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How the LCCSA has a vital role to play in reforms to the criminal justice system

By Piers Desser, Editor

There are moments when a profession is confronted with so many apparently discrete reforms that it becomes difficult to see the direction of travel. Criminal justice currently feels rather like one of them.

Jury trial, sentencing powers, court reform, legal aid, prison capacity, digitalisation and artificial intelligence are being discussed as separate questions, each with its own consultation, working group or legislative provision.

Yet they are all responses to the same underlying problem: a system which is struggling to reconcile the demands placed upon it with the resources available to meet them.

That makes this an interesting moment for criminal practitioners. We are not simply being asked to make the existing system work better. We are being asked to reconsider what the system should look like.

The criminal justice system has spent much of the last few months discussing its own reconstruction. Jury trial, magistrates' sentencing powers, the Crown Court backlog, legal aid, Common Platform, prison capacity and now artificial intelligence have all competed for attention. It is quite a list.

One begins to wonder whether the criminal justice system is being reformed, or merely continuously consulted upon.

The most consequential proposals remain those contained in the Courts and Tribunals Bill. The Government proposes removing the defendant's right to elect Crown Court trial in either-way cases, increasing magistrates' sentencing powers and creating a new Crown Court Bench Division in which certain cases would be tried by a judge alone.

Provision is also made for judge-alone trials in suitably technical and lengthy fraud and financial cases.

These are substantial constitutional changes. They are also comprehensible responses to a system in which the Crown Court has struggled to keep pace with demand. The Government's own figures describe an open caseload of more than 80,000 cases, with receipts continuing to exceed disposals.

Nobody working in the courts needs persuading that delay is a serious problem. The question is rather more difficult: how much of the architecture of criminal justice should be altered because the system is under pressure?

There is an obvious temptation to regard jury trial as an expensive luxury in a court system which cannot keep up. But the jury is not simply another piece of court infrastructure. It represents a particular relationship between the citizen and the State.

Any change to its role deserves consideration on that basis, rather than solely by reference to the number of cases which can be removed from the Crown Court list.

The same applies to the proposed expansion of magistrates' sentencing powers and changes to appeals. If reform is driven principally by capacity, we should at least be candid about that. There is nothing inherently wrong with making a system more efficient.

There is something more troubling about allowing the pressures of an inefficient system to determine, by necessity, the rights available within it.

This is not an argument against reform. It is an argument for asking the right question before we embark upon it. And there are plenty of other questions.

The criminal courts cannot function without criminal

Contributors to this edition

lawyers. The Government's own consultations have acknowledged the pressure on publicly funded practitioners and described the legal aid system as being at breaking point.

There has been some progress, and we should acknowledge it. But the economics of criminal practice

‘The volume of material in a serious case can be extraordinary’

remain a serious issue for solicitors and advocates alike. Recruitment is important; retention is more important.

There is little point encouraging a new generation into criminal defence if, after a few years, they conclude that the profession offers an admirable sense of public service but an increasingly creative approach to personal finance.

The sustainability of the profession is not a peripheral issue. It is part of the justice system itself.

Nor is the problem simply one of remuneration. The modern criminal solicitor is expected to navigate an increasingly complex mixture of law, procedure, digital evidence, disclosure, case management and technology.

The volume of material in a serious criminal case can be extraordinary. A modern telephone may contain more information than some Crown Court archives.

Which brings us to Common Platform.

The system is now an established part of criminal practice, and the LCCSA has recently sought the views of defence practitioners on its operation and on the Single Justice Service. The question is no longer whether criminal justice will become digital. It has. The question is whether digitalisation will actually make criminal justice better.

There is a difference between putting a form online and improving the process that requires the form.

Meanwhile, AI is moving rapidly into areas of work which would have seemed fanciful only a short time ago: document review, transcription, analysis of large datasets and legal research.

The opportunities are obvious. So are the risks. If AI assists in reviewing millions of pages of disclosure, who checks the machine? What happens when it misses the significant document? And if the prosecution can afford sophisticated analytical tools which are unavailable to the defence, does technological progress risk creating a new form of inequality of arms?

These are not futuristic questions. They are questions that criminal practitioners will increasingly have to answer in ordinary cases.

There is another development which deserves our attention. On 10 September the CPS opened consultation on a revised Code for Crown Prosecutors. The Code governs decisions about whether to prosecute, what charges to bring and how cases should be handled as they progress.

For defence practitioners, the Code is not an abstract document. It is part of the framework within which charging decisions are made and cases come before the courts. It therefore deserves the same close scrutiny as the procedural reforms occupying much of our attention.

The last few months have also reminded us of something rather important about the LCCSA itself. Our role is not simply to comment when legislation arrives. The Association exists to participate in discussions about the criminal process, to represent practitioners and to promote high standards of advocacy and practice.

That role matters particularly now.

The criminal justice system plainly needs reform. It needs investment. It needs functioning technology. It needs sensible allocation of cases. It needs prisons which are capable of accommodating those whom the courts sentence. And it needs a criminal defence profession capable of providing properly prepared and properly remunerated representation.

But above all, it needs to retain sight of what all the machinery is there to achieve.

A criminal case is not a unit of throughput. A defendant is not a case number. A jury is not simply a delay. A solicitor is not an administrative adjunct to the court. And a

‘A solicitor is not an administrative adjunct to the court’

digital platform is not a success merely because it has replaced paper. Perhaps that is the useful perspective with which to approach the reforms ahead.

By all means let us make the system faster. By all means let us make it more efficient. By all means let us use technology where it genuinely helps.

But let us not confuse a system that processes cases efficiently with a system that administers justice well.

That distinction is rather more important than any of us can afford to forget.

The use of facial recognition technology in London

Judicial review: Shaun Thompson and another v The Metropolitan Police Commissioner (2026) EWHC 915 (Admin)

By Peter Doyle KC

First adopted in September 2024, the Metropolitan Police Service (MPS) has a policy of using live facial recognition technology (LFR) to prevent and detect crime, to find missing persons and to protect the public. Relevant faces of interest to the police are kept on LFR watchlists.

Cameras used are generally moveable rather than fixed. The software attempts to match captured facial images with those known to the police. They are expressed in unique biometric or numerical values. If there is no match then the captured data is automatically and immediately deleted.

In April this year, The High Court dismissed a judicial review challenge to the MPS's revised policy governing the overt use of LFR, finding that it complies with Articles 8, 10 and 11 of the European Convention on Human Rights.

The challenge was brought by Shaun Thompson and another who contended that the policy violated Art. 8 ECHR because it interfered with the right to respect for private and family life (Ground 1) and that it also violated Arts.10 and 11 because the policy was not prescribed or in accordance with the law and interfered with both freedom of expression and freedom of assembly and association. (Ground 2).

In the first claimant's case LFR mistakenly matched his face to that of his brother who was on a watchlist. Although officers doubted whether the claimant was in fact the same person he was questioned and asked to provide his fingerprints. When he refused he was threatened with arrest.

The second claimant was a director of Big Brother Watch. In that and her own personal capacity she both monitored the use of LFR in London and also protested about its deployment and increasing use.

The Central Issue

The Court determined that the central issue in the case was its lawfulness and whether its existence, meaning and consequences were foreseeable to the person concerned.

A measure will not be in accordance with the law within the meaning of Art.8(2) unless it has both a basis in domestic law and is of sufficient quality as to render it accessible to the person concerned who must be able to foresee its consequences for him and be compatible with the rule of law.

As Lord Sumption said in In Re Gallagher (2019) UKSC 3, namely, "The measure must not confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself."

The policy must have sufficient clarity and foreseeability so as not to allow arbitrariness; that is decision-making by a public authority on the basis of whim, caprice, malice or predilection.

Neither the claim nor the court was concerned with the merits or demerits of the policy itself.

The court addressed the law as it applies to the relevant Articles (see 34-39).

Police Duties

The police owe to the public a common law duty to prevent and detect crime. That function can include the use, retention and disclosure of images of individuals.

In Bridges the Divisional Court (upheld by the Court of Appeal) (see (2020) 1 WLR 5037) held that the police may make reasonable use of a person's photograph for policing purposes.

Hence the use of CCTV, ANPR and body worn video footage. However, specific statutory authority is required for "intrusive measures" for example to take fingerprints, to enter a property to search and to take a DNA sample.

Agreed fact -v- issue in the case

The compilation of a watchlist falls within the statutory powers of the police in relation to arrested persons and by common law in relation to other persons of "possible interest" being steps necessary for keeping the peace, preventing crime or protecting property.

None of this was in issue; the issue was whether the

MPS Policy met the necessary tests.

The Tests

This called for a reminder of what Lord Bingham pithily explained in Gillan v United Kingdom (2010) 50 EHRR

"The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law.

"The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. That is what, in this context, is meant by arbitrariness, which is the antithesis of legality."

This is the requirement that the measure be both compatible with the rule of law and foreseeable in terms of its existence, meaning and consequences.

The key question is whether the exercise of the power is subject to principles, whether set out in law, policy or a combination of the two, which suffice to prevent decisions being dependent on the will of the decision-maker or arbitrary.

The LFR Constraints and Safeguards

Despite the broad purpose of the policy the court recognised that it contained significant constraints because LFR technology may only be used in three specific sets of circumstances. For the analysis of the prescribed circumstances see 94-116 of the judgment.

In short it can be used (i) to police either a crime or missing person "hotspot, (ii) to protect "protective security operations" and (iii) to locate people based on specific intelligence.

The policy had a number of built-in safeguards.

It is mandatory for those who authorise LFR deployment to consider whether any particular deployment would be "a proportionate means of achieving the MPS' policing objectives" (see para 6.1 of the Policy which itself draws attention to the relevant Convention rights).

The policy sets out stress tests for considering in three separate stages whether deployment of LFR would be proportionate in the particular circumstances.

It also identifies the specific roles and duties of the officers who carry out LFR deployment. It includes rolls to be performed by Gold, Silver and Bronze Commanders.

It also contains significant safeguards against the arbitrary deployment of LFR including the provision on application for its use of (i) a Community Impact Assessment (ii) an Equality Assessment and (iii) a Data Protection Impact Assessment. Other documents also complemented the Policy.

Conclusions

The court concluded that:

(i) the more intrusive the act complained of the more precise and specific must be the law said to justify it

(ii) the Policy contained sufficient safeguards against arbitrary use

(iii) the advance of technology, in particular Artificial Intelligence, did not engage the terms of the Policy under challenge nor its current lawfulness

(iv) there was no evidence that the policy failed on the grounds of discrimination

(v) the Policy did not require the police to spell out in its published material every instance and every circumstance in which it will exercise a discretion or power

(vi) the Policy was proportionate and provided the claimants with an adequate indication of the circumstances in which LFR will be used and will enable them to foresee, to a degree that is reasonable in the circumstances, the consequences of travelling in an area of London where LFR is in use.

Accordingly the policy was prescribed, was in accordance with the law, and its existence, meaning and consequences were both accessible and foreseeable.

Both grounds for challenge failed.

Note:

1. The court only addressed current technology and did not second-guess how matters might be considered if more advanced technology was deployed at some future date.

Clearly an issue could arise as to whether any more sophisticated means of intrusion were in all the circumstances disproportionate to the policing objectives.

2. The court considered witness statements filed on behalf of the claim and having done so emphasised that evidence given in support of a claim for judicial review must be relevant to determine the question of public law raised in the pleaded case.

A duty to the court was imposed on a party's lawyer to consider with care and objectivity whether the evidence put before the court – from a client or otherwise- is relevant and, if not, then to advise that it is inadmissible and a client should heed such advice. If this is not done then costs implications may follow.

Peter Doyle KC of 25 Bedford Row has a reputation for taking on some of the most complex matters, especially serious fraud and related cases as well as the gravest crime, particularly those involving murder and manslaughter.

The controversial case of Eddie Gilfoyle: three decades of doubt

By Gunnjeet Gill

More than thirty years after Eddie Gilfoyle was convicted of murdering his pregnant wife, Paula, the Channel 4 documentary *The Accused: Beyond Reasonable Doubt ?* revisits a case reshaped by time, a case the broadcaster once challenged in *Trial & Error* in1996.

Moving between the original investigation, decades of appeals and the present day, it traces how evolving evidence and understanding have steadily challenged the certainty of a 1993 conviction.

Suicide or Murder?

The episode begins on the Wirral, where Paula Gilfoyle's body was discovered in the garage of the family home, her death initially treated by responding officers as what journalist Jon Robins relays, they believed was an "obvious suicide".

Paul Caddick, Eddie's brother-in-law, recalls Eddie arriving at his parents' home in a panic with Paula's note and realising, as he read it, that she intended to take her own life.

Yet the documentary shows the swift shift in attitudes, turning from suicide to murder.

As news of Paula's death spread, local gossip centred on the belief that a heavily pregnant woman could not have taken her own life.

Eddie Gilfoyle's first appeal solicitor Campbell Malone recalls: "A lot of stuff swirling around" the relationship, and, in hindsight, Professor David Canter, forensic psychiatric, suggests that the conclusion of murder may simply have been easier for those around her to comprehend than the reality of suicide.

A flawed conviction

The gossip soon translated into the prosecution's case. At trial, the jury heard from 'no fewer than 17 witnesses' in the first two days of trial, who portrayed Paula as a 'bubbly' expectant mother incapable of taking her own life. As Campbell Malone argues, the logic became self-reinforcing - if Paula was not the type to die by suicide, then her death must have been murder.

Prosecutors relied on reconstruction footage intended to show Paula could not have hanged herself, despite serious failings in the original investigation. Merseyside police failed to photograph the garage properly, removed the ligature and destroyed part of the rope.

Paul Caddick recalls officers cutting Paula down and laying her on the garage floor, a decision that "completely destroyed everything".

Eddie's current solicitor and co-director of APPEAL, Matt Foot comments: "Speculating about something that's happened in a criminal case is very dangerous. You're supposed to be sure that a crime has been committed."

Over 100 complaints were made regarding the police investigation by Eddie's late sister and Paul's late wife, Sue Caddick. Resulting in a nine-month reinvestigation, Lancashire Police concluded there was no evidence a crime had been committed and that Paula had died by suicide.

The findings were supported by pathologist Professor Bernard Knight, who concluded there was "nothing about this case which prevents this from being a suicide by hanging".

Recalling the appeal that followed in 1995, Paul remembers thinking: "You can't ignore this. How can they?' Yet the findings were ultimately sidelined, prompting Malone's bitter assessment that 'we were properly shafted."

The years that follow are defined by persistence. The episode charts the family's campaign, from public rallies to hunger strikes. Eddie recalls that his relatives were "drumming up support, left right and centre", and he and eight fellow inmates at HMP Wakefield joined the protest.

Prosecution expert resiles for Second Appeal

As the decades pass, we return to Professor David Canter. At the time of Eddie's arrest, he explains that he felt "led to believe that Eddie was a prime suspect" and acknowledges that a "very cautious" report he provided to Merseyside Police gave investigators confidence they were "on the right tracks".

Reapproached decades after Eddie's conviction, he dismissed his suggestion that Eddie dictated the suicide note as "nonsense" and stresses that there was "no real definitive evidence ... it was just an opinion". Crucially, he now notes that understanding of maternal suicide and antenatal depression has advanced significantly since 1993.

Despite a referral from the Criminal Cases Review Commission, Eddie's second appeal was rejected. "It was turned down and that was the end of it," Paul bluntly reflects.

Modern understanding of ante-natal depression

A further significant development arrives in the final act. Through diaries, and letters uncovered by solicitor Matt Foot, Paula emerges as a far more complex figure than the uniformly "bubbly" presentation to the jury in 1993.

Rather than an expectant mother incapable of self-harm, the documents reveal a profound history absent from the original trial, including the trauma of her previous relationship with a boyfriend who was later convicted of rape and murder.

This now casts the striking letter written during her pregnancy in which Paula admits that 'the baby has come when I'm at my lowest ever in my life', in a new light. Paula's statement that sits uneasily alongside the initial insistence that suicide was unthinkable.

Consultant perinatal psychiatrist Sarah Jones explains that women can be highly adept at masking symptoms during pregnancy, while social expectations often

discourage them from expressing distress.

By placing Paula's writings within a modern understanding of antenatal depression and maternal suicide, a core assumption underpinning the conviction is challenged, and a once overlooked, misunderstood psychiatric issue prompts a very different interpretation of her death.

The Gilfoyle Campaign continues

Eddie remains resolute. "I want to clear my name," he says. "That's what I'm living for."

Paul echoes him: "One day this case will come right in the end... we're not going to stop."

The episode does not answer the question posed by its title: *Suicide or Murder?* Instead, it dismantles the evidential basis for murder before turning to the evidence of Paula's state of mind, antenatal depression and possible suicidal intent that was overlooked in 1993.

As David Jessel reminds us: "You don't solve a mystery by injustice."

The mystery is the very question posed by the documentary's title. Through revised expert evidence, advances in understanding antenatal depression and the enduring absence of compelling evidence for murder, the episode reveals that this mystery is no longer as intangible as it once seemed.

The question is, can the CCRC and Court of Appeal catch up with the modern-day view of ante-natal depression?

Find more information about Eddie Gilfoyle and APPEAL's support at: https://appeal.org.uk/eddie-gilfoyle.

To follow updates on APPEAL's work, sign-up to the newsletter: https://appeal.org.uk/act-now/subscribe/

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Can the defence cope – and should we always have to?

Nneka Akudolu KC and Emily Stone of 2 Hare Court explore active case management, systemic failure and the defence as the criminal courts' elastic resource.

Every criminal practitioner knows the hearing. Something that should have happened has not: material is late, disclosure is still "being chased", the defendant was not produced for conference, or counsel was instructed yesterday. The case is called on and then comes the familiar question: *are the defence ready?*

Usually, somehow, the answer is yes. There is something quite revealing in that familiarity. When part of the procedure fails, somebody must deal with the consequences. What is striking is that, wherever the failure originated, responsibility for making the case work so often arrives at the same place.

The Criminal Procedure Rules require cases to be dealt with efficiently and expeditiously. Parties must identify issues early, comply with directions and raise failures while something can still be done about them.

In *R v Jisl* [2004] EWCA Crim 696, the Court of Appeal observed that time is itself a resource and active case management part of the judge's duty.

In *R v Ulcay* [2007] EWCA Crim 1867, the Court went further. Even where court orders make it difficult for representatives to look after their client's interests to the standard ordinarily expected, solicitor and counsel may nevertheless have to "soldier on".

Now, there is good sense in that; a fair trial does not confer unlimited preparation time, still less a licence to manipulate the timetable. Directions should mean something and difficulties should be raised while there remains a realistic prospect of solving them.

The harder question is how far that expectation can extend where the obstacle was created elsewhere.

Take body-worn footage arriving on the morning of trial. It runs for twenty-five minutes. The pragmatic solution is obvious: counsel watches it outside court while the judge deals with a mention and, with luck, the trial need not be troubled.

However, the running time of evidence often bears little relationship to the time required to deal with it. Twenty-five minutes may require repeated viewing, comparison with statements, fresh instructions, further investigation and wholesale reconsideration of cross-examination.

Service is not preparation and requiring the defence to complete that preparation at speed does not cure the original inefficiency. It simply relocates it.

That asymmetry can become lost in the language of collective responsibility. The prosecution serves evidence late and the defence is asked how quickly it can read it. A prison fails to produce a defendant, and the defence is asked whether ten minutes will suffice. The failures differ, but the proposed solution is consistent.

Can the defence cope? The defence is so often treated as the elastic part of the system, expected to stretch precisely because everyone knows that, somehow, it usually will.

R v Boardman [2015] EWCA Crim 175 provides a useful counterpoint. Telephone and cell-site evidence was served only days before trial despite repeated defence requests, and the defence expert required weeks to deal with it.

The judge excluded the evidence rather than lose the trial date and the Court of Appeal upheld that decision. Sir Brian Leveson endorsed an earlier description of the prosecution failures by Judge Dutton as "lamentable" and rejected the suggestion that workload or resource pressure could dictate trial progress. The Court also criticised the defence for failing to raise the problem earlier. Nevertheless, a duty to assist the court in managing a failure cannot become a duty to make that failure disappear.

Boardman was candid about where the cost can fall. Repeated hearings may require fixed-fee defence practitioners to attend again, reducing the rate at which they are effectively remunerated. The cost has not vanished because it does not appear on the court list. It has changed hands.

Jonathan Fisher KC's *Disclosure in the Digital Age* review records concerns about increasing volumes of digital material, disclosure delay and the difficulty of meaningful preparation where material arrives late or in unwieldy form.

In the magistrates' courts, Fisher described increasing digital material combined with short case-progression timetables as a "toxic mix". That matters because modern procedure also demands greater defence engagement.

The defence must identify the real issues, serve meaningful defence statements, formulate focused disclosure requests and narrow the trial issues, but meaningful engagement requires something with which to engage.

A direction can impose a timetable, but it cannot manufacture the conditions necessary to comply with it. Time can be compressed on paper rather more easily than in reality.

Institutional failure and defence failure are not equally visible. If the defence misses a direction, there is a named solicitor or advocate before the court from whom an explanation can be sought.

The person responsible for defective disclosure may be nowhere near the courtroom. The defence is often the only part of the machinery immediately available to absorb the problem and, inconveniently for the argument, we are rather good at doing so.

Solicitors obtain instructions where proper conferences have proved impossible. Advocates read briefs on trains and rewrite cross-examinations in corridors. Professional competence turns systemic difficulty into apparent procedural success.

Because that labour is largely invisible, it becomes possible to mistake it for efficiency. Some of the criminal courts' apparent efficiency is, in truth, privately subsidised by professional goodwill.

At the end of March 2026 there were 80,061 open cases in the Crown Court and 370,722 in the magistrates' courts.

Every lost fixture has consequences. Rule 1.1 requires cases not merely to be processed efficiently, but to be dealt with *justly*. Efficiency and expedition sit alongside fairness between prosecution and defence, Article 6 rights, the interests of witnesses and victims, and proportionality.

The question is not whether efficiency matters; it plainly does. It is what we are measuring when we say it has been achieved. If a trial remains effective because counsel works through the night on material served weeks late, the list may record an efficient outcome. Yet the timetable has been preserved only by moving the cost of failure somewhere less visible.

The law may require counsel to "soldier on", but it should be slow to make conscription the default. Resilience and improvisation are part of criminal practice, but the danger lies in allowing their reliability to disguise the conditions which made them necessary.

When something has gone wrong and everybody is looking for a way to save the fixture, the question should be more exacting than whether the defence *can* manage. It should be whether, in fairness, they ought to have to.

Nneka Akudolu KC is a distinguished jury advocate, renowned for her formidable expertise across the full spectrum of the most serious criminal offences.
Before coming to the Bar in 2025, Emily Stone served as a commissioned officer in the British Army and later as a Human Intelligence Officer.

Raising the age of criminal responsibility

By Caroline Liggins

As youth justice practitioners, we are often confronted with some of the most difficult cases in the criminal justice system. Cases involving serious violence, sexual offending and significant harm to victims rightly provoke strong public concern and calls for accountability.

However, difficult cases should not distract us from an important legal and ethical question: at what age should a child be held criminally responsible for their actions?

The recent Southampton case involving three boys convicted of raping two teenage girls has reignited debate about youth justice and sentencing. The boys, aged 13 and 14 at the time of the offences, initially received sentences that prompted widespread criticism and were subsequently referred for review under the Unduly Lenient Sentence Scheme.

Like many practitioners working with children, I understand the public concern generated by cases of this nature. The harm caused to the victims was profound and demands a serious response.

However, the case also highlights a fundamental tension within youth justice: how do we balance accountability with our legal and moral obligation to recognise that children are developmentally different from adults?

The current position in England and Wales

England and Wales have one of the lowest ages of criminal responsibility in Europe.

A child can be arrested, prosecuted and punished through the criminal courts from the age of 10. Although the youth justice system differs from the adult system, children as young as 10 are still exposed to criminalisation and its potentially lifelong consequences.

This position sits increasingly uneasily alongside contemporary research into child development. We now know far more about adolescent brain development than was understood when many of our criminal justice frameworks were established.

The parts of the brain responsible for impulse control, risk assessment, emotional regulation and consequential thinking continue to develop throughout adolescence.

Children often act impulsively, are heavily influenced by peers and may struggle to appreciate long-term consequences in the way adults do. These are not excuses for offending behaviour; they are developmental realities that should inform how the law responds to children.

What do international standards tell us?

The United Kingdom has repeatedly been criticised by international child rights bodies for maintaining such a low age of criminal responsibility.

In General Comment No. 24, published in 2019, the United Nations Committee on the Rights of the Child concluded that an age of criminal responsibility below 14 years is not internationally acceptable and encouraged states to adopt a minimum age of at least 14. The Committee relied on developments in neuroscience, child psychology and evidence-based youth justice practice.

The Committee has also specifically recommended that the UK raise the age of criminal responsibility to at least 14 and expand the use of diversionary and welfare-based interventions, while recognising the need for proportionate responses to the most serious harmful behaviour.

Similarly, the Council of Europe has long advocated for child-friendly justice systems that prioritise rehabilitation, participation and the best interests of the child. Its guidance recognises that children require a fundamentally different legal response from adults and that justice systems must reflect children's developmental needs.

As legal practitioners, we should ask why England and Wales continue to resist a reform that much of the international community now regards as settled.

The Southampton case

The Southampton case illustrates why this debate is often emotionally charged. The offences were exceptionally serious, the harm to the victims significant, and public outrage entirely understandable.

However, law reform should never be driven by the most extreme cases.

Youth justice policy is at its weakest when it responds to exceptional examples rather than wider evidence. We must resist the temptation to formulate policy based on rare but highly publicised offending.

The reality is that most children who enter the criminal justice system present with significant vulnerabilities. Many have experienced adverse childhood experiences, exploitation, family instability, unmet educational needs, trauma, mental health difficulties or substance misuse within the family.

For many children, offending behaviour is a symptom rather than the root problem.

As practitioners, we regularly represent children whose lives have been shaped by neglect, violence and exclusion long before they enter the courtroom. Criminalisation often addresses the behaviour without addressing its causes.

Why raising the age matters

Raising the age of criminal responsibility does not mean abandoning accountability. Nor does it mean that serious offences such as rape, homicide or grave violence should be met with anything less than a robust, protective and proportionate response.

This is perhaps the most common misconception in public discourse.

A higher age threshold would not prevent professionals, local authorities, schools or safeguarding agencies from intervening when a child engages in harmful behaviour. Nor would it prevent robust responses to serious incidents.

Rather, it would shift the focus from punishment towards safeguarding, welfare and rehabilitation.

Children below the age of criminal responsibility could still be subject to intensive interventions, behavioural programmes, family support and protective measures. The crucial difference is that they would not acquire a criminal record or enter a system that research consistently associates with poorer long-term outcomes.

Evidence suggests that unnecessary criminalisation can increase the risk of reoffending by reinforcing a criminal identity and entrenching young people within the justice system. By contrast, diversionary approaches have been shown to reduce reoffending and improve long-term outcomes.

A youth justice system fit for children

The principal aim of the youth justice system is the prevention of offending.

If that remains our objective, we must be willing to ask whether our current approach is achieving it.

A justice system that prosecutes children from the age of 10 may satisfy calls for punishment, but punishment alone does not necessarily make communities safer. As youth justice practitioners, we repeatedly see that children are capable of extraordinary change when given the right support, intervention and opportunities.

The question is not whether children should be held accountable.

The question is whether accountability is best achieved through criminalisation or through a framework that recognises childhood vulnerability, developmental immaturity and the capacity for rehabilitation.

Conclusion

The Southampton case is a reminder that children can commit serious and harmful offences. It also demonstrates why youth justice requires a careful, evidence-led approach rather than one driven solely by public outrage.

From a youth justice perspective, the case for raising the age of criminal responsibility is compelling. International bodies have called for reform, developmental science supports reform, and decades of youth justice practice demonstrate that children are fundamentally different from adults.

The true measure of a justice system is not how harshly it punishes children, but how effectively it prevents future harm. Raising the age of criminal responsibility would not weaken accountability.

Rather, it would strengthen our commitment to a child-centred, evidence-led system focused on rehabilitation, protection and long-term public safety.

Caroline Liggins is a partner in the criminal defence team and head of the youth team at Hodge Jones & Allen Solicitors.

Challenging Restraint Orders under POCA: Variation, discharge and the new focus on dissipation risk

By Jonathan Lennon KC and Sam Healey

Restraint Orders can have immediate and serious consequences for individuals and businesses. Especially in circumstances where there may be little prospect of a charging decision anytime in the near future.

In this article we deal with the basics of how to best go about seeking a variation to, or even the complete discharge, of a Restraint Order. In particular, following some significant amendments recently following the implementation of parts of the Crime and Policing Act 2026 (CPA) on 29th June 2026, we consider the following:

- When Restraint Orders are made under the Proceeds of Crime Act 2002;
- The new statutory focus on the risk of dissipation following the Crime and Policing Act 2026;
- The importance of full and frank disclosure in without notice applications;
- Why complex financial structures do not, without more, prove dissipation risk or criminality;
- Applications for living expenses, legal expenses, variation and discharge;
- Delay, progress reports and when an Order may no longer be justified.

The Starting Point

An application for a Restraint Order will generally be made without notice and often at the early stages of an investigation. In practice, an individual or business will only receive notice after the order is made, or have an indication something is wrong when they are unable to access bank accounts.

For suspects, directors, business owners and sometimes third parties, the timing can cause considerable disruption. As the Restraint Order is likely to have been made very early on in an investigation, the evidence is incomplete, the prosecution case is undeveloped and no charging decision is expected for months, or sometimes years. That is why early scrutiny of the Restraint Order, the evidence supporting it and the way in which it was obtained is critical.

There are a number of grounds which a prosecutor may rely upon in applying for a Restraint Order, but the most common is the existence of an on-going criminal investigation where there is a reasonable suspicion that the suspect has benefitted from his or her offending (s40 (2)). However, this is not the only statutory criteria that must be satisfied in order for the Crown Court to grant the order.

Risk of Dissipation

Aside "reasonable suspicion" (see below) there had always been an additional hurdle which, until now, had not been spelt out in the legislation. There had to be a risk of dissipation before the Court would restrain assets.

This was often a cause for challenge especially where a suspect was aware of a criminal investigation but had not taken any steps to dissipate assets before the application for the Restraint Order had been made; see e.g. Re B [2008] EWCA 1374.

It was said that the risk of dissipation had to be 'real', not 'merely fanciful', before an Order could be granted; Re AJ & DJ (unrep. Dec 9, 1992).

The CPA has now inserted into s40(1) of POCA a formal condition for the granting of a Restraint Order that there is; "*a real risk that relevant realisable property* [..] *will be dissipated unless the Crown Court exercises the powers conferred….*".

This is supplemented by s40(1B) which requires the court to consider a number of factors before deciding a risk of dissipation exists - this includes, for example, the nature of the property in question and evidence of the suspect's character.

On the one hand, this new statutory test makes it easier for the Crown to secure a sustainable Restraint Order as it forces the prosecution, and the Court, to consider the real risk of dissipation test, which was sometimes previously just given lip-service.

The new statutory test also does away with the notion that a suspect who knows of the criminal investigation but has not, for example, sold his or her house, does not mean that that fact alone should prevent a Restraint Order being made.

However, the more a prosecutor has to answer questions and justify a without notice application, the more the risk of getting it wrong. This could lead to a potential separate challenge on lack of full and frank disclosure grounds (see below).

For example, the police may believe that their suspect is a leading figure in a fraudulent scheme and advance that to the Judge, but then fail to bring to the Court's attention other evidence suggesting a much more minor role at best.

Furthermore, the amount by which a suspect is believed to have benefited from their purported criminal conduct is a determining factor when considering whether to make an all assets Restraint Order.

For example, if the evidence, at its highest, shows that the suspect was paid a limited sum for his or her services to the alleged criminal enterprise and only for a limited period, then restraining all of his or her assets would arguably be neither proportionate nor necessary.

Duty of Full and Frank Disclosure

As most Restraint Orders are made without notice, similar to search warrants, this places a heavy duty on the applicant. The Crown must not simply put forward material that supports the statutory conditions for the application.

There must be full and complete disclosure, including disclosure of anything that might militate against the granting of the application. This duty requires the applicant to, as Hughes LJ memorably put it: *"put on his defence hat and ask himself, what, if he was representing the defendant or a party with a relevant interest, he would be saying to the judge."*

This obligation to present a case fully and fairly may be especially important where reliance is made on the complexity of financial arrangements.

The duty of disclosure includes the duty to investigate and the applicant "*must make proper inquiries before making the application… The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries" (Brinks Mat Ltd v Elcombe [1988] 1 WLR 1350 at 1356F-1357D).*

The case of *Windsor & Hare v CPS [2011] EWCA 143* is instructive. HMRC were investigating an alleged duty diversion fraud involving suspects linked to the Eastenders group of companies dealing in alcohol imports. HMRC obtained, *ex parte*, both a Restraint and a Management Receivership Order.

In the subsequent appeal proceedings, the Court of Appeal quashed the orders but allowed time for the Crown to re-apply to the Crown Court for new orders. That later application was unsuccessful.

The Appeal Court took advantage of the case to effectively teach HMRC a lesson, along with a lesson to judges, that such orders should not be granted *ex parte* unless the prosecution can demonstrate that they have done their job properly.

The applicants had relied on "*broad and unsupported statements*", such as the suspects being members of an Organised Crime Group (OCG) and that it was "*suspected the goods may have been diverted*" etc. That is suspicion, not evidence, and the Court firmly found that it was not good enough.

Where it can be shown that the court was not given a fair picture, or that important and contextual material was omitted, there may be a basis to seek discharge of the Restraint Order.

Complex Financial Structures

In serious fraud and financial crime investigations, prosecutors often point to complex company structures, offshore entities, trusts, nominee arrangements or international accounts as evidence of risk.

Does the existence of a "complex web" in a corporates financial structure provide evidence of a risk of dissipation? The answer is 'no' - at least not on its own. In challenging the making of a Restraint Order made in the criminal courts, it is sometimes useful to draw an analogy with civil freezing injunction authorities.

In *Holyoake v Candy [2017] EWCA Civ 92*, the Court of Appeal considered a case that involved H's proposed purchase of a £43 million property in London and the loan to him for that purpose from the Defendant C.

C was then subject to an unlawful means conspiracy claim after H claimed that the agreement was tainted by later intimidation by C. H secured a world-wide freezing injunction against C. In granting the injunction, the High Court had found that there was a good arguable case on the underlying merits and that there was a risk of dissipation.

In relation to the dissipation issue the Judge accepted that the mere fact that there was a large number of offshore companies in the structure in issue, by itself, was not evidence of a risk of dissipation, but it was a factor that could "*legitimately be taken into account*" (para 20).

The Court of Appeal rejected that logic. Gloster LJ found that there had to be a real risk, judged objectively, that any future judgment would not be met because of the risk of an unjustifiable dissipation of assets.

If such a risk had been made out then "*the link to complex and offshore corporate structures and the potential to transfer value rapidly and invisibly through corporate reorganisation could contribute to that risk*". However, the "*mere possibility of a party using a complex corporate structure .... does not equate to a risk of dissipation*" (paragraph 50).

Where the investigator has, in the without notice application, relied on the use of BVI corporations and offshore accounts for example, to suggest underlying criminality, as opposed to just the risk of dissipation, then that can lead to a challenge.

In *R (Rawlinson and Hunter) v Serious Fraud Office [2013] 1 WLR 1634*, a case relating to a search warrant, concerned the same duty of full and frank disclosure that is required in any without notice application.

The SFO had specifically relied upon a particularly complex transaction as evidence of criminality. The High Court noted that "*like many very wealthy businessmen, RT operated the business in which he had an interest through a complex structure based in an offshore location for fiscal reasons*" (para 5).

The very complexity required the SFO to explain to the Judge that in fact, the suspects had received advice from two pre-eminent international law firms about the transaction in issue. The SFO had failed to do so and therefore a fair picture was not painted and the 'defence hat' was not put on.

The Holyoake v Candy case was followed by the High Court in *National Crime Agency v Baker [2020] Crim LR 976* (the 'Holyoake' principle now being applied to prove the underlying allegation and not just proof of the risk of dissipation).

The Court discharged three Unexplained Wealth Orders (UWOs) and interim freezing orders which had been granted *ex parte* in respect of properties. Unreliable assumptions had been made by the NCA regarding the source of the funds used to purchase the properties.

The need for caution in treating complexity of property holding through corporate structures as grounds for suspicion, as recognised in *Holyoake v Candy* in the context of the risk of dissipation of assets in civil proceedings, applied equally in the context of UWOs.

As always, much depends on the issues and the factual position. It may be stated that the very structure itself is part of the means of a conducting a fraud, for example, a pension or tax fraud allegation when the prosecution will have other evidence of dishonesty.

On the other hand, the client may be indicating that in fact the assets are not his or hers as alleged or, more usually, that there is an interest in the trusts or accounts etc. but the complex arrangements in place are there for a good and legitimate reason.

Living & Legal Expenses

This is another area which often frustrates those on the wrong end of a Restraint Order - the amount allowed by the Order for ordinary living expenses.

An application to vary the Order after the initial *ex parte* Order will often challenge the amount allowed to be spent on daily living i.e. the weekly or monthly sum that will be free from the Restraint Order to permit living expenses to be drawn from a frozen account.

In these applications, what is required is a careful analysis of expenses together with as much proof as possible of the legitimacy of the expenses and the means or income that will satisfy these costs.

These are steps that should be considered at the earliest opportunity given how convoluted this issue alone may become.

Historically, a variation could not be made for legal expenses in relation to the actual offence in respect of which the Restraint Order is made (s41(4)(a)).

Thus, if there are no free assets, the State must pay for the defence (assuming a criminal charge is made) through Legal Aid. However, CPA now introduces an important change by allowing exceptions to a Restraint Order for the payment of reasonable legal expenses.

A new s41ZA reverses the limitation but is yet to be bought into force. Once enacted, eligible Respondents will be able to withdraw sums from frozen accounts to pay for their legal fees.

How Long will the Restraint Order Last?

It has long been the case that the Crown, upon successfully applying for a Restraint Order (whilst a criminal investigation was on-going), had to provide the Court with progress reports. These are usually served every three or six months depending on the size of the investigation as a statement from the financial investigator and a report from the prosecutor.

Anyone affected by a Restraint Order may apply for its discharge. One of the grounds for doing so is under s42 (7)(a), the Court must discharge the order if proceedings have not been started within '*a reasonable time*.' The reporting requirement is meant to help assess whether the Crown have been acting diligently or not.

The Court of Appeal handed down guidance on how to deal with applications to discharge a Restraint Order where it is said that the investigation has been going on for too long to justify the continued restraint of assets.

As set out in *R v S [2019] EWCA Crim 1728* the following, non-exhaustive list, are relevant:

- the length of time that had elapsed since the restraint order had been made;
- the reasons and explanation advanced for such lapse of time;
- the length and depth of the investigation before the restraint order was made;
- the nature and extent of the restraint order;
- the nature and complexity of the investigation and the potential proceedings;
- the degree of assistance given to, or obstruction of, the investigation (paras 29-40).

In the recent case of *R v Bewley [2026] EWCA Crim 730*, the Court of Appeal refused to interfere with a Crown Court Judge's decision to quash a Restraint Order following the prosecution failing to provide evidence properly addressing the charge of unreasonable delay on their part.

This is another area where the CPA has amended POCA providing further statutory structure around this analysis. Section 41(7CA) is inserted into the reporting requirements section and adopts 6 similar points set out by the Court of Appeal above.

Interestingly, the very last point (vi) is left out of the new statutory list of relevant factors. The CPA also adds another factor in favour of the prosecution which is '*the extent to which the matters subject to* [the] *investigation include matters arising abroad*.'

Restraint Orders affect homes, families, business, employees, creditors and third parties. Where an Order continues for a prolonged period without charge, the practical impact can become a central argument for variation or discharge.

Application for Variation or Discharge

Anyone affected by the Restraint Order can apply for its variation or discharge. Once a suspect has been served with a Restraint Order, and has decided to fight it, then the first step must be to sit down with his or her legal advisors and figure out what the challenges are.

For example, how much money is needed for reasonable living expenses, what is said about the investigation, how much of the defence case it is tactically wise to give away at that early stage and whether the prosecution can demonstrate it acted properly at the *ex parte* stage.

In some cases, the correct approach may be to seek a targeted variation to allow ordinary expenditure, business trading, payment of professional fees or preservation of asset value. In others, the better course may be to challenge the Order in principle and seek a discharge.

A well-prepared application will usually involve:

- Careful analysis of the original application and supporting evidence;
- Identification of omissions, assumptions or unsupported assertions;
- Evidence of the client's financial position and legitimate source of funds;
- Consideration of benefit, available amount and proportionality;
- A clear schedule of any living, business or legal expenses sought;
- Assessment of the investigation timeline and any unexplained delay;
- Tactical consideration of what defence material should be deployed.

Conclusion

Restraint Orders are powerful orders with serious consequences. They are often obtained without notice, at an early stage of an investigation, and before the person affected has had any opportunity to respond.

The recent and pending statutory amendments do not remove the need for careful judicial scrutiny. If anything, they create a more defined framework for challenge.

Prosecutors must properly address dissipation risk, the court must consider the relevant statutory factors, and respondents have clear routes to seek variation or discharge.

For those affected, the priority is early, specialist and strategic advice.

The immediate questions are whether the Order was properly obtained, is there a risk of dissipation, is it proportionate, was the court given a fair picture, does the restraint remain justified and what practical steps are needed to protect living arrangements, business interests and the wider defence strategy.

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Custody, suspended sentences, and the new landscape of the Sentencing Act 2026

By Dominic Morel

For those of us who practise in the Crown Court, the last twelve months have brought the most significant recalibration of sentencing law in a generation.

The Sentencing Act 2026, which received Royal Assent on 22 January 2026, was born of necessity rather than ideology: a prison estate holding well over 87,000 people, running at roughly a quarter above certified capacity with every local prison overcrowded and every probation programme oversubscribed.

The Act translates the recommendations of David Gauke's Independent Sentencing Review, published in May 2025, into binding law. For practitioners advising clients at the point of plea and sentence, the practical consequences are now impossible to ignore.

The presumption against short custody

Since 22 March 2026, courts have been under a statutory presumption, contained in the new section 277A of the Sentencing Act 2020, to suspend any custodial sentence of 12 months or less unless exceptional circumstances relating to the offence or the offender justify an immediate custodial term.

This is not a mere shift in guideline emphasis; it is a change in the starting point itself.

The exceptions are narrower than many clients assume — breach of a court order is the paradigm example — and the presumption falls away entirely where the offender is already serving a custodial sentence, is on remand, is detained under the Mental Health Act 1983 or where consecutive sentences aggregate beyond 12 months.

Advisers should not assume that a client facing a short sentence will walk free with a suspended order; the statutory route to immediate custody remains available, but it now requires positive justification rather than being the default.

Suspended sentences: a longer reach

The change most likely to alter day-to-day practice in the Crown Court is the extension of the maximum period over which a custodial sentence can be suspended, from two years to three.

Courts convicting offenders aged 18 or over on or after 22 March 2026 may now impose up to three years' custody suspended for an operational period of up to three years — though the operational period may only exceed two years where the custodial element itself exceeds two years.

A sentence of two years suspended for three, in other words, remains unlawful. Notably, the maximum period of active probation supervision has not moved;
it remains capped at two years, save for unpaid work requirements, which may continue to the end of the operational period.

This creates real tactical scope for mitigation in cases that would previously have attracted immediate custody as a matter of course.

Time served: the release-point shift

The third pillar concerns automatic release. The Act moves the release point for most Standard Determinate Sentences from 40 or 50 per cent to one third, and from two thirds to one half for those convicted of serious violent or sexual offences, who remain excluded from the more generous progression model.

These provisions, having been paused for review, are now confirmed to commence on 1 October 2026, and will not extend to rape or certain child sexual and grooming offences.

For any client currently serving, or facing, a determinate sentence, the interaction between date of conviction and the transitional provisions will materially affect the practical length of custody — a calculation that now demands as much care as the sentencing hearing itself.

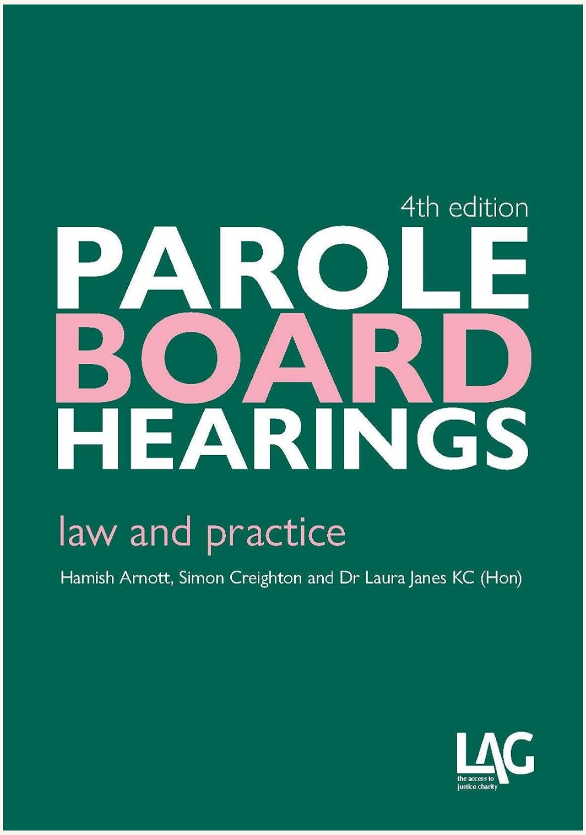
A note of caution

None of this is without controversy. Victims' organisations have rightly questioned whether a presumption against short custody risks applying in cases where immediate imprisonment properly reflects the gravity of the offending.My advice to clients, as ever, is to treat each case on its own facts — but the starting point for that advice has fundamentally changed.

Dominic Morel is a solicitor at Carson Kaye Solicitors where he represents clients charged with serious and complex offences including large scale conspiracies to supply class A drugs, importations, firearms offences, fraud, and violence offences including S18 GBH and murder.

A timely update to ‘peerless’ parole procedures guidebook

Dean Kingham reviews the 4th Edition of *Parole Board Hearings: Law and Practice* by Hamish Arnott, Simon Creighton and Dr Laura Janes KC (Hon) published by LAG.



It is twelve years since the last edition of this must-have book which continues to be the only one dedicated to covering the decision-making powers and procedures of the Parole Board.

The degree of change has been astronomical so it’s a timely update to appraise this ever-developing area of law.

During the past twelve years the parole process has significantly shifted and we have seen the development of greater transparency through public parole hearings and victims being given the right to observe parole hearings.

A revised edition of this book is much needed – and is most welcome.

It is written with clarity, the right amount of detail and will no doubt feature on the desks of Parole Board members, professionals who go before the Parole Board, lawyers, law students and academics.

The entire process from start up to finish is described in detail to be the only resource needed to thoroughly understand the parole process.

This book will be reached for by those just starting out to represent prisoners in such proceedings all the way through to experienced legal representatives who want to double check something quickly.

At a face-to-face hearing recently I was asked by a long-serving judicial member of the Parole Board whether I used the book and of course I said yes. The update was much needed and welcomed.

The three authors are widely respected across the spectrum of prison law and between them have served a significant period representing vulnerable prisoners and those with complex needs and risk.

The best endorsement I can give it is that it will hold a place on my bookshelf and if I need a quick reference guide to assist me deal with a point or remind me of the position then I will certainly turn to it.

Dean Kingham is a Prison and Public Law solicitor at Reece Thomas Watson Solicitors where he is frequently at the forefront of the main challenges protecting the rights of prisoners.

How do we challenge an investigation we cannot see?

By Katerina Pai

Most (if not all) criminal defence solicitors will have had a case where, months after the event, we discover that "something which should have been done was not done".

The CCTV was not secured. BWV was not saved. A witness was identified but never spoken to. Material which may have assisted the defence once existed but, by the time anyone realises its significance, it no longer does. When these issues eventually come to light, often well into proceedings, there is very little anyone can do to put matters right.

A case involving a child suspect recently caused me to consider the opposite problem: not simply what happens when an investigation does too little, but what happens when it potentially does too much.

The police repeatedly sought access to highly sensitive third-party material, including medical and social care records. Consent was expressly refused, yet further requests followed.

There were also references to the possibility of obtaining the records through formal means if consent continued to be withheld, without any meaningful explanation as to what those means would involve or why such an intrusive step was considered necessary.

'That experience left me with a question which is troubling'

Perhaps there was a perfectly proper basis for pursuing the material. That is not really the point. The difficulty was that there was no meaningful way of knowing. More concerningly, persistent enquiries revealed that some information had been obtained despite consent having been refused.

Had those enquiries not been made, and had the relevant agencies not repeatedly been reminded of the position regarding consent, it is difficult to know what else might have been disclosed.

That experience left me with a question which is troubling precisely because it should have an obvious answer: should protecting a child's confidential information really depend upon how persistent their solicitor happens to be?

In considering that question, I started looking more closely at what is supposed to happen during a police investigation before charge.

Perhaps naively, I expected there to be a reasonably accessible explanation of the process. Instead, I found myself moving between legislation, disclosure guidance, prosecution guidance and policing practice simply to understand what mechanisms exist. It struck me that the pre-charge investigation remains remarkably inaccessible to those who have never worked within it.

Criminal practitioners are familiar with the parts of the process we can see. What takes place between those visible stages, however, can remain something of a black box.

Unless you have previously investigated cases yourself, prosecuted them, or otherwise had reason to see the investigative process from the other side, it can be surprisingly difficult to understand exactly what is happening behind the scenes.

This is not because investigators are without duties. The Criminal Procedure and Investigations Act 1996 and its Code of Practice require investigators to pursue all reasonable lines of enquiry, whether they point towards or away from the suspect.[1]

The College of Policing similarly describes an investigation as a process and states that investigators must explain the investigation process to suspects and keep them informed of its progress.[2]

Investigations should also be subject to effective and proactive supervision at regular intervals and at important stages in their progression.[3]

On paper, therefore, there is a framework designed to ensure that investigations are both fair and properly managed.

From the defence perspective, however, it can feel very different. In many cases, there is simply no window into the investigation through which its progress can be meaningfully observed.

There is an obvious tension in being expected to advise our clients while knowing so little about the process in which their interests are being affected.

Interestingly, the existing framework already recognises that greater dialogue at the pre-charge stage can be beneficial.

Annex B of the Attorney General's Guidelines on Disclosure provides for voluntary "pre-charge engagement" between investigators, prosecutors, suspects and their representatives.[4]

In principle, therefore, the system already accepts that defence engagement with the direction of an investigation is not necessarily improper interference with police work.

That is important because, in practice, requests for information from the defence can sometimes be treated as exactly that. Questioning lines of enquiry can be met with silence or, on occasion, with the suggestion that repeated correspondence is discourteous.

There is an odd imbalance in that position. A suspect may remain under investigation for many months, with potentially serious consequences for their education, employment, family relationships and mental wellbeing, while repeated enquiries by their solicitor as to what is actually happening can themselves become unwelcome.

Third-party material brings the problem into particularly sharp focus, as they may contain some of the most private information that exists about an individual. None of this means that such records should never be obtained.

Nor does refusal of consent necessarily prevent investigators from seeking material through lawful formal mechanisms where the relevant legal test is satisfied.

What matters, however, is the distinction between the existence of a power to seek material and the justification for using that power in the circumstances of a particular case.

The CPS's own guidance on third-party material reflects that distinction. It states that obtaining third-party material must form part of a reasonable line of enquiry and that enquiries should be reasonable, necessary and proportionate. Speculative enquiries should not be undertaken simply because material might exist.[5]

These requirements seem entirely sensible. The difficulty arises in asking who is able to scrutinise their application before charge.

If the police seek a child's medical or social care records, how is the child's solicitor supposed to assess whether the request is genuinely necessary and proportionate if they are given no meaningful explanation of the line of enquiry to which it relates?

If the request is refused and formal powers are then contemplated, will the suspect or their solicitor be told what process is being used and on what basis?

The legal position itself demonstrates why those questions matter. Where access to third-party material has been refused and investigators consider that it is nevertheless necessary to obtain it before charge, CPS guidance identifies formal mechanisms which may be available, including an application under Schedule 1 to the Police and Criminal Evidence Act 1984 in appropriate circumstances.

Such an application involves substantive legal requirements, including questions of relevance and substantial value to the investigation.[6] If an intrusive investigative step must satisfy a legal threshold when formal powers are used, it does not seem unreasonable for the person whose private material is being sought to understand, at least in broad terms, why the step is considered justified.

There is an interesting contrast here with the increasing attention given to third-party material belonging to victims.

Since January 2026, the Victim Information Requests Code of Practice has provided a specific framework governing requests for victims' third-party material, emphasising necessity and proportionality and placing particular restrictions on intrusive requests, including enhanced protections in relation to counselling material.[7]

Those safeguards are important and the concerns which led to them are entirely legitimate. Victims should not be subjected to speculative or unnecessarily wide demands for private information simply because they have reported a crime.

But the basic principle should not become controversial when the private information happens to belong to a suspect. A child's medical history does not become less private because that child is accused of an offence.

Nor should the fact that a person is suspected of wrongdoing remove the need for investigative decisions affecting highly sensitive information to be necessary, proportionate and capable of explanation. The interests at stake may be different, but the need to guard against unnecessary intrusion remains.

The lack of visibility during investigations also causes difficulty in the opposite direction. Defence practitioners routinely encounter cases in which, after charge, it becomes apparent that an obvious enquiry was not pursued when it still could have been.

CCTV was not obtained before it was overwritten. BWV capturing the first account was not saved. A witness was never contacted. By the time the defence receives sufficient material to recognise the omission, the opportunity may have disappeared permanently.

This creates a strange position in which the defence may simultaneously have very limited ability to prevent unnecessary lines of enquiry and very limited ability to ensure that necessary ones are pursued.

Both difficulties arise from the same structural problem: during the period when investigative decisions matter most, those decisions are largely invisible to the person whose liberty may ultimately depend upon them.

It also raises a more fundamental question about what we understand the purpose of a criminal investigation to be. The statutory framework requires reasonable lines of enquiry to be pursued whether they point towards or away from a suspect.[1]

That requirement must mean that an investigation is not simply an exercise in constructing the strongest possible prosecution case against the first person identified. Its purpose is surely to establish, as fairly and accurately as possible, what happened and whether there is sufficient evidence to justify criminal proceedings.

Of course investigators will develop theories as a case progresses. The concern is not that police officers deliberately ignore inconvenient evidence or consciously pursue innocent people.

It is that any decision-making process which is largely insulated from external visibility is vulnerable to ordinary human tendencies such as confirmation bias.

Tunnel vision does not require bad faith. Sometimes it requires nothing more than an early theory which gradually becomes the lens through which every subsequent piece of information is viewed.

Meaningful scrutiny can guard against that, but the defence often has remarkably few practical mechanisms through which to provide it. Even obtaining a basic update can be difficult with the amount of emails that go unanswered.

This is particularly difficult to reconcile with the College of Policing's own guidance that investigations should be subject to effective and proactive supervision and that suspects should be kept informed of progress.[2][3]

'Children and vulnerable suspects require particular consideration'

Again, none of this is intended as an attack on individual police officers. There are many excellent officers who communicate openly, consider defence representations fairly and approach investigations with precisely the independence and objectivity the system expects of them.

Police resources are also under significant pressure. Officers carry demanding caseloads, priorities change and supervisors have their own considerable workloads. The solution cannot simply be to demand that every officer provide the defence with a running commentary on every investigative decision.

Nor would complete transparency be appropriate. Safeguarding considerations and the privacy of complainants and witnesses may properly restrict what can be shared.

Nobody could sensibly suggest that a suspect should have access to the entire police investigation file in real time. But there is a very large space between complete transparency and near-total opacity.

Indeed, the concept of pre-charge engagement already demonstrates that these ideas are not alien to the existing system. The Attorney General's Guidelines expressly envisage discussion about lines of enquiry, medical records, digital material, witnesses and expert evidence before charge.[4]

The problem may therefore be less about inventing an entirely new system and more about making genuine engagement an ordinary and accessible part of investigations rather than something which exists principally in guidance but is rarely experienced in day-to-day practice.

There are modest ways in which that could be achieved. Where particularly intrusive third-party material is sought, the suspect's representative could be told in sufficiently clear terms what category of information is required, the line of enquiry to which it relates and why the request is considered necessary and proportionate.

Where the defence raises a specific, realistic and time-sensitive line of enquiry, there could be a mechanism for confirming whether it has been considered and, where appropriate, whether it will be pursued.

Meaningful periodic updates and an identifiable route to a supervising officer would also provide some reassurance that concerns can be raised before they become irreversible problems.

Children and vulnerable suspects arguably require particular consideration.

They are often the very people about whom the state and other agencies hold the greatest quantity of sensitive information, while simultaneously being among those least equipped to understand or challenge the consequences of its disclosure.

Once confidential information has been provided to investigators, it cannot truly be undisclosed. Equally, once evidence has disappeared because nobody secured it in time, it cannot be recreated.

The decisions taken during the investigative stage therefore have consequences which may be impossible to reverse later, regardless of how rigorous the disclosure process becomes after charge.

The case which prompted me to consider these issues ultimately left me thinking less about the particular requests that had been made and more about what would happen if nobody challenged them.

Perhaps exactly the same decisions would have been taken after full explanation and scrutiny. Perhaps every enquiry would have been shown to be entirely necessary and proportionate. But without that transparency, there is no way of knowing, and that is precisely the point.

The police must be able to investigate independently. Defence solicitors should not direct investigations and suspects should not be given information which could genuinely compromise them.

But independence does not have to mean invisibility. If the criminal justice system expects us to protect our clients' rights before charge, particularly where those clients are children or otherwise vulnerable, we must be given enough information to know when those rights require protecting.

Otherwise, the uncomfortable question remains: how do we challenge an investigation we cannot see?

References

[1] Criminal Procedure and Investigations Act 1996, s.23(1)(a), together with the *Criminal Procedure and Investigations Act 1996 Code of Practice* (2020), para. 3.5. The statutory framework requires reasonable steps to be taken for the purposes of an investigation, while para. 3.5 of the Code provides that investigators should pursue all reasonable lines of enquiry whether they point towards or away from the suspect.

[2] College of Policing, *Authorised Professional Practice: Investigation process*, under "Reasonable and relevant lines of enquiry", "Pre-charge engagement" and "Contact strategy". The guidance states that investigators should pursue reasonable and relevant lines of enquiry towards and away from a suspect and that investigators must explain the investigation process to suspects and keep them informed of its progress.

[3] College of Policing, *Authorised Professional Practice: Investigation process*, "Investigative supervision". The APP states that investigators and investigations should be subject to effective and proactive supervision at regular intervals and at key milestones, including bail, release under investigation, pre-charge advice and charging decisions.

[4] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024), Annex B, paras. 3–4. Pre-charge engagement is described as voluntary engagement following the first PACE interview and before charge. The non-exhaustive examples include giving a suspect an opportunity to comment upon proposed lines of enquiry, identifying additional enquiries, agreeing digital searches, obtaining consent to medical records, identifying witnesses and discussing expert or forensic evidence. See also the Guidelines' provisions on recording pre-charge engagement.

[5] Crown Prosecution Service, *Disclosure Manual: Chapter 5 – Reasonable Lines of Enquiry and Third Parties*. The guidance requires third-party enquiries to be reasonable, necessary and proportionate. Among other matters, investigators should consider what relevant information is believed to exist, why it is thought to be held by the third party, whether obtaining it would amount to a proportionate intrusion into privacy, whether a less intrusive route exists and whether the request can be limited in scope. It also states that investigators should not undertake speculative enquiries and should be able to articulate why obtaining the material represents a reasonable line of enquiry.

[6] Police and Criminal Evidence Act 1984, Schedule 1; see also CPS, *Disclosure Manual: Chapter 5 – Reasonable Lines of Enquiry and Third Parties*, "Obtaining access to third party material". The CPS guidance explains that where a third party refuses access and the investigator considers production necessary before charge, formal mechanisms may be considered, including an application under Schedule 1 PACE where applicable. Schedule 1 contains statutory access conditions concerning matters including the material's relevance and substantial value to the investigation and the use or availability of other means of obtaining it.

[7] Home Office, *Victim Information Requests: Code of Practice*, published 12 January 2026. The Code governs authorised persons requesting victims' third-party material and emphasises necessity, proportionality and the pursuit of a reasonable line of enquiry. It also introduces particular protections in relation to counselling information, including a presumption against such requests unless the applicable statutory requirements are met.

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