THE LONDON ADVOCATE

THE NEWSLETTER OF THE LONDON CRIMINAL COURTS SOLICITORS' ASSOCIATION

NUMBER 94 AUTUMN 2020

As we approach the tail end of 2020 (finally!), we find ourselves locked-down again but with – emerging as I write - positive news of a vaccine. While it will not change matters overnight, it seems that there may be grounds for optimism of a return to normality at some point in the first half of 2021. Though precisely what the post-pandemic "normality" will look like is anyone's guess.

What we do know is that the profession – long used to struggling in the face of adversity (not to mention animosity) – faces huge challenges, many of which pre-date Covid-19: a vast (and growing) backlog of cases awaiting charge or trial in spite of dwindling volumes overall; a crisis in recruitment and retention leading to an ever-aging profession; legal aid deserts. As ever, funding is the root cause, and the current attitude in government sadly gives do-gooding activist lawyers no cause for positivity. What should lift spirits, though, is reflecting on how the defence community has pulled together during the public health emergency, to maintain service provision and ensure representation of the vulnerable in the face of considerable odds. Our collective resilience and determination can only be to our benefit in the future.

The Advocate's return to normality is not waiting for a vaccine, however. After two issues that were all but devoted to pandemic-related matters, this issue reports on our, successful-albeit-remote, AGM with contributions from the immediate past-President and her newly-installed successor. We also bring you articles on a significant recent case concerning adverse inferences and on cautiously welcome developments on changes to the Rehabilitation of Offenders Act regime in respect of child offenders.

As ever, any contributions or ideas for content for future editions will be warmly welcomed, simply contact the editor.

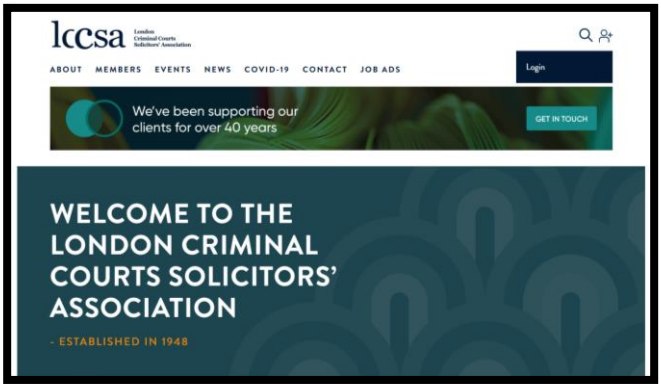
Ed Smyth, Editor
(esmyth@kingsleynapley.co.uk)

LCCSA NEWS

NEW WEBSITE

Launched this week, the Association's new website is a huge improvement on the previous iteration; easier on the eye and more straightforward to navigate. Please have a look at: https://www.lccsa.org.uk/.

Members who wish to take agency work can use their member profile to advertise their experience and what locations and types of work they cover.



A new court and police station diary system will enable members to find an agent quickly and will enable advocates to register their presence at a place and time to gain new work, so that anyone needing last minute cover, for that bail breach matter, can check and see who is already at the relevant court. This will make enquiries more relevant, more focussed, and more efficient.

Firms and businesses can now advertise job vacancies on a new jobs page.

Applications for renewal of membership and identity cards will now be completed quickly and easily online.

A guide on how to use these new functions will be circulated to members shortly.

ID CARDS

New identity cards for full solicitor members will become available in the very near future. They will permit search-free and fast-tracked entry into courts, while continuing to provide evidence of professional status to police custody staff. We have worked with, and received support from, the Law Society on this important project, and will be able to offer it to any solicitor, regardless of

whether they practice in criminal law or not. ID cards will be provided to members free of charge.

Since the pandemic, interest and demand for the court access scheme has grown, rhe Association has been working hard to be included: the criteria for recognition is robust and it has not been an easy exercise. Delays have been caused by Brexit, the general election and the pandemic but we will have a safe and secure system

AGM, 3 NOVEMBER 2020

The Association held its AGM on 3 November, by Zoom. Aside from the formality of electing the coming year's committee, attendees were addressed by the outgoing President, Kerry Hudson, on an eventful past year before our new President, Mark Troman set out his hopes for 2020-21.

Our special guest this year was Dr Courtney Griffiths QC, who spoke with characteristic erudition and force about his experience and challenging of racism in the criminal justice system over four decades as one of the most prominent members of the criminal bar.. He urged those listening to speak out against the treatment of BAME individuals by the police and the courts, and stressed the need for profession to continue striving for greater diversity.

COMMITTEE MEMBERS 2020 – 2021

President: Mark Troman (Powell Spencer & Partners)

Past President: Kerry Hudson (Bullivant Law)

Vice President: Hesham Puri (MK Law)

Junior Vice President: Adeela Khan (Edward Fail Bradshaw & Waterson)

Treasurer: Rumit Shah (Galbraith Branley)

Secretary: Matthew Hardcastle (Kingsley Napley)

Training Officer: Diana Payne (Blackfords LLP)

Law Reform Officer: Edward Jones (Hodge Jones & Allen)

Media/Advocate: Edmund Smyth (Kingsley Napley)

Administrator: Sara Boxer

Other Committee members

Claire Anderson (ABV Solicitors)

Rakesh Bhasin (Edwards Duthie Shamash)

Steve Bird (Birds Solicitors)

Peter Csemiczky (Hickman & Rose)

Claire Dissington (GT Stewart)

Malcolm Duxbury (Bullivant Law)

Rhona Friedman (Commons)

Alison Marks (MK Law)

Danielle Reece-Greenhalgh (Corker Binning)

Raymond Shaw (Shaw Graham Kersh)

Bianca St Prix (Hodge Jones & Allen)

Jonathan Black

COMMITTEE MEETINGS

The LCCSA committee meets on the second Monday of each month at 6:30pm, for the foreseeable future, by telephone or video-conference. All members are welcome so if you wish to participate please contact the editor or Sara Boxer.

♦ ♦ ♦ ♦

OUTGOING PRESIDENT'S REPORT

A year ago today, I stood before you all [in real life, indoors, in a group of more than 6!], terrified, setting out what I had planned for my year ahead in the Presidential "hot seat".

What a year!

I know I said it was difficult to predict what would happen, but who could have predicted then the year we've had?

I can hear my Nan saying now, "Trust you to pick a year where there's a global pandemic. She doesn't do anything by halves!"

Looking back over the last 12 months, it's been a year of meeting upon meeting, in person at first, quickly replaced with us all becoming Zoom and Microsoft Teams experts overnight.

The committee and I have worked tirelessly to look after the interests of our 700 plus members as well as steering our own firms through unprecedented times. There's no instruction manual for dealing with a pandemic!

Frustratingly, it often takes many hours of meetings to achieve even the smallest of change in the Criminal Justice System but despite the challenges we have all faced this year, we have still managed to achieve some small gains.

The early pre-Covid months were spent engaging with the MOJ and the other Practitioner Groups trying to negotiate funds for the CLAR accelerated items. I am grateful to the Committee for the collaborative working on the Association's formal Consultation response.

It's not going to save the profession, but the extra funds now available for sendings and unused material is at least a step in the right direction of injecting much needed money into a Legal Aid system still based on 1990s rates and after a long history of cut after cut.

In March, we just got our CLAR Consultation response in when everything changed overnight. We saw our offices close, the Courts came to a virtual halt whilst people fought over the last loo rolls in Asda and the police appeared to be in complete denial that any pandemic existed.

I still haven't worked out how the DSCC knew that detainees were "Covid-negative". Perhaps it's the same call centre staff the government hired for the ongoing track and trace debacle!

In April, when it became apparent our health and safety was being compromised, we joined forces with the CLSA agreeing a Joint Protocol for police station attendances. Nearly 100 firms signed up to this and it was the precursor which eventually helped us push for a National Interview Protocol, to which the Association became a signatory. Until then, the expectation was very much that we would just carry on "business as usual", pandemic or no pandemic.

Your examples of poor and unsafe police working practices here in London were crucial in helping us demonstrate beyond the anecdotal, the need for a consistent and safer approach by the police. It's not perfect, but it at least gives you a solid framework to rely on to encourage police to consider your safety, take a common sense approach and embrace technology where appropriate.

Perhaps the best thing to come out of the pandemic, is that it has forced the various parts of the Criminal Justice System into regular collaboration to not only keep the system going, but to come up with new ways to keep us all safe and make the system more efficient to deal with the backlog.

In the last few months, as we gradually moved away from immediate "firefighting" to what HMCTS call "recovery", we have been in continual talks with the Legal Aid Agency. We have tried to ensure a common sense approach is taken around measuring compliance over the course of the pandemic for Legal Aid practitioners, and the first meetings have just started around what the new Crime Contracts in 2022 may look like. We are keen to encourage the Legal Aid Agency to focus on reducing bureaucracy and apparent over-regulation in these contracts.

Other projects we have been involved with which have now started to take off, include "Surgeries" with the CPS and the early PSR before plea protocol.

The surgeries with the CPS are being piloted now in Highbury, Bromley & Bexley Magistrates' Courts. We are all well aware of the ongoing difficulties with communications between the CPS and the defence. The purpose of these surgeries is to encourage meaningful communications with decision makers at the CPS in advance akin to the old Case Management Hearings. Please do take advantage of the pilot. If this is successful, it could be rolled out across the London Magistrates' Courts on a more permanent basis.

The early PSR before plea protocol started this week (2nd November 2020) and it is hoped that identifying cases early and encouraging direct communications between Probation and the Defence, will avoid solicitors having to attend Court and hang around for lengthy periods only to be told a PSR cannot be done that day, or one is not yet ready.

As always, your feedback on these initiatives is crucial. We need to make sure they work for us as Solicitors and our clients, not just to the benefit of the Courts and CPS.

So what next? It's a difficult path ahead and there is a lot still for us to achieve. We are not yet out of the woods with Extended Operating Hours. Emergency meetings are being set up to discuss the Metropolitan Police decision to pull out of CVP. It is hoped they can be persuaded to at least postpone this decision as we go into

a second lockdown. Many firms will be struggling to manage cash flow with limited Crown Court Trial income and we are still facing an ongoing recruitment and retention crisis, not helped by a CPS recruitment campaign actively targeting experienced Solicitors in private practice.

Sadly, public attitude towards lawyers hasn't improved. Last year I referred to our Home Secretary's apparent obsession with locking people up. Now our government has gone one step further in making personal attacks on us "lefty", "do-gooding" lawyers "hamstringing" the system. I'm not sure Priti Patel banked on us priding ourselves on our "do-gooding", nevertheless we must stand firm on such attacks on the rule of law and ensure the public is properly informed as to what we do as specialist criminal practitioners.

The Association has signed the letter already signed by over 800 lawyers seeking an apology from Ms Patel & Boris Johnson for undermining the rule of law and putting our lives at risk for doing our jobs. Some of you would have also heard me give evidence last week to the Westminster Commission Inquiry into the sustainability and recovery of the Legal Aid Sector where I made it clear that such public attacks from prominent government figures, as well as the misleading media coverage of Legal Aid must be stopped.

The Association will continue to engage with Parliament to fight against this dangerous wider rhetoric as well as continue to look after the interests of hard working Solicitors on the ground.

I set out the year with the aims of keeping you all regularly updated, avoiding any more cuts to Legal Aid/encouraging new money into the system, working with the other parts of the Criminal Justice System to make Solicitors' voices are heard and to fight for our interests as practitioners. In March, the health and safety of our members also became and remains of paramount importance. I hope that regardless of what this year has thrown at us, the committee and I managed to achieve those aims the best we could in the circumstances.

It has been a challenging year and there are uncertain times ahead but it has been an absolute pleasure to take the Association through such unprecedented times. Hopefully next year we might get a summer party and a European trip away – we can but hope.

Our incoming President, is a Solicitor Advocate and the Head of Serious Fraud and Business Crime at Powell Spencer & Partners. He has been involved with the Committee since 2014, he was our Honourable Secretary for 3 years, and he has put up with me in the role of Vice President over the last year.

I wish him every success in the year ahead, Mark Troman.

NEW PRESIDENT'S ADDRESS

I arrived at Kings Cross Station possessing only a job offer as an outdoor clerk, my father's tatty 1970's grey leather suitcase, one suit and nowhere to live. The latter hardship was not so much out of penury as a consequence of the 7th July London bombings interrupting my attempts to find lodgings.

And so my first week of work, clerking a murder trial at the Bailey, was conducted while sofa-surfing around Shoreditch, living among aspiring DJs and other nocturnal types. I was lucky to start with such an interesting trial, an inter-gang assassination, and the intoxicating sense of drama was only enhanced when I was locked in the courthouse one afternoon. The cause being the second, failed terror attack on London. I recall an elderly usher confidently telling me the building was bomb-proof, while pointing at shards of glass embedded in the columns of the atrium, courtesy of a prior IRA action.

If that start sounds a little-too Dick Whittington (there has been a cat along the way) I certainly did not believe the high street was paved with gold. Not long after starting I recall being told about this new idea, Price Competitive Tendering, and how providing legal services was really like collecting dustbins, which you could bid to provide as cheaply as possible. Like most people reading this, I wasn't put off by the warnings and believed the rewards of the job would outweigh these worst-case scenarios. Since then PCT / BVT has twice failed to ruin this profession; but rather it has been harmed more by political neglect than radical reform.

My legal career has almost exclusively been spent in criminal defence, bar short stints in employment and

family at the beginning. Like many I started out as a busy police station representative before being admitted to the roll and seeking duty solicitor status as soon as possible. I was wisely advised to take on trial advocacy as soon as possible after qualification, to ensure I broke my duck while still young and eager to learn. I have always enjoyed it and it led in turn to higher rights of audience and the greater legal challenges posed in the Crown Court. I remain active in all three roles and hope that will enable me to understand the problems faced by the members when representing their interests.

Having settled into practice it was some time before I joined the LCCSA. Early after qualification I was told you had to wait to be invited, like some Masonic Lodge. That was not true but my memory of it reminds me that the LCCSA must continually welcome all who share a commitment to criminal law in London and be clear that we want mass membership and mass participation.

Not long after joining the Association I was invited to join the Committee. I did so when the Austerity Coalition turned their deadly gaze upon legal aid and set Chris Grayling upon us. After waging a long war his Two Tier reform was defeated, and we felt triumphant but wounded by a large percentage cut. The commitment and action of the committee at that time was great to witness and was an experience which will guide me as I take on the responsibility of being President this year.

My reason for joining the Committee and taking on officer roles was simple. I love my job but most in society do not. In our best moments we help change lives for the better, be that the avoidance of a miscarriage of justice or by securing a second chance against the odds. We must all act as custodians of the profession and its traditions. Through our membership of this Association we can protect and promote our role for all those who need it in the future. Despite all the difficult times of the last decade there is no doubt the need for our care and dedication remains great. The pandemic does not seem to slow the rate of arrest and imprisonment, but it does threaten the efficacy of the court process and thus its ability to acquit the innocent. Our work over the next few years will be hard but I hope it enhances a sense of solidarity in the profession and brings better recognition of our value by the public and by the Ministry.

The state needs to reminded of our important role and they need to be reminded of their duty of care towards us. The health and wellbeing of our members is of paramount importance. Being described as key workers should not mean being exposed to unnecessary risk.

The police must allow us access to suspects in a way which is both safe and adequate. We must continue to have confidential discussions with our clients but preserve the option of remaining remote through these periods of contagion.

Reminding the state to consider us in their plans has always been a key demand of the Association But it is all the more pressing at a time when the Home Secretary and the Prime Minister launch attacks on the profession. The Prime Minister's cheerleading remarks, though completely ill-informed, make it hard for people like us to engage with the MOJ and its agencies. It is the "do-gooders" of this Association who donate their time to support the management of an underfunded justice system. It is a bitter irony that this work in turn spares the blushes of those politicians by helping to maintain that system.

It makes it hard for us to continue to volunteer in the face of such hostility, but we don't do it for them. Our commitment to the rule of law is not party political, no matter what they imply.

Kerry and the committee have fought for many improvements in working conditions and those arguments must continue to be made. There is more the courts and police could do, and we will need to react to changing policies and working arrangements.

I recognise that in reacting to these new ways of working not all our members will agree on the solution. What level of risk is acceptable in practice is often a very personal decision.

We the Committee need to hear from the membership. This year has seen many of you speaking out, whether on our member forum or on social media, to highlight unsafe practice. We read those messages and they guide us. Please continue to share your experiences and ideas, remember that we need to hear all sides of the argument and that healthy debate helps us find the best policy.

The second main theme of the coming year will be the Independent Review into Criminal Legal Aid , otherwise known as CLAR 2, meetings upon which I attend on behalf of the Association with Jon Black and Rakesh Bhasin. This review promises to conclude in 2021 making recommendations to ministers. It is already much delayed and we must hold the Ministry to that promise.

It is an exercise that represents both an opportunity and a threat. We are not naïve and though we will engage, we have seen enough of prior reviews to know there is no guarantee funding will increase. It is remarkable that we are still being forced to make the case for better pay, but that we will do.

The Review sets out its key priorities and expectations for service delivery such Quality, Outcomes, Competition, Efficiency, Diversity, Resilience and Transparency.

We all know, that in a market where the price is fixed and the consumer has a choice of supplier, we are already focussed on competing for work through quality. We know we have diversity and are forced through low pay to be efficient. We all know what the answer is to ensure this can continue: end the attack on levels of pay.

But we can do more to publicise the importance of our work. Increasing our focus on positive public messages can improve our business case. That will be one of my priorities this year. If you have ideas and inspirations for this, please get in touch.

The Review will reorganise the way cases are remunerated, there will be trade-offs that will suit some practice types more than others. With that in mind we will communicate with members as much as we are able and again I urge you to engage with us when that time comes.

Common Platform

During this year the Common Platform will play a greater role in our practice. It will arrive first in Croydon Magistrates' and Crown Courts early in 2021 and then roll out to the rest of our region. If you haven't already, please go to the gov.uk website for information on how to register and use this system,

While this new tool should work to reduce administrative burdens, it will inevitably pose short term problems both in terms of design and usage. The Association will be able to argue for changes and we will need members to help us identify problems and solutions.

I have been short on toasts in this speech and so can I instead ask all of you to make a promise: To join me at next year's summer party, when the sun will shine on our uncovered faces, stood closely together, our glasses overflowing and we can toast until we are flush and merry.

♦ ♦ ♦ ♦

ARTICLES

TO SPEAK OR NOT TO SPEAK: ADVERSE INFERENCES AND THE COURT OF APPEAL'S DECISION IN R V BLACK

Maia Cohen-Lask of Corker Binning provides a useful commentary on ta recent, important Court of Appeal decision which may have a significant effect on the future application of adverse inferences.

Anyone who has ever watched a TV crime drama will know that, when you are arrested, you do not have to say anything but it may harm your defence if you do not mention when questioned something you later rely on in court. And so, through these words, the caution sets up the most significant decision a suspect must take when they are arrested, or when they attend an interview under caution voluntarily – do they provide the police with their version of events at the interview, or exercise their right to silence? Whilst determining what advice to give on this issue has always been a matter of judgment, the principles governing the exercise of that judgment have been thrown into confusion by the Court of Appeal's recent decision in R v Black [1].

The potential "harm" alluded to in the caution is that, under section 34 of the Criminal Justice and Public Order Act 1994 [2], a judge can invite a jury to draw adverse inferences against a defendant if they rely on facts in their defence at trial which they failed to mention when being questioned. This means that a jury is entitled to conclude that the true reason the defendant failed to answer questions in interview is that they had no answer to give. However, a key element of the caution is the word "may". Whilst it may harm your defence if you remain silent, not all "no comment" interviews will necessarily be held against a suspect at their later trial. Section 34 specifies that an adverse inference can only be drawn for facts that, "*in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned*" (underlining added). Several cases (including R v Condron [3]) have since clarified that this reasonableness requirement means that an inference can only be drawn if the prosecution case at the time of the interview was sufficiently strong as to justify calling for an answer. A lawyer advising on what, if anything, it is "reasonable" for their client to mention at interview will therefore always do so by reference to (among other matters) the volume and quality of pre-interview disclosure.

The police (and other investigators) have complete discretion as to the extent of the pre-interview disclosure they provide. In a large and complex fraud investigation, disclosure can range from a two-paragraph summary through to tabbed bundles of relevant contemporaneous documents with detailed covering briefings. But where, in a complex case, disclosure is limited, vague, and contains no contemporaneous documents, the advice is more likely to be that the suspect should remain silent at interview, on the basis that, under section 34,

the *"circumstances"* do not *"reasonably"* require him to provide a detailed answer in response, there being no coherent or properly evidenced allegation to respond to.

And so, to the case of Mr Black, arrested early one morning in December 2014, accused of conspiracy to commit fraud by false representation between 2011 and 2013. The case related to Mr Black's solar panel business. The allegation was that a number of the representations made in brochures and sales pitches about the degree of investment return (and how that return would be achieved) were false. Pre-interview disclosure consisted of a two-page summary of the police case. Mr Black was, perhaps unsurprisingly, advised to answer "no comment" to the questions put to him in interview. At his trial, a number of years later, when the prosecution evidence amounted to some 75,000 pages, the judge ruled that there were facts that it would have been reasonable for Mr Black to have mentioned at his interview. This ruling was upheld by the Court of Appeal, for the reason that "*Mr Black confirmed in cross examination that he had lived through events and he had been given disclosure before the interview*". The Court also noted that "*there was no evidence adduced at trial to show that the prosecution case at the time of the interview was insufficient to call for an answer… It is common ground that there was no burden on Mr Black to give such evidence. However the absence of any such evidence meant that there was nothing to rebut the proper inferences to be drawn about the strength of the prosecution case at the time of interview*".

This reasoning is difficult to follow. In at least two ways, it muddies the waters of when a suspect can be reasonably expected to provide an account at interview.

Firstly, it seemingly equates the mere fact that disclosure took place with an inference that the prosecution case at interview was sufficiently strong to call for an answer. This is a fallacy. Whether the prosecution case at interview calls for an answer can only be determined by consideration of the quality of the disclosure (such as the alleged offences identified, the degree of specificity, the provision of contemporaneous documents implicating the suspect etc.). It is our experience that the quality of disclosure provided at interview, especially in large and complex cases, varies greatly, and it is not uncommon for its quality to fall short of reasonably calling for a response. If, as this judgment implies, the quality of disclosure provided at interview is irrelevant – or of less importance than the mere fact that the police gave some disclosure – that would constitute a significant shift in the law.

The implication of this shift is to suggest that unless the defendant at trial can explain why the prosecution case at interview was insufficient to call for an answer, an adverse inference must necessarily follow. This is a novel and disconcerting idea, because it seems to place a *de facto* burden on a defendant to justify their decision to exercise their right to silence. It also allows the court to abdicate its responsibility objectively to examine the quality of the disclosure and decide for itself whether it was sufficient to call for an answer from the suspect. If this judgment does represent a shift in the law, it is therefore a shift which disadvantages suspects.

Secondly, it introduces a seemingly new relevant consideration to the assessment of reasonableness, namely that the defendant had "lived through events". This is a troubling inclusion on the court's list of considerations, because having lived through events has no connection whatsoever with the strength of the prosecution case, or whether it is therefore reasonable to expect an answer. We all "lived through" our A level exams, but that does not mean it is reasonable to expect someone to be able to explain several years later why they underperformed in one of their papers. Suspects interviewed under caution will always have "lived through" relevant events in some shape or form (except in cases of mistaken identity). The suggestion that this is relevant to the reasonableness of answering questions about those events has the practical effect of diluting the right to silence. (The inclusion of this factor reflects an increasingly common attitude in the criminal justice system that defendants "know" if they are guilty or not, regardless of whether they are presented with any evidence of their guilt [4].)

Finally, the judgment sidesteps the difficult implications it has for the preservation of privilege over legal advice given at the police station. If the fact of pre-interview disclosure *per se* can be interpreted at trial as establishing a case to answer at interview, the best way to avoid an adverse inference is for the lawyer to state, on tape, during the interview itself, that the pre-interview disclosure does not establish a case justifying a response. However, doing so immediately engages thorny issues of privilege. To make such a statement whilst avoiding disclosing that this is the reason why the suspect has been advised to remain silent is to walk a very fine linguistic (and legal) tightrope. The Court of Appeal recognised this issue, but did not engage with it, stating merely that "*Mr*

Black did not say that he had been given any legal advice to the effect that the evidence was insufficient to justify a response from him (although saying that would have raised issues of legal privilege)." This logic leads to the unsatisfactory result that whether it was reasonable for the suspect to provide an account in interview is less about the court's objective assessment of the quality of the pre-interview disclosure, and more about how convincingly the defendant on trial can justify his choice to remain silent, including by reference to any legal advice he received to this effect.

The Court of Appeal's approach in R v Black has thrown the law on adverse inferences into considerable confusion. It has created inroads into the previously unambiguous position that the prosecution case must be sufficiently strong to call for an answer before adverse inferences can be drawn from a suspect's silence. Defence lawyers will struggle, if this case is followed, to confidently advise their clients that, where disclosure in complex crime investigations is sparse or incoherent, a no comment interview is likely to be consequence-free at any future trial.

[1] [2020] EWCA Crim 915

[2] https://www.legislation.gov.uk/ukpga/1994/33/section/34

[3] [1996] 1 WLR 827

[4] Examples of this attitude arising in practice include: the defence do not need to be shown CCTV of an incident prior to entering a plea because they know whether or not they committed the crime; or the defendant is not entitled to full credit for guilty pleas made any later than the very first appearance in court because they know if they are guilty.

https://www.corkerbinning.com/people/maia-cohen-lask/

♦ ♦ ♦ ♦

THE CURRENT CHILDHOOD CRIMINAL RECORDS SYSTEM ACTS AS A LIFE SENTENCE FOR MANY

Caroline Liggins and *Aneela Samrai of Hodge, Jones and Allen report on this summer's announcement by the government that youth cautions are no longer discloseable as part of DBS checks, but that there remain real problems with the rehabilitation of child offenders.*

The current childhood criminal records system, governed under the Rehabilitation of Offenders Act 1974, allows widespread and lengthy disclosure of childhood criminal records. A criminal record can block access to employment, education, housing and insurance. Childhood criminal records act as a barrier to opportunity and endure throughout adulthood, making them, in effect, life-sentences. Between 2014 and 2018 nearly 850,000 people were affected by the disclosure of youth criminal record on a standard/enhanced check.

A 2017 enquiry by the House of Commons Justice Select Committee found that the system for disclosure of youth criminal records undermines the principles of the youth justice system to prevent offending by children and young people and to have regard to their welfare. The enquiry concluded that the system prevents children from moving on from their pasts and creates a barrier to rehabilitation.

In January 2019, the Supreme Court ruled that the disclosure of youth reprimands and warnings, now replaced with youth cautions, to future employers is incompatible with Article 8 of the European Convention on Human Rights, the right to respect for private and family life. The court held that the disclosure of youth reprimands, now youth cautions, on DBS forms is directly inconsistent with their intended purpose as a rehabilitative and diversionary measure from the criminal justice system.

While the judgment confirmed that the current system is unlawful, it was left to Parliament to consider how to implement necessary changes and to give effect to the ruling. At long last in July 2020, the Government responded to this landmark judgment by announcing it plans to stop the automatic disclosure of youth cautions.

In its Business Plan for 2020-2021, the Youth Justice Board for England and Wales (YJB) outlines its vision of "a youth justice system that sees children as children, treats them fairly and helps them to build on their strengths so they can make a constructive contribution to society".

The YJB's strategic objectives are to:

- strengthen and enhance the delivery of its statutory functions;
- see a youth justice system that sees children as children first, and offenders second;
- see an improvement in the standards of custody for children and promote further rollout of constructive resettlement;
- influence the youth justice system to treat children fairly and reduce over-representation; and
- see a reduction in serious youth violence and child criminal exploitation.

These welcome developments in youth justice are severely undermined by the current criminal records

system. The Standing Committee for Youth Justice (SCYJ) recently published a briefing paper outlining how the current childhood criminal records system acts as a fundamental barrier to YJB's objectives. The SCYJ argues that the current childhood criminal records system anchors young people to their past and entrenches their criminal identity. The SCYJ argues this "impedes progress at pivotal opportunities for a child or young person to move away from crime, namely when trying to advance in education, obtain housing, or employment."

The current system criminalises children who are victims of exploitation that receive criminal records for behaviour that is a direct result of exploitation or a response to related trauma. Not only are these children let down by a society that fails to protect them from the harms of exploitation, they are punished further by a justice system that fails to recognise them as victims and by the long-term consequences of childhood criminal records.

Education, employment and secure housing are vital to constructive resettlement yet the childhood criminal records system acts as a barrier to accessing such opportunities thus actively working against rehabilitation of children. The current system creates long-lasting stigma that makes it very difficult for young people to move away from an offending identity. This prevents young people from moving on from past mistakes and reaching their full potential.

Black and Minority Ethnic (BAME) young people experience multiple discriminations and oppressions that can affect their access to education, housing and healthcare. The current system of childhood criminal records acts as an additional burden to BAME young people who are already overrepresented in the criminal justice system. In this way the current system entrenches racial disparity and inequality.

The current childhood criminal records system is not conducive to taking a child first, offender second approach to youth justice. It fails entirely to recognise child development and the complex reasons children become entangled in the criminal justice system, including exploitation. The current system prevents adults striving to positively change their lives from doing so. David Lammy summarises the problem as "people can change quickly but their criminal record does not." A childhood mistake made at as young as ten years old can have devastating consequences for an individual's livelihood throughout their entire life.

Children should not be stigmatised throughout their entire lives for offences committed as children. The current system fails to distinguish offending as children from offending as adults. While the Government's plans to stop the automatic disclosure of youth cautions is welcome, a major review of legislation on the disclosure of childhood criminal records is desperately needed. We need a system that better balances the need to protect the public while allowing children to grow up and move on from their pasts.

The Government should look to recommendations 34 and 35 of David Lammy MP's Lammy Report and consider the benefits of a sealing process for childhood criminal records.

"Our CJS should learn from the system for sealing criminal records employed in many US states. Individuals should be able to have their case heard either by a judge or a body like the Parole Board, which would then decide whether to seal their record. There should be a presumption to look favourably on those who committed crimes either as children or young adults but can demonstrate that they have changed since their conviction." (Recommendation 34)

"To ensure that the public understands the case for reform of the criminal records regime, the MoJ, HMRC and DWP should commission and publish a study indicating the costs of unemployment among ex-offenders." (Recommendation 35)

The current system is arbitrary and does not take into account the positive changes people make after childhood offending. A sealing process would bring much needed flexibility to recognise when individuals have moved on from childhood offending and no longer pose a significant risk to others and would emancipate these individuals from the shackles of their childhood criminal records. This would allow greater access to employment and constructive resettlement. It would also allow young people to move away from an offending identity and give them a real chance to achieve positive change throughout adulthood.

https://www.bja.net/legal-team/caroline-liggins/

https://www.bja.net/legal-team/aneela-samrai/

♦ ♦ ♦ ♦

BRUCE REID

"JUDICIAL DISCRETION IN CONTESTED TRANSFER OF REPRESENTATION ORDERS – THE LEGAL AID AGENCY'S GUIDANCE ON THE WAY FORWARD."

[Squirrel Nutkin is starting his bail application:]

'Madam, there's no CCTV, no forensic and whilst the Crown makes much of his record, Mr Polecat, whatever calumnies he has inflicted on the Common Weal over his

scant 25 years on the planet, has never been guilty of being drunk in charge of a lawnmower…..

DJ Puddleduck (Bored) – 'It is recent legislation, Squirrel……, I think he was only released from Thameside the week after it was passed…...'

[Enter Jan Jackal.]

'This is *my* client! Why is Mr Nutkin representing him? I want this case put back so I can take instructions!'

SN (Evenly, but with gritted teeth) – 'I was in the police station with him, I was Guest of Honour at his socially distanced EDR barbecue. Whenever he is on tag, it rings my number so I can phone EMS to tell them he has taken his pregnant girlfriend to hospital. Part of Acorn, Chestnut and Nutkin's unswerving commitment to excellence and client service. Of course he is mine!'

JJ – 'His Grandmother phoned my office this morning to request my personal assistance.'

Perry Polecat (From the dock) – 'My sainted Grandmother, who raised me, God rest her Soul, has been dead for these 5 long years!'

DJ P – 'Probably true, I haven't heard that 'Dying Grandmother in Ireland, so he failed to to attend' mitigation recently from you, have I, Squirrel?'

JJ – 'She contacted us from beyond the grave. Our Diary Manager checks Courtserve every evening and his ouija board never lies….. Although perhaps it was the other Grandmother…...'

PP – 'Hated *that* bitch! Always sending me to school; grassed me to Education and Welfare whenever I interned in Paddy Power's and was always on at me to marry any babymother I brought home. If I had listened to her, I'd be a serial bigamist.'

DJ P – 'Admittedly that is a glaring omission from the record……haven't had a COVID breach either….. Good going, Perry…...'

JJ – 'I have represented him before!'

DJ P – 'True, that will be the 3 year gap in his PNC when he was inside, I seem to recall Judge Cocklecarrot at Inner London regaling me on that one. Something about twp budgerigars and some underpants. No lawnmower though….'

PP – 'I am not having them again!……'

DJ P – 'Squirrel, there's a 'deferred' on offer if you are interested in an indication…...we can sort this now…….'

JJ (Alarmed at the prospect of the case finishing today) – 'My client has a choice of advocate, put this case back so I can diss Mr Nutkin and bludgeon Mr Polecat into submission.'

DJ P – 'You are not going to give up are you? The answer's 'No' - Don't you have any other work?'

[Awkward silence.]

[Then...]

JJ – 'I am going to Judicially Review that decision!'

DJ P (Momentarily alarmed; thinking, quite rightly, that, vexatious or not, this will entail having to give a reasoned decision – never a welcome prospect - and hours spent with that nerd Gary Goblin from the MOJ and his infernal tick-boxes) – 'Let's not rush to judgement….'

(An innocent smile crosses her face and she taps something into the iPad to DJ Snookums. She pauses, waiting for a reply, then continues.)

'…Given the detail of Squirrel's argument, I imagine that he will be some while and I am aware that he is Duty in court 5 and DJ Snookums is getting impatient. Squirrel, would it be appropriate for your colleague to take over your slot to assist the Court?'

SN – 'But…..but….? Times are hard, I have half my staff on furlough…..'

DJ P (raises an eyebrow and inclines her head slightly) - 'If anything comes up in the rest of the list, you will have to be called in, given Duty will be in Court 5…Pretty please?….' (Again, the eyebrow lifts imperceptibly.)

SN (Practised advocacy kicks in and the hint is taken) - 'Certainly Madam.'

DJ P – 'Be worth it Jan, even if you get a transfer now Percy will change his mind next week……Juicy list in Court 5…….'

JJ (Simpering) - 'I am only too pleased to assist the Court.'

5 mins later in Court 5

Marty Mole (List Caller) – 'Thank God you are here! We have a list of 15 here in the Domestic Violence and Harassment Court, all of them have shouty personality disorders and 5 of those are waiting for 'Together' to do their reports and the Maudesley are not answering the phone so we can't get started.'

DJ Snookums – 'I have waited long enough for Duty. I am not going to start my list till you have taken instructions from all of them.'

JJ - 'But Sir, its 5.00!'

DJ S – 'Precisely. You're late and I am not going to contribute to the backlog just so you can take instructions, I don't care how long it takes and I will sit early at 9.00 tomorrow. I expect you to be ready with all of them. The Court will remain open till you finish tonight'

[Rises and leaves.]

5.05pm: Sherry glasses clink in the retiring room. - 'Thanks Snookster, got me out of a tricky one there.'

9.15pm: 'Owww!!!' (with salacious sadism Marty Mole prods Jan awake with the Pitchfork of Justice, which is only allowed to him on disastrously late sittings.) 'Only 5 to go! 'Together' are typing the first of the reports now!'

For the tenth time that evening, Jan hears the words 'No I am not signing anything, not until someone hears my side of the story……..Don't you understand? No-one is listening to me!' The Defendant searches in his bag for 2 minutes and then hands over the third piece of cardboard salvaged from a CoCo Pops packet – 'I hope you can read the green ink…...I have put it all in capitals to help you…….'

♦ ♦ ♦ ♦

lccsa

London Criminal Courts Solicitors' Association