule if they had any doubts as to whether an individual was subject to the prohibition on identification.

The documentation that reporters were entitled to receive was also restricted by Mr Justice Poole. The only documentation that he ruled to be available were opening and closing position statements or skeleton arguments and the indices to the hearing bundles.

This order saw the setting aside of the rules that were laid down in Section 12 of the Administration of Justice Act 1960, which had the effect of making it potentially a contempt of court to publish information relating to proceedings before any court sitting in private where the proceedings:

- i. Relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
- ii. Are brought under the Children Act 1989; or
- iii. Otherwise relate wholly or mainly to the ... upbringing of a minor.

The pilot

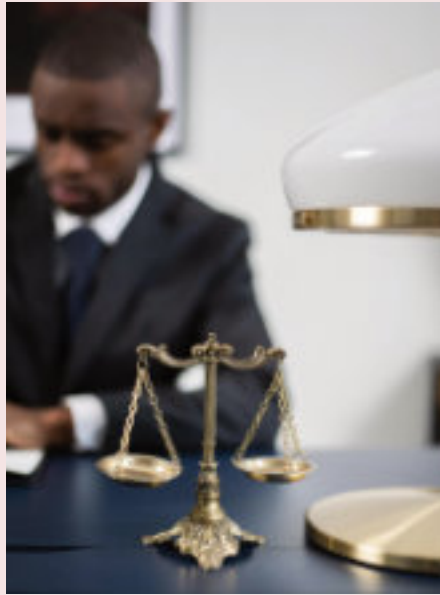
Before the transparency pilot began journalists were technically able to attend Family hearings but were not able to report on anything of substance. Louise Tickle, a freelance journalist decided to campaign for greater transparency within the Family Courts. This resulted in her winning an appeal to report on a case in 2018 (*M (A Child) [2018] EWCA Civ 240*), which involved the Southampton City Council, the Local Authority in the case, adducing weak evidence to support an application to place a child for adoption. This successful appeal culminated in Sir Andrew MacFarlane expressing a view that new guidance was needed in regard to reporting of Family Law proceedings and resulted in the publication of his Transparency Review² in October 2021. This review stated that ‘there needs to be a major shift in culture and process to increase the transparency (of Family Courts) in a number of respects’

One of Sir Andrew’s proposals was the reporting pilot, which has now been expanded to cover 16 courts and this news has received a considerable amount of media interest. This extended pilot will launch firstly in public law proceedings before judges, then private law in spring and the magistrates from autumn, which is how the original pilot worked. The 16 additional courts participating in the pilot include Liverpool, Manchester, West Yorkshire, Kingston-upon-Hull, Nottingham, Stoke, Derby, Birmingham, Central Family Court, East London, West London, Dorset, Truro, Luton, Guildford, and Milton Keynes.

Necessary considerations

The pilot does raise some potential concerns which do need to be carefully considered. Family law often involves personal and sensitive information about individuals and families. An increase in transparency could compromise the privacy of parties involved. Protecting the privacy and dignity of those who are involved in Family law proceedings is essential and it is vital to ensure that Transparency Orders are effectively enabling the balance of transparency and privacy.

Family law cases often involve domestic violence or child protection and in such cases transparency could result in safety risks for vulnerable individuals. The necessary safeguards must be in place to ensure the safety and security of all parties when court



hearings are open and court documents are more widely accessible.

Opening up Family law proceedings to potential media scrutiny may lead to sensationalised reporting or a distortion of the facts of a case. This could then serve to undermine the integrity of the legal process and contribute to a misunderstanding amongst the public of the issues involved in such cases.

The prospect of increased transparency may also discourage parties from using the Family law system to seek resolutions as they may fear judgment or public exposure. For victims of abuse, the thought of a journalist sitting in the court could increase their anxiety and make the idea of going to court even more daunting for them. Individuals using the Family law system may be concerned that someone reading a media report detailing their case may be able to work out their identity, adding to the stress they are already going through.

It is hoped though that as the pilot continues to be rolled out to new locations and the reporting of the media continues if the right safeguards are in place and the appropriate care and attention is given, that the parties involved in Family law proceedings will begin to see that they can trust that their identities will be protected. Promisingly, Mrs Justice Lieven, lead judge for the pilot, confirmed that there had been no complaints about potential identification of families during the initial pilot in 2023.

The continued expansion of media reporting should improve understanding of Family law and how decisions are made. By providing more access to court proceedings and documents the Family law process should be demystified. It can also help to shine a light on some of the issues in the Family Court, for example the pressures the court system is under as a whole and the difficulties a party can

face in Family proceedings if they do not have legal representation.

Increased transparency can also assist in ensuring that lawyers and judges are kept accountable for their actions in the Family Courts. When they are conducted with greater transparency there is likely to be a greater scrutiny of judicial decision making and conduct, which should in principle reduce the risks of bias, inconsistency and misconduct.

By increasing openness and accountability in the Family Courts the public trust in the Family law system could increase. Having confidence that the system is fair and transparent should mean the public are more likely to accept and comply with decisions made by the court, which could help to reduce conflict and the need for further proceedings.

Reporting to date

There has already been a lot of positive reporting taking place since the initial pilot started at the beginning of 2023. It has showed times when the Family Court has worked well to the benefit of families and children and demonstrated a family focused approach in the courts. The widening of the pilot should hopefully see an increase in this positive reporting.

President of the Family Division Sir Andrew McFarlane said:

“Extending the reporting pilot to family courts across the country is a huge step in the judiciary’s ongoing work to increase transparency and improve public confidence and understanding of the Family Justice System. After a pioneering year of reporting from Leeds, Cardiff and Carlisle journalists and legal bloggers will be allowed to report from a further sixteen courts.”

“We hope than in extending the pilot further we can continue to understand the impact that Family Court reporting has. I would like to urge the media to read the guidance and come to the Family Courts to see the vital and challenging work that is done there, and to report on the cases and issues that are so important.”³

Natalie Dean MBA, Pupil Barrister, Wilberforce Barristers

¹ Re: *BR & Ors (Transparency Order: Finding of Fact Hearing)*[2023] EWFC 9

² *Confidence and Confidentiality: Transparency in the Family Court, Sir Andrew Macfarlane, 28 October 2021*

³ <https://www.judiciary.uk/groundbreaking-family-court-reporting-pilot-rolled-out-to-sixteen-more-courts-across-england/>



Breaking Barriers: My Journey to the Bar

Despite coming from a single-parent household, receiving state education, and lacking legal connections, I never hesitated in my aspiration to become a barrister. While I've always been aware that my background differs from the typical path to a career at the Bar, I refused to let it dictate my choices. It is reassuring to see significant strides in equality and diversity, as evidenced by the BSB's 2024 annual report, which demonstrates encouraging statistics on the Bar's increasing representation.

By **Serena Christine Ranklin**. Called to the Bar by The Honourable Society of Lincoln's Inn – October 2023

Growing up, my mother and grandfather instilled in me the belief that anything is achievable. Despite my mother juggling multiple jobs and my grandfather running his own electrical engineering business, their relentless work ethic taught me the value of perseverance and determination from an early age.

Education

I always enjoyed school and learning in general, although I was always extremely chatty, which at one point was a criticism, especially during class. Fortunately, that trait is now referred to as having a charismatic and bubbly personality, which I now embrace within the legal profession.

I remember going to the library one evening after college, sitting there with the pressure of selecting a degree, and contemplating what would genuinely make me feel proud and fulfilled. I also questioned what I could excel at, and from there, the answer for me was a career in law – a choice that opened numerous possibilities for me to influence change, help people, and be a voice for others.

I followed my dream and studied Law at university in Manchester, I immediately felt as though I had thrown myself into the deep end. However, this risk turned out to be one of the best decisions I had made, I knew immediately I had paved a positive way for my future. I distinctly recall having the opportunity to meet Lady Hale at a conference and being extremely inspired by her work and words. I took a photo with her, one which I still cherish to this day, as a source of motivation believing that maybe one day, I too could be such an inspiration to the younger generation.

Bar School

I then pursued the Barrister Training Course combined with a Master of Laws, immediately after completing my Law degree. I became intrigued by life at the Bar and the art of advocacy, and I wanted to embrace this opportunity as quickly as possible. It is fair to say that when I first began the course, I felt extremely alone, and I am not ashamed to say that I struggled. I was naive to

the extensive workload and complexities that arose from studying Blackstone's Criminal Practice and the Civil Procedure Rules. Unfortunately, I had only ever heard immediate success stories from those who had taken the course, never about the obstacles that accompanied it. However, I quickly realised that struggling through the course was completely normal, and it was likely that my fellow students were experiencing similar challenges. I think it is important to acknowledge the obstacles that can arise and embrace the struggle rather than overlook it, after all, the course is setting you up for a career at the Bar.

Displaying a strong sense of resilience, I quickly established a daily routine of attending university classes, consolidating what I learned in the library after class, and preparing for the upcoming days. After, I would walk to the gym, which provided a huge release and balance. I joke about this, but at one point, I genuinely believed that the library staff were expecting rent payments considering how often I attended and the hours I worked.

I thoroughly enjoyed the Barrister Training Course, with examination in chief and cross-examination being my favourite on the syllabus. I have always been a competitive person, so I enjoyed the challenges and obstacles that arose when dealing with witnesses and evidence. My problem became quite evident when I was faced with the litigation examinations. I can honestly say, based on my personal experience, that those two examinations were among the biggest challenges I have ever faced until they turned into the most significant achievements I had attained, and I believe that is the key. You will never be defeated until you give up.

During the course, I was fortunate enough to secure a role as a Specialist Investigator and Court Advocate. This role required me to manage my time effectively and organise my revision. In this capacity, I apply to the Magistrates Court for orders and prosecute breaches. This role not only enhanced my advocacy skills and courtroom confidence, but also filled me with a sense of contentment in helping others which exemplifies the reason why I



have always aspired to become a Barrister.

I would arrive at the library and stay until late at night, making sure I understood the content of the books, the specific style of questions asked, and the language. Yes, it is a different language. A unique kind of determination came over me during this time, I would plan my work and be disciplined with my revision as much as possible.

After I left the exam hall on those two last occasions, I knew I had done everything I could to prepare. I now understand that the course provided only a small insight into the level of work and preparation that barristers engage in daily. It tested whether you could manage it and get through the challenges, regardless of external factors.

The verdict was in, and I had passed the Barrister Training Course. All I could think about from that moment onwards was the fact I could be called to the Bar of England. I remember feeling overwhelmed; I ran out of the room I was in, practically fell down the stairs with happy tears, and showed my mother the email, she grabbed me and gave me the biggest hug. Then, I drove to my grandad's house to surprise him with the news. I think I cried for a week straight; I could not believe it. My grandad repeatedly said, 'Serena, you have come such a long way' with tears in his eyes. I believe that every experience studying the course is extremely personal, with unforeseen obstacles that life can throw at you, teaching everyone resilience in its own way, just like the Bar seems to.

Call to the Bar

I was Called to the Bar on the 12th of October 2023 at the Honourable Society of Lincoln's Inn. The vision I had of this day, the one that got me through the struggle, lived up to every single expectation I had. I envisioned this day in the library when I was doubting my abilities, and thought, if I can get there, I can genuinely achieve anything. I think I had shivers down my spine the entire day. I took my wig out of its box and placed it on my head for the first time after having it fitted. I remember looking in the mirror and having tears in my eyes at the fact that I had reached this moment.

As I was called up, the Treasurer confirmed that I had been published as a Barrister on behalf of the Honourable Society of Lincoln's Inn. I stepped forward, while feeling very nervous of course, and the Treasurer's smile was one of pure delight to each one of us.

Advice

Each barrister vividly recalls the day they were called to the Bar. For those

currently immersed in the challenges of the Bar Training Course or those yet to embark on this journey, I urge you to hold onto the significance of this day and use it as your motivation. My call day served as my driving force and is a solid reminder that achieving this goal is within reach for anyone who wants it enough. I started with nothing but a vision, and if that is all you possess, then consider it a valuable starting point. Regardless of your background, gender, or family circumstances, maintain your vision and pursue it with unwavering determination.

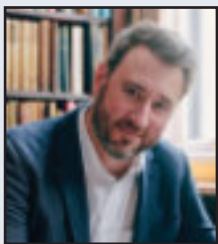
If you are contemplating a career at the Bar and seeking more guidance, I recommend watching a video titled 'The Law is for Everybody – Inspiring the Next Generation of Barristers.' This video was suggested to me by His Honour Judge Mushtaq Khokhar during a week marshalling him at Leeds Crown Court, created by The Honourable Society of Lincoln's Inn, this resource offers valuable insights into the legal profession and may provide further inspiration for aspiring barristers.

I would like to take a moment to acknowledge Judge Khokhar and his remarkable journey, hearing his story left me deeply inspired, he exemplifies how one can overcome obstacles to achieve greatness. Reflecting on my own journey, I realise the value of such inspiring stories. I wish I had encountered this video previously; I urge others to watch the video and draw motivation from it if this applies to you.

The law is for everyone, and the Bar is becoming increasingly representative. Not all barristers have the stereotypical background that is assumed, many have faced obstacles. If you encounter setbacks along your journey, don't let them deter or define you. Get back up and keep pushing forward – each attempt brings you one step closer to your goals.

Next on the agenda - securing a pupillage!

Serena Christine Ranklin



The Cab rank rule and explaining the law: Tom Cross reflects on his new podcast

Barristers must accept instructions which are appropriate taking into account their experience, seniority and / or field of practice, irrespective of (a) the identity of the client, (b) the nature of the case to which the instructions relate; (c) whether the client is paying privately or is publicly funded; and (d) any belief or opinion which they may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.

That is the “cab rank” rule, as set out in our Code of Conduct. It applies subject to exceptions, including where the work would not be for a “proper fee”.

In general, lay people do not know about it, or understand the rationale behind it. This may be unsurprising. I am sure that, during my time at the Bar, it has become less common for barristers to seek to justify or even to explain the rule to non-lawyers. Some reasonably question its efficacy in practice. But I detect that an increasing number of the profession don't really believe in it at all. If I am right, it should give cause for concern.

Certainly, the efficacy problem is real. The rule is so hedged in qualifications that its core principle - that the client's identity is irrelevant - can easily be circumvented. It is virtually unenforceable, save in cases of egregious breach. Lord Steyn may have been too cynical in *Arthur J S Hall & Co. v Simons* (A.P.) [2000] UKHL 38 [2002] 1 AC 615 to say, at 678, that “its

impact on the administration of justice in England is not great. In real life a barrister has a clerk whose enthusiasm for the unwanted brief may not be great, and he is free to raise the fee within limits. It is not likely that the rule often obliges barristers to undertake work which they would not otherwise accept”. But since the rule only obliges the barrister to accept instructions which are “appropriate taking into account [their] experience, seniority and / or field of practice”, compliance is almost never questioned. What are “appropriate” instructions allows the barrister a broad discretion in practice to decline particular work. The discretion enables barristers to position themselves as associating with certain clients or causes, and solicitors (not themselves subject to the rule) who act for such clients may prefer to instruct barristers on that basis.

But the existence of qualifications to the rule cannot be justification, at least by itself, for doing away with it. As Sir Igor Judge P noticed in *R v Ulcay* [2007] EWCA Crim 2379; [2008] 1

WLR 1209 at [40]: “... criticism is largely directed at the possible evasion of the principle, rather than the principle itself”. If, a decade ago, Lord Neuberger was right that it is worth keeping the rule “notwithstanding its continued existence being questioned by The Law Society in 2010 and, more recently, by the Legal Services Board”¹, the profession needs to revisit the reasons why we have it and be prepared to defend them.

There is, in fact, more than one justification for the rule. The early rationale was provided by the barrister Thomas Erskine (later Lord Chancellor) in 1792 when he was criticised for defending Tom Paine, a man charged with seditious libel. Although focussed on criminal law, his words “apply with necessary modification to a civil case” (per Arden LJ in *Kjell Tore Skjevesland v Gevevan Trading Co Ltd* [2002] EWCA Civ 1567 [2003] 1 WLR 912 at [44]). He said that:

“if an advocate refuses to defend, from what he may think of the

charge or of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions ...” (R v Paine (1792) 22 State Tr 357, 412).

Put simply, courts decide cases, not barristers, so the barrister cannot refuse the case because they think it unworthy. For justice to be administered, the barrister must leave it to those constitutionally responsible for deciding the case to do so. More recently, Lord Hobhouse expressed the same idea in *Medcalf v Mardell* [2002] UKHL 27 [2003] 1 AC 120 at [51]. The duty of the advocate to promote and protect fearlessly his lay client's best interests is not simply “a duty which the advocate owes to his client”. “It is also in the public interest that the duty should be performed. The judicial system exists to administer justice” and “the role of the independent professional advocate is central to achieving this outcome”.

But a slightly different justification is also often cited, namely the need to protect the barrister's reputation. Hence Lord Reid said in *Rondel v Worsley* [1969] 1 AC 191 at 227 that if counsel is bound to act for a person “however unpopular or even offensive he or his opinions may be”, “no reasonable man could think the less of any counsel because of his association with such a client, but, if counsel could pick and choose, his reputation might suffer if he chose to act for such a client”. In Arthur J.S. Hall, Lord Hoffmann spoke similarly at 686 not only about “enabling unpopular causes to obtain representation in court”, but also “protecting barristers against being criticised for giving their services to a client with a bad reputation”. And Lord Hobhouse in *Medcalf*'s case said at [52] that the advocate should not be exposed to pressures which will tend to deter them from representing certain clients: “unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the executive, the judiciary or by anyone else”.

Each of these justifications is important. But in my view the defence of the rule tends to focus too much on the second and not enough on the first. The more powerful - and compelling - reason for the rule is that the integrity of the very system depends on it to the benefit of every member of society. Protecting barristers' reputations may be a good thing - especially if you are a barrister - but we should see it as secondary. And the public is more likely to be receptive to the first justification than the second, because it is about protecting their interests.

Unduly focussing on the barrister's reputation involves a further problem.



Today's barrister's reputation is not developed simply through their work on individual cases. They must also show personal commitment to wider cultural values, such as Equality and Diversity. If they do not, they may not be able to progress to Silk, may find themselves receiving fewer instructions, and may even be in breach of the Code of Conduct. In my view, it is a positive and welcome development that barristers are expected to show such commitment. Apart from anything else, it enables the Bar to maintain public confidence in the profession. But if, beyond their casework, the barrister's reputation can rest on whether they possess certain personal values, it becomes more difficult in practice to argue that their reputations should be protected notwithstanding the counter-cultural or unpalatable causes which their clients may represent. For the best contemporary rationale we may do better to go back to Erskine, and stress the fundamental importance of a fair trial for the parties.

The cab rank rule has long been at the heart of the work of the Bar. Reflecting on it brings reflection on the work of the Bar generally and the service we provide to society. I believe that the Bar can do better at explaining the system in which we operate as well as the law which it applies. To that end, late last year, I started a podcast, Cross Examination, “for law people, lay people, and everyone in between”. Its premise is simple: the law applies to us all, and lawyers have a duty to explain it. The first series covered topics from AI and Discrimination to Medical Cannabis to Miscarriages of Criminal Justice. The format involves my interviewing a non-lawyer with direct personal experience of the topic, and exploring their story with the most expert lawyers in the field. Using the story as a platform, we seek both to explain the law and to ask whether, in a given area, it is fit for purpose. The common denominator of each episode is that they are concerned with the law on some important contemporary cultural, moral, or ethical issue, thereby covering the wide range of

topics I encounter in my practice across public and human rights law, and beyond. In compiling episodes, I have found it helpful that, in my practice, I act for a wide range of parties, which affords perspective.

The most gratifying response to Series One has been from the members of the public who have told me they welcome its accessibility. I hope that the podcast might help in that small way to promote the integrity of the work which barristers do.

But I am left reflecting that the task of promoting the integrity of the Bar can more generally be difficult without effectively explaining - and defending - the cab rank rule. That is surely not an exercise which we should abandon, at least for the reasons Erskine gave, although I accept it is not an easy one. Erskine himself not only lost friends for representing Paine; it also cost him his position as Attorney-General to the Prince of Wales. And it certainly did not help him persuade his jury, which convicted Paine without even retiring. But therein lies the point. Defending and properly adhering to the cab rank rule may require particular courage when breaching it is the more socially convenient thing to do; but the existence of social pressures, which vary in nature across the generations, is precisely why we must continue to embrace it.

For more information about Cross Examination, the website is www.crossexamination.co.uk, the e-mail address is info@crossexamination.co.uk, and its social media handle is @crossexaminepod.

¹Lord Neuberger, Tomorrow's Lawyers Today – Today's Lawyers Tomorrow, speech of 19 February 2013, referred to in a BSB report, The “Cab Rank Rule”: A Fresh View, 28 February 2012: <https://www.barstandardsboard.org.uk/static/000f3ede-9f15-4a6c-817f2e8c0f3e9825/BSB-Cab-Rank-Rule-Paper-28-2-13-V6-final.pdf>.



The legal crisis management revolution: Some thoughts from the sanctions revolution



By **Prof. Dr. Viktor Winkler, LL.M.** (Harvard), Attorney at German and EU law and professor of law, Frankfurt/Germany

I advise clients in the most sudden and the most dramatic legal crisis clients can find themselves in.

No. I am not a defense attorney.

Criminal penalties emerge after an organic and long-winded process for which the client will, or, at least, can, prepare quite thoroughly. In my line of work companies cannot prepare. They have no time to prepare. No time to wait, no time to adjust to what is, by far, the most dramatic intrusion the law has to offer: (International) sanctions. They come as quickly as a summer storm and are, regularly, as aggressive as a hurricane. What makes sanctions measures, by any government, so dramatic is not merely that they are never announced to the person or company affected by them, be it directly or indirectly, or that they usually affect core businesses in the most sweeping prohibitive way with a very short history of sanctions unable to inform them what to do exactly. What makes sanctions so dramatic is that, unlike criminal penalties, the grave and deep infringements into the rights of those subject to these legal measures are inflicted without the constitutional safeguards we call criminal procedure. No right to be heard, no right to an attorney, no time to send those armies of lawyers drafting up a storm, not even the right to know their charges---actually, not even the right to know you are sanctioned. This does not make sanctions outright unlawful. But from a constitutional law perspective this makes them the deepest, the most severe basic rights intrusions known to our democratic Western legal systems.

Working in and advising in sanctions, and, in my case, mostly in Russia-related sanctions, thereby shoved my nose onto a phenomenon I played no role in helping create but one I cannot stop to marvel at ever since I have founded the (probably) first law firm in Germany devoted solely to sanctions: The phenomenon of legal crisis management.

“Oh, please”, you will say, “not that crisis *shtik* again.” And you would be right, too. I myself cannot hear it anymore. As a former legal history scholar I had many years ago in one of my researches found to my astonishment that every scholarly generation, and I literally mean every, in the history of jurisprudence since the 1850s was actually *über*-convinced that it was experiencing a profound and miraculously special state of

aggregated crisis. Crisis is not just everywhere, it was *always everywhere*.

But, luckily, I am not referring to this type of crisis. I am not talking about crises, whether imagined or not, coming from the outside, the real world, and so I am not talking about the hordes of low-browed and low-priced “legal consultant”-type legal consultants who went to bed before Covid and the Ukraine war only to, in an act of self-infused reincarnation, wake up the next day as high-powered crisis management lawyers (and, more often than not, even as sanctions lawyers, I might add).

I am instead talking about a very specific type of crisis: the legal crisis. This type of crisis is not created by lab-sneaking viruses, hacking, or wars, but by the law, or, to be more precise, by governmental measures in various legal forms. You may say that there is absolutely nothing new about that and I would agree. But something has changed recently, and, I argue, very significantly. And that is the volume and the quality of such legally-created crises. The number of regulatory interventions by governments alone, from Brussel and Berlin to London and New York, has increased at such a breathtaking pace since, roughly, the year 2000 that the sheer volume of these legal requirements alone has created an ongoing legal crisis in its own right. A brooding, largely unspectacular kind, but still.

The change in quality is more interesting: The legal crises of today, very much unlike the ones in the 1990s, and even in the early 2000s, are marked by an intricate entanglement of legal and reputational aspects. This is true for the new field of sanctions more than for any other: When I advise my clients to adhere to sanctions in the strictest of ways I am making a legal argument about the threat of enforcement as much as I am making one about the devastating effect on the company’s reputation should it even remotely create the suspicion its businesses could perhaps be supporting Russia more than the Russia sanctions.

But sanctions, here too, are only *pars pro toto*. In almost all areas of regulatory laws, clients today in the Western world face a reputational risk by breaking laws that is so high that – and this is the most important aspect perhaps – the lines get blurred between law and reputation, between regulatory and political pressures. And governments start to increasingly take

advantage. In an upcoming scholarly article I call this phenomenon “Regulation By Reputation”---the states’ attempt to achieve political goals by a hybrid of law and reputational threats intended to go well beyond the limits – and the reach – of ordinary regulatory intervention.

We experience this in various areas, but most strongly probably in the area of human rights and in the area of climate change. Here, the Western governments have long switched from pure law to a new set of rules which, increasingly by seeking to transform private companies into activist policers of certain goals, combine legal, political and reputational dimensions.

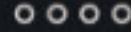
This creates the true legal crisis of the 2020s, and probably the 2030s, for companies: The inability to achieve compliance in the deeper sense of the word with a regulatory onslaught which cannot be handled with the old toolbox. Indeed companies, whether in the UK or Germany or elsewhere, have so far been remarkably inattentive in accepting and discussing this new legal crisis management in the age of the never-ending regulatory tsunami. And companies proved that lack in the most recent covid and war crises, of all things: Response teams were created, task forces implemented, if any, and then vanished; some sooner and some later, but vanish they did.

And that is exactly the problem. Companies have not drawn the most essential conclusion from “the new normal”: That they need to transform all of their internal organization and processes (both!) into permanent crisis organizations – not just ones that can, if necessary, act as such. That is what I mean by legal crisis management. And it would mean we as lawyers have yet to create and (re-)invent this discipline for our clients. Because such legal crisis management would not only capture every part of the in-house governance of legal and compliance risks, but would actually lead to the disappearance of the distinctions between legal and non-legal functions (risk, communications, compliance) altogether. To all those who say that this is too extreme of an outlook and or that this will simply never happen I say: Look at the regulatory landscape today across the UK, Europe, America, Australia, or Canada, and tell me you can clearly draw the distinction between a legal and a non-legal issue.

Prof. Dr. Viktor Winkler, LL.M.
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Mr Sameer Singh MBBS BS, FRCS Consultant Orthopaedic Surgeon

Mr Sameer Singh is an experienced expert witness (Personal Injury and Medical Negligence) and can take instructions for cases on behalf of either claimant or defendant. Mr Singh produces clear unbiased reports based on the evidence to assist the courts. His areas of expertise are:

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His practice concentrates on all aspects of trauma (bone and soft tissue) with specialist interest in Shoulder, Elbow and Hand disorders. Mr Singh is Bond Solon trained and maintain skills as an expert witness with regular CPD and sits on the BOA Medico-legal Committee.

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ANTONY FANSHAWE BSC, FCA, MBA

Antony is a hugely experienced chartered accountant, insolvency practitioner and businessman. He is both an FCA and has an MBA. In his professional life he has acted as an insolvency practitioner, advised creditors and debtors, sold many companies and businesses, raised finance, and brought claims. He has acted as an insolvency and accountancy expert for 23 years giving opinions on:

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Liz Bossley, the CEO of the Consilience Energy Advisory Group Ltd, has more than 45 years' experience in crude oil and refined products trading and in shipping operations and the freight market. She has acted as expert witness in around 50 disputes and is an accomplished public speaker and published author. Consilience has just launched a new software package, Revenue Analysis, Apportionment and Hedging (RAAH), to aid oil producers and asset traders in determining and hedging their future revenue stream.

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