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CRIMINAL LAW UPDATE

2019

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Part 1 STATUTORY CHANGE

TBA
Stalking Protection Act 2019

Creates "stalking protection orders".

A chief officer of police may apply to a magistrates' court in respect of a person (the defendant) if it appears that

(a) the defendant has carried out acts associated with stalking

(b) the defendant poses a risk associated with stalking to another person (which may be in respect of physical or psychological harm and which may arise from acts the defendant knows or ought to know are unwelcome to the person even if, in other circumstances, the acts would appear harmless in themselves), and

(c) There is reasonable cause to believe the proposed order is necessary to protect another person from such a risk (whether or not the other person was the victim of the acts mentioned in (a)).

In granting such an order under section 2, the magistrates may include a prohibition or requirement if satisfied that the prohibition or requirement is necessary to protect the other person from a risk associated with stalking and provided it, so far as practicable, does not conflict with the defendant's religious beliefs or interfere with the times which he normally works or attends an educational establishment.

An order may be of fixed duration (and for a minimum of two years) or until further order:

S.3. The Act makes provision for the making of interim orders: s.5. Appeals in relation to orders made under the Act lie to the Crown Court: s.7.

It is an either-way offence to breach a stalking protection order or interim stalking protection order without reasonable excuse, the maximum penalty on conviction on indictment being five years' imprisonment, or a fine, or both: s.8.
A person cannot be conditionally discharged in respect of such an offence.

The Act also imposes notification requirements in relation to persons subject to either full or interim orders: ss.9 and 10. Those requirements do not apply if the person is already subject to sexual offence notification requirements. A person giving notification must also comply with any request to allow their fingerprints or photographs to be taken: s.10 (5). It is an either-way offence, with the same maximum penalty as for section 8, to fail to comply with requirements under section 9 or 10: s.11.

Mental Health Units (Use of Force) Act 2018
Provides for the oversight and management of the use of force in Mental Health Units. Where a police officer assists staff they must wear and have operational BWV> A failure goes to the admissibility of evidence.

Crime (Overseas Production Orders) Act 2019.
Makes detailed provision about overseas production orders and about the designation of international agreements for the purposes of section 52 of the Investigatory Powers Act 2016.

1 Making of overseas production order on application

(1) A judge may, on an application by an appropriate officer, make an overseas production order against a person in respect of electronic data if each of the requirements for the making of the order is fulfilled (see section 4).

(2) An application for an overseas production order must—

(a) specify the designated international co-operation arrangement by reference to which the application is made, and
(b) specify or describe the electronic data in respect of which the order is sought.

(3) An appropriate officer applying for an overseas production order must not specify or describe in the application for the order electronic data that the appropriate officer has reasonable grounds for believing consists of or includes excepted electronic data.

(4) An overseas production order is an order made under this Act that either—

(a) requires the person against whom the order is made to produce the electronic data specified or described in the order, or
b) requires the person against whom the order is made to give access to the electronic data specified or described in the order.

(5) In this Act “designated international co-operation arrangement” means a relevant treaty which—

(a) relates (in whole or in part) to the provision of mutual assistance in connection with the investigation or prosecution of offences, and
(b) is designated by the Secretary of State by regulations.

Thus the Act enables appropriate officers to apply to a crown court judge for the production of existing stored electronic information (other than privileged or confidential data) located or controlled outside the UK, for use in the investigation and prosecution of indictable offences or the investigation of terrorism. Such a power can only be exercised where a designated international co-operation arrangement exists in relation to the territory in which the subject of the order operates

This would cover material held in the United States by Facebook and Google

S 8 In making such an order, the judge may impose a requirement on the subject of the order preventing them from disclosing the making of the order or its contents without authorisation. There are additional protections for journalistic material Electronic data produced in compliance with an overseas production order may be retained for as long as is necessary, and may be used as evidence in criminal proceedings:

In order to become operational, the UK must negotiate an international treaty that facilitates the reciprocal arrangements.

Counter-Terrorism and Border Security Act 2019

PART 1
COUNTER-TERRORISM

CHAPTER 1
TERRORIST OFFENCES

CHAPTER 2
PUNISHMENT AND MANAGEMENT OF TERRORIST OFFENDERS

PART 1
COUNTER-TERRORISM

CHAPTER 1
TERRORIST OFFENCES

1 Expressions of support for a proscribed organisation
In section 12 of the Terrorism Act 2000 (support), after subsection (1) insert—
"(1A) A person commits an offence if the person—

(a) expresses an opinion or belief that is supportive of a proscribed organisation, and
(b) in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation."

2 Publication of images and seizure of articles

(1) Section 13 of the Terrorism Act 2000 (uniform) is amended as follows.
(2) In the heading, after "Uniform" insert "and publication of images".

(3) After subsection (1) insert—

"(1A) A person commits an offence if the person publishes an image of—
(a) an item of clothing, or
(b) any other article,
in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.

(1B) In subsection (1A) the reference to an image is a reference to a still or moving image (produced by any means)."

(4)…[police powers]

3 Obtaining or viewing material over the internet

(1) Section 58 of the Terrorism Act 2000 (collection of information) is amended as follows.

(2) In subsection (1)—
(a) omit "or" at the end of paragraph (a);
(b) after paragraph (b) insert ", or
(c) the person views, or otherwise accesses, by means of the internet a document or record containing information of that kind."

(3) After subsection (1) insert—

"(1A) The cases in which a person collects or makes a record for the purposes of subsection (1)(a) include (but are not limited to) those in which the person does so by means of the internet (whether by downloading the record or otherwise)."

(4) After subsection (3) insert—

"(3A) The cases in which a person has a reasonable excuse for the purposes of subsection (3) include (but are not limited to) those in which—

(a) at the time of the person's action or possession the person did not know, and had no reason to believe, that the document or record in question contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
(b) the person's action or possession was for the purposes of—
(i) carrying out work as a journalist, or
(ii) ''academic research."

4 Entering or remaining in a designated area

(1) The Terrorism Act 2000 is amended as follows.

(2) After section 58A insert—

"Entering or remaining in designated areas overseas

58B Entering or remaining in a designated area

(1) Subject to subsections (3) and (4), a person commits an offence if—

(a) the person enters, or remains in, a designated area, and
(b) the person is a United Kingdom national, or a United Kingdom resident, at the time of entering the area or at any time during which the person remains there.

(2) It is a defence for a person charged with an offence under this section to prove that the person had a reasonable excuse for entering, or remaining in, the designated area.

(3) A person does not commit an offence under this section of entering, or remaining in, a designated area if—

(a) the person is already travelling to, or is already in, the area on the day on which it becomes a designated area, and
(b) the person leaves the area before the end of the period of one month beginning with that day.

(4) A person does not commit an offence under this section of entering, or remaining in, a designated area if—

(a) the person enters, or remains in, a designated area involuntarily, or
(b) the person enters, or remains in, a designated area for or in connection with one or more of the purposes mentioned in subsection (5).

(5) The purposes are—

(a) providing aid of a humanitarian nature;
(b) satisfying an obligation to appear before a court or other body exercising judicial power;
(c) carrying out work for the government of a country other than the United Kingdom (including service in or with the country's armed forces);
(d) carrying out work for the United Nations or an agency of the United Nations;
(e) carrying out work as a journalist;
(f) attending the funeral of a relative or visiting a relative who is terminally ill;
(g) providing care for a relative who is unable to care for themselves without such assistance.

(6) But a person does not commit an offence of entering or remaining in a designated area by virtue of subsection (4)(b) only if—

(a) the person enters or remains in the area exclusively for or in connection with one or more of the purposes mentioned in subsection (5), or
(b) in a case where the person enters or remains in the area for or in connection with any other purpose or purposes (in addition to one or more of the purposes mentioned in subsection (5)), the other purpose or purposes provide a reasonable excuse for doing so under subsection (2)….

(9) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 10 years, or to a fine, or to both….

58C Section 58B: designated areas

(1) The Secretary of State may by regulations designate an area outside the United Kingdom as a designated area for the purposes of section 58B if the following condition is met.

(2) The condition is that the Secretary of State is satisfied that it is necessary, for the purpose of protecting members of the public from a risk of terrorism, to restrict United Kingdom nationals and United Kingdom residents from entering, or remaining in, the area.

(3) The reference in subsection (2) to the public includes a reference to the public of a country other than the United Kingdom.

(4) Where an area is designated by regulations under this section, the Secretary of State must—

(a) keep under review whether the condition in subsection (2) continues to be met in relation to the area, and
(b) if the Secretary of State determines that the condition is no longer met, revoke the regulations (or revoke them so far as they have effect in relation to that area if the regulations designate more than one area).

(5) Regulations under this section cease to have effect at the end of the period of 3 years beginning with the day on which they are made (unless they cease to have effect at an earlier time as a result of their revocation or by virtue of section 123(6ZA)(b)).

(6) Subsection (5) does not prevent the making of new regulations to the same or similar effect…..

5 Encouragement of terrorism and dissemination of terrorist publications

(1) The Terrorism Act 2006 is amended as follows.

(2) Section 1 (encouragement of terrorism) is amended in accordance with subsections (3) and (4).

(3) In subsection (1)—

(a) for the words from “some” to “published” substitute “a reasonable person”;
(b) for “to them” substitute “, to some or all of the members of the public to whom it is published,”.

(4) In subsection (3)—

(a) in the opening words, for “members of the public” substitute “a reasonable person”;
(b) in paragraph (b), omit “those”.

(5) Section 2 (dissemination of terrorist publications) is amended in accordance with subsections (6) and (7).

(6) In subsection (3), in paragraph (a), for the words from ", by" to "them" substitute "by a reasonable person as a direct or indirect encouragement or other inducement, to some or all of the persons to whom it is or may become available as a result of that conduct,".

(7) In subsection (4)—

(a) in the opening words, after "by a" insert "reasonable";
(b) in paragraph (b), for "that person" substitute "a person".

6 Extra-territorial jurisdiction

CHAPTER 2
PUNISHMENT AND MANAGEMENT OF TERRORIST OFFENDERS

Sentencing

7 Increase in maximum sentences

(1) The Terrorism Act 2000 is amended in accordance with subsections (2) to (4)

(2) In section 38B (information about acts of terrorism), in subsection (5)(a), for "five years" substitute "10 years".

(3) In section 58 (collection of information), in subsection (4)(a), for "10 years" substitute "15 years".

(4) In section 58A (eliciting, publishing or communicating information about members of armed forces etc), in subsection (3)(a), for "10 years" substitute "15 years".

(5) The Terrorism Act 2006 is amended in accordance with subsections (6) and (7).

(6) In section 1 (encouragement of terrorism), in subsection (7)(a), for "7 years" substitute "15 years".

(7) In section 2 (dissemination of terrorist publications), in subsection (11)(a), for "7 years" substitute "15 years
".

8 Sentences for offences with a terrorist connection

(1) The Counter-Terrorism Act 2008 is amended as follows…".

(4) Schedule 2 (list of offences where terrorist connection to be considered) is amended ….

9 Extended sentences etc for terrorism offences: England and Wales

(1) The Criminal Justice Act 2003 is amended as follows.

(2) In section 224 (meaning of “specified offence” etc.)—

(a) in subsection (1), for “or a specified sexual offence” substitute “, a specified sexual offence or a specified terrorism offence”;
(b) in subsection (3), after the definition of “specified sexual offence” insert—“specified terrorism offence” means an offence specified in Part 3 of that Schedule.”

12th April 2019

Voyeurism (Offences) Act 2019

Creates new either way offences carrying two years on indictment by inserting s67A in the Sexual Offences Act 2003

“67A Voyeurism: additional offences

(1) A person (A) commits an offence if—

(a) A operates equipment beneath the clothing of another person (B),
(b) A does so with the intention of enabling A or another person
(c), for a purpose mentioned in subsection (3), to observe—
(i) B’s genitals or buttocks (whether exposed or covered with underwear), or
(ii) the underwear covering B’s genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, and
(c) A does so—
(i) without B’s consent, and
(ii) without reasonably believing that B consents.

(2) A person (A) commits an offence if—

(a) A records an image beneath the clothing of another person (B),
(b) the image is of—
(i) B’s genitals or buttocks (whether exposed or covered with underwear), or
(ii) the underwear covering B’s genitals or buttocks,
in circumstances where the genitals, buttocks or underwear would not otherwise be visible,
(c) A does so with the intention that A or another person (C) will look at the image for a purpose mentioned in subsection (3), and
(d) A does so—
(i) without B’s consent, and
(ii) without reasonably believing that B consents.

(3) The purposes referred to in subsections (1) and (2) are—

(a) obtaining sexual gratification (whether for A or C);
(b) humiliating, alarming or distressing B.

In section 68 (voyeurism: interpretation), after subsection (1) insert—

"(1A) For the purposes of sections 67 and 67A, operating equipment includes enabling or securing its activation by another person without that person's knowledge."

(4) In Schedule 3 (sexual offences for purposes of notification requirements), after paragraph 34 insert—

"34A(1) An offence under section 67A of this Act (voyeurism: additional offences), if—

(a) the offence was committed for the purpose mentioned in section 67A(3)(a) (sexual gratification), and
(b) the relevant condition is met.

(2) Where the offender was under 18, the relevant condition is that the offender is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months.

(3) In any other case, the relevant condition is that—

(a) the victim was under 18, or
(b) the offender, in respect of the offence or finding, is or has been—
(i) sentenced to a term of imprisonment,
(ii) detained in a hospital, or
(iii) made the subject of a community sentence of at least 12 months."

Notes: If the only motive was financial this would not be caught by the Act

A picture taken other than beneath clothing is not criminalised.

Animal Welfare (Service Animals) Act 2019

In force 8th June 2019

(1)The Animal Welfare Act 2006 is amended as follows.

(2)In section 4 (offence of causing unnecessary suffering to a protected animal), after subsection (3) insert—

"(3A) In determining for the purposes of subsection (1) whether suffering is unnecessary in a case where it was caused by conduct for a purpose mentioned in subsection (3)(c)(ii), [protection of person, property or another animal]the fact that the conduct was for that purpose is to be disregarded if—

a) the animal was under the control of a relevant officer at the time of the conduct,
b) it was being used by that officer at that time, in the course of the officer's duties, in a way that was reasonable in all the circumstances, and
c) that officer is not the defendant.

(3B) In subsection (3A) “relevant officer” means—

a) a constable;
b) a person (other than a constable) who has the powers of a constable or is otherwise employed for police purposes or is engaged to provide services for police purposes;
c) a prisoner custody officer within the meaning of Part 4 of the Criminal Justice Act 1991.

(3C) The Secretary of State may by regulations amend subsection (3B).

Only a person in the public service of the Crown may be specified in subsection (3B) by virtue of regulations under this subsection.”

Offensive Weapons Act 2019 **Save as shown not yet in force**

Part 1 Corrosive products and substances
This Part makes it:

- a summary offence to sell a "corrosive product" to a person who is under the age of 18: s.1. A "corrosive product" is defined as a substance listed in the first column of Schedule 1, or a product that contains a substance listed in the first column of that schedule in a concentration higher than the limit set out for that substance in the second column.

- a summary offence for a remote seller to deliver a corrosive product, or arrange for its delivery, to residential premises or a locker: s.3.

- a summary offence for a body corporate, i.e. delivery companies that have entered into an arrangement with a remote seller, who is outside of the UK, to deliver a corrosive product into the hands of a person aged under 18: s.4.

- A due diligence defence is available to a person charged with an offence under section 1, 3 or 4: ss.1(2), 2, 3(8) and 4(5).

- an either way offence to have a "corrosive substance" in a public place: s.6. A "corrosive substance" is defined as a substance that is capable of burning human skin by corrosion. The maximum penalty on conviction on indictment for such an offence is four years imprisonment, or a fine, or both.

It is a defence for a person charged with an offence under section 6 to prove that they had good reason or lawful authority for having the corrosive substance with them in a public place, or that they had it with them for use at work: s.6(2) and (3). A minimum sentence of six months must be imposed where a person convicted of a section 6 offence committed on or after the day that section 8 comes into force is aged 16 or over and has at least one relevant conviction, unless to do so would be unjust in all the circumstances: ss.8 and 9.

[relevant convictions refer to all offensive weapons and bladed article offences]

Definition of a corrosive substance

SCHEDULE 1

Name of substance and Chemical Abstracts Registry number (CAS RN)	*Concentration limit (weight in weight)*
Ammonium hydroxide (CAS RN 1336-21-6)	10% w/w
Formic acid (CAS RN 64-18-6)	10% w/w
Hydrochloric acid (CAS RN 7647-01-0)	10% w/w
Hydrofluoric acid (CAS RN 7664-39-3)	0% w/w
Nitric acid (CAS RN 7697-37-2)	3% w/w
Phosphoric acid (CAS RN 7664-38-2)	70% w/w
Sodium hydroxide (CAS RN 1310-73-2)	12% w/w
Sodium hypochlorite (CAS RN 7681-52-9)	10% w/w
Sulfuric acid (CAS RN 7664-93-9)	15% w/w

Part 2 *Knife crime prevention orders*

This part confers power on a court to make a knife crime prevention order in respect of a person aged 12 or over where:

- an application is made by the police and the court is satisfied on the balance of probabilities that, on at least two occasions within the previous two years but after the commencement of section 14, the defendant had a bladed article with him without "good reason" (see s.14(5)) or lawful authority in a public place, on school premises or on further education premises; or

- the person has been convicted of an offence committed after the commencement of section 19, an application for such an order is made by the prosecution and the court is satisfied on the balance of probabilities that the offence is a "relevant offence" (see s.19(10)); and

- the court thinks it is necessary to protect the public from the risk of harm involving a bladed article, to protect any particular members of the public from such a risk, or to prevent the defendant from committing an offence involving a bladed article.

A knife crime prevention order must be for a fixed period of at least six months and not more than two years: s.23(3)

There are provisions for piloting these orders; for interim orders and a requirement for consultation in cases involving youths

Regulation 9 of the Criminal Legal aid General Regulations is extended (paragraph (uc) so that advocacy assistance is available in civil proceedings

Failure to comply with those notification requirements without reasonable excuse, or knowingly providing false information, is an either-way offence: s.25. Breaching a knife crime prevention order, without reasonable excuse, is an either-way offence: s.29. The maximum penalty on conviction on indictment for offences under sections 25 and 29 is two years' imprisonment, or a fine, or both.

Part 3 Sale and delivery of knives

The following new offences are created:

- It is a summary offence for remote sellers to deliver a "bladed product" (defined in s.41), or arrange for its delivery, to residential premises or a locker, subject to the defences in section 40: s.38.

- It is a summary offence, subject to a due diligence defence, for a body corporate, viz delivery companies that have entered into an arrangement with a remote seller, who is outside of the UK, to deliver a bladed product to residential premises into the hands of a person under 18 or to deliver a bladed article into the hands of a person under 18: ss.39 and 42.

New section 141B is also inserted into the Criminal Justice Act 1988 to modify the operation of the due diligence defence to the summary offence under section 141A of selling knives and certain articles with a blade or point to persons under the age of 18, where the sale is carried out remotely so that additional conditions must be satisfied corresponding to those in section 2 above for corrosive products.

Part 4 Possession etc of certain offensive weapons

- Section 1 of the Restriction of Offensive Weapons Act 1959 , which makes it a summary offence to manufacture, import, sell, hire or lend a flick knife, flick gun or gravity knife, is amended (a) so that a "flick knife" or "flick gun" will also include any knife that opens automatically from a closed position, or partially opened position to a fully opened position, by means of any manual pressure that is applied to a button, spring or other device in or attached to the knife, and (b) to make possession of a knife described under that section a summary offence, subject to certain defences.

- The Criminal Justice Act 1988 is amended, inter alia, to (a) extend the either-way offence under section 139A of having a bladed or pointed article or an offensive weapon on school premises to further education premises, and (b) make possession of an offensive weapon in private a summary offence, subject to various existing and new defences, under section 141(1A).

The Criminal Justice Act 1988 (Offensive Weapons) Order 1988 (SI 1988/2019)*, which specifies weapons and defences for the purposes of section 141 of the 1988 Act,[(1) Any person who manufactures, sells or hires or offers for sale or hire, exposes or has in his possession for the purpose of sale or hire, or lends or gives to any other person, a weapon to which this section applies shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or both].is amended, inter alia, to add the weapon sometimes known as a "cyclone knife" or "spiral knife" and to extend existing defences to the new section 141(1A) offence. A new defence to, inter alia, offences under section 141 is also inserted relating to the presentation of curved swords in Sikh ceremonies.

Note s141 has defined defences if carrying out functions for the crown or visiting forces, for museums and galleries, and for theatrical film and TV productions

Part 6 Threatening with offensive weapons

- The either-way offences of threatening with an offensive weapon in a public place under section 1A of the Prevention of Crime Act 1953 and of threatening with an article with a blade or point in a public place or with an article with a blade or point or an offensive weapon on school premises under section 139AA of the Criminal Justice Act 1988 are amended to replace the requirement of the threat causing immediate risk of serious physical harm to the victim with a requirement that the threat is such that a reasonable person exposed to it would think that they were at risk of immediate physical harm. The section 139AA offence is also extended to cover further education premises.

- An either-way offence of threatening another person with an offensive weapon, bladed or pointed article or corrosive substance in a private place in such a way that there is an immediate risk of serious physical harm is created, with a maximum penalty on conviction of indictment of four years' imprisonment, or a fine, or both: s.52.

Part 6 Firearms **in force 16.5.19**

Two additions are made to the list of prohibited weapons in section 5 of the Firearms Act 1968, with related transitional provisions.

PART 2 CRIMINAL INVESTIGATIONS

Inferences from silence

An invitation to give an account can be a question within s34 CJPOA 1994, even when the interviewer has given an inaccurate summary of events. There had been, in this case, an opportunity to see the relevant CCTV

"The defendant is questioned under caution, in our judgment, if the circumstances are such that he is expressly or by necessary implication invited to give his account of the matter which has given rise to the interview. It is not necessary that specific questions are asked of him.

We agree with the judge that it was plain that the appellant was being invited to give his account and deliberately chose not to do so. He had been arrested for assault and was clearly being invited to say whether he accepted that he had assaulted Mr Ward and if not, why not? He was asked, in the course of the interview, to account for the injury to his hand which, the officer suggested, would have been caused by the blow which he struck. The officer could have said, "why did you punch him?", in so many words but in effect that was what the officer was saying and the appellant knew that he was in effect being asked that. He was expressly asked whether he wanted to give an account before or after watching the CCTV and, after it had been played, whether there was anything which he would like to say. What he was being invited to comment on was perfectly apparent to him.

It was not a case where, because there were no specific questions, the appellant did not appreciate that he was being questioned and invited to give his account. That was not his evidence. Rather his evidence was he decided not to say anything on the advice of his solicitor.

[The appeal was allowed because the judge's summing up on inferences was defective]

R v Green 2019 EWCA Crim 11

Part C PACE Codes

Revised Codes C and H ***Effective 21st August 2019***

The amendments to require all detainees to be given an opportunity to speak to a member of custody staff in private regarding their health, hygiene and personal needs, with necessary arrangements made to accommodate such needs as soon as practicable. The amendments specifically require the provision of menstrual hygiene products free of charge to detainees where requested. The amendments make clear that there should be privacy for detainees in the toilet area of their cells.

The amendments require officers to have regard to the dignity of a detainee when conducting an intimate search or a strip search and extend the obligation to have regard to the dignity of a detainee when determining their gender for the purpose of a search. The requirement to speak to a staff member of the same sex may be modified in respect of a transgender detainee to ensure their needs are accommodated.

Questioning

Provided the police act in good faith PACE Code C does not apply to investigative questioning before the defendant becomes a suspect unless it is obvious and thus even though a technical offence is indicated (here under Port of London Byelaws 1978), The answers were therefore admissible at a trial for gross negligence manslaughter

"Although, in an attempt to escape compliance with the codes, the police cannot ignore the possibility that a criminal offence (even one punishable with a financial penalty at the behest only of a different authority) has been committed, it is equally important that police officers should not be subject to a potential trap if, by careful searching of byelaws, an esoteric offence of which they cannot be expected to be aware can be found."

R v Shepherd 2019 EWCA Crim 1062

<u>Appropriate Adults</u>

The fact that an experienced solicitor made no request for an appropriate adult was a factor in deciding that an interview should be admitted at trial.
R v Beattie 2018 NICA 1

A confession to an appropriate adult is admissible in evidence
R v Ward 2018 EWCA Crim1464

<u>Powers of arrest</u>

On specific facts the High Court found that there had been no reason to carry out the arrest, the officer's belief in the need to arrest the suspect was not objectively justified and therefore the arrest was unlawful.

The objective test of whether an arrest is necessary 'is more than simply 'desirable' or 'convenient' or 'reasonable'. It is a high bar, introduced for all offences in 2005 to tighten the accountability of police officers. The officer who has given no thought to

alternatives to arrest is exposed to the risk of being found by a Court to have had objectively no reasonable grounds for his belief that arrest was necessary (Hayes v Chief Constable of Merseyside [2011] EWCA Civ 911)'. The judgment makes it clear that the officer should have interviewed the suspect, established his identity and requested his mobile phone. Had the officer encountered any issues he could have carried out an arrest at that point.

The Commissioner of Police for the Metropolis v MR [2019] EWHC 888 (QB)

Implications of employment investigations

An employer considering dismissing an employee does not usually need to wait for the conclusion of any criminal proceedings before doing so. The court will usually only intervene if the employee can show that the continuation of the disciplinary proceedings will give rise to a real danger (and not merely a notional danger) that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene. It is necessary to demonstrate a real damage of injustice in the criminal proceedings for a sustainable allegation of prejudice. Complaints which are generic will not be sufficient.
North West Anglia NHS Foundation Trust v Dr Andrew Gregg [2019] EWCA Civ 387

Search warrants

The duty of disclosure extends to facts that would be known on proper enquiry.

S 15(6)(b) PACE requires identification of the articles sought and "communications between father and son" and "financial documentation" without limit of time were both too broad

R (Brook) v Preston CC 2018 EWHC 2024 (Admin)

Criminal record certificates

The Disclosure and Barring Service (Police Act 1997)(Criminal Record Certificates: Relevant Matters)(Amendment)(England and Wales) Order 2013 (2013/1200) is incompatible Art 8 ECHR (by 4:1 majority) in 2 respects

1 the multi conviction rule

2 Disclosure of reprimands warnings and youth cautions (for which no consent is required)

In other respects the Police Act scheme is lawful

R(P G and W) and other cases v Secretary of State for the Home Department 2019 UKSC 3

Notes

The court supports its earlier decision in R(AR) v Chief Constable of Manchester on the basis that employers will apply the Code of Practice issued under s122 Police Act 1997

For a full review of the relevant law and material on the retention of criminal records see

R (CL) v Secretary of State for the Home Department 2018 EWHC 3333 (Admin)

Code for crown prosecutors: **effective 26.10.18**

(1) A new emphasis on considering whether further reasonable enquiries, or evidence held by the police, could impact the prosecution decision: prosecutors must now consider this at all stages of the process, even when making their early advice to police, and must give it particular consideration when applying the evidential stage of the full code test. The full code test should only be applied where all outstanding reasonable lines of enquiries have been made, or the prosecutor is satisfied that any further evidence or material is unlikely to affect the application of the test.

(2) An increased focus on those who benefit from criminal conduct, and the importance of confiscation orders. Prosecutors must now consider whether charges will allow for confiscation orders in appropriate cases, and should only accept a defendant's plea in a case where a defendant has benefitted from criminal conduct if it enables the court to make a confiscation order in an appropriate case.

(3) An amendment of the factors to be considered at the public interest stage of the full code test, so that prosecutors must now focus on the maturity of suspects at the time of the offence, rather than only their age and whether they were under 18, recognising that young adults will continue to mature into their mid-twenties.

(4) The introduction of a definition of "victim" in the code, and a new requirement that, where cases are stopped, consideration should be given to the effect of the method of termination on the victim's position under the Victim's Right to Review scheme.

(5) Guidance on how to apply the Threshold Test has been simplified and updated, to make sure it is only being used where completely necessary and to avoid cases being charged prematurely. The Threshold Test allows a suspect who presents a substantial bail risk such as a serious risk of harm to the public, to be charged and therefore held in custody in the expectation that further evidence will be produced

by the police. It must only be applied in limited circumstances after a rigorous examination of all the conditions.

(6) When prosecuting for other government bodies the CPS must have regard to their enforcement policies They must have regard to the Crim PR and Crim PD as well as sentencing guidelines

(7) The CPS must continue to consider material submitted by the defence.

CPS Legal Guidance 28.1.19

Offences during Protest, Demonstrations or Campaigns

ECHR stage

29. The first step is to consider whether the activity involve freedom of expression and/or freedom of assembly and association. If it does, prosecutors should consider whether the activity is aimed at the destruction or limitation of any rights and freedoms in Schedule 1 of the Human Rights Act 1998. If protections of freedoms are engaged, the prosecution must be necessary and proportionate.

Arranging or facilitating the commission of a child sex offence.

Under Section 14 of the Sexual Offences Act 2003 provides the offence of arranging or facilitating the commission of a child sex offence. A person commits this offence if:

He intentionally arranges or facilitates something that he intends to do, intends another person to do, or believes that another person will do, in any part of the world, and doing it will involve the commission of an offence under ss9 - 13

Would-be abusers caught in undercover operations are to be prosecuted in every case for the same offence as those who meet real-life victims Evidence obtained by police or other activist groups will result in substantive charges of arranging or facilitating a child sex offence

Previously, charging such crimes as ‘attempts’ had been an option available to prosecutors. This had raised some concern that offenders might receive overly generous discounts in their sentences where the defence pointed out in mitigation that there was no tangible victim.

External legal advice states that “once the intention is proved, it is immaterial that it is in fact impossible to commit the substantive offence”.

Firearms

In guidance in relation to firearms dated 6.8.19, the CPS states that, where firearms are disguised as another object (such as stun guns disguised as torches or mobile phones or other innocent objects), prosecutors should charge section 5(1)(b) (which does not carry the minimum sentence) rather than section 5(1A)(a) (which does), unless there is a significant aggravating factor, any use or intended use of the stun gun, or the commission or alleged commission at the same time or recently of other relevant offences.

CPS Policy guidance on the prosecution of crimes against older people

"We recognise that older people are often targeted because of their age and a perception that they are vulnerable. This can have a devastating impact on the victim because they are being targeted for a personal characteristic. Whilst there is no statutory definition of crimes against older people, nor legislation allowing for a sentence uplift to be applied as in hate crime cases, we are committed to ensuring that justice is delivered for older people by prosecuting offences against them and supporting victims and witnesses throughout that process.

This document explains the way in which we deal with crimes where older people have been targeted on the basis of their age or age related vulnerability and how we support older people who are victims and witnesses of crime.

For the purpose of our policy and guidance, the term "victim" is used to describe a person against whom an offence has been committed, or the complainant in a case being considered or prosecuted by the CPS.

Reviewing prosecuting decisions

A review as possible where there was a mistake of law

Such issues arose from a failure to consider as relevant:

1 the officer's earlier driving to the later collision involving the moped from which the deceased was thrown

2 evidence that went to causation and foreseeability

R (Torpey) v DPP 2019 EWHC 1804 (Admin)

See the very thorough review of the relevant law by Roderick Munday at CLW 19.28.3

PART 3 PROCEDURE

PET forms; use as evidence

If circumstances arise in which it is sought to argue that the information provided on a PET form should have evidential significance, an appropriate application must be made and the hurdles both in relation to hearsay and s78 PACE satisfied.

The court is entitled to see the PET form under Crim PR 24.13(2) but it may not normally be put in evidence (Crim PD 24B4) as long as the case is conducted in the spirit of the Crim PR

Two appeals were considered by way of case stated, both involving consideration of the use which the court may make of information provided by advocates for the defendant on PET forms. It was argued that critical evidence was taken from the form to treat as evidence to fill a gap in the prosecution case or support a conclusion reached.

In V the complainant did not attend for the trial, the defendant had accepted presence at the scene, and that he had been correctly identified, on the PET form. The court heard from an independent witness who saw an assault but had never taken part in ID procedures. The defendant did not give evidence and submissions were made as to identification and the possibility of error. The answers were not within part three paragraph 9 entitled “Admissions”

There was no application under 118 of the 2003 Act to admit the relevant parts of the form as hearsay, nor was there a s10 formal admission the appeal was allowed. The justices had confused “the provision of case management information with evidence without the same being formally introduced”.

Valiati V DPP; KM v DPP 2018 EWHC 2908 (Admin)

Use of form SFR1

Non-compliance with the Crim PR (r 19 on expert evidence) and the admissibility of evidence are distinct issues. Non-compliance cannot alone make a form SFR 1 admissible. It had no evidential weight. There was no (s10) agreement to the form.

Hunt v CPS 2018 EHWHC 3341 (Admin)

Fair Trial

A fair trial was possible without the ability to cross examine a complainant who sought to withdraw her complaint of domestic violence but who, in evidence, confirmed that s9 statements to the police were true. She declined to say more. She as treated as a hostile witness and the s9 statements admitted under s119

CJA 2003. The defendant had raised self-defence on arrest (as did the complainant in part). The defendant declined to give evidence.

Griffiths v CPS 2018 EWHC 3062(Admin)

Note; but was s119 appropriate?

119Inconsistent statements

(1)If in criminal proceedings a person gives oral evidence and—

(a)he admits making a previous inconsistent statement, or
(b)a previous inconsistent statement made by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865 (c. 18),
the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible.

(2)If in criminal proceedings evidence of an inconsistent statement by any person is given under section 124(2)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.

S 120 would not apply (no oral evidence to rebut)and res gestae unlikely to be allowed A better approach may be s114(1)(d) but s114(2) must be considered

(2)In deciding whether a statement not made in oral evidence should be admitted under subsection

(1)(d), the court must have regard to the following factors (and to any others it considers relevant)—

(a)how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
(b)what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
(c)how important involved in challenging the statement; the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
(d)the circumstances in which the statement was made;
(e)how reliable the maker of the statement appears to be;
(f)how reliable the evidence of the making of the statement appears to be;
(g)whether oral evidence of the matter stated can be given and, if not, why it cannot;
(h)the amount of difficulty involved in challenging the statement
(i)the extent to which that difficulty would be likely to prejudice the party facing it.

Disclosure

A breach of duty arose when the police did not follow all reasonable lines of enquiry. However this case should not have been stayed on the facts. The trial process could be adapted. Not all mobile devices have to be seized. The court approved the Director's Guidance

"1. Communications between suspects, complainants or witnesses can be of critical significance whether as evidence in support of the prosecution case or as unused material which either undermines it or assists the defence case. This is particularly so where the complainant and suspect have been in a personal relationship, however briefly, for example, in cases involving allegations of a sexual nature. This guidance is primarily directed to such cases. Its purpose is to ensure that the significance of communication evidence is understood and assessed at the appropriate time and that it is handled correctly.

Serious consequences have occurred and will continue to do so if this is not done. Such evidence includes communications by way of telephone or other electronic device or by social media and is not restricted to communications between the complainant and suspect but may include contact with third parties [see below].

2. Investigating officers are required to pursue all reasonable lines of inquiry, whether to exonerate or implicate suspects, under the Code of Practice issued under CPIA 1996. This will often include the obtaining and analysis of communication evidence whether it originates from devices or social media accounts belonging to the complainant or the suspect or, in some cases, to third parties. Prosecutors should be alert to the often critical importance of such evidence and, where such reasonable lines of inquiry have not been undertaken, should provide appropriate advice to the police to pursue them. This might be advice to obtain devices which have not hitherto been seized or to examine those which have in an appropriate way. In the category of cases to which this guidance is primarily directed, it would be rare indeed for communication evidence not to feature as part of the police investigation.

3. The Attorney General's Guidelines on Disclosure provide assistance on what amounts to a reasonable line of enquiry. The investigator must decide how best to pursue a reasonable line of enquiry in respect of such material, ensuring that the extent and manner of the examination are commensurate with the issues in the case. This should be achieved in consultation with the prosecutor, if appropriate. Therefore, the following advice is provided:

- Consider asking the suspect or/and complainant whether there might be communication material which may have a bearing on the case.

- It is necessary carefully to consider the facts of a particular case, the issues raised and any potential defence in order to decide what amounts to a reasonable line of enquiry.

- Prosecutors should provide assistance to investigators when making such a decision and, ideally, agree with them what amounts to a reasonable line of enquiry.

- In reaching such a decision, prosecutors are reminded that the whole of a relevant download falls to be considered i.e. all forms of message communication [even if deleted] and photographs / videos if stored. Equally the investigation should not be limited to messages between the complainant and the suspect only as communications between either of them and others may have an impact on the case, for example, when reference is made by either to the events which are the subject of the allegations.

- In some cases it may be necessary for the whole of a download to be examined. The extent of any investigation of digital material should only be confined if it is not considered to be a reasonable line of enquiry."

22. Subsequent to this ruling, on 24 July 2018, 'A Guide to "reasonable lines of enquiry" and Communications Evidence' was published by the DPP ('DPP Guide') which states:

"13. The examination of mobile devices belonging to the complainant is not a requirement as a matter of course in every case. There will be cases where there is no requirement for the police to take the media devices of a complainant or others at all, and thus no requirement for even a level 1 examination to be undertaken. Examples of this would include sexual offences committed opportunistically against strangers, or historic allegations where there is considered to be no prospect that the complainant's phone will retain any material relevant to the period in which the conduct is said to have occurred and/or the complainant through age or other circumstances did not have access to a phone at that time…

19. What represents a reasonable line of enquiry is an investigative matter for the police and whilst the prosecution will do what they can to assist in identifying potential further enquiries, that ought not to be taken by the police as definitive or exhaustive"

R v E 2018 EWCA Crim 2426

See Disclosure - A guide to "reasonable lines of enquiry" and communications evidence

24 July 2018 Legal Guidance
Extracts:

The examination of digital media devices

6. Mobile devices are not standard and the ability of digital forensic services to access data varies between manufacturers, models, operating systems and even versions of the same model of a device and may also change over time.

7. It is not possible to obtain and examine every artefact or item of digital evidence from a device for analysis in every situation – there are constraints to the extent and depth of an examination in the circumstances of each case. It is critical that the investigator and prosecutor are aware of the opportunities presented by a device and the limitations and boundaries of an examination; including the implications of utilising one examination methodology over another if further work is required in the future.

   Although capabilities vary across England and Wales, there are essentially 3 levels of data extraction and examination of mobile devices offered by the digital forensic services, namely:

i. **Level 1** – Configured Logical Extraction - Digital Forensics Kiosks,
ii. **Level 2** – Logical & Physical Extraction - Digital Forensics Hubs or Laboratories or Forensic Service Providers, and
iii. **Level 3** – Specialist Extractions & Examinations - Central Digital Forensics Laboratories or Forensic Service Providers.

8. Terms such as “Full” extractions or downloads should be avoided as they can easily lead to assumptions and misinterpretation of the actual agreed method(s) of examination.

9. A Digital Forensics Kiosk or Self Service equipment is officer operated equipment based within operational police premises. These officers are usually non practitioners, trained and competent to follow a preconfigured workflow on the equipment. These data extractions are sometimes referred to by officers by referring to the vendor of the equipment and extraction software e.g. “XRY, Cellebrite or Aceso downloads”.

10. Level 1 mobile device examination provides a “logical” extraction. A “logical” extraction provides the live data that is readily available on device, probably all of the data you could see if you were able to turn on the device and browse through it. A logical extraction will extract the live data that is supported by the extraction software. This could vary by handset, operating system and types of applications. It may not extract all of the data present and will not usually extract deleted material.

11. Level 2 mobile device examination can be either a “logical” extraction using selected tools in a laboratory environment to report that data or a “physical” extraction, which recovers a bit for bit copy of the data held on the memory chip of the device. “Physical” downloads can extract deleted data, although again

capabilities vary depending on the nature of the device, operating system, types of applications and whether they are supported by the extraction software.

12. Level 3 mobile device examinations are usually expert and bespoke methods to tackle complex issues or damaged devices. Examples include specialist evaluation and interpretation of digital data or Level 1, 2, or 3 data extraction.

Application of the principles

13. The examination of mobile devices belonging to the complainant is not a requirement as a matter of course in every case. There will be cases where there is no requirement for the police to take the media devices of a complainant or others at all, and thus no requirement for even a level 1 examination to be undertaken. Examples of this would include sexual offences committed opportunistically against strangers, or historic allegations where there is considered to be no prospect that the complainant's phone will retain any material relevant to the period in which the conduct is said to have occurred and/or the complainant through age or other circumstances did not have access to a phone at that time.

14. There are equally cases where a level 1 examination is sufficient as a first step. Examples include cases where the parties are known to each other, particularly for a short period, but where there is no particular reason to consider that their communications will be of importance but there is the possibility that they will be of relevance. In such circumstances, the use of a level 1 examination is a reasonable first examination stage, always with the caveat that if either that level 1 examination reveals the need for a more detailed examination, or other material generated by the investigation, for example from an account in interview or via a defence statement from the accused, requires a deeper examination of the content of a device.

15. It would be prudent to retain a complainant's phone until there has been an opportunity to provide the accused with an opportunity to comment on the allegation, either through an interview or through liaison with defence representatives. This precaution itself will be fact sensitive, in that there may be cases where the delay to the return of a phone to a complainant would be disproportionate, but that consideration must be judged cautiously, with the benefit of the doubt resolved in favour of retaining the phone until an informed decision as to the level of necessary phone examination can be made.

16. There will also be cases where the requirement from the outset is to undertake a level 2 or level 3 examination. These are likely to be required in every case where the offence is committed using electronic means, for example sexual communication with a child or possession of indecent images of children. This will also be the case where, beyond the issue of consent being raised at all by either complainant or accused, the credibility of the complaint or reliability of the complainant is put in issue from the outset and in circumstances that make a detailed examination of the complainant's phone necessary. This is a case by case assessment, but examples would include cases where the account of the complainant or an account provided by an accused either in interview or to others

at a stage identifies a need to examine the past history and content of contact between the complainant and accused, or the complainant and an identified third party, and where there it is thought likely to be material of a kind that a level 1 search may not identify relevant to such issues.

Analysis of the material

17. In examining the contents of a mobile device download, the investigator may set parameters relating to timeframes that are proportionate to the facts, for example between the date the complainant and suspect met to a month after the suspect's arrest. If there are messages that are potentially undermining / assisting at either end of the window of time searched, then the search should be extended further.

18. As with all communication evidence, the prosecution must be able to explain to the defence and the court what we are doing as well as, importantly, what we will not be doing. Transparency of the approach that has been taken in every case is of paramount importance. The prosecution should encourage early dialogue with the defence as to what has been considered reasonable. Below is an example of how this might be recorded in the Disclosure Record Sheet (DRS) and Disclosure Management Document (DMD);

The criminal trial process can only operate effectively if those with the responsibility for disclosure understand fully the obligations upon them. It is not always easy to trawl through social services records and through social media entries highlighting potential relevant material, but neither is it always straightforward to counter allegations of sexual abuse based primarily on the word of a complainant. If the Crown decides to prosecute, it must do so fairly. But it is important, when reviewing material of the aforementioned kind, that one does not fall into the trap of equating unsubstantiated allegations made by a complainant with false allegations. The reviewer for the prosecution cannot form their own view of what has been going on and keep the material from the defence and from the trial judge. All material that may undermine the prosecution case or assist the defence should be disclosed. Ultimately, it is for the trial judge, not the prosecutor, to decide if the records are admissible.
R. v Simmons [2018] EWCA Crim 2534

<u>Time Limits</u>

When a defendant is already before the court there is a valid summary only charge, even without a requisition, if the details are emailed to the defence within the 6 month time limit>There was at worst a procedural failure . The case related to new charges put after the six months but copied to the defence within that time. There had been no requisition within s32 CJA 2003

DPP v McFarlane 2019 EWHC 1895 (Admin)

The Criminal Procedure (Amendment) Rules 2019 (effective April 2019)

Part 4 Rules 4.3 and 4.4 are amended to define as the court office at which a document must be served on a court officer for a magistrates' court or the Crown Court the office advertised as the one at which that court's business is administered (which may not be in the same place as that court's courtrooms).

Part 7 Rule 7.2 is amended to require all private prosecutors to provide the information listed in the rule, not only those who have no legal representative.

Part 19 Rules 19.3 and 19.4 are amended to require an expert witness to disclose to the party by whom he or she is commissioned, and to require that party to disclose to each other party and to the court, anything that might reasonably be thought capable of undermining the reliability of the expert's opinion or detracting from the expert's credibility or impartiality. A new rule 19.9 is added to govern the procedure where a party who introduces expert evidence wants to withhold in the public interest part of what the expert witness otherwise could say, for example because to say it would reveal confidential investigative techniques.

Criminal Practice Directions Amendments 1st April 2019**4**

7. CPD VII Sentencing I: IMPACT STATEMENTS FOR BUSINESSES
These amended sections have been updated to make clear that public sector bodies (hospitals, schools etc.) are entitled to submit to court a statement, to be taken into account when determining sentence, by outlining the impact that the offending has had upon that institution.

8. CPD XI Other proceedings 47A: INVESTIGATION ORDERS AND WARRANTS
These sections have been revised and updated to support the new direction that has been developed to deal with investigation orders in the Crown Court.

9. CPD XI Other proceedings 47B: INVESTIGATION ORDERS AND WARRANTS IN THE CROWN COURT
This new direction marks a significant change in approach for some Crown Courts in the management of investigative orders, including production orders. Its purpose is to address and alleviate some of the operational practices that have developed in the management of these applications. The new sections should provide a consistent, national approach and ensure that there is a fairer geographical spread of the work.

CPD XI Other proceedings 47A: INVESTIGATION ORDERS AND WARRANTS

47A.1 Powers of entry, search and seizure, and powers to obtain banking and other confidential information, are among the most intrusive that investigators can exercise. Every application must be carefully scrutinised with close attention paid to what the relevant statutory provision requires of the applicant and to what it permits. CrimPR Part 47 must be followed, and the prescribed forms (retaining the Notes for Guidance section) must be used. These are designed to prompt applicants, and the courts, to deal with all of the relevant criteria.

47A.2 The issuing of a warrant or the making of such an order is never to be treated as a formality and it is therefore essential that the judge or magistrate considering the application is given, and must take, sufficient time for the purpose. The prescribed forms require the applicant to provide a time estimate, and listing officers and justices' legal advisers should take account of these.

47A.3 Applicants for orders and warrants owe the court duties of candour and truthfulness. On any application made without notice to the respondent, and so on all applications for search warrants, the duty of frank and complete disclosure is especially onerous. The applicant must draw the court's attention to any information that is unfavourable to the application. The existence of unfavourable information will not necessarily lead to the application being refused; it will be a matter for the court what weight to place on each piece of information. As Hughes LJ made clear in *Re Stanford International Limited*[2] "In effect a prosecutor seeking an *ex parte* order must put on his defence hat and ask himself what, if he was representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge". This is, as Aitkins LJ recognised, "a heavy burden but a vital safeguard. Full details must be given[3]."

47A.4 Where an applicant supplements an application with additional oral or written information, on questioning by the court or otherwise, it is essential that the court keeps an adequate record. What is needed will depend upon the circumstances. The Rules require that a record of the 'gist' be retained. The purpose of such a record is to allow the sufficiency of the court's reasons for its decision subsequently to be assessed. The gravity of such decisions requires that their exercise should be susceptible to scrutiny and to explanation by reference to all of the information that was taken into account.

47A.5 The forms that accompany CrimPR Part 47 provide for the most frequently encountered applications. The included Notes for Guidance summarise for the applicant and the court the relevant criteria for making and considering an application. However, there are some hundreds of powers of entry, search and seizure, supplied by a corresponding number of legislative provisions. In any criminal matter, if there is no form designed for the particular warrant or order sought, the forms should still be used, as far as is practicable, and adapted as necessary. The applicant should pay particular attention to the specific legislative requirements for the granting of such an application to ensure that the court has all of the necessary information, and, if the court might be unfamiliar with the legislation, should provide a copy of the relevant provisions. Applicants must comply with the duties of candour and truthfulness, and include in their application the declarations required by the Rules and must make disclosure of any unfavourable information to the court.

CPD XI Other proceedings 47B: INVESTIGATION ORDERS AND WARRANTS IN THE CROWN COURT

47B.1 This section covers applications made under:

(i) Schedule 1 Police and Criminal Evidence Act 1984 (PACE);
(ii) Section 2 Criminal Justice Act 1987;
(iii) Drug Trafficking Act 1994;
(iv) Part 8 of the Proceeds of Crime act 2002;

(v) Section 5 Coroners and Justice Act 2009
(vi) Terrorism Act 2000.
It does NOT cover applications under the Extradition Act 2003.

Criminal Procedure Rules Amendments **effective 7th October 2019**

Part 47

Rule 47.1 is amended in consequence of the addition of new rules 47.66 to 47.71. The new rules are added to provide for applications to a Crown Court judge under the Crime (Overseas Production Orders) Act 2019.

Abuse of process

The granting of a stay is a remedy of last resort. That even very significant and unjustifiable delay may have been occasioned by fault on the part of the prosecution does not of itself mean that there should be a stay.

In cases brought on the basis that the defendant can no longer have a fair trial, a stay should not ordinarily be granted in the absence of serious prejudice to the defendant that cannot be remedied through the trial process. In cases where an indication has been given that there will be no prosecution, a stay of a subsequent prosecution will not ordinarily be granted unless there is an unequivocal representation to that effect *and* the defendant in question has acted to his detriment in reliance upon that unequivocal representation

R. v LG [2018] EWCA Crim 736

Civil law issues

Forced marriage protection order s 63A Family Law Act 1996

An order was refused where a loosely arranged "engagement" without the victim's consent, but not with the intention subsequently of her being forced to marry whether she wanted to or not, did not amount to a forced marriage or any imminent risk of that. There was a distinction between consensual arranged marriages and forced marriages involving serious human rights abuses, the instant case was far closer to the arranged marriage end of the spectrum. The nature of the arrangement was such that, had it endured to an age when the victim might legally have married, she would have had a say and, had she not wished it, it would not have proceeded

West Sussex County Council and another v F and others [2018] EWHC 1702 (Fam)

PART 4 YOUTH JUSTICE

Sentencing

“The authorities all demonstrate the modern approach of the courts to sentencing those aged under 18 (for manslaughter), namely the need to look carefully at the age, maturity and progress of the young offender in each case. That is also necessary in cases involving young people who offend before they are 18, but are sentenced when technically adults, and also young people who offend in early adulthood but are far from the maturity of adults. In sentencing H, the judge had been wrong to describe her simply as an "adult". He had insufficient regard to the fact that she was only 17 at the time of the offending and the finding that the "whole reckless enterprise was on the basis that it would be for fun". This was an important finding that should have led the judge to give careful consideration to her maturity. The sentencing guideline for children and young people expressly refers to the need to take account of factors that can diminish culpability, including immaturity, the impact on decision making and lack of insight into the consequences of offending on victims.” The Guideline applies even though a defendant has reached 18 by the time they appear in court
R. v Hobbs [2018] EWCA Crim 1003

"Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear […] Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. "The Age of Adolescence": thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday."
Att.-Gen.'s Reference (R. v Clarke); R. v Andrews, CLW/18/20/7, [2018] EWCA Crim 185,

A youth rehabilitation order, coupled with an intensive supervision and surveillance programme, would be substituted on a 17 year old, who was 15 at the time of the offence, with a YRO for matters subsequent to this offence, for an arson of a bus which spread to the bus garage causing £1.8 million damage. Though the guideline on sentencing children and young people is not to be treated rigidly, it sets out as a broad guide that the sentence for those aged 15 to 17 should be in the region of a half to two-thirds of the adult sentence. In simply stating that the sentence after trial should be two-thirds of the sentence appropriate for an adult, the judge's reference to the guideline was cursory and inadequate. He failed to reflect the detailed guidance in the guideline setting out clear and unequivocal sentencing principles in relation to young people. In particular, the need for an individualistic and not offence-focussed approach, the need to not treat children as mini-adults, and the effect and significance of being "looked-after" were all apposite here. The delay of 22 months between offending and sentence in this case should have been a significant factor in the sentencing exercise. 22 months in the life of an immature troubled teenager is a very long time indeed. This was delay largely outside the control of the appellant.
R. v JT [2018] EWCA Crim 1942

PART 5 CRIMINAL LAW AND ROAD TRAFFIC

Conspiracy: Corporate defendants

There could be a fair trial of a corporate defendant for conspiracy where its guilt depended on the guilt of its directing will and mind" where that person was not indicted as a co-conspirator or otherwise available to give evidence at trial. The mere fact that not all alleged conspirators are before the Court is not a sound reason for the trial against one or some of them not proceeding. Even if there are only two alleged conspirators and one is absent it is not a good ground for not proceeding against the present conspirator. If that is good law for individuals the Court was not persuaded there was any justification for a different rule in the case of corporate conspirators

Alstom Network UK Ltd [2019] EWCA Crim 1318

Defences

Self defence

S76 CJIA 2008 provides a wider defence for a householder against a trespasser whether they are an intruder (enters as a trespasser) or a trespasser for any reason such as their permission to remain having been removed ("in or entering as a trespasser"). The defence is not directly concerned with whether the person was a trespasser at all, but rather the defendant's belief. Section 76(8A)(d) is satisfied where the defendant believed at the time the force was used that the injured person was in, or entering, the building or part thereof as a trespasser. The use of the language of "trespass" in a judge's direction would be likely to confuse without some simple elaboration. The question is whether the defendant believed that the person concerned had no right or business to be in the building, or was there without authority, at the time of the violent incident

R v Cheeseman 2019 EWCA Crim149

Entrapment

The principles laid down on entrapment in *R. v Looseley* 2001 UKHL 53 remain good law and are compliant with the ECHR On the facts the court made no decision on the burden of proof

"A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly. Police conduct which brings about, to use the catchphrase, state-created crime is unacceptable and improper. To prosecute in such circumstances would be an affront to the public conscience. In a very broad sense of the word, such a prosecution would not be fair."
Lord Nicholls then considered at some length the meaning of "state-created crime" and concluded (at [23]) that a "useful guide" was to consider:

"…whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime. I emphasise the word 'unexceptional'…."
The investigatory technique of providing an opportunity to commit a crime was intrusive and "should not be applied in a random fashion, and used for wholesale 'virtue-testing', without good reason."

"…the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute. Lord Steyn's formulation of a prosecution which would affront the public conscience is substantially to the same effect…

"First, entrapment is not a substantive defence in the sense of providing a ground upon which the accused is entitled to an acquittal. Secondly, the court has jurisdiction in a case of entrapment to stay the prosecution on the ground that the integrity of the criminal justice system would be compromised by allowing the state to punish someone whom the state itself has caused to transgress. Thirdly, although the court has a discretion under to exclude evidence on the ground that its admission would have an adverse effect on the fairness of the proceedings, the exclusion of evidence is not an appropriate response to entrapment. The question is not whether the proceedings would be a fair determination of guilt but whether they should have been brought at all…"

The various Looseley considerations were distilled by Professor David Ormerod, *in* Recent Developments in Entrapment [2006] Covert Policing Review 65, cited *in* R v Moore [2013] EWCA *Crim 85* Prof. Ormerod identified five factors as of particular relevance:

- i) Reasonable suspicion of criminal activity as a legitimate trigger for the police operation;
- ii) Authorisation and supervision of the operation as a legitimate control mechanism;
- iii) Necessity and proportionality of the means employed to police particular types of offence;
- iv) The concepts of the "unexceptional opportunity" and causation;
- v) Authentication of the evidence.

The case involved the security services communicating with a suspected terrorist. Contact was usually initiated by the suspect

R. v Syed [2018] EWCA Crim 2809.

Murder: loss of control

A defence must raise “sufficient” evidence of the defence for it to be left to the jury. Evidence of a qualifying trigger was not of itself enough. Each element of the defence must be considered sequentially and separately. Here there was insufficient evidence that a person with a normal degree of tolerance and self-restraint would have reacted as the defendant did. Self-defence and the partial defence of loss of control are legally

distinct. A defence of self-defence in a homicide case does not necessarily of itself carry with it a sufficient evidential basis in the alternative for a defence of loss of control.

R v Goodwin 2018 EWCA Crim 2287

Torture

S134 CJA 1988 provides for an offence of torture by a public official or person acting in an official capacity. This is not confined to those acting on behalf of a recognised state, and includes any person who acts otherwise than in a private and individual capacity for or on behalf of an organisation or body that exercises or purports to exercise the functions of government over the civilian population

R v TRA 2018 EWCA Crim 2843

Manslaughter

Manslaughter is unlawful killing without an intent to kill or do grievous bodily harm… He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter if death results

An act will only intervene to remove liability if it is one that "nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history", such as where he had left the scene before a weapon appears.

Jogee 2016 UKSC 8 had relegated knowledge of a weapon to proof of intention rather than a pre-requisite for murder, The court did not accept that, if there is no necessary requirement that the secondary party knows of the weapon in order to bring home a charge of murder (as is the effect of Jogee), the requirement of knowledge of the weapon is reintroduced through the concept of supervening overwhelming event for manslaughter.

.A route to verdict was provided. In relation to Tas, the questions were:

1. Did Tas stab the deceased or participate in a joint enterprise in which he was stabbed – if no, acquit; if yes, go on to (2);
2. Was Tas acting otherwise than in lawful self-defence – if no, acquit; if yes, go on to (3);
3. Either as the stabber or as a participant in the joint enterprise, did Tas intend to kill the deceased or at least cause him really serious bodily harm if the need arose – if yes, guilty of murder; if no, go on to (4);
4. Did Tas, as part of a joint enterprise, intend the deceased to be caused some harm falling short of really serious harm – if yes, guilty of manslaughter; if no, acquit.

On appeal, it was submitted on behalf of Tas that the jury should have been allowed to consider whether use of a knife took events beyond the scope of the joint venture. The trial judge was entitled to conclude that there was insufficient evidence to raise the possibility that production of the knife was a wholly supervening event rather than a simple escalation

R v Tas [2018] EWCA Crim 2603

Gross negligence manslaughter

The test is whether the warning signs of a serious and obvious risk of death were present, distinguishing Rose 2017 EWCA Crim1168 where the defendant was not sufficiently alerted, and had no cause to be, to the risk of death on the facts available to them at the time of the breach of the duty of care

Note: The distinction appears to be unsatisfactory: that there can be no criminal liability if the risk would only have been obvious had the defendant complied with their duty of care. The less responsible the employment, the easier to be found liable. The crime seems to be not doing the act rather than doing the act badly

R v Winterton 2018 EWCA 2435

The case involved a death cause by nut allergy The test to be applied was whether the defendant's breach of their duty of care gave rise, on their knowledge at the time of the alleged breach, to a serious and obvious risk of death to the class of persons to whom the defendant owed a duty. The particular circumstances of a specific victim were not in issue.

However the knowledge could not be imputed to an individual as part of the law of manslaughter. Thus the defendant was not liable because the business he owned might have had knowledge when he himself had none.

It should be noted that, properly pleaded the responsibilities of the owner of a restaurant cannot, be ignored simply by ensuring that he is unsighted on the specific orders and allergy requirements being made. In addition to liability in negligence, unless an appropriate system is in place and enforced, an owner or manager will also be guilty of health and safety and food safety regulatory offences, as was the case here. Further, in an appropriate case, a person could properly be convicted of manslaughter for a failure to introduce appropriate protective systems, either in the context of restaurants or elsewhere. The need for knowledge cannot be used unjustifiably to relieve from liability those in charge of restaurants or other businesses at the expense of those on the front line

In *R v Honey Rose* [2017] EWCA Crim 1168 the Court identified five principles

a) the defendant owed an existing duty of care to the victim;

b) the defendant negligently breached that duty of care;
c) it was reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death;
d) the breach of that duty caused the death of the victim;
e) the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.

The question of whether there is a serious and obvious risk of death must exist at, and is to be assessed with respect to, knowledge at the time of the breach of duty.

A recognisable risk of something serious is not the same as a recognisable risk of death.

A mere possibility that an assessment might reveal something life-threatening is not the same as an obvious risk of death: an obvious risk is a present risk which is clear and unambiguous, not one which might become apparent on further investigation.

The court is [not] entitled to take into account information which would, could, or should have been available to the defendant following the breach of duty in question. The test is objective and prospective.

R v Kuddus 2019 EWCA Crim 837

Modern Slavery

Section 1(5) of the Modern Slavery 2015 Act provides the following clarification which applies when considering whether someone is a victim of modern slavery or forced or compulsory labour:

“The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour.”

As a result of s.1(5), even if it does appear that the complainant was consenting to the treatment in question, the provision ensures that the jury must still go on to consider whether he or she is a victim of modern slavery or forced or compulsory labour. The jury must grapple with the difference between “true” consent and what the trial judge described as “coerced” consent. The judge directed the jury that, “A person may consent to perform work (i.e. in the sense of simply agreeing to do it) without necessarily doing it voluntarily (i.e. out of free choice).”

R. v Nguyen (T.H.); R. v Nguyen (V.H.); R. v Tran

Trafficking

For an interpretation of “arranging” and facilitating” in a predecessor section to s2 Modern Slavery Act 2015 see R v K W and A 2018 EWCA Crim1432

False Imprisonment

A mistake of law cannot provide a defence under s3 CLA 1967 of preventing crime when a driver, who had quarrelled with his fare, refused to allow her to leave the cab until he returned to their starting point

R v Wilkinson 2018 EWCA Crim 2154

Rape

A member of a group under police surveillance who had entered into a sexual relationship with an undercover police officer was unable to establish that her lack of knowledge as to the officer's true identity vitiated her consent to sexual relations within the meaning of the Sexual Offences Act 2003 s.74.

There is a consistent line of authority under common law and the Sexual Offences Act 1956 that supports the proposition that only pressure and coercion or two frauds are capable of vitiating consent: fraud as to the nature of the sexual act (which appears to include deception as to gender at birth) and fraud as to the identity of the perpetrator through impersonation of husband or partner; and there is no authority that indicates or suggests otherwise. Assange v Swedish Prosecution Authority [2011] EWHC 2849 (Admin) indicates that deception that is closely connected with "the nature or purpose of the act", because it relates to sexual intercourse itself rather than the broad circumstances surrounding it, is capable of negating a complainant's free exercise of choice for the purposes of section 74 of the 2003 Act, which defines consent. That may represent a modest extension in the way in which the law examines "consent" in the context of sexual offending, but did not support the profound change in the approach to consent argued for that the matter to which the deception related had to be sufficiently serious in objective terms as to be capable of being regarded as relevant to a woman's decision-making and that, subjectively, the deception went to a matter which the woman regarded as critical or fundamental to her decision-making.

The common law position was not to be extended. The decision whether or not to prosecute could be corrected for errors of law but only rarely on other grounds.

R (on the application of Monica) v DPP [2018] EWHC 3469 (QB)

Sexual activity in the presence of a child

Section 11(1) of the Sexual Offences Act 2003 requires that

- A intentionally engages in an activity that is sexual,
- in the presence or under the observation of a child (B),
- A does so for the purpose of A's obtaining (some) sexual gratification from B's presence or observation,
- A knew or believed that B was aware of the activity or intended that B should be aware of the activity, and
- the child B was under 16 and A did not reasonably believe that B was 16 or over or B was under 13.

The offence under section 11(1) requires there to be a link between the "purpose of obtaining sexual gratification" and the presence of the child

It may be that engaging in sexual activity in the presence of a conscious child should be made a criminal offence. However, if so, it is not for the courts to legislate to that effect. It is for Parliament.

R. v B and L [2018] EWCA Crim 1439

Drugs: permitting premises to be used

Whilst McGee 2012 EWCA Crim 613 established that an offence under s8 MDA 1971 requires the prohibited activity to take place on and not from the premises

1. This indictment pleaded that the activity as including offering to supply drugs which on the facts might be inferred and
2. Supply included the whole process of supply

R v McNaught 2018 EWCA Crim 1588

Aggravated Burglary

The relevant time for consideration of an intent in relation to a “weapon of offence” (not made or adapted to cause injury to the person) is the time of the theft and not of the entry

R v Eletu and White 2018 EWCA Crim 599

Fraud

3 Fraud by failing to disclose information

A person is in breach of this section if he—
(a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
(b) intends, by failing to disclose the information—
(I) to make a gain for himself or another, or
(ii) to cause loss to another or to expose another to a risk of loss.

There is no legal duty on a local authority taxpayer to notify a change of address

R v D 2019 EWCA Crim 209

Tax fraud

The offences of being knowingly concerned in a fraudulent activity undertaken with a view to obtaining payments of tax credits, contrary to section 35 of the Tax Credits Act 2002, and fraudulent evasion of income tax, contrary to section 106A of the Taxes Management Act 1970, are both offences of specific intention, requiring proof by the prosecution of "knowledge". Knowing connotes something more than mere recklessness, and recklessness is not sufficient for either offence.

R. v Godir [2018] EWCA Crim 2294

Administering noxious substances

It is an offence under s24 OAPA 1861 unlawfully and maliciously to administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person,

Whether a substance is a noxious thing for the purpose of section 24 will be for the judge to rule as a matter of law whether the substance concerned, in the quantity and manner in which it is shown by the evidence to have been administered, could properly be found by the jury to be injurious, hurtful, harmful or unwholesome.(which falls within the case law definition of noxious)

If it can be properly so regarded, it will be a matter for the jury whether they are satisfied that it was a noxious thing within that definition. A cupful of human urine, from an unknown source, thrown at the face of a victim is capable of being regarded as an unwholesome, and therefore a noxious, thing

Veysey & Others [2019] EWCA Crim 1332

Assaults

Execution of duty

Two officers unlawfully detained the defendant who was entitled to use reasonable force to resist. A third officer intervened because he feared the defendant had a weapon. He was acting lawfully in those circumstances but if the defendant honestly believed the officer was assaulting him, he had a defence whether or not the officer was in the execution of his duty. The force must be reasonable- a bite was not
Dixon v CPS 2018 EWHC 3154 (Admin)

Police officers attended the defendant's home address following a call from his father, claiming that the defendant was being aggressive. An officer told him that if he did not leave he would potentially be arrested for breach of the peace, as the officer believed that either party may come to harm if one of them remained. The appellant stood up with clenched fists and moved towards the officers aggressively. One of the officers arrested the appellant for breach of the peace, following which the appellant shouted and swung his fists, connecting with their heads.

Given what they had been told by his father, the officers had been acting in the execution of their duty when they arrested the appellant for aggression that could properly be regarded as making a breach of the peace imminent, namely his physical aggression towards the officers. At no point when the appellant stood up and clenched his fists was there any eviction for him to resist, lawfully or otherwise.

Rawlins v CPS [2018] EWHC 2533 (Admin).

Offensive Weapons

A court has a wide discretion to decide whether a reasonable excuse is made out. An innocent purpose for having a weapon, offensive per se, in a public place does not equate to a reasonable excuse; rather the court is entitled to consider necessity or immediate temporal connection between possession and the purpose for which it is carried.

The defendant was found in possession of a butterfly knife (offensive per se) and he said that his defence that he carried the knife habitually and used it for his work as a plumber, electrician and gas engineer discounting alternative tools as being ineffective. A tribunal of fact must review the balance of evidence capable of affecting its ultimate conclusion, which would include the type of weapon and where it was found. It was not in a toolbox or overalls' pocket, but in the glovebox of his personal vehicle. It was found on a Saturday afternoon, when there was no evidence that he had been working. If it rejected temporal proximity, the court must then consider whether the defendant might have forgotten to move the weapon out of the public place

Garry v CPS [2019] EWHC 636 (Admin)

Bladed article

A blade capable of being locked, however weakly, was not a folding pocket knife within s139 CJA 1988 as it was not immediately foldable by simply applying pressure to the blade. It had to be "unpopped"
Sharma v DPP 2018 EWHC 3330 (Admin)

A cut-throat razor, less than 3" in length, does not fall within the definition of a folding pocket knife as it is a razor and not a knife. The trial should continue with the defendant putting forward his defence of good reason as he was a trainee barber

R v D 2019 EWCA Crim 45

Public Order

An offence under S5 POA 1986 may be committed against a police officer but they are expected to show a degree of resilience

Confirming DPP v Orum 1981 1 WLR 88

Williams v CPS 2018 WEWHC 2869 (Admin)

A decision to discontinue a s5 prosecution was not irrational where there was no risk of public disorder and the language was intemperate and offensive. That did not make it abusive under s5 when read with Art 10 ECHR

C A A v DPP 2019 EWHC 9 (Admin)

Highway obstruction s137Highways Act 1980

The issue was whether the obstruction is without lawful excuse. The rights of protest effected by Arts 10 and 11 ECHR can be read consistently with that provision as an interference with those Articles would be unlawful under section 6(1) of the HRA, and a person will by definition have "lawful excuse". That requires consideration of the following questions:

1. Is what the defendant did in exercise of one of the rights in Articles 10 or 11?
2. If so, is there an interference by a public authority with that right?
3. If there is an interference, is it "prescribed by law"?
4. If so, is the interference in pursuit of a legitimate aim as set out in para. (2) of Article 10 or Article 11, for example the protection of the rights of others?

5. If so, is the interference “necessary in a democratic society” to achieve that legitimate aim?

That last question will in turn require consideration of a set of sub-questions which arise in order to assess whether an interference is proportionate:

1. Is the aim sufficiently important to justify interference with a fundamental right?
2. Is there a rational connection between the means chosen and the aim in view?
3. Are there less restrictive alternative means available to achieve that aim?
4. Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

The last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is inherently a fact-specific enquiry.

R v Ziegler 2019 EWHC 71 (Admin)

Stalking

Section 4A Protection from Harassment Act 1997 requires no objective conduct on the part of a defendant beyond stalking. The remainder of the statutory test is concerned with the effect on the mind of the complainant, and the knowledge, or constructive knowledge, of the defendant. The question that arises is the actual effect on the mind of the victim. As regards the requirement in section 4A(1)(a)(i) that the person fears, on at least two occasions, that violence will be used against him or her, in the instant case, evidence of a threat to use sexually explicit material was not evidence of a fear of violence. Moreover, that the complainant feared that she would be "hunted down" by the appellant was not, unless more was said, evidence of a fear of violence, although it might have been evidence of a fear of stalking or harassment. It is not enough to establish that conditions existed that might reasonably have engendered a fear of violence: that will be so in many stalking cases. The court must be sure that such a fear was actually engendered. The offence requires proof of a specific state of mind on the part of the complainant, not merely proof of circumstances that might reasonably engender that state of mind.

Pendlebury v DPP 2018 EWHC 3567 (Admin)

<u>Misconduct in public office</u>

There are two elements to this offence. The first requires that there be a public officer “acting as such", which means acting in the discharge of the duties of the office. It is not enough to hold an office when the conduct occurred

The second element the "wilful neglect to perform his duty and/or wilfully misconduct himself.” This has the common feature of corrupt abuse of public power for personal

gain, or gross neglect in failing to comply with the core duties of the office. Such conduct is capable of satisfying the connected tests of breach of duty and the gravity necessary for the offence to be established. The offence will be made out only if the manner in which the specific powers or duties of the office are discharged brings the misconduct within its ambit.

There is no basis to suggest that the offence can be or has been equated to bringing an office into disrepute or misusing a platform outside the scope of the office.

R. (Johnson) v Westminster Magistrates' Court [2019] EWHC 1709 (Admin)

Dangerous Dogs

A person is guilty of an offence under s3 if there is a dog dangerously out of control but s10 (3) Dangerous Dogs Act 1991provides an exception when the dog is being used for a lawful purpose by a constable or a person in the service of the Crown. This does not apply when a dog is being necessarily exercised as it is not then being used for a lawful purpose that is as part of a police activity

The prosecution undertaking as to acquittal may be given by email

R v PY EWCA 2019 Crim 17

Road Traffic

The absence of barriers was not itself enough to make a car park a public place. The majority of the signage suggested otherwise

Richardson 2018 EWHC 428 (Admin)

A requisition is “issued” once fully prepared in the CPS office. It will not be out of time if not sent to the court within 6 months of the offence

Brown v DPP 2019EWHC 798 (Admin)

Notice of intended prosecution

The due diligence requirement in s2(3)(c) Road Traffic Offenders Act 1988 to identify the address of the driver or registered keeper is met by sending the notice to the address recorded on the PNC which is taken from DVSA

R v Pledge 2019 EWCA Crim 9121

Handheld telephones

Using a mobile phone to take photographs whilst driving does not amount to an offence under s41D RTA 88 and Reg110 Road Vehicles(Construction and Use) Regulations 1986. These are concerned only with “interactive communications” and necessary preparation. However offences of careless driving and dangerous driving may be made out.

DPP v Barreto 2019 EWHC 2044 (Admin)

PART 6 SENTENCING
Guidelines

Child Cruelty Effective for all matters sentenced on or after **1st January 2019** Applies to:

Cruelty to a child – assault and ill treatment, abandonment, neglect, and failure to protect

Children and Young Persons Act 1933 (section 1(1))
Causing or allowing a child to suffer serious physical harm
Domestic Violence, Crime and Victims Act 2004 (section 5)
Causing or allowing a child to die
Domestic Violence, Crime and Victims Act 2004 (section 5)
Failing to protect girl from risk of genital mutilation
Female Genital Mutilation Act 2003 (section 3A)

General note on harm:

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

Psychological, developmental or emotional harm A finding that the psychological, developmental or emotional harm is serious may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does not imply that the psychological/ developmental harm suffered by the victim is minor or trivial.

Note additional STEP FIVE

Parental responsibilities of sole or primary carers
In the majority of child cruelty cases the offender will have parental responsibility for the victim.

When considering whether to impose custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children in the offender's care). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lower culpability cases or where the offender has otherwise been a loving and capable parent/carer.

Where custody is unavoidable consideration of the impact on the offender's children may be relevant to the length of the sentence imposed. For more serious offences where a substantial period of custody is appropriate, this consideration will carry less weight

Criminal Damage and Arson effective 1st October 2019 for those who are 18 or over

There are five new guidelines in the standard matrix form. The paragraphs set out below are of note

Generally:

- Step 2 – Starting point and category range

- Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

- Where the offender is dependent on or has a propensity to misuse drugs or alcohol, which is linked to the offending, a community order with a drug rehabilitation requirement under section 209, or an alcohol treatment requirement under section 212 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

- Where the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Arson – criminal damage by fire

Courts should consider requesting a report from: liaison and diversion services, a medical practitioner, or where it is necessary, ordering a psychiatric report, to ascertain both whether the offence is linked to a mental disorder or learning disability (to assist in the assessment of culpability) and whether any mental health disposal should be considered

Criminal damage / arson with intent to endanger life or being reckless as to whether life endangered

Criminal damage where the damage has a value exceeding £5,000

Criminal damage where the damage has a value not exceeding £5,000

Racially or religiously aggravated criminal damage

- Racially or religiously aggravated criminal damage offences only NOTE THERE ARE SEPARATE TABLES

- Having determined the category of the basic offence to identify the sentence of a non-aggravated offence, the court should now consider the level of racial or religious aggravation involved and apply an appropriate uplift to the sentence in accordance with the guidance below. [following is a list of factors which the court should consider to determine the level of aggravation]. Where there are characteristics present which

fall under different levels of aggravation, the court should balance these to reach a fair assessment of the level of aggravation present in the offence

Threats to destroy or damage property

Sentencing Council: General guideline and expanded explanations: **effective 1st October 2019.**

The electronic guidelines will from that date be the guidelines and not pdfs or other copies

This general guideline covers offences that are not covered by a specific sentencing guideline to ensure a structured and consistent sentencing process.

The Sentencing Council has also published expanded explanations which will be embedded in the existing offence specific guidelines, adding extra information to aggravating and mitigating factors to make it easier for courts to maintain consistency and transparency when sentencing.

Step 1 Reaching a provisional sentence

a) Where there is no definitive sentencing guideline for the offence, to arrive at a provisional sentence the court should take account of all of the following (if they apply):

- the statutory maximum sentence (and if appropriate minimum sentence) for the offence;
- sentencing judgments of the Court of Appeal (Criminal Division) for the offence; and
- definitive sentencing guidelines for analogous offences.

The court will be assisted by the parties in identifying the above.

For the avoidance of doubt the court should not take account of any draft sentencing guidelines.

When considering definitive guidelines for analogous offences the court must apply these carefully, making adjustments for any differences in the statutory maximum sentence and in the elements of the offence. This will not be a merely arithmetical exercise.

b) Where possible the court should follow the stepped approach of sentencing guidelines to arrive at the sentence.

The seriousness of the offence is assessed by considering

- the culpability of the offender

Highest level
⇓

Lowest level

Deliberate - intentional act or omission
Reckless - acted or failed to act regardless of the foreseeable risk
Negligent - failed to take steps to guard against the act or omission
Low/no culpability - act or omission with none of the above features

Highest level
⇓
Lowest level High level of planning/ sophistication/ leading role

- Some planning/ significant role
- Little or no planning/ minor role and
- the harm caused by the offending.

Highest level
⇓
Lowest level Very serious harm caused to individual victim(s) or to wider public/ environment etc

- Serious harm caused OR high risk of very serious harm
- Significant harm caused OR high risk of serious harm
- Low/ no harm caused OR high risk significant harm

c) The initial assessment of harm and culpability should take no account of plea or previous convictions.

The court should consider which of the five purposes of sentencing (below) it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence.

- The punishment of offenders
- The reduction of crime (including its reduction by deterrence)
- The reform and rehabilitation of offenders
- The protection of the public
- The making of reparation by offenders to persons affected by their offences

Step 2 Aggravating and mitigating factors

Once a provisional sentence is arrived at the court should take into account factors that may make the offence more serious and factors which may reduce seriousness or reflect personal mitigation.

Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.

It is for the sentencing court to determine how much weight should be assigned to the aggravating and mitigating factors taking into account all of the circumstances of the offence and the offender.

Not all factors that apply will necessarily influence the sentence.

If considering a fine ….

The court should determine the appropriate level of fine in accordance with this guideline and section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and that the court must take into account the financial circumstances of the offender.

Where possible, if a financial penalty is imposed, it should remove any economic benefit the offender has derived through the commission of the offence including:

- avoided costs;
- operating savings;
- any gain made as a direct result of the offence.

The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to comply with the law.

In considering economic benefit, the court should avoid double recovery.

Where the means of the offender are limited, priority should be given to compensation (where applicable) over payment of any other financial penalty.

Where it is not possible to calculate or estimate the economic benefit, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.

When sentencing organisations the fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law. The court should ensure that the effect of the fine (particularly if it will result in closure of the business) is proportionate to the gravity of the offence.

Obtaining financial information: It is for the offender to disclose to the court such data relevant to their financial position as will enable it to assess what they can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case. In setting a fine, the court may conclude that the offender

is able to pay any fine imposed unless the offender has supplied financial information to the contrary.

AGGRAVATING CIRCUMSTANCES

- Offence committed whilst on bail

- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation, or transgender identity

- Offence was committed against an emergency worker acting in the exercise of functions as such a worker

The Assaults on Emergency Worker (Offences) Act 2018 [set out]

OTHER AGGRAVATING FACTORS

Commission of offence whilst under the influence of alcohol or drugs

Offence was committed as part of a group

Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation (including as a result of domestic abuse, trafficking or modern slavery) which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.

When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and/or lack of maturity when considering the significance of group offending. [this provision applies throughout the guideline]

Offence involved use or threat of a weapon

Planning of an offence

Commission of the offence for financial gain

High level of profit from the offence

Abuse of trust or dominant position

Restraint, detention or additional degradation of the victim

Vulnerable victim

Victim was providing a public service or performing a public duty at the time of the offence

Other(s) put at risk of harm by the offending.

Offence committed in the presence of other(s) (especially children)

Actions after the event including but not limited to attempts to cover up/ conceal evidence

Blame wrongly placed on other(s)

Failure to respond to warnings or concerns expressed by others about the offender's behaviour

Offence committed on licence or while subject to court order(s)

Offence committed in custody

Offences taken into consideration

Offence committed in a domestic context
Refer to the Overarching Principles: Domestic Abuse Definitive Guideline

Offence committed in a terrorist context
Where there is a terrorist element to the offence, refer also to the Terrorism Offences Definitive Guideline

Location and/or timing of offence

Established evidence of community/wider impact

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

This factor should increase the sentence only where there is clear evidence of wider harm not already taken into account elsewhere. A community impact statement will assist the court in assessing the level of impact.

For issues of prevalence see the separate guidance.

Prevalence

Sentencing levels in offence specific guidelines take account of collective social harm. Accordingly offenders should normally be sentenced by straightforward application of the guidelines without aggravation for the fact that their activity contributed to a harmful social effect upon a neighbourhood or community.

It is not open to a sentencer to increase a sentence for prevalence in ordinary circumstances or in response to a personal view that there is 'too much of this sort of thing going on in this area'.

First, there must be evidence provided to the court by a responsible body or by a senior police officer.

Secondly, that evidence must be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time so that meaningful representations about that material can be made.

Even if such material is provided, a sentencer will only be entitled to treat prevalence as an aggravating factor if satisfied

that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels);

that the circumstances can properly be described as exceptional; and
that it is just and proportionate to increase the sentence for such a factor in the particular case being sentenced.

FACTORS REDUCING SERIOUSNESS OR REFLECTING PERSONAL MITIGATION

(Factors are not listed in any particular order and are not exhaustive)

No previous convictions or no relevant/recent convictions

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

First time offenders usually represent a lower risk of reoffending. Reoffending rates for first offenders are significantly lower than rates for repeat offenders. In addition, first offenders are normally regarded as less blameworthy than offenders who have committed the same crime several times already. For these reasons first offenders receive a mitigated sentence.

Where there are previous offences but these are old and /or are for offending of a different nature, the sentence will normally be reduced to reflect that the new offence is not part of a pattern of offending and there is therefore a lower likelihood of reoffending.

When assessing whether a previous conviction is ‘recent’ the court should consider the time gap since the previous conviction and the reason for it.

Previous convictions are likely to be ‘relevant’ when they share characteristics with the current offence (examples of such characteristics include, but are not limited to: dishonesty, violence, abuse of position or trust, use or possession of weapons, disobedience of court orders). In general the more serious the previous offending the longer it will retain relevance.

Good character and/or exemplary conduct

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character through, for example, charitable works may reduce the sentence.

However, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their good character or status to facilitate or conceal the offending it could be treated as an aggravating factor.
Remorse
Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction).

Lack of remorse should never be treated as an aggravating factor.

Self-reporting

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm
Where an offender has self-reported to the authori
ties, particularly in circumstances where the offence may otherwise have gone undetected, this should reduce the sentence (separate from any guilty plea reduction).

Cooperation with the investigation/ early admissions

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Assisting or cooperating with the investigation and /or making pre-court admissions may ease the effect on victims and witnesses and save valuable police time justifying a reduction in sentence (separate from any guilty plea reduction).

Little or no planning

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where an offender has committed the offence with little or no prior thought, this is likely to indicate a lower level of culpability and therefore justify a reduction in sentence.

However, impulsive acts of unprovoked violence or other types of offending may indicate a propensity to behave in a manner that would not normally justify a reduction in sentence.

The offender was in a lesser or subordinate role if acting with others / performed limited role under direction

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Whereas acting as part of a group may make an offence more serious, if the offender's role was minor this may indicate lower culpability and justify a reduction in sentence.

Involved through coercion, intimidation or exploitation

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where this applies it will reduce the culpability of the offender.

This factor may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts.

Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.

This factor may indicate that the offender is vulnerable and would find it more difficult to cope with custody or to complete a community order.

Limited awareness or understanding of the offence

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

The factor may apply to reduce the culpability of an offender acting alone who has not appreciated the seriousness of the offence or of an offender who is acting with others and does not appreciate the extent of the overall offending.

If the offender had genuinely failed to understand or appreciate the seriousness of the offence, the sentence may be reduced from that which would have applied if the offender had understood the full extent of the offence and the likely harm that would be caused.

Where an offender lacks capacity to understand the full extent of the offending see the guidance under 'Mental disorder or learning disability'.

Little or no financial gain

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where an offence (which is not one which by its nature is an acquisitive offence) is committed in a context where financial gain could arise, the culpability of the offender may be reduced where it can be shown that the offender did not seek to gain financially from the conduct and did not in fact do so.

Delay since apprehension

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where there has been an unreasonable delay in proceedings since apprehension which is not the fault of the offender, the court may take this into account by reducing the sentence if this has had a detrimental effect on the offender.

Note: No fault should attach to an offender for not admitting an offence and/or putting the prosecution to proof of its case.

Activity originally legitimate

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where the offending arose from an activity which was originally legitimate, but became unlawful (for example because of a change in the offender's circumstances or a change in regulations), this may indicate lower culpability and thereby a reduction in sentence.

This factor will not apply where the offender has used a legitimate activity to mask a criminal activity.

Age and/or lack of maturity

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Age and/or lack of maturity can affect:

the offender's responsibility for the offence and
the effect of the sentence on the offender.

Either or both of these considerations may justify a reduction in the sentence.

The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults (typically aged 18-25) are still developing neurologically and consequently may be less able to:

- evaluate the consequences of their actions
- limit impulsivity
- limit risk taking
-

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Immaturity can also result from atypical brain development. Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse may affect development.

An immature offender may find it particularly difficult to cope with custody and therefore may be more susceptible to self-harm in custody.

An immature offender may find it particularly difficult to cope with the requirements of a community order without appropriate support.

There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

Many young people who offend either stop committing crime, or begin a process of stopping, in their late teens and early twenties. Therefore a young adult's previous convictions may not be indicative of a tendency for further offending.

Where the offender is a care leaver the court should enquire as to any effect a sentence may have on the offender's ability to make use of support from the local authority. (Young adult care leavers are entitled to time limited support. Leaving care services may change at the age of 21 and cease at the age of 25, unless the young adult is in education at that point). See also the Sentencing Children and Young People Guideline (paragraphs 1.16 and 1.17).

Where an offender has turned 18 between the commission of the offence and conviction the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed, but applying the purposes of sentencing adult offenders. See also the Sentencing Children and Young People Guideline (paragraphs 6.1 to 6.3).

When considering a custodial or community sentence for a young adult the National Probation Service should address these issues in a PSR.

Sole or primary carer for dependent relatives

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. See also the Imposition of community and custodial sentences guideline.

For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

Where custody is unavoidable consideration of the impact on dependants may be relevant to the length of the sentence imposed and whether the sentence can be suspended.

For more serious offences where a substantial period of custody is appropriate, this factor will carry less weight.

When imposing a community sentence on an offender with primary caring responsibilities the effect on dependants must be considered in determining suitable requirements.

In addition when sentencing an offender who is pregnant relevant considerations may include:

any effect of the sentence on the health of the offender and
any effect of the sentence on the unborn child

The court should ensure that it has all relevant information about dependent children before deciding on sentence.

When an immediate custodial sentence is necessary, the court must consider whether proper arrangements have been made for the care of any dependent children and if necessary consider adjourning sentence for this to be done.

When considering a community or custodial sentence for an offender who has, or may have, caring responsibilities the court should ask the National Probation Service to address these issues in a PSR.

Useful information can be found in the Equal Treatment Bench Book (see in particular Chapter 6 paragraphs 94-100)

Physical disability or serious medical condition requiring urgent, intensive or long-term treatment

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

The court can take account of physical disability or a serious medical condition by way of mitigation as a reason for reducing the length of the sentence, either on the ground of the greater impact which imprisonment will have on the offender, or as a matter of generally expressed mercy in the individual circumstances of the case.

However, such a condition, even when it is difficult to treat in prison, will not automatically entitle the offender to a lesser sentence than would otherwise be appropriate.

There will always be a need to balance issues personal to an offender against the gravity of the offending (including the harm done to victims), and the public interest in imposing appropriate punishment for serious offending.

A terminal prognosis is not in itself a reason to reduce the sentence even further. The court must impose a sentence that properly meets the aims of sentencing even if it will carry the clear prospect that the offender will die in custody. The prospect of death in

the near future will be a matter considered by the prison authorities and the Secretary of State under the early release on compassionate grounds procedure (ERCG).

But, an offender's knowledge that he will likely face the prospect of death in prison, subject only to the ERCG provisions, is a factor that can be considered by the sentencing judge when determining the sentence that it would be just to impose.

Mental disorder or learning disability

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Mental disorders and learning disabilities are different things, although an individual may suffer from both. A learning disability is a permanent condition developing in childhood, whereas mental illness (or a mental health problem) can develop at any time, and is not necessarily permanent; people can get better and resolve mental health problems with help and treatment.

In the context of sentencing a broad interpretation of the terms 'mental disorder' and learning disabilities' should be adopted to include:

- Offenders with an intellectual impairment (low IQ);
- Offenders with a cognitive impairment such as (but not limited to) dyslexia, attention deficit hyperactivity disorder (ADHD);
- Offenders with an autistic spectrum disorder (ASD) including Asperger's syndrome;
- Offenders with a personality disorder;
- Offenders with a mental illness.
- Offenders may have a combination of the above conditions.

Sentencers should be alert to the fact that not all mental disorders or learning disabilities are visible or obvious.

A mental disorder or learning disability can affect both:

- the offender's responsibility for the offence and
- the impact of the sentence on the offender.

The court will be assisted by a PSR and, where appropriate, medical reports (including from court mental health teams) in assessing:

- the degree to which a mental disorder or learning disability has reduced the offender's responsibility for the offence. This may be because the condition had an impact on the offender's ability to understand the consequences of their actions, to limit impulsivity and/or to exercise self-control.
- a relevant factor will be the degree to which a mental disorder or learning disability has been exacerbated by the actions of the offender (for example by the voluntary abuse of drugs or alcohol or by voluntarily failing to follow medical advice);

- in considering the extent to which the offender's actions were voluntary, the extent to which a mental disorder or learning disability has an impact on the offender's ability to exercise self-control or to engage with medical services will be a relevant consideration.
- any effect of the mental disorder or learning disability on the impact of the sentence on the offender; a mental disorder or learning disability may make it more difficult for the offender to cope with custody or comply with a community order.

Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.

Similarly, a commitment to address other underlying issues that may influence the offender's behaviour may justify the imposition of a sentence that focusses on rehabilitation.

The court will be assisted by a PSR in making this assessment.

Step 3 Consider any factors which indicate a reduction for assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 4 Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the guideline for Reduction in Sentence for a Guilty Plea (where first hearing is on or after 1 June 2017, or first hearing before 1 June 2017).

Step 5 Dangerousness

Where the offence is listed in Schedule 15 and/or Schedule 15B of the Criminal Justice Act 2003

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A).

When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

Step 6 – Special custodial sentence for certain offenders of particular concern

Where the offence is listed in Schedule 18A of the Criminal Justice Act 2003 and the court does not impose a sentence of imprisonment for life or an extended sentence, but does impose a period of imprisonment, the term of the sentence must be equal to the aggregate of the appropriate custodial term and a further period of 1 year for which the offender is to be subject to a licence.

See the Crown Court Compendium, Part II Sentencing S4-3 for further details.

Step 7 Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guidelines.

Step 8 Compensation and ancillary orders

In all cases the court should consider whether to make compensation and/or other ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.
Step 9 Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

Step 10 Consideration for time spent on bail (tagged curfew)

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Ancillary Orders
Sexual Notification Orders

If, on breach of a court order (conditional discharge), for indecent exposure, a sentence of imprisonment is imposed the notification provisions then apply from the date of the new sentence. There will, usually be no right of appeal purely against the notification requirement

R v Rawlinson 2018 EWCA Crim2825

Sexual Harm Prevention Orders

Where the appropriate custodial term was 30 months or less, good reason was required before imposing an indefinite SHPO as this extends indefinitely the placement on the sex offenders register

R v Ali Mahmood 2019 EWCA Crim 788

A SHPO may be varied under s103E SOA 2003, out of time for appeal, and even though hate relevant material could have been discovered within the time limit. The measure is one of protection but the application must not be a hidden appeal

R Cheyne 2019EWCA Crim 182

Criminal Behaviour Orders

Notifying a "relationship" was too vague. Amended to notifying once there had been a period of joint- residence of 14 days, whether consecutive or otherwise

R v T R Maguire 2019 EWCA Crim 1193

Relationship to restraining orders

A CBO may be used to prevent, in defined circumstances, unsupervised contact with children under 16 whereas a restraining order may not as it is directed at particular victim(s)

R v AD 2019 EWCA Crim1339

Confiscation

Time limits

The two year time limit was properly extended for exceptional reasons on the facts of this case where the crown calculated the limit incorrectly from the end of the co-defendant's trial

R v Hall 2019EWCA Crim 662

Benefit arising

When the allegation is a breach of planning controls on a particular day (charged as on or about), and when dealing with particular criminal conduct, only the benefit on that day (one day's rent) amounted to a benefit. This is to be distinguished from cases differently pleaded where the benefit is much more widely "connected" to the crime alleged as in R v Sangha 2018 EWCA Crim 2562 (carousel fraud)

"The benefit which the court needs to identify [under s76 POCA 202] is the benefit obtained "as a result of or in connection with" the criminal conduct of which the defendant has been convicted, or in respect of which he has pleaded guilty. There is no scope for the court to find that the defendant has committed other or more extensive offences and to go on to identify the benefit which he has received from such further offending".

R v Panayi 2019 EWCA Crim 413

Just because someone is an employee does not mean that the benefit is limited to their wages or fee. In this case the defendant conspired to commit money-laundering with his employer and was not an employee acting in the legitimate employment. His commission related directly to the turnover of the money he was laundering and was share of the proceeds..

The court decline to decide whether proportionality applied to the benefit calculation as well as to the issue of available assets

R v Fulton 2019 EWCA Crim163

Valuation

Where property is owned by a third party, who could not alone have afforded the mortgage payments, a trust may be found to exist and the defendant's share must be calculated on an objective analysis of the dealings between the parties

R v Reid 2019 EWCA Crim 690

realisable property

Pensions that as yet have no realisable value are 'realisable property' within the meaning of POCA 2002.
Ahmed v Crown Prosecution Service [2018] EWCA Civ 2543 (powers of an enforcement receiver)

Variation

In considering an order under s22 POCA 2002 to increase the amount of the available assets, the court may have regard to delay and assistance given over a period of time to the police. There was a broad discretion, although orders should be enforced. In this case to take 40% of the increased value was just in all the circumstances

R v S 2019 EWCA Crim 569

Unlawful orders

A compensation order remained valid even if there was a breach of s15 POCA 20002 because it was made whilst postponing confiscation proceedings.

R. v Sachan [2018] EWCA Crim 2592,

Priority

When a company was not itself indicted, it had a prior claim for breach of fiduciary duty against the convicted directors for the proceeds of their crime, ahead of any confiscation order

CPS v Aquila Advisory Ltd 2019 EWCA Civ 588

Costs

A costs order may not be delayed by more than 28 days (s15(4) POCA 2002 even to await confiscation proceedings. The common law cannot be used to override the statute.

AG for the Isle of Man v Darroch 2019 UKPC 31
On provisions similar to this doubting (overruling) R v Constantine 2010 EWCA Crim 2406

Enforcement

A court may not commit to prison for non-payment because the offender had had “long enough” to pay. There must be compliance with the MCA1980

R (Beach) v Folkestone MC 2018 EWHC 2843 (Admin)

Driving disqualification

Protection of the public is not the only reason to impose a disqualification. It may form part of the punishment (in a transferred points case)

R v Griffin 2019 EWCA Crim 563

For a disqualification under s147 PCC(S) Act 2000 to be imposed in relation to a conspiracy, the vehicle musty have been involved in the formation and not just the furtherance of the conspiracy

R v Campbell 2019 EWCA Crim 1450

Particular Offences

Sexual Offences

When dealing with an offence committed since the implementation of the Sexual Offences Act 2003 it is proper to have regard to the sentencing guideline on sexual offences by those under 18 if that was their age at the time of the offence. It was not necessary to apply case such as Forbes where the court was considering historic sexual abuse. Rather one could consider the level of sentence at the time of the offence, rather than of sentence.

R v Orritt 2018 EWCA Crim 2286

PART 7 EVIDENCE

PACE Codes of Practice

Section 67(9) of PACE provides that "Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of a code".

A prison officer, who was the recipient of an unsolicited admission of involvement by a defendant awaiting trial for murder by joint enterprise, was not investigating an offence within the meaning of that section so as to trigger that obligation

Whilst there was a failure promptly to record the comment, a delay in placing the information on the Intelligence Report System, and the prison officer destroyed the original note she made of the comment after entering it on to the IRS, those were points that went to weight rather than admissibility.

Given the spontaneity of the conversation, the total absence of any question or comment that precipitated the comment, and the fact that there was no suggestion of bad faith, there was no doubt that the evidence was admissible.

R. v Harper (Lyndsey) [2019] EWCA Crim 343

Bad Character

S100:Where the issue in this s18 trial was intent alone, *the complainant's* previous convictions for GBH 27 years before had no substantial probative value nor did unproven allegations of other violent conduct(partly to negative suggestion that complainant was disabled)

R v Paine 2019 EWCA Crim341

S 101 Bad character can be established by evidence of previous conduct; it can also be established by evidence of a stated future intent.
The issue in the case was self-defence. The documents found in the applicant's flat suggested that the applicant was somebody who wanted to move up the criminal ladder, and become a major player, and who was prepared to countenance buying a handgun in order to achieve that aim. It was also relevant to his state of mind, and in particular to how he might react to a challenge to his authority. It was relevant that there was evidence that, on leaving the scene, the applicant had said "This is what you get".

Provided the jury was sure that the notes were approximately contemporaneous and representative of his state of mind, the material was admissible."

R v Towsey 2019 EWCA Crim63

On these facts evidence of a very bad previous criminal record should not have been admitted. There were two relevant gateways:

S101 (1) (f) false impression: A suggestion that the defendant had carried out an audit was insufficient to suggest professional employment. Material is only admissible (s105(6)) if it goes no further than is necessary to correct the false impression

S101(1)(g) Imputation against a witness: Only issues raised before the jury (and not for instance on an application to stay) may be taken in to account.
No consideration was given to s 101(3) (the overall fairness of the proceedings)

The provision should not too readily be invoked when there was criticism of an investigating officer, lest the rule inhibit a legitimate line of enquiry.

R v Omotoso 2018 EWCA Crim1394

Note a prepared statement was used, as to one part of which the defendant changed his explanation and which did not mention a second issue on which he later relied.

Where it went beyond mere denial, a statement that ”I don’t like gangs” amounted to giving a false impression in a trial relating to the sale of firearms. Convictions for dishonesty and violence were admitted as going to credibility as a result of evidence of gang association.

R v Fender 20-18 EWCA Crim 2829

<u>Hearsay</u>

When a complainant was treated as a hostile witness and her earlier statements were put to her they were admissible under s119 Criminal Justice Act 2003. Her retraction statement did not say the earlier statements were untrue. The bench was entitled to have regard to them as representing the truth even though there was no chance for the defence to cross examine her on them. She had made in them admissions against herself which went to their credibility.

Griffiths v CPS 20-18 EWHC 3062 (Admin)

<u>Unidentified Witnesses</u>

A statement made by an unidentified witness (reading a car registration number to another who was on a 999 call) might be admitted under s114(1)(d) but on many occasions the inability to use s124 CJA 2003 to challenge the credibility of the witness will work against admissibility under s114(2). However res gestae evidence was unlikely to be affected by that concern. The provisions on anonymous witnesses could not be used as those required an identified witness.

R v Brown (Nico) 2019 EWCA Crim 1143

Identification Evidence

Odd coincidences, if unexplained, may be used to support a weak identification.

R v Gray 2018 EWCA Crim 2083

Telephone intercepts

Where a company held copies of text messages in case they needed to be redelivered, and complied with a production order, the evidence was admissible. It was not obtained by an unlawful intercept. The company was not monitoring transmissions and did not store the relevant communications so as to make them available while being transmitted to persons other than the intended sender or recipient.

R v James 2019 EWCA Crim 622

Expert Evidence

On the dangers of joint reports see R v Jones (Gareth) 2018 EWCA Crim2816 where a conviction of a man with severe learning difficulties was set aside following a trial which would have been conducted very differently in modern conditions

Vulnerable Witnesses

Even a vulnerable witness (here a 3 year old child) should normally be cross examined, with all necessary special measures. “There is a general duty to ensure the defence case is put fully and fairly and witnesses challenged, where that is possible”

R v RK 2018 EWCA Crim 603

“The following is best practice in a case involving cross examination of a vulnerable witness.

First, the identification of any limitations on cross examination should take place at an early stage. We assume that this will occur at the ground rules hearing where the judge will discuss with the advocates the nature and extent of the limitations imposed and whether they are simply as to style or also relate to content.

Before the witness is cross examined, it is best practice, (as recommended by the Judicial College) that as well as giving the standard special measures direction, the trial judge also directs the jury in general terms that limitations have been placed on the defence advocate. If any specific issues of content have been identified that the cross examiner cannot explore, the judge may wish to direct the jury about them after

the cross examination is completed. On any view, the judge should direct the jury about them in the summing-up.

Finally, we should add that every advocate (and trial judge) is expected to ensure that they are up to date with current best practice in the treatment of vulnerable witnesses.

R v YGM 2018 EWCA Crim 2458

Pre-recorded cross examination

Best practice required

1. At the ground rules hearing the judge should discuss with the advocates how and when any limitations on questioning will be explained to the jury.
2. If this has not happened, or there have been any changes, the judge should discuss with the advocates how any limitations on questioning will be explained to the jury *before* the recording of the cross examination is played.
3. The judge can give the jury the standard direction on special measures with a direction on the limitations that the judge has imposed on cross-examination and the reasons for them *before* the cross examination is played.
4. The judge should consider if it is necessary to have a further discussion with the advocates before their closing submissions and the summing-up on the limitations imposed and any areas where those limitations have had a material effect. In this way the advocates will know the areas upon which they can address the jury.
5. In the summing-up the judge should remind the jury of the limitations imposed and any areas identified where they have had a material effect upon the questions asked.
6. If any written directions are provided to the jury the judge should include with the standard special measures direction a general direction that limitations have been imposed on the cross-examination.

R v PMH 2018 EWCA Crim 2452

<u>Use of Intermediary/ Inferences at trial from silence</u>

The principles, as set out in Rashid 2017 EWCA Crim 2 and the Practice Direction 3F, are clear: the intermediary can make a recommendation based on the material they have considered but it is just that - a recommendation. Ultimately it is for the trial judge to decide, having considered all the material, whether and to what extent an intermediary is necessary. Only in a very rare case will an intermediary be required for the duration of the trial

Absent evidence of a causal connection between the absence of an intermediary whilst giving evidence and the decision not to give evidence, adverse inferences might be allowed
Section 35(1)(b) of the 1994 Act provides an exception to the general rule that a jury may draw an adverse inference from the failure to give evidence if:

"…(b) It appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence."

The judge has a wide margin of judgment and discretion (Dixon [2013] EWCA Crim 465). It does not follow from the fact that an accused has a physical or mental condition that it is necessarily 'undesirable' within the meaning of the subsection for him to give evidence. The trial judge must consider all the material before him or her including the expert opinion, albeit he or she is not bound by it. In this case, the recorder considered all the material before him including the appellant's ability to respond to questioning by police on a straightforward issue he undoubtedly understood.

R v Biddle 2019 EWCA Crim 86

In dismissing an appeal by a defendant who had the benefit of an intermediary, in a cutthroat defence case, where the defence attacked that appointment and were said thereby to undermine that defendant's position the court held:

First it is important to note the role of an intermediary. A trial judge will allow the instruction of an intermediary to a witness or a defendant to assist them in communicating and participating in the trial. The role of an intermediary is not to provide expert or professional opinion on the level of cognitive skills or intellectual functioning of a defendant or witness. If evidence of cognitive skills or intellectual functioning is both relevant and admissible, it should come from an expert suitably qualified to comment. No such evidence was called. Thus, there was no evidence of the appellant's intellectual functioning, other than the jury's assessment of the appellant and the evidence of his co-accused. The fact that an intermediary had been granted carried with it no implications of the level of the appellant's intellectual functioning. The only implication was that he may need assistance in communicating and participating.

Second, in a cut-throat defence it is often the case that grave allegations are made by one accused against another. In this case, for example, the appellant alleged that the co-accused Gray was a murderer. It was the duty of Gray's counsel to do his best to challenge the prosecution case and to undermine that allegation. He was, therefore, bound to attempt to undermine the credibility of the appellant. He tried to do that in several ways, including by challenging the provision of an intermediary for him and linking that to his level of intellectual functioning. We accept both that he laboured the point, and in his closing speech contravened the judge's clear directions. He referred yet again to the issue of whether the appellant needed an intermediary and effectively invited the jury to re-visit the issue. He should not have done so. However, he was entitled to suggest that the appellant was sheltered from more robust questioning by the provision of an intermediary. That is a standard argument advanced and indeed this court has endorsed more than once that a judge should direct the jury that the effect of a special measure may mean that an advocate may not ask questions of the witness in the usual form. Mr Rouse was also entitled to ask questions about the level of the appellant's functioning, as we have indicated, provided that it was relevant to an issue in the case. Here it was said to be relevant to the issue of his credibility.

Bearing those observations in mind, we have considered Mr Rouse's comments in their entirety. In our view, they were mild in comparison to some that are made during a cut-throat defence – and, indeed, those that were made during this appellant's defence. In addition, they were peripheral to the main issues in the case. The judge corrected any wrong impression given by his clear and robust directions in his oral summing-up. The judge also gave the jury a written copy of his directions. The jury could, therefore, have been in no doubt as to how they should approach the role of the intermediary

R v Mahomud 2019 EWCA Crim 667

S28 YJ and CE Act 1999 extended **3.6.19**

1 To cover all sexual and modern slavery offences in Liverpool Kingston and Leeds Crown Courts

2 To apply s16 (age or incapacity) to Crown Courts at Bradford Carlisle Chester Durham Mold and Sheffield

S28 YJCE Act 1999

An advocate must not, in a closing speech, impugn the s28 procedures based on ground rules hearings. The purpose of cross examination is to elicit evidence. Judicial directions could however have dealt with the issues arising including suggestions that a witness was not credible because of her sexual history.

Le Brocq v Liverpool CC 2019 EWCA Crim1398

PART 8 COSTS

Civil proceedings; s64 MCA 1980

A court might properly make no award for costs against the police in relation to a withdrawn application under s298 POCA 2002 even when there had been no active investigation. An explanation for the presence of the moneys had been required

Bennett v Chief Constable of Merseyside 2018 EWHC 3591 (Admin)