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The London Advocate reaches its hundredth edition at a time of considerable drama for the criminal defence community. The bar's escalated action started last week, supported by the LCCSA, and will continue across the summer. There has been widespread media coverage and one detects that, finally, the wider public is beginning to appreciate the dire state of criminal legal aid and the administration of criminal justice. To drive home to the MoJ the message that proper fee increases are needed now, that the profession is united and that the usual tactic of divide and rule will no longer be effective, the LCCSA is consulting with member firms this week on further action that solicitors can take. Further details will be circulated to members as soon as possible.

In a change from his usual location, this edition sees Bruce Reid set out the case for a no holds barred approach to action as being the only hope of effecting proper funding reform. Meanwhile, Greg Foxsmith argues that the current action has better prospects than any previous iterations. Remaining on the subject of protest, Greg is also the author of this edition's book review (Charged, by Matt Foot and Morag Livingstone.

Elsewhere, you will find an analysis on recent changes to the rules governing arrests pursuant to Part 2 extradition requests, and two articles on sentencing guidelines: for burglary and sexual offences respectively.

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LCCSA NEWS

TRANSFORM JUSTICE REPORT ON ASSAULTS ON EMERGENCY WORKERS

The maximum sentence for assaulting a police officer, NHS worker, prison officer or firefighter has doubled twice in the last four years. But are increased maximum penalties for assaulting an emergency worker helping to 'protect our protectors'?

Transform Justice's new **research** finds that not only has this done nothing to reduce violence or abuse towards emergency workers, it's also having detrimental consequences, sweeping more people with mental health conditions into the criminal justice system. Kerry Hudson, former LCCSA President, spoke at the report's launch on 23 June.

LIVE LINKS IN CRIMINAL PROCEEDINGS – EFFECTIVE FROM 28 JUNE

Section 51 Criminal Justice Act 2003 (as substituted by the Police, Crime, Sentencing and Courts Act 2022 with effect from **28 June 2022**) enables courts to require or permit a person to take part in eligible criminal proceedings through a live link ("a live link direction"), including at preliminary hearings, trials (whether summary or on indictment), sentencing, appeals and other identified types of hearing (see section 51(3)).

A live link direction may only be made in respect of those who are taking part in the proceedings (including counsel, solicitors, witnesses and defendants). It may not be made for those who are not taking part in the proceedings (eg public observers or journalists).

Statutory Guidance is issued by the LCJ: https://www.judiciary.uk/wp-content/uploads/2022/07/Live-links-Guidance-for-criminal-courts-July-2022.pdf

KERRY HUDSON APPEARS IN PROSPECT MAGAZINE

Our former President, Kerry Hudson, was the subject of a profile piece in the July edition of current affairs magazine, Prospect. You can read the article – in which Kerry emphasises the unrealistic burdens on defence solicitors - here:

https://www.prospectmagazine.co.uk/people/criminal-defence-solicitor-kerry-hudson-why-were-boycotting-burglary-cases

COMMITTEE MEETINGS

The LCCSA committee meets on the second Monday of each month at 6:00pm. All members are welcome to attend (in person at the offices of Kingsley Napley, 20 Bonhill St, EC2A 4DN or remotely) and if you wish to participate please contact the editor or Sara Boxer (admin@lccsa.org.uk).

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OPINION

BRUCE REID – NOTHING TO LOSE

Detecting a welcome streak of militancy in the chatter recently, I thought it would be interesting to codify the arguments.

The cause is just and the need for a dramatic pay rise unanswerable, the profession differs only on the means of achieving it.

My position is easier than most; I am close to retirement, the house is paid for, we have no kids, don't run a car and are vegetarian, and whilst I may view the transition to cheaper bourbon with trepidation, it will be manageable. I am aware that many of you are fearful for your mortgages, the future of your firms and devoted staff and the dangers of disciplinary action. So, I will understand if you respond to the arguments below with 'It's all very well for you, Bruce'; but unfortunately folks, the logic, dare I say it, is impeccable and will remain the same, so read on.

My first advice to you all is to get out – now; whatever the result of any industrial action, we will not be restored to the happy situation in which I entered the profession.

Most of you will not take that advice or you wouldn't be reading this, so let us consider how to effect what change we can.

The odds are formidable, we have a Government with no money, having p***ed it away on Brexit, the wholesale purchase of Marigold dish-gloves from cronies in the belief they were PPE - £14 billion at the last count - and the impact of COVID. Ministers are chosen for their loyalty to Bobo not competency and are driven by ideology and soundbites. Since when was the return to Imperial Measures a priority in an economic crisis?

Moreover, we are among their least favourite people, marginally above asylum seekers and Priti Vacant doubtless has plans for our mass-deportation to Rwanda. If there is no extra money for the NHS then we are not in line for it either.

We also have the enemies of HMCTS, the LAA and the threat of contract breaches and disciplinary action.

Pretty tough eh? Well, what choice do we have? WTF, let's go for it! On your feet or on your knees!

We can forget any concession from Government unless it is forced out of them. No more letter writing, polite meetings with junior nobodies and importantly, no trust in Lord Bellamy - he will do nothing for us; his analysis is pertinent and favourable but he will not be able to do anything to help. I have no doubts of the gentleman's intelligence or ability or indeed his genuine commitment to assist us, but to accept the post of implementing the necessary reforms when the Government has effectively already rejected those suggestions, demonstrates either culpable naivete or an obsessional desire for a peerage. The thought of being a fig-leaf for Boris Johnson is not a job that anyone should contemplate – look away now kids…….

So; how to force things? There are several factors in our favour.

For once, the Bar, whilst of course ultimately acting in their own interests, seem aligned with us. We cannot win this without them and need to support them, they are demonstrating courage in disrupting the Crown Courts, we must do the same below.

Secondly, we are not acting alone. The rail workers are striking, the teachers are actively considering it, BA threatens the airports and other industries will gather

courage from that and do the same. There is a tail-wind on this at the moment.

Thirdly, the Government is at least brittle if not weak. Incompetent Ministers and yes men cannot or do not negotiate and intervene as they used to in the past. Look at the inaction over the rail strikes. I am always suspicious of what I read in the Guardian – too much wishful thinking when it comes to political analysis - but with Labour winning back a Red Wall seat and the Lib Dems taking a South Western constituency with a thumping majority means that the coalition that brought Bobo to power is fracturing. The very reason that the Conservative Party chose him as leader – electability – seems in doubt.

Whilst I welcome a palace coup, we will still be left with a Conservative Government, but at least it will be a Government, not a medieval court with a King and favourites and a job of course for the WAGS. We should be ready for this change. We should start now.

I understand the slow movement of the LCCSA committee on tactics – it is necessary to take the whole profession with them not just armchair firebrands like me – but the odd Day of Action, gowned or not, is not going to work. It will make us feel good but that's about it.

Achievement factor? Zilch. 'The natives are restless, Sir' – 'Don't worry, they never do much….'

I respect the Committee, I have known some of them for years, but we need them to demonstrate the same aggression in defence of the profession that I know they pursue in defence of their clients.

In short, we need to strike, walk out, decline to act, call it what you like - on a semi-permanent basis, not just a couple of days. We need to frustrate the whole system and effectively stop it working until the Government concedes. The methods of doing this can be left to our leaders to recommend but it's going to have to be bloody and brutal to have any effect at all. This lot are insusceptible to reasoned argument, it will have to be both barrels and then reload and fire again until we win it.

This goes against the very reason we signed up in the first place but if we don't effect change now, there will be no-one to do it anyway, you will have taken early retirement, gone bankrupt, had a breakdown etc etc.

The response will be ferocious. Contact breaches will be implemented, disciplinary proceedings commenced and the Judiciary will report us to both the LAA and the SRA at the first opportunity.

But let us consider these paper tigers (sorry, early teenage flirtation with Maoism makes an unwelcome appearance……):

The Judiciary first; many DJ's will be sympathetic, most of them applied for a post in order to escape our current situation, the Crown Court Judges and the LCJ are another matter. The latter's recent assertion that they are not taking part in the Bar's dispute, but will ensure that the Presiding Judges take disciplinary action on any disobedience is at once Olympian and po-faced.

Appeals to 'professionalism' are disingenuous at best. The Establishment, wherever it is, always relies on appeals to a higher power when it wants to con individuals into volunteering for death or sacrifice.

Think WW1 Generals sending a regiment into murderous machine-gun fire, a jihadi Imam encouraging suicide bombers or, back to Maoism and the need for intellectuals to do manual labour for the cause of the Revolution. The Greater Good, King and Country, Service of the Lord, the Advance of Socialism, call it what you like it is all ultimately BS if you are dead or broke. So, we do the bare minimum to avoid being struck off, no helping the Court, strict demarcation of Duty appearances etc. Politely; stuff professionalism, it's a con.

Professionalism assumes a reasonable income permitting the professional the time and energy to exercise noblesse oblige. Not extra shifts at the behest of some numpty who has re-drafted the Criminal Procedure Rules yet again to improve 'efficiency' with the introduction of another moronic form.

So, let's forget that; what about contract breaches? We are only obliged to perform Duties and service existing work, there is no obligation to take on unprofitable work. Which at the moment is all of it.

So, we don't take on committals for sentence at all, or crappily paid Crown Court trials in general, never mind just the burglaries. Nothing with harassment in it – seven hearings usually in the Mags and clients who are by definition difficult. Don't talk to me of 'vulnerable persons with personality disorders' – too often that is a medicalisation of rudeness and it still means that we get the flak from them whatever the diagnosis.

No mental health cases – four abortive MH assessments/PSR attempts? – more difficult morally but inherently unprofitable. We just undertake cases that will be binned in 2 or at most 3 hearings with a pleasant client. That should cut it by 90%.....

I am beginning to enjoy this prospect……

Given that that most Defendants are too chaotic to apply for Legal Aid without us and the duty can't act on the second occasion, that should pour sugar in the petrol tank.

When I undertake duties for other firms, the cannier ones will tell me not to pick up those difficult cases up anyway.

But, you say 'We will make no money' – 'Well,' I reply, 'you ain't making it now, are you?'

But, you say, 'We will never win and then we will lose everything'. A strong possibility, that much is certain, I concede, but consider, the Spartans lost at Thermopylae but they enabled the Athenians to beat the Persians later on and no-one gave the Ukrainians more than 72 hours before Kyiv was overrun.

Our profession has no history of industrial action so we have no heroes or heroines, but there are enough examples for us elsewhere. The Tolpuddle Martyrs, the Bryant and May Match Girls strike and Grunwick are labour movement history. The Suffragette Movement and Gay Liberation have both morphed into a continuous struggle that has gained widespread acceptance, but no-one gave them a chance when the first brave and crazy participants poked their heads above the parapet.

They haven't won yet but they didn't lose, did they?

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GREG FOXSMITH – OUR TIME IS NOW

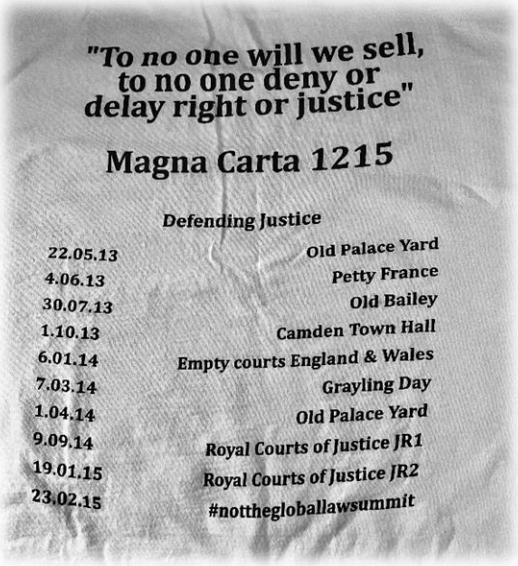
For as long as anyone can remember, those doing criminal legal aid work have complained about the poor remuneration. Despite these complaints, things have only got worse: payments have not increased in over 20 years and successive governments have cut legal aid across all areas both in payment and scope.

As professional lawyers and advocates, skilled at defending difficult clients accused of deplorable crimes, we have collectively been very poor at arguing our own case for fair pay, or winning over public opinion by countering the perception that we are "fat cat" lawyers.

The current bar protest is to be applauded, and solicitors should do whatever we can to support and publicise their action. Above all else, we must ensure that the government and/or MoJ do not deploy the tactic of "divide and rule", which has previously undermined attempts at collective action.

It is worth taking a look back at some of the previous protests - which the LCCSA was often pivotal in organising and promoting - and contrasting with the current strike.

We might start with the demo outside parliament in May 2013 (remember the coffin marked: "RIP legal aid"?), a protest against the government's plans to cut £220m from the annual budget for criminal legal aid and remove defendants' right to choose their solicitor.



By a sad twist of fate, that date also saw the horrific murder in London of soldier Lee Rigby, so understandably all media attention focused on that leaving the legal aid protest largely un-noticed.

We were back in June-blocking the road outside the Ministry of Justice in Petty France, and in October "UK Uncut" organised protests against legal aid cuts in London, Manchester, Hull, Liverpool, Northampton, Cambridge and Norwich.

There was a militant mood at the January 2014 "day of action", comprising a protest against legal aid cuts in the morning outside Westminster Magistrates Court organised by Matt Foot and the relatively new umbrella group "Justice Alliance", followed by an LCCSA-organised "training session" (we didn't want to call it a strike) for lawyers, at Islington Town Hall. The day's action received widespread and relatively favourable media coverage (summarised in my blog at that time http://www.gregfoxsmith.co.uk/legal-aid-protest-lawyers-on-strike/)

This was followed by a much larger demonstration on 7 March 2014 outside the Houses of Parliament - probably the largest gathering of protesting legal aid criminal lawyers and supporters ever assembled, known as "Grayling Day" after the lamentably useless Lord Chancellor of that time, Chris Grayling

The demo (highlights of which can be seen in this short film on YouTube)again raised the profile of the fight against legal aid cuts - eg Guardian report here

Grayling was the subject of further protest the following year- the 800th anniversary of the signing of Magna Carta (2), and there were two further protests outside the RCJ - in 2014 and 2015.

We had some successes – the defeat of "two-tier" being an obvious example - but here we are in 2022, still over-worked and underpaid.

Lessons learned? Protests need careful organisation, are more effective done with others, need to be well publicised, and for media attention a key speaker or "celebrity support".

Above all, there needs to be two things.

Firstly, a clear message, with easily accessible facts backing up the message, and secondly an impact, something that will bring the MoJ to the table. I believe the current bar action has both.

And we as lawyers need to understand and trust each other. Previously we were 'double-crossed" by the bar leadership, who snuck off and did a deal with the MoJ behind our backs, ending "no returns" for a few crumbs from the table at the expense of solicitors.

I can confidently say there are no such concerns with CBA leader Jo Sidhu QC, an honourable man, who has shown both great courage and diplomacy.

The other trust issue is between ourselves- any actions that solicitors take are undermined by competitors ignoring a collective action, or by our fear that such will be the case.

We must stand united - and the LCCSA has a valuable role in providing the necessary leadership.

Our time is now.

Do Right. Fear No One.

As LCCSA President Hesham Puri says:

"We must stand united in our resolve to secure the future of our profession.

This may be our last chance to show this government that we will not hesitate to take appropriate action if needed.

The CBA has shown what can be achieved with a united front.

We fight for our clients and must now fight for ourselves"

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ARTICLES

REVISED GUIDELINES FOR BURGLARY OFFENCES: AN UPDATE

Tetevi Davi of 25 Bedford Row provides a commentary to the revised sentencing guidelines for burglary offences, which aim to address a long-term trend of sentence inflation.

On 1 July 2022, the Sentencing Council's Revised Guidelines for the offences of domestic, non-domestic and aggravated burglary will come into effect in England and Wales. The Revised Guidelines are the product of a consultation, which sought to evaluate the impact of the existing Guidelines on sentencing outcomes. The latest Guidelines represent a significant departure from the existing Guidelines both in terms of their structure and content. These changes will need to be carefully considered by both practitioners and sentencers going forwards.

The need for change

It was not anticipated that there would be any impact on sentence severity when the existing Guidelines came into force in 2012; the Guidelines were introduced solely as a means to achieve greater consistency in sentencing decisions. Despite this, subsequent research by the Sentencing Council revealed that sentence severity increased for all three burglary offences following the introduction of the existing Guidelines. The most notable impact concerned sentences for non-domestic burglary, where the numbers of both suspended and immediate custodial sentences rose sharply after the existing Guidelines came into effect.

One factor that has been identified as contributing to these increases, is the larger number of higher culpability and greater harm factors in the existing Guidelines as compared with the previous Guidelines; this made it more likely that offending would fall within the most serious category and receive a harsher sentence. Furthermore, the shift away from using defined amounts of financial loss to determine culpability, and the inclusion of commercial and personal loss to the victim as higher culpability factors may also have played a role in more severe sentences.

What has changed?

Structurally, the existing Guidelines have only two categories of harm (greater harm and lesser harm) and two categories of culpability (higher culpability and lower culpability). The Revised guidelines have three categories of harm (categories 1, 2 and 3) and three categories of culpability (high culpability, medium culpability, low culpability). Further, whilst the existing Guidelines have only three starting points, the Revised Guidelines have nine. The maximum sentences for burglary have not been altered by the Revised Guidelines.

In relation to culpability factors, offending motivated by or demonstrating hostility based on protected characteristics has been removed as a higher culpability factor and is now only an aggravating factor. Membership of a group is also no longer a higher culpability factor and is now an aggravating factor. In the context of aggravated burglary, a weapon being present on entry is no longer a higher culpability factor and has also been included as an aggravating factor.

Factors that have been retained within the highest categories of culpability include offending, which demonstrates a significant degree of planning or organisation, the targeting of a vulnerable victim and offending where a knife or other weapon was carried in the context of domestic and non-domestic burglary. New medium culpability factors include offending, which demonstrates *some* degree of planning, and, in the case of domestic and non-domestic burglaries, instances where the offender goes equipped for burglary. The lowest category culpability factors have remained largely unchanged in the Revised Guidelines, with "coercion" and "intimidation" being added to involvement through exploitation.

In relation to harm factors, theft of or damage to property causing a significant (now "a substantial") degree of loss to the victim, whether of economic, commercial or personal value, is still within the highest category of harm. As is the victim being on, or returning to, the premises when the offender is present. Soiling, ransacking and vandalism have now been subdivided, with soiling and/or extensive damage or disturbance to the property now in the highest category of harm, and ransacking or vandalism now in the second category.

Offending causing physical or psychological injury to the victim has been retained in the Revised Guidelines, with offending causing *substantial* injury of this type in the highest category of harm and offending causing *some* injury of this type in the second category. Theft or damage causing a *moderate degree* of loss has been included as a second category harm factor. As with the culpability factors, the lowest culpability harm factors have remained unchanged in the Revised Guidelines.

Conclusion

It remains to be seen whether the Revised Guidelines will be able to reverse the trend of increasing sentence severity ushered in by the introduction of the existing Guidelines. The structure of the Revised Guidelines, with new medium categories of harm and culpability, certainly provides sentencers with greater flexibility, which could lead to a more measured approach to the categorisation of offending in future. This is reinforced by the fact that some higher culpability factors have been reduced to aggravating features only. However, with several of the higher culpability and greater harm factors retained, and evidence of a general trend of increasing sentence severity, particularly in the magistrates' courts where the majority of offenders are sentenced, it is not clear what practical effect the Revised Guidelines will have. These changes also come within a context of increased sentencing powers in the magistrates' courts, which also raises questions over their potential impact.

For defence practitioners, the Revised Guidelines helpfully provide greater room to manoeuvre in mitigation. Further, the fact they were specifically

introduced to correct inflation in sentences is a fact which can be underscored at sentencing hearings.

https://www.25bedfordrow.com/site/people/profile/tdavi

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PART 2 EXTRADITION:

NO WARRANT, NO PROBLEM

Mark Smith of 5 St Andrew's Hill, an extradition specialist, highlights the significant new power (contained in the Extradition (Provisional Arrest) Act 2020) to arrest without a warrant.

The Extradition (Provisional Arrest) Act 2020 introduced the power for police officers to arrest a person without an extradition warrant. This opens the door for arrests to be made where the only information provided is an INTERPOL Red Notice. The provisions inserted into the Extradition Act 2003 at sections 74A to 74E are not straightforward to navigate and set out numerous procedural steps of which both prosecutors and defence lawyers need to be aware.

What's changed?

Before the 2020 Act, a person could be arrested on an extradition request from a 'Part 1' territory (i.e. EU member state) on the basis of a certificate issued by the National Crime Agency, but needed to seek a warrant from a judge before arresting a person requested by a 'Part 2' territory (i.e. non-EU country). To avoid this procedural delay, the 2020 Act introduced a power to make a Part 2 arrest based on an NCA certificate without having to go to court.

This new power only applies to some specified 'Part 2' territories, currently Australia, Canada, Iceland, Liechtenstein, New Zealand, Norway, Switzerland, and the USA. The power can only be exercised for 'serious offences' meaning offences that would attract a sentence of 3 years or more in the UK. The NCA should also only issue a certificate if the seriousness of the conduct makes it 'appropriate' to do so.

Procedure

If the NCA receives an INTERPOL Red Notice (or other similar request) and considers that it meets the criteria, a certificate can be issued under s.74B. A person can be arrested on the basis of this certificate under s.74A and then brought before Westminster Magistrates' Court under s.74D. From there, the process follows much the same format as the procedure for other Part 2 provisional arrests, but practitioners should take particular note of the requirements of the NCA certificate.

The certificate must satisfy s.74B(2) by naming the relevant territory and the form and date of the request (e.g. INTERPOL Red Notice). It must also specify that the country is a specified Part 2 territory, that it is a valid request, for a serious extradition offence, and that it is appropriate to issue the certificate. The certificate must also include the information set out in s.74C, including the relevant provisions of law and particulars of sentence. This is commonly done by annexing the INTERPOL Red Notice itself.

Potential challenges

If the certificate does not include all the necessary information, or it was not given to the Requested Person as soon as practicable after arrest, the defence can make an application under s.74D(10), which gives the District Judge a **discretion** to order discharge.

But the judge is **required** to discharge the Requested Person if there were no reasonable grounds for issuing the certificate or s/he was not brought before the court quickly enough after arrest. This would clearly require a more substantive argument than the discretionary grounds, most likely on the basis that the conduct is not sufficiently serious for the certificate to have been issued in the first place.

These new provisions provide a powerful new tool for the enforcement authorities, and both parties will need to be aware of the requirements so that the procedural safeguards are upheld and the Requested Person's rights are respected.

https://www.5sah.co.uk/barristers/mark-smith

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VULNERABLE VICTIMS –

SEXUAL OFFENCES SENTENCING GUIDELINES

Gudrun Young QC and Shusmita Deb of 2 Hare Court examine the element of the Sexual Offences

Sentencing Guideline which addresses the vulnerability of victims, and the potential unfairness on offenders of the "particularly vulnerable" category.

The definitive sentencing guidelines on sentencing sexual offences involves a step-by-step process where first the sentencing judge has to determine the starting point by identifying the correct category of harm caused by the offence (ranging from Category 1 – 3) and thereafter the degree of culpability of the offender (Culpability A or B). The starting point can then be moved upwards or downwards according to the mitigating and aggravating features of each case.

For many of the offences that fall within the guidelines (including rape, assault by penetration and sexual assault as well as the equivalent child sex offences), one of the factors that places an offence within Category 2 Harm is that the *"victim is particularly vulnerable because of personal circumstances"*. Whilst the guidelines themselves do not provide a definition of *"particularly vulnerable"*, they clearly envisaged this should only be held to apply when a victim was ***"particularly** vulnerable"* as compared to the majority of victims in similar cases so as to justify a finding of greater harm. Almost by definition any victim is vulnerable, and therefore great care must be taken not to widen the concept too broadly, especially bearing in mind that the consequences of doing so are serious – a significant increase in the starting point relative to an offence falling within Category 3. If sentencing judges are too ready to find that a victim is *"particularly vulnerable"* then offenders may receive sentences which are, in reality, simply too high.

And yet it appears that this may be exactly what is occurring. It has long been recognised that extreme youth/old age or a recognised disability can render a victim *"particularly vulnerable"*. However, a number of Court of Appeal cases in recent years have grappled with the meaning of the phrase *"particularly vulnerable"* with the effect that the class of victims falling within this category appears to have been gradually but significantly widened. Indeed, whilst allowing sentencers (who are usually best placed to make an assessment of the facts) a degree of flexibility and discretion is necessary, there is a real danger that the concept *"particularly vulnerable"* is being so widely interpreted as to render the first part of the phrase almost entirely meaningless.

The broadening of the circumstances in which victims have been found to have been particularly vulnerable appears to have started with the issue of victims who are incapacitated through sleep/intoxication. In *R v Rak* [2016] EWCA Crim 882, the victim was a university student who was in effect comatose due to drinking. Mr. Justice William Davis stated: "*It is argued that vulnerability as referred to the guideline must refer to permanent characteristics, such as age, be it very old or very young, or some permanent disability. We do not accept that proposition. This young woman was vulnerable due to the position she was in*." [para. 15]. Similarly, in *R v Samuel Thomas Bunyan* [2017] EWCA Crim 872, another university student was found to be particularly vulnerable due to her personal circumstances because *"she was asleep, drunk in bed and a trusted friend had taken advantage of that vulnerability"* [para. 25]. In *R v LD* [2017] EWCA Crim 2575 the court found that a victim who is asleep when sexual activity begins is particularly vulnerable just as a victim who was insensible through intoxication would be.

A number of decisions have followed along the same lines including *R v Sepulvida-Gomez* [2019] EWCA Crim 2174 (where a victim was regarded as particularly vulnerable as she had drunk half a bottle of wine and was asleep in her boyfriend's bed and as such was found to be *"defenceless"*); *R v McPartland and another* [2019] EWCA Crim 1782 (victim was drunk alone with two older men); *Attorney General's Reference (R v BN)* [2021] EWCA Crim 1250 where the court said that they *"find it difficult to see how a child or adult who is asleep when the sexual activity begins and, therefore does not know what is happening and so is powerless to resist or protest, could generally be anything other than particularly vulnerable due to their personal circumstances"* [para. 25]; *Attorney General's Reference (R v Behdarvani-Aidi)* [2021] EWCA Crim 582 (where victims were intoxicated with drink and drugs). It appears, therefore, that the law in relation to particular vulnerability arising from sleep/intoxication is well-established.

In other cases, findings of particular vulnerability have gone much further than anything to do with a victim's age, disability or due to sleep/intoxication.

In the case of *Regina v KC* [2019] EWCA Crim 1632 the Court considered competing arguments as to whether a child was particularly vulnerable due to personal circumstances when a complainant was in a familial

relationship with their abuser, there was a grooming element and a pattern of abusive behaviour spanning a lengthy period of time. Green LJ stated:

"It is not sensible to seek to construe the Guidelines as if they were a statute. They cannot predict every permutation of circumstances that might arise and there must be a degree of elasticity in the terminology used, and to this extent there is a degree of flexibility in how the guidelines operate. In this case the combination of the factors applicable to this offending are, broadly, within the rubric 'Child is particularly vulnerable due to …personal circumstances'" [para. 45].

KC was followed in a recent appeal by the Solicitor General against a sentence on the grounds that it was unduly lenient R *v DP* [2022] EWCA Crim 57. In that case the Judge had placed the offence in Category 3A, declining to make a finding of particular vulnerability in respect of a victim who suffered from no relevant disability, was in mainstream school and lived with her mother and sister with other family members nearby. The Court found that there was a combination of factors almost exactly the same as applied in *KC* and that a child who was in a familial relationship with their abuser and who was being abused over a period of time was particularly vulnerable.

Another recent case perhaps illustrates the extent to which meaning of being "particularly vulnerable" has been widened further to include a range of personal characteristics such as religious faith or practices. *R v Joey Saunders* [2022] EWCA Crim 264 was a rape case where the appellant and victim were students at university. After a night of drinking and dancing at their student union, the appellant invited the victim to his room. The victim made it clear that she did not want to have sex beforehand, largely because she had strict religious beliefs pertaining to the preservation of her virginity.

Holroyde LJ found that in the circumstances of this case the victim's social and religious background made the loss of her virginity a particularly harmful blow. He stated:

"The inclusion of harm factor allows the sentencer to take into account a range of features which may increase the harm which the offence caused, was intended to cause or might foreseeably have caused to the victim. Often the relevant circumstances will be those which substantially limit or exclude the victim's ability to avoid, protest against or report the offence. This may be the case where, for example, a victim is very young or insensible through drink. But personal circumstances may also render a victim particularly vulnerable to even greater harm than is likely to be suffered by other victims of a similar offence. A victim may, for example, have mental health problems which are greatly exacerbated by the effects of the offence. Similarly, a victim's religious and/or social circumstances may be such that being the victim of a sexual offence strikes at her faith and/or results in the condemnation by her peers" [para. 13].

Whilst Holroyde LJ advises that due weight must be given to the words *"particularly vulnerable*", and warns against double counting, the dangers of this approach are clear.

Sentencing Judges are therefore being asked to look carefully at the particular circumstances of each case and ask themselves whether a factor or combination of factors relating either to the personal characteristics of the victim, their living/domestic relationships, their relationship to the offender, the nature and duration of the offending behaviour, or indeed any other *"permutation which may raise"* may have the capacity to render them particularly vulnerable according to the guidelines. This gives rise to a potentially infinite range of factors/circumstances which a sentencing judge could take into account, arguably far beyond anything envisaged by those who coined the phrase *"particularly vulnerable"* when drafting the guidelines.

The phrase *"particularly vulnerable"* is clearly designed to denote an enhanced degree of vulnerability outside of the normal range of vulnerability pertaining to your "average" victim – some special, distinct, unusual, *particular* feature about *that* victim or *those* circumstances that properly elevate the level of harm so as to significantly increase any sentence imposed. No argument can sensibly be had with this if a victim suffers from a particular disability, is extremely young or extremely old or is completely unconscious/incapacitated at the time of the commission of the offence and therefore unable to defend themselves or get help. Perhaps the Courts have also been right to recognise that a range of factors (familial relationship/youth/grooming/duration) can combine so as to render a victim *"particularly vulnerable*", although arguably all of those factors could properly be treated as significantly aggravating features or used as a basis to take the offence outside of the Guidelines so as to reach an appropriate sentence, as opposed to stretching the concept of particular vulnerability too far.

However, when any number or nature of personal characteristics/circumstances can come into play, it is hard to see how almost any victim could not, in one way or another, be brought within the category of particular vulnerability. After all, who then is the victim who is only "merely" or "ordinarily" vulnerable? Which

victim *doesn't* have something particular about them or their circumstances which could be used to justify a finding of particular vulnerability? What is the yardstick by which we separate "***particular"*** vulnerability from the common-garden variety?

The effect upon those who come to be sentenced – possibly erroneously – on the basis of a finding of Category 2 Harm may be deemed particularly harsh when one considers that, because this exercise is concerned with harm rather than culpability – and "we must take our victims as we find them" – a sentence can be significantly increased due to factors which may be (and often are) completely outside of the intention, contemplation or knowledge of the offender.

It seems to us that sentencing judges need robust guidance that a finding of Category 2 Harm should only be justified on the basis of "***particular*** *vulnerability"* with a strong warning against the dangers of applying that term too liberally. Whilst each case must turn on its own facts, and it may be there is no strict definition of factors or circumstances which can rise to *"particular vulnerability"*, such a finding must be based on significantly more than individual vulnerabilities or circumstances which do not, in truth, justify a finding of greater harm. Or rather it should be recognised that all offending causes harm which can often not be quantified as between different individuals and in only those most clear-cut of cases should higher sentencing follow as a result. In particular, Courts should be wary of taking account of personal characteristics pertaining to a victim over and above a recognised disability. Otherwise, the list of factor becomes endless and the notion of what is ***"particular"*** in any case diminishes to a vanishing point.

https://www.2harecourt.com/barristers/gudrun-young/

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BOOK REVIEW

Greg Foxsmith, former President of the LCCSA, reviews "CHARGED - how the police try to suppress protest" (Matt Foot and Morag Livingstone, Verso, £18.99)

The Government has been enacting its latest set of illiberal measures to deter protest by criminalising those that participate via The Police Crime Sentencing and Courts Bill 2021.

This Act contains a number of core proposals that "*pose a significant threat to the UK's adherence to its domestic and international human rights obligations, while also lacking an evidential basis to justify their introduction*" (Justice, https://justice.org.uk/police-crime-sentencing-and-courts-bill/) and has attracted serious criticism from Liberty and Amnesty amongst others.

The Bill is only the latest in a perpetual and evolving battle between Government authority, and those who wish to exercise what even this Government purports to recognise as the "democratic right to protest".

As citizens we cherish our democratic freedoms and value our "right" to protest, and indeed many LCCSA members are currently participating in or supporting various actions in protest at legal aid cuts. At the same time, we understandably get upset or complain if we are inconvenienced by a demonstration, particularly if it is not a cause we identify with or support.

As lawyers, we recognise that there is a legal framework to balance competing rights, and that framework is always changing as the Government makes new laws as reference above.

The laws are political decisions, but the Courts interpret and uphold the laws with us lawyers playing our part representing those arrested or charged after participating.

"Protest law" has become, if not exactly a niche practice, certainly an area where some firms have accrued or claim expertise.

There are textbooks that cover the relevant law and legislation- notably the excellent PROTEST HANDBOOK by Tom Wainwright et al.

The newly published CHARGED by Foot and Livingstone however is a very different beast.

For a start, it's a very readable book in the way that a textbook can never be- this is a book you can pick up, start at the beginning, and gulp down the chapters, set out in a historical narrative starting with police reforms under the Thatcher government.

Its focus is on the politicisation of policing protest, and is unashamedly polemical as the full title suggests.

These is a typically forthright foreword by Michael Mansfield QC ("*the real agenda….is to ensure that any effective public expression is circumscribed…*"

Much of the high-level decisions on policing have been made without political accountability, as the book's introduction makes clear, highlighting secret deals conducted by the Home Office and ACPO. The authors have examined recently de-classified documents that catalogue the deliberate, planned but secret shift in policing tactics in the early 80s, and in hypocritical contrast to the recommendations of Lord Scarman's report for better Community policing. It was also an extension of the secretive and equally unaccountable surveillance techniques, some of the implications of which are only now coming to light in the Undercover Policing Inquiry (aka the "spy cops scandal")

Co-author Matt Foot (Birnberg Peirce, Justice Alliance) is well known to this association, and other LCCSA members (eg current committee member Rhona Friedman) pop up with contributions or quotes scattered throughout the book or in the acknowledgements. The book is well sourced, as evidenced by the 40 pages of notes and references, unobtrusive but authoritative, at the back of the book,

Different chapters revisit significant protests over the years - eg the "battle of Stonehenge" (1985), "Wapping" (1987), Poll Tax protest (1990) etc- and as such makes for a fascinating read as to what actually happened at each and how they were policed, analysing the evidence that has accrued over the years.

A chapter on the Welling anti-racist protest of 1993 brought back memories for me- I was then an articled clerk, and attended with friends and colleagues from Edward Fail Bradshaw and Cunningham. We witnessed a "baton-charge" by the mounted police, which felt disproportionate and wrong. Only now and thanks to this book do I have the evidence as to what happened, why that was wrong, who was in charge, and how operational and tactical mistakes were covered up. "Top brass" on the day included Paul Condon, previously responsible for the infamous Mangrove club raid in 1988, later becoming Met commissioner. We know much more about him and other officers in charge at Welling from evidence at the McPherson Inquiry, as the same officers were involved in the Stephen Lawrence murder enquiry.

The anti-racism protests were ultimately successful in that the BNP bookshop was closed, but the pattern of police behaviour - infiltration by undercover officers of protest groups, spying (including on the Lawrence family), aggressive policing and later cover-ups and denials - has been repeated ad-infinitum. Each successive chapter of this book makes it harder to believe the mantra that we have "*policing by consent*".

Policing under (and with pro-active support from) the Blair government does not escape the authors forensic critique, and there is particular focus on the then new tactic of detention of protestors known as "kettling". This led to legal challenge (breach of Article 5) and went through 4 different courts, with a certain Kier Starmer instructed. Ironically, following the G20 protests in the City in 2009 it was Starmer (by now DPP) who decided not to bring charges against the officer who fatally struck Ian Tomlinson. My own recollection of that protest is contained within this book, but once again with the benefit of this book I now see the full picture of which my anecdote was merely a transitory footnote.

Similarly, the chapter on policing the tuition fee protests has unearthed shocking evidence of poor policing tactics, violence and misrepresentation. It reads very differently from the way I recall the Prosecution opening and presenting the case against those charged.

From Peterloo to XR and BLM, there is a long history of policing protest amounting to suppression- after reading this book you may think it is more like oppression.

As the authors conclude, "*the long history of protest confirms that dissent always returns despite efforts of the State to suppress it*".

Let us hope that the latest effort of the State does not change that, and as lawyers be vigilant in playing our part to defend those of our fellow citizens who are being investigated, or charged.

This book will restore confidence, provide historical context, but above all it's a cracking good read.

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