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Welcome to October's London Advocate, the final edition of the Association's 2018-19 year (and a bit later than intended, apologies).

In this issue we bring you the annual President's Report, an introduction to our new President and a report on our annual conference. As for articles, former Chief Magistrate Howard Riddle reminisces, Greg Powell's history of legal aid continues, James Wood QC examines the viability of abuse of process in historical sex case, and Julian Hayes and Michael Drury bring us up to speed on an important recent case concerning facial recognition technology.

The issue also features a review of "the Firearms Law Handbook" and would not be complete without Bruce Reid's column, this time looking askance at the DSCC in all its glory. Enjoy!

Ed Smyth, Editor

PRESIDENT'S REPORT

At the end of his second stint in office, Jon Black looks back at the period since his first presidency, four years ago and reviews a busy but also frustrating year.

As many know this is my second term as President of the Association: I last held the position in 2015-16 between which there has been a kind of inside-out Greg sandwich thanks to Messrs Foxsmith and Powell. In 2015 the legal profession was united to get rid of Chris Grayling, and the general election gave some hope of that. Alas while many of us were concentrating on legal aid, others focused on bacon sandwiches and the election led directly to the 2016 referendum since when Brexit has suffocated almost all other topics of political debate. The reason I mention this is because it demonstrates how long we have been treading water without any progress and how our justice system has suffered as a result.

We were within a hair's breadth of duty solicitor contracts when the plug was pulled. Firms who successfully bid were offered contracts on the basis of the volume of matter starts that they committed to undertake. Imagine what would have happened to firms

that had made those commitments unaware not only that lower crime volume would plummet, but also that work would dry up as the criminal justice estate was "reorganised" and local courts and police stations shut? Surely the government was aware of the closure plans when offering the duty contracts?

The next round of contracts is likely to see a dramatic fall in providers: we have seen numerous firms announcing their withdrawal from publicly funded criminal defence work, overwhelmed by oppressive over-regulation and the daily struggle to persuade the LAA to pay what is due for the work done.

Turning to events of the last twelve months, the Committee has been busy representing the interests of the 700-plus members of the association. Since the start of the year I, together with Greg Powell and others from the Committee, have been engaging with the MOJ. On the plus side, our counterparts present as different animals to the vandals that presided over previous debacles. Disappointingly, however, although I wish I could write of good news, we have received no assurances that there will be new money available for criminal legal aid, despite advanced discussions in relation to criminal legal aid fees. It may be that the uncertainty of and preoccupation with Brexit is the cause, but that is essentially why we have been treading water for four years without concrete proposals. With the average age of the profession being 47, it is time for the government not to simply acknowledge the emergency but to do something about it which does not simply depend upon the survival of a few larger firms.

In the past few months we are proud to have triggered debate on the astonishingly high number of suspects Released Under Investigation with our legal limbo campaign and survey. Hickman and Rose followed this up with a freedom of information request that revealed an eye watering total of 193,000 RUI suspects.

Vice President Kerry Hudson has represented your interests during the disclosure review, and both Kerry and I were invited to speak at a conference on the topic to London prosecutors and senior police officers. Suffice it to say we made it clear that we were not - contrary to popular view - participating in a game of justice, but can

only play with the cards we are dealt and that the key to a functioning justice system is communication.

Mark Troman has been working with HMCTS to resolve the secure access to courts issue which we hope will develop further in the coming months, and Edward Jones has led our responses to law reform and sentencing consultations. Whilst these are the headlines, there are many other meetings attended by our hard-working committee.

We are proud that the scope of our membership is not limited to legal aid practitioners (as the variety of firms represented at our recent conference in Barcelona was testament - as 80 attendees used the weekend to socialise, network and learn. I urge you to seriously consider joining us next year), and those of our members that have been elevated to the Bench continue to offer themselves as a valuable resource. We congratulate those recent appointments from our number both to the Magistrates and Crown Court Bench.

Where next? We currently exist in a completely topsy-turvy society in which we have a ringside seat on the equally topsy-turvy justice system. Despite the spike in serious offending we see a huge dip in matters flowing through the courts, yet HMCTS is struggling to clear backlogs and failing to use available court rooms and surplus judges. You would have thought that there would be plenty of capacity to deal with matters that have been put on hold for months and years, but for some inexplicable reason the criminal justice system refuses to operate in a rational manner. How our new Home Secretary - who has warned offenders that she is "coming after" them - will cope with this reluctance to empty the metaphorical inbox is as much as a mystery as her commitment to keeping our prisons full and silence on tackling recidivism with effective rehabilitation.

The London Criminal Justice System is unique and that is why the LCCSA, 70 years since its establishment, is here to stay. The way in which we worked to assist detainees during recent Extinction Rebellion protest was a prime example of the need for a diverse yet collegiate profession in London. Kerry Hudson and her dynamic team of committee members have an interesting year ahead of them. I wish them the very best of luck.

MEET THE NEW PRESIDENT

Incoming LCCSA President Kerry Hudson introduces herself; explaining how and why she chose a career in criminal law, detailing some of the valuable work the Association does for the

profession and calling on members to consider joining the Committee.

Do you ever wake up and suddenly think "how an earth did I end up here?"

I cannot believe that a whole year has gone by since outgoing President Jonathan Black asked me to be Vice President and I ran out of good excuses to say no. I had served my 3 years as a Committee member and as Jonathan said, I was already teeing myself up for the job by volunteering to attend various meetings as a Committee representative, often being the lone voice for the Defence [and Defendants] in the room.

I am told I have form for being a "trouble maker". I grew up on a Council Estate in a small town in Essex where children were to be seen and not heard. I drove my mother mad always asking "but why?" to everything she asked me to do. I was the one in class who always said what everyone else was thinking, which more than once led to me being made to stand outside.

Little did I know then that fast-forward 20-odd years and I would not only get paid to be the "vocal" one but would be actively encouraged to question anything and everything put before me.

I started my legal career late. Sadly, as a teenager I had the (false) belief that people like me from schools like mine did not become lawyers. My original degrees were in English Literature and then American Literature and I worked in publishing for a bit before realising that it wasn't too late to study Law.

After studying part time (whilst working full time) for the Graduate Diploma in Law and then the Bar Vocational Course, Lady Luck gave me a break: I sat next to somebody who was working as a Paralegal at Bullivant Law and she got me an interview to do the same. That "shop floor" experience saw me becoming police station accredited, cross-qualifying as a Solicitor, taking the rubbish overnight duties and learning the trade.

Nearly 12 years later, and I am still at Bullivants, although I've gone from turning up at Inner London Crown Court to clerk a PTPH (showing my age now!) and not knowing where to find a Defence Statement in a file, to taking over the running of the firm with my fellow Director Claire McGrath.

It has been a whirlwind. My legal career started just after Carter started to bite. Every person I met in criminal defence tried to put me off, warning me to get out before it was too late and Legal Aid collapsed entirely. But the more I was warned off, the more determined I became to work in Legal Aid and to fight against the cuts, the more

I dug my heels in and became increasingly more actively involved in trying to instigate some positive change and help keep alive a fair justice system for all.

I first got involved with the Committee in 2015 when a colleague (and former Committee member himself, probably fed up with me venting about the criminal justice system) persuaded me to channel my frustrations more constructively. Over the last 4 years, I have been involved in many projects and (slowly but surely) have seen some positive changes that benefit our members as well as our clients.

I have been involved with the Better Case Management/Digital Case System roll out, the National Disclosure Improvement Plan (NDIP), the Common Platform project and our recent “Legal Limbo” press drive to highlight the ongoing RUI scandal.

I have also been involved in trying to resolve the recent issues caused by the DSCC change of provider. Jonathan and I attended the Chiswick call centre recently to try and get to the heart of the problems. Although there are still some minor problems being reported, hopefully you are all seeing some improvement since we presented a number of specific case examples to the LAA and the new provider. Thank you to all those members who sent me details of individual cases.

The Committee has also assisted in agreeing a protocol across the prison estates to allow solicitors to bring laptops into prisons, gave input that has led to flexible court hours in the criminal courts being postponed (at least for the time being!) and has assisted in making the current Digital Case System more user-friendly, albeit there is some way still to go.

I continue to attend various project meetings including working groups testing Magnet software (the technology that will in the near future change the way the police analyse and present mobile phone evidence), and NDIP Phase 2 which is working towards applying good practice from serious and complex cases in the Crown Court to “volume” cases in the Crown, Magistrates’ and Youth Courts, bringing in recommendations from the Attorney General’s Review in November 2018.

We are fortunate to have a very strong, diverse, experienced and active Committee and between us we attend many meetings with the various “stakeholders” in the Criminal Justice System, often in the middle of our working days and without remuneration. We have a seat at the table where change will happen, with or without input from Criminal Solicitors. Let’s together make our voices heard.

If you are already a member of the LCCSA, thank you for your ongoing support and we very much look forward to receiving your input and looking after your interests over the next year. If you are not a member, please do consider joining. We are stronger together. Although the struggles with Legal Aid take up a large chunk of our time, we are dedicated to representing the interests of all our members. If we are not covering an issue that affects you or your practice, tell us about it. We want to hear from you and we want to help.

So what do I intend to achieve in the year ahead? With so much uncertainty around Brexit, the impending Fees Review and our current Home Secretary’s apparent obsession with locking people up, it is difficult to predict what may happen.

We have a strong foundation of experienced co-opted Committee members who have long memories ready to remind those newer members at the LAA/MOJ/HMCTS of past failings. We have some active grass-roots hardcore Criminal Legal Aid Duty Solicitors out there in the field telling it like it is warts n’ all in the London police stations and Courts. And we have members who work in Crime outside of Legal Aid providing us with valuable perspective as to the needs and the pressures on Criminal Solicitors as a whole.

Whatever lies ahead, we will ensure there is a place at the table to represent the interests of our 700 and growing members.

Lastly, I would like to thank the outgoing President Jonathan Black for volunteering for this job, not once, but twice (!) and to the Committee for giving a trouble maker a chance at the helm. I have some pretty big shoes to fill but I’m looking forward to the year ahead and whatever challenges may come.

LCCSA NEWS

LCCSA AGM, THURSDAY 14 NOVEMBER WITH GUEST SPEAKER HOWARD RIDDLE CBE

The LCCSA AGM and Dinner will take place on Thursday 14 November at 6:30pm at the newly refurbished Malmaison Hotel, 18-21 Charterhouse Square, London, EC1M 6AH.

We are delighted to announce that our guest speaker is Howard Riddle CBE. Howard was a defence practitioner for many years before being appointed to the district bench. He rose to become the Senior District Judge (Chief Magistrate) for England and Wales between 2010 and his retirement in 2016. Howard was awarded a CBE in the New Year’s Honours list for services to the Administration of Justice. Please join the LCCSA and

hear his candid observations on how the justice system has tried to cope as it creaks towards collapse.

Ticket prices are £55 for Members and £70 for Non-Members. The cost of the ticket includes a three course dinner and wine.

Early Bird Discount of £45 for Members, £60 for Non Members ONLY if you book before 31st October.

Places are limited this year, so please book your place now! For further details please contact Sara Boxer at sarsboxer@gmail.com or on 07974 395 156

“LOOK WHAT YOU MISSED!” - LCCSA EUROPEAN CONFERENCE, BARCELONA, 4- 6 OCTOBER 2019

One of the largest contingents ever attended this year’s European Conference in Barcelona from 4 – 6 October. Doubtless the lecture programme and the location were a winning combination in influencing participation. And rightly so, it was proved.

Arrival on the Friday at the luxury hotel overlooking the sea and but a short amble to the beach set the scene for an enjoyable weekend. A formal dinner that evening provided an abundance of conviviality and mouth-watering local cuisine in a restaurant overlooking the marina and the sea. A picturesque backdrop which only served to put further from our minds the thought of a rain-soaked London. Thank you to Forensic Equity Ltd. for sponsoring the dinner.

Despite such a sociable gathering, there was an impressive turnout to conference itself the following morning. Lectures by Hoss Zahir, Emma Fenn, Tom Wainwright and Gerwyn Wise from our sponsors, Garden Court Chambers. Diversely interesting subjects and first-class lecturing made the morning slip by intellectually.

The walking tour of Barcelona in the afternoon proved popular and built up an appetite for the evening’s revelries. The drinks reception kindly sponsored by Garden Court Chambers gathered us before setting off for more fine dining at yet another excellent restaurant showcasing the best of Catalan cuisine, hospitality and charming location.

The prospect of a lecture by Karl Laird of 6 KBW who was a returning speaker from last year by popular demand - a reason to encourage delegates to join lectures on the Sunday morning.

So, in case it is not evident you missed enjoyable learning at a luxury venue in a beautiful city with three days of sunshine punctuated by fine dining in excellent company.

The conference grows in popularity each year for good reason. New delegates are made most welcome and report that they enjoyed themselves with the intention to attend again next year. Think how you spent your weekend. Might the Conference not be a tempting prospect for you next year....?

Our grateful thanks to our speakers and to both our sponsors Garden Court Chambers and Forensic Equity Ltd.

Diana Payne, Training officer

COMMITTEE MEETINGS

The LCCSA committee meets monthly (second Monday of the month at 6:30pm) and all members are welcome. Meetings take place at Kingsley Napley, 14 St John’s Lane, EC1M 4AJ.



ARTICLES

Howard Riddle CBE, former Senior District Judge, decries the legal aid funding crisis and fears for the future.

I remember my first LCCSA dinner. It was at the Savoy, and seemed impossibly grand. I was wearing a dinner jacket for the first time and we sat on a table with one of the Arbour Square stipes.

I had only just decided that, after all, I would rather be an East End legal aid lawyer than (as had been my original plan) a tax lawyer with a big city firm. The pay differential was significant, but outweighed by idealism, wanting to do something useful, and a sense of excitement.

It was the right decision. When I left Edward Fail Bradshaw and Waterson almost 20 years later I could honestly say I had never been bored. Every day was different. There had been plenty of excitement. Making a decent profit was never easy, but we had always been able to pay the bills.

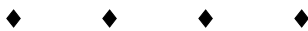
Many of my colleagues on the stipendiary (later district) bench had been officers or members of the LCCSA. They were good judges. They may not always have been defence minded, but they knew and had experienced the difficulties facing defence lawyers. We particularly valued a good duty solicitor, and the experienced solicitor who could put a client’s case persuasively yet succinctly.

Where are those experienced advocates of the future, and the next generation of judges, to come from? I have recently been teaching able students preparing for the professional qualifying exam. Precious few of them want to embark on criminal legal aid work. They can't afford to. Most of them have student debts that can only be paid off if they take the offer of a city firm. They know that trainees in such firms often earn more than partners in legal aid firms.

We need investment across the board. The courts and the CPS need money to function properly. But most of all, good legal aid lawyers need to be properly remunerated. Duty solicitors are essential to the smooth working of the courts. Their work in giving advice and in case management is not only invaluable to defendants; it saves money for HMCTS, the CPS and the police. The pay cannot compete with commercial firms, but it can be increased to a level that will attract the best criminal lawyers and judges of the future.

Howard Riddle CBE, Senior District Judge (Chief Magistrate) for England and Wales 2010-2016.

Howard is the author (with Judge Robert Zara) of Essential Magistrates' Court Law, which will be reviewed in the next edition of The London Advocate.



A BRIEF HISTORY OF LEGAL AID

A Practitioner's Perspective, Part II

Greg Powell's essay continues from the July issue, examining how attempts at reform misunderstood how the legal aid market operates, and the twin challenges of technological changes and the erosion of value.

5. Reform and the Market

The foundation of reform was a myth, that Legal Aid expenditure was "out of control" accompanied by a sinister subtext that the force driving expenditure was improper exploitation by the supplier base. Academic research, however, showed that a rise in need, volume of cases and a tsunami of legislation, especially in crime were in fact to blame. Nevertheless the myth took hold.

The paradox was that in the early 2000s the government was investing substantially in workers compensation schemes. Rightly so, but whilst it spent billions on the one hand it sought to cut Legal Aid expenditure by millions on the other. Lord Carter proposed a crude simplistic trade off of volume for price: a theme that has bedevilled proposals for so-called "reform" ever since.

These proposals foundered as they were both administratively complex and unable to resolve contradictions between rewarding incumbent suppliers with market share and providing opportunities for new entrants. They also hopelessly confused the nature of the market. This is worth spelling out: the MOJ is a single purchaser of Legal Aid services. It sets prices. The suppliers when they bid for work (however defined) face an existential crisis: if their bid fails then they are out of business.

The Legal Aid market for services is not like, for example, the NHS, which procures across a vast organisation for multiple services offering bidders the opportunities to bid for different sizes of contract in different geographical areas.

An historic strength of the system was its openness. There were no limits on the number of contractors and sufficient prices allowed a degree of entrepreneurial activity to fill in gaps in the market place (and as prices have declined so has that activity). However there are two other benefits from the way in which the market has operated.

A key element to successful entrepreneurial activity is establishing reputation, typically driven by the other key element: client choice. The introduction of the Duty Solicitor Schemes enabled firms to source a more "captive" work stream and gain clients through duty solicitor activity in courts and police stations. Nevertheless it was axiomatic for all firms that the quality of their work was sufficient to draw clients back to them or achieve word of mouth referrals. In this way client choice drives quality.

Unfortunately restrictions on the ability to transfer Representation Orders have led to a decline in client choice. There is a consumer paradox for people who are initially arrested, represented by a duty solicitor and bailed or released under investigation. Pre-charge, there is no Legal Aid available and they are free to make enquiries in the marketplace to find out if the duty solicitor they have accessed "accidentally" is the best to represent them or whether they could find a better alternative. In this way consumers are free to move around within the market.

However, if for example, a person is *arrested* for murder, has a duty solicitor and is *remanded in custody* they then find it very difficult to change due to the rules which to this degree undermine an aspect of client choice.

Contracting has also restricted the opportunities for new entrants to the start of each contract cycle and has severed civil and criminal services. The most startling

reform that could be contemplated would be ending contracting completely. This would be a return to a pre-contracting era where all firms needed to do was to keep within the rules in respect of claims and payments. In other words that the work was properly done and claimed. Such a more open system would certainly allow new entrants *and with other incentives and structural changes*, allow firms to re-establish mixed practices of civil and crime and provide more local integrated services needed to meet the vast unmet need.

It is not difficult to be imaginative about what is possible in the Legal Aid market. The Legal Services Commission as the successor to the Legal Aid Board had a worthwhile initiative through which firms took on trainees who were subsidised directly by the LSC in return for a contractual commitment to stay in Legal Aid work for a period of time. Legal Aid ought to be an option within law school courses as a bespoke subject and participation could be leveraged through grant, the relief of debt and payments to suppliers to provide subsequent training contracts.

6. A Fundamental Problem

Underpinning access to justice are the right to a fair trial and equality of arms between the parties. Both are vital to the proper working of the adversarial system and ensuring that the court has before it all admissible evidence to achieve the fundamental objective, the pursuit of truth.

No one is facing up to the work, time and cost posed by the explosion of electronic material. It simply means that in cases where it is relevant, the evidence must be examined and deployed by prosecution and defence. These are tasks which have made the process of litigation more time intensive and more costly. This is for the police as investigators, the prosecution as an independent prosecutorial body assessing the evidence and for the defendants. All require extra resources of a degree of magnitude to properly cope with the technological development. There is no shortcut; it simply requires more money and acceptance that this will be a demand led system that cannot be contained with fixed “envelopes” of cost.

7. The Erosion of Value

The financial argument arising from the explosion of electronic material sits alongside the major other issue: the erosion of value. It is not feasible for solicitors and counsel to continue negotiating over deploying the same envelope of money in new ways. Inventing other proxies for value, combining proxies with time, combining other structures of payment such as standard fees, non-standard fees, higher-standard fees all fail to account for

both the explosion in evidence and the fact that current values have been eroded to a degree where the work is unsustainable.

That unsustainability is evidenced by the recruitment and retention crisis within criminal firms, the almost complete separation of private client work and Legal Aid work and by the advancing age of the cohort of duty solicitors.

Career opportunities have been truncated by the short horizon of business, the uncertainty of profits and the lack of career paths. One exit is to the Crown Prosecution Service which now offers substantially better terms than are available generally within the defence community. Another exit is to simply abandon the work and take up different careers.

The next part of Greg's history describes the crisis in access to justice, the unique challenges faced by London-based legal aid practitioners and what, if anything, might be achieved by the current review of criminal legal aid fees.



IS ABUSE OF PROCESS IN HISTORIC SEX ABUSE DEAD?

James Wood QC of Doughty Street Chambers considers some of the policy reasons which apparently lie behind the Court of Appeal's increasing willingness to overturn trial judges' decisions to stay proceedings on grounds of delay and loss of evidence, and reluctance to find convictions unsafe where trial judges have declined to grant a stay.

In July this year in [PR v R \[2019\] EWCA Crim 1225](#), a Court led by Lord Justice Fulford (the new Vice-President of the CACD) declined to interfere with a trial judge's decision to allow a case of historic sex abuse to proceed, even though the time periods of delay were significant, and the loss of material substantial. On reading his judgment, many considered that it most likely spelt the end of any realistic hope of the use of the abuse application to achieve a stay of proceedings on grounds of loss of historic material as a realistic or sustainable remedy.

The similar earlier ruling in May of this year in [R v SR \[2019\] EWCA Crim 887](#), rejecting arguments seeking to overturn the trial judge's discretion to allow a trial to proceed, in what the court described as a “troubling” case of loss of historic investigative material, when coupled with an apparent willingness to overturn a trial judge's discretion to stay proceedings when potentially relevant mobile phone evidence had been lost as one “that was not reasonably open to him” (per Sir Brian Leveson (P) in [R v](#)

[E \[2018\] EWCA 2426](#), could all be seen as tantamount to an abolition of the jurisdiction, save in the most exceptional of circumstances.

In the 70's, 80's and 90's such stays on grounds of loss of material were prevalent and common place when complainants in sex abuse cases came forward late. Indeed the claim of the most minor of potential evidential disadvantage to the defence could often lead to a stay on grounds of trial unfairness, even if the consequence was to lead to a denial of justice to victims. As we moved through the millennium, judicial attitudes started to change. In 2001 Brooke LJ's judgment in [R \(Ebrahim\) v Feltham Magistrates Court \[2001\] 2 Cr App R 23](#), was to be a turning point, ruling that circumstances in which a trial would "inevitably be unfair are likely to be few and far between", and that the criminal trial was well able to cope with arguments about loss of evidence. This change of approach coincided with an increase in public understanding of the long term personal damage caused to the victims of child sex abuse, and of the factors of fear, oppression, repression, inhibition and immaturity which can credibly lead complainants to only feel able to address deeply painful and personal memories of abuse in middle age and later life. This, coupled with the obvious deterrent effect on potential abusers of children, of knowing that their child victims will grow to adulthood, and when free from oppression from abusers, will be able to speak, and be allowed to give compelling evidence of childhood abuse after many years, have undoubtedly contributed to a further loosening of the tests of trial fairness formerly applied, and a greater reliance upon protective directions to juries upon the potential disadvantages to the defence of significant delay in the trial process.

Whilst our common law jurisdiction has historically relied on staying proceedings on grounds of abuse of process, in other codified European jurisdictions historic sex cases and aged prosecutions were prevented by perhaps unduly short statutory limitation periods for prosecuting offences. It is of note that our courts are not isolated in responding to changing attitudes and the "Me Too" era of historic allegations, by removing obstacles to prosecution which might prevent victims being heard. EU states have also been changing their laws by lengthening the limitation periods which tended to prevent the trial of historic abuse cases. Germany, for instance has revised its 20 year statutory limitation on sex offences to only apply after the victim has reached the age of 30, in effect meaning victims can complain up to the age of 50. In 2013 the Netherlands removed all limitation periods for serious sexual offences which carry a minimum sentence of 8 years. Similar changes are occurring further east, with

Poland recently moving legislation to remove any limitation period for child sex offences [\[1\]](#). So in this sense, what is occurring in our courts has an international consistency as the "Me Too" disclosures gather force.

It must be said, though, that the protections provided by the abuse jurisdiction in historic cases have not totally evaporated, and the trial process itself can provide some protections if defence advocates take the opportunity to fully deploy the fact of the potential material which has been lost, and its potential impact on the trial, in order to raise doubt. In [PR v R \[2019\] EWCA Crim 1225](#) 1 Fulford LJ reviewed the authorities (at paras 67-70) before citing Treacy LJ in [R v RD \[2013\] EWCA Crim 1592](#) at para 71. He stated

"It is clear that imposing a stay in situations of missing records is not a step that will be taken lightly; it will only occur when the trial process, including the judge's directions, is unable adequately to deal with the prejudice caused to the defence by the absence of the materials that have been lost. The court should not engage in speculation as to what evidence might have become unavailable but instead it should focus on any "missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case" (per Treacy LJ [67] above)."

It remains difficult, in the current climate, to imagine almost any circumstances where the trial process will not be able to cope with lost material. That being so, it remains unlikely the Court of Appeal will interfere when a trial judge rejects submissions seeking a stay, or where contentions are made that missing material renders historic convictions unsafe [\[2\]](#).

Even if successful at first instance, the Court of Appeal has shown a willingness to allow prosecution appeals where trial judges or justices have concluded that a stay should be granted [\[3\]](#).

Advocates confronted with historic cases, whilst not abandoning abuse arguments, would be well advised to concentrate on fully and extensively deploying the extent of the lost material in front of the jury, and find ways of illustrating the impact that material might have had on the trial process. If this were done effectively, no doubt using hearsay provisions, then a jury will be more likely to give due weight to the arguments, and if trial judges seek to limit the scope of the exploration during the trial process, it may be the Court of Appeal will be more sympathetic, particularly as the directions of trial judges on delay are now required to invite the jury to consider the unfairness presented to the defence by the loss of material. Such a direction should be tailored so that juries understand that the evidence of what has gone missing, is clearly evidence

in the proceedings which can properly be considered by them, in determining whether guilt has been established beyond reasonable doubt.

[1] <https://www.dw.com/en/child-sex-abuse-how-long-do-the-statutes-of-limitations-run-in-the-eu/a-43659400>

[2] See also *R v Allan* [2017] EWCA Crim 2396, where much of an initial investigation had gone missing.

[3] See for example *DPP v Fell* [2013] EWHC 562 (Admin).

<https://www.doughtystreet.co.uk/barristers/james-wood-qc>



HIGH COURT RESPONDS TO FIRST LEGAL CHALLENGE OF THE USE OF LIVE FACIAL RECOGNITION TECHNOLOGY

Julian Hayes and Michael Drury of BCL assess the key findings of the High Court's judgment in *R (on the application of Bridges) v Chief Constable of South Wales Police* [2019] EWHC 2341 (Admin).

In a seminal judgment handed down in September in relation to a claim for judicial review brought by Mr Edward Bridges, the High Court ruled that the South Wales Police use of live facial recognition technology ('FRT'), which has been trialled since 2017 was lawful even though no specific FRT law was or is in existence. The Court suggested this is the first legal challenge of its kind to be brought anywhere in the world.

Whilst it is crucial to recognise that the judgment is fact-specific, it appears that the Court found that the South Wales Police have deployed this technology in a proportionate and measured way, against a background in which Elizabeth Denham, the Information Commissioner, expressed her deep concern about the rollout of live facial recognition technology by law enforcement and suggested in the proceedings that the categories of persons in the 'watchlist' with which the collected data was to be compared must be specified in law.

The key findings of the Court were as follows:

- An image of a person's face is 'personal data' for the purposes of the data protection legislation;
- FRT involves the creation and processing of a biometric picture of an individual which requires 'sensitive processing';
- Such processing affects an individual's privacy rights created by the ECHR and protected in the UK by

the Human Rights Act 1998: it is more than taking a photograph in a public space;

- Such processing can be, and in this case was, compliant with ECHR privacy rights and data protection obligation on those collecting and processing personal data. In this instance this was because, in the context of historically wide common law powers available to the police to gather and use information to protect the public and keep the peace, the deployment of the technology by the South Wales Police has been in compliance with the Data Protection Act 2018; in adherence to the Surveillance Camera Code of Practice (as secondary legislation); and in accordance with extensive policies and procedures adopted by them – taken together these were considered by the Court together to be "*legally enforceable standards*".

The judgment does not explore whether the policies and procedures adopted currently by the South Wales Police are watertight, but it does recognise the need to periodically review the legal framework in future (whilst at the same time, specifically noting that, in respect of the South Wales Police's standard operating procedures, future improvement or alteration "*is not evidence of present deficiency*").

The Court's judgment dealt only with the use of FRT by law enforcement, limited to the specific facts of the South Wales Police trials; it left open the door to future challenges on human rights grounds. The judgment does not deal directly with the use of FRT in quasi-public spaces such as shops and retail parks which has aroused recent media controversy. However, the Court's conclusions may contain important lessons for private entities seeking to legally deploy FRT for legitimate commercial reasons, at least as far as confirming FRT needs to operate squarely within data protection requirements.

Notwithstanding the fact that Mr Bridges, represented by 'Liberty', immediately announced his intention to appeal the Court's findings, it is likely that other law enforcement agencies will see this judgment as a green light to develop and deploy live facial recognition technology for law enforcement purposes. For the moment, the judgment makes it clear that the focused use of the technology as a tool to assist the police in apprehending individuals wanted on suspicion of having committed an offence; those who are known protestors who had committed previous criminal offences; and those who may be considered to pose a risk of harm to themselves, is permissible in assisting police officers to

carry out their duty to protect the public and keep the peace.

<https://www.bcl.com/our-people/julian-hayes/>

<https://www.bcl.com/our-people/michael-drury/>



BOOK REVIEW

The Firearms Law Handbook by Laura Saunsbury and Nick Doherty, 8th Edition, Wildy, Simmonds & Hill Publishing (1 Aug. 2019)

Paperback: 338 pages

The objective of this book is to untangle a convoluted area of law and make it accessible to both non-lawyers and criminal practitioners. It incorporates the myriad changes to firearms legislation since the previous edition in 2011, and also endeavours to identify areas most susceptible to change in the current political climate.

The authors have gathered information from multiple sources to present clear answers to most issues facing those dealing with firearms, with just enough opinion to inspire the practitioner. Although the book is relatively short, it is densely packed with pearls of wisdom and plenty of experience; this saves criminal lawyers valuable time and effort and gives them a solid foundation on which to build their case.

Each topic is introduced with an amalgam of the law from legislation and guidance, expanding with relevant case law and illustrating it all with apt examples. The authors resist the temptation to embark on a discussion on the merits of the law but use carefully chosen theory to caveat its anomalies and quirks.

Each chapter handles a different aspect of gun ownership and many also address the corresponding provisions of Scots law.

The book starts by explaining the definitions encountered in firearms law, then moves on to what it describes as “the most difficult chapter in the book to digest”: prohibited weapons and ammunition. The authors offer a detailed explanation of the classification of prohibited weapons and their components, and prohibited ammunition; they then also briefly address the difference in the meaning of “possession” between drug and firearms offences, putting the law into context and enhancing the readers’ understanding.

Once the general principles of firearms law have been covered, the book moves on to more specific topics. Most of the areas of particular interest to the practitioner are touched on throughout the book, but the authors

have also included specific chapters on topics such as young people and guns, criminal offences relating to firearms, and refusal, revocation and appeal (in respect of certificates).

The book concludes with a series of appendices containing guidance and practical information.

This book is peppered with pragmatic advice for gun owners and highlights considerations for lawyers confronted with firearms cases. Examples range from an explanation of what the police and prosecutor are likely to take into account when issuing certificates and prosecuting firearms offences, to what to consider when instructing a former FSS expert in a firearms case.

Acknowledging the plethora of topics surrounding the law of firearms, the authors constrain the scope of the book to the most important facets and inform the reader where to continue with their research. This makes the book a great starting point for even the more complicated firearms cases, and promotes an understanding of the law worth the investment.

The authors have succeeded in their aim to comprehensively set out an intricate area of law for both lawyers and non-lawyers; it is a compulsory read for the responsible firearm owner and a handy foundation for practitioners.

Radha K. Baan, Kingsley Napley LLP



BRUCE REID

DSCC MELTDOWN - A CONSIDERED PERSPECTIVE

It's a quiet day at Camberwell, the Digital Mark Up is neither marking nor up. DJ Pussywillow has been reduced to reading the MOJ's emails on the thrilling progress on the removal of asbestos at Croydon Mags and how it's completion and the Second Coming of Christ are both confidently expected in January. Realising just how sad this is, he searches for "Celebrity Fat Shaming" instead.

Felix Mansfield and Squirrel Nutkin (Defence Solicitors) are commiserating outside Court 2.

Felix Mansfield - "You look miserable, Squirrel! Trouble with Him Indoors?"

Squirrel Nutkin - "Yeah, Nigel (Nutcracker - his husband) has got me on a Disciplinary. He said "One more 4:00 am call out and it's no snuggles for a month."

FM - "Ouch! Was the case worth it?"

SN - "Hardly - a DSCC call out to Dorchester...12 hours after they had charged him, at least I didn't have to go.....What the heck are they playing at?"

FM - "Well, the lowest tender for the service, ('a rigorous bidding procedure conducted to the highest specifications' according to Gary Goblin of the LAA) was, wait for it, a TV repair shop in Colliers Wood..... did a brilliant free job on my plasma screen when I threatened to report them for telling me I had 45 minutes to get to Grimsby."

SN - "How are we supposed to get any work whilst this is going on?"

FM - "Look, it's as much trouble for the police as it is for us, so Sgt Ferret at Walworth and I just bypass it. Look at this text I got early Saturday evening, that at first sight, might have threatened Negroni Hour"(produces phone)

"Ciao Felix! Perry Polecat's nicked on a shoplift. No rush, he's been street homeless for a bit and so he's as happy as a pig in muck on the All Day Breakfast. No bail till Monday 'cos of the Means Warrant so we agreed he'd only ask for you on Sunday afternoon. 4.00 suit? Let me know. Cheers! Fergus"

SN - "Great..... but how about the Duty stuff?"

FM - "We got that cracked as well. Fergus just Whatsapps the local hacks aka "The Camberwell Gang" and doesn't bother with the DSCC at all. Once you're at the station you sort the number, reference etc out. Look at this."

"Yo, Bloods! Got a racially agg bus rage for fam! Drunk and obnoxious and assaults anything that moves. First come first served but I'd advise a delay for the lucky winner to give the f***er a chance at sobering up. Call soonest! If no takers I will call the DSCC, personally, I don't care how long he stays here. I am off shift in 39 minutes. Jah Love, Fergus"

FM - "Want me to add you to the Group?"

SN - "Either that or a career in TV repair...."

TWO DAYS LATER

Not much change on Digital Mark Up....

DJ Pussywillow now knows more about Kim Kardashian than the Hearsay Rule.

SN - "Thanks, Felix! Fergus got me a juicy one. The Peckham Liberation Front Coffee Shop Hostage Siege!"

FM - "What, those anti-gentrification nutters from outside the Town Hall shouting -

ESS, EEE, FIF-TEEN! - NO. FLAT. WHITES!

ESS, EEE, FIF-TEEN! - NO. FLAT. WHITES!"

SN - "The same. They mooched some machetes from a couple of under-employed drug dealers and stormed 'Roasting In Peckham', which as one of the drug dealers pointed out used to have an entirely different meaning....."

They locked the door, pulled the plug on the WiFi and force-fed the assembled freelance media consultants some jellied eels; made the staff switch the Espresso machine to making Builder's Tea. The live Facebook feed went viral. Ever see a foot long beard entangled with jellied eels? Over 18s Only! "

FM - "Nasty! How did it end up?"

SN - "Sort of fizzled out. Once the media consultants discovered that the eels were gluten free and the tea was Fairtrade, they ordered seconds. By the time Inspector Water-Vole and his Wall of Kevlar hurtled through the door, the consultants were happily discussing the necessity of supporting Local Food Heroes and giving the PLF free help on the press release. The shop now serves the eels on wholemeal sourdough, (micro greens extra) as a lunch-time special. Includes a 5% donation to Shelter so everyone's happy."

Anyway, can you cover my PSR for Harold Hare? I gotta give a Press conference - update on the hunger strike."

THE NEXT DAY...

FM - "Great stuff, Squirrel! That Conference had everything; Gentrification, climate change, no more single use plastic - you'll have every radical protester in town shouting for you from the station. Not sure where the Trans Rights stuff came in though? What's that got to do with coffee..... or jellied eels for that matter?"

He pauses, "Or perhaps I shouldn't ask? I confess an old timer like me is playing catch-up with all of this...."

SN - "Part of the unified struggle, Felix - one of them is going to do a Chelsea Manning in custody - should add at least a month and a couple of thousand pages to the trial. As s/he/they said, "You have to fight them on all fronts"

FM - "You lucky bastard! How are things with Nigel?"

SN - "Cool again. He saw the TV coverage of the Press Conference, said I was wonderful although my hair did look like the Wrath of Christ. So I am off the Disciplinary!