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**Albion Chambers** CRIME TEAM NEWSLETTER

# Disclosure protocols

## In fashion again

The snappily titled "2013 Protocol and Good Practice Model (Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings) October 2013", came into force on 1 January 2014. The document is not binding on local authorities (paragraph 1.3), however they are urged to adopt the disclosure practices described within it. The DPP (on behalf of the CPS) is a signatory to the Protocol. The Protocol deals with disclosure between local authorities, the police and CPS, and with disclosing material into the criminal and family justice systems.

Since various agencies signed a model protocol in October 2003, many local authorities have signed up to similar local protocols, and many are now adopting the 2013 Protocol. In the intervening years, practice has varied as to:

a) whether material from social services files is provided to the police voluntarily; and

b) the response to a request that material is disclosed onwards to defence teams in criminal proceedings.

As to (b), the response has ranged from consent being given, limited documentation being scrutinised by the court, through to witness summonses being issued and all material vetted by independent counsel. The 2013 Protocol is a clear attempt to keep the issues away from Court, stating that, *"PII applications to the criminal court for the withholding of sensitive material should be rare" (paragraph 13.2).*

The Protocol addresses the common issues that result in such applications entering the court arena. Paragraph 9.2 seeks to ensure precision in relation to the initial request from the police to the local authority. This should, if adhered to, prevent requests so wide that they constitute an attempt to go through the entirety of files. Wide ranging requests are not only difficult and time-consuming to assess, but they tend to result in Prosecution agencies then needing to examine a wealth of irrelevant and repetitious material. The Protocol is aimed at looking for and providing material on topics and details that have been specifically requested, rather than having a trawl through social care files to see what emerges.

The author's experience so far in using the new Protocol is that local authorities are empowered to return the initial request to the police with a requirement that details are clarified, basic facts are made available to put the disclosure exercise in context, and proportionate parameters are put on the timeframe. This makes sense; for example, is there any merit at looking at a child's behaviour when a toddler, when the person in question is now an adult? If looking for factual disclosures or sexualised behaviour this may be relevant, whereas if looking for a propensity for untruthfulness it might be tenuous at best.

The Protocol contains some obvious but important suggestions about redaction and summarising, and also specifies that material will not be disclosed to the defence without further consultation with the local authority or order of the court. This serves as a final check on the details, since the police may have needed more detail for their investigation than would be necessary to disclose to the defence. It also avoids automatic recourse to the Court because the local authority will be able to assess the likelihood of disclosure in the context of the issues in the criminal case, and come to their own decision. By requiring sufficient detail from the police and CPS, local authorities are enabled to weigh the competing public interests in favour and against disclosure in an informed way with reference to the issues specific to each particular case. There still will be occasions where recourse to the court is necessary where the balancing exercise is not so obvious. However, it would be hoped that liaison between the agencies concerned will keep issues to be decided by a Judge to a minimum. For those who fear a detriment in material not being examined by independent counsel, this may be misplaced, since independent counsel or specialist in-house disclosure officers may be behind the scenes to advise upon and assess the requests from police and CPS.

The Protocol perhaps misses an opportunity to give any guidance about disclosure of medical records, where issues about confidentiality and onward disclosure are also likely to arise. Although medical records are unlikely to be disclosed voluntarily by health organisations, a protocol for their request by police and CPS, issues of consent, and clarification of the position where medical reports appear on social care files and family court files, would be of assistance to those who are faced with discovering or obtaining medical documents.

The only mention of medical reports within the Protocol is in the context of family court proceedings at paragraph 10.4, which curiously suggests that the local authority should be able to disclose pre-existing medical reports from within those proceedings. While this may be true in the sense that this would not constitute a contempt of court under s12 of the Administration of Justice Act 1960, it overlooks the fact that medical reports are not written by the local authority and are not theirs to disclose. The 2003 model protocol suggested that the local authority should not reveal to the police relevant medical reports or other medical information without the consent of the author of that document. I suggest the best practice is still for the local authority to alert the police/CPS to the existence of such documentation so that

they may then obtain it by other means.

Finally, by way of warning, the Protocol contains a bold statement at paragraph 14.1, which states that, *"in highly exceptional cases, the CPS may need to make disclosure to the defence of the edited/summarised document without the consent of the local authority"*. There is a tension because the Prosecution duty of disclosure must be complied with for a trial to continue fairly. On the other hand, disclosure from social care files is made for limited and incremental purposes and Prosecution agencies should not breach those limits, or they will put local authorities in breach of their duties. The operation of disclosure protocols has depended on the CPS consulting the local authority and asserting PII on their behalf, or allowing the local authority to do so, if they wish. One would imagine that if the CPS discloses material without the consent of the local authority, and without court scrutiny, the whole process would quickly break down with local authorities unwilling to entrust the contents of their files to Prosecution agencies at all. Even envisaging a trial in progress, and a local authority representative incommunicado, a matter of sensitive disclosure could be put before a Judge for a ruling, which would be the other acceptable route for disclosure, and the Protocol could have said so. Paragraph 14.1 does not cite any authority and does not elaborate upon the exceptional cases envisaged. If acted upon, it could result in the 2013 Protocol becoming extremely unfashionable. Perhaps this point will be considered further in 12 months' time when the Protocol is due for a formal review.

**Kirsty Real**

# Look – don't touch

The Court of Appeal has recently expanded the approach to be taken in respect of the admissibility of indecent images in cases involving allegations of sexual misconduct against children. In *Latham* [2014] EWCA Crim 207, the appellant appealed against his conviction for indecent assault on a young male (whose age at the time of the offence could not be proved, but was either 17 or 18) on the basis, inter alia, that the trial judge had been wrong to admit in evidence nine previous convictions for possession of indecent images. The evidence was admitted by the trial judge as evidence of propensity under s101(1)(d) and under s101(1)(g) the defendant having made an attack on the character of the complainant. The Court of Appeal upheld the conviction.

The point in relation to admissibility under s101(1)(g) is simply stated; the court emphasised that when defending it is not possible to rely upon the ability to edit interviews to avoid the admissibility of bad character evidence under this section. Any assertions beyond "robust denial", such as here the assertion that the complainant and witnesses had conspired to lie, open the gateway. The best route when defending must therefore be to accept that the gateway is opened, but to argue that the evidence should nevertheless be excluded because of its prejudicial effect under s101(3) and/or s78 of PACE.

The main point of interest of the judgment in *Latham* is the argument in relation to s101(1)(d). The point was previously made by the court in *D, P and U* [2011] EWCA Crim 1474 that previous convictions for possession of indecent images may have probative force in an allegation involving sexual contact. However, at that stage the Court of Appeal highlighted limitations on the admissibility of such evidence. Crucially, they emphasised that whether such evidence was admitted would depend, in part, on the precise circumstances of the contested allegation and whether there was sufficient similarity or nexus between what was depicted in the images, in terms of the age and sex of the child captured, and the disputed conduct. Hughes LJ sounded a note of caution; *"There may be a sufficient difference between what has been viewed and what is alleged to have been done for there to be no plausible link"*.

The change in the Court of Appeal's very recent decision in *Latham*, moved the question of admissibility away from those narrow criteria, making it easier for the prosecution to adduce previous convictions for possession of indecent images. Giving judgment, Hallett LJ said that whilst it would have been preferable had the Crown been able to discover more detail of previous convictions, *"Nevertheless, as sparse as the details were, they were sufficient to be capable of establishing a propensity to have a sexual interest in children. The appellant denied any sexual interest in B. B may have been technically an adult at the time of the commission of the alleged offence but he was an immature teenager the appellant (17 years old) had known since he was nine years old. The appellant must have looked upon him as a child. A sexual interest in children was, therefore, potentially relevant and admissible".*

The arguments against the admission of indecent images convictions tend to focus on the fact that just because a defendant looks at pictures of children does not tend to prove that he/she has a propensity to touch them. However, the judgment in Latham cuts away the ground beneath that argument. As was noted in *D, P & U*, in child sex allegations there are two matters in issue:

(i) Does the defendant have a sexual interest in children? and

(ii) If so, does the defendant act upon that and touch children sexually?

Only the second question is a question of propensity under s103. However, the court was clear that convictions for possession of indecent images are relevant to the first question – a sexual interest in children makes it more likely that the defendant would go on to touch them. What the judgment in *Latham* appears to show is that the sex of the children, their age, or the activity depicted are not details upon which the question of admissibility depends.

It could be argued that there is a degree of common sense – which the Court of Appeal called upon – to this position. The line which is crossed is simply that of expressing any interest in a child underage. The finer detail of sexuality, or preference as to whether the child is under or over 10, does not detract from the relevance of that line having been crossed when it comes to consideration of the first question of whether a defendant has a sexual interest in children. The approach of the court in *D, P & U* was that, as a sexual interest in children is a sufficiently unusual one, "perhaps not as unusual as it ought to be" the fact of a defendant having possessed indecent images of children may be sufficient to be relevant and admissible with regard to whether they have a continuing sexual interest in

children. The judgments in *D, P & U* and *Latham* resonate with the observations of the court in *Hanson*, that whereas a single conviction for burglary may not show an ongoing propensity, a single conviction for sexual offences involving children could do so. The counter argument is that this is too broad-brush an approach; 'once a paedophile, always a paedophile', and 'any child will do'. It would be interesting to know, from expert psychologists, whether this approach is right.

**Anna Midgley**

# The Effect of LASPO on sentencing of "dangerous" and serious offenders

On 3 December 2012 a major change to sentencing powers came into effect. As a consequence of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)1 the provisions of the Criminal Justice Act 2003 in respect of the sentencing of offenders deemed by the courts to be "dangerous," were amended.

The implementation of LASPO brought about a number of significant changes. The first and perhaps the most-well publicised, is the abolition of imprisonment for public protection ('IPP') for offenders convicted after 3 December 2012. The second is the introduction of a new life sentence for offenders over 18 convicted of a "second listed offence". And finally, the third, is the introduction of a number of new provisions relating to extended sentences.

Further guidance on the application of the new provisions has been given by the Court of Appeal in *Attorney General's Reference 27/2013, sub nom R v Burinskas and Others* [2014] EWCA Crim 334 (*'Burinskas'*).

Although these provisions have been in force for over a year, it is inevitable, given the nature of the offences that trigger the provisions, that it will take time for such cases to reach the courts. However, as the volume of such cases increases, it is apparent that many practitioners are not conversant with the detail of the new regime.

### New life sentences under s224

As a consequence of the bringing into force of LASPO, we now have section 224A of the Criminal Justice Act 2003 ('CJA 2003'). The criteria for imposing a life sentence under this section are, first that the defendant, aged 18 or over, is convicted of an offence listed in Part 1 of Schedule 15B, secondly that the qualifying offence was committed after 3 December 2012, and finally that the sentence condition and the previous offence condition are met. There is, therefore, no requirement that the offender is found to be "dangerous" as would previously have been required under the CJA 2003.

The sentence condition is that, disregarding these provisions, the court would impose a sentence of ten years or more for the new offence (s.224A(3)) and section 153(2). Section 153(2) makes it clear that in deciding whether such a sentence would be imposed the court may take account of other associated offences. The previous offence condition is that when the offence was committed, the offender had been previously convicted of an offence listed in Schedule 15B, and a "relevant" sentence was imposed on the offender for the previous offence (s.224A(4)).

A life sentence or IPP will be relevant if the defendant was not eligible for release during the first five years of the sentence (or would not have been so eligible except for time served on remand) (s.224A(5)). An extended sentence is relevant if the custodial term exceeded ten years, again excluding time served on remand (s.224A(6), (7), (9)). Any determinate is relevant if it was for a period of ten years or more (s.224A(8)).

Once persuaded that all of these conditions are met, the court must impose a sentence of life imprisonment, unless it forms the view that there are particular circumstances which relate to the offence, the previous offence or to the offender which would make it unjust to do so in all the circumstances (s.224A(2)).

### Life sentences for dangerous offenders under s 225

Section 225 of the CJA 2003 applies where a person is convicted of a serious offence after 3 December 2012, and the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission, by him, of further specified offences (the old 'dangerousness' test). Section 224 of the CJA defines a specified offence and a serious offence in a manner familiar to those used to dealing with the old provisions.

If the defendant is found to be dangerous, then a life sentence must be passed if two further conditions are satisfied. The conditions are that the offence is one where the offender would be liable for imprisonment for life and that the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life.

### Extended sentences

Section 226A of the CJA 2003 was also inserted by LASPO. It provides that an extended sentence may be imposed when an adult defendant (so aged 18+), is convicted of a violent or sexual offence committed either before or after 3 December 2012, which is specified in the original Schedule 15, and the court concludes that the defendant is dangerous, but he or she does not qualify for a life sentence, and either condition A or B is met.

Condition A is that, at the time of the commission of the instant offence the defendant had been convicted of an offence listed in Schedule 15B. Condition B is that, if the court were to impose an extended sentence of imprisonment, then the appropriate custodial term would be at least four years. That term is to be calculated in compliance with section 153(2) and is therefore to be commensurate with the seriousness of the offence, or the combination of associated offences (s.226A(6)).

Once satisfied that such a sentence should be imposed, the court must set an extension period of such length as the court considers necessary for the purpose of protecting the public from serious harm occasioned by the commission of further specified offences (s.226A(7)). It must not exceed five years in the case of a specified violent offence or eight years in the case of a specified sexual offence (s.226(8)). It remains the case that the total term of an extended sentence can not exceed the maximum term for the offence at the time it was committed (s.226A(9)).

### Applying the new regime

In many cases which involved the old dangerousness regime, advocates would rely upon the Court of Appeal's decision in *R v Kehoe* [2008] EWCA Crim 819, at paragraph 17 in which the Court stated that:

*"We think that now, when the court*

*finds that the defendant satisfies the criteria for dangerousness, a life sentence should be reserved for those cases where the culpability of the offender is particularly high or the offence itself particularly grave."*

This is no longer reliable authority. Indeed any decisions of the higher courts based upon the regime in place from 2005 to 2012 are now of questionable status. At para 15 of the decision in *Burinskas* the Court said:

*"In our judgment decisions about the circumstances in which a life sentence was appropriate handed down during the currency of the version of the CJA which was in force between 3 April 2005 and 3 December 2012 are now of limited assistance. It is necessary for us to have regard to the whole of the new provisions to ascertain what Parliament intended."*

The effect of this is that the abolition of IPP sentences will lead to life sentences being imposed more frequently. The new extended sentences are not a replacement for sentences of IPP and must not be put forward as such (para 19 of *Burinskas*).

The proper approach was set out by the court in Burinskas at para 43 as follows:

*"i) Consider the question of dangerousness. If the offender is not dangerous and section 224A does not apply, a determinate sentence should be passed. If the offender is not dangerous and the conditions in section 224A are satisfied then (subject to ss.2 (a) and (b)), a life sentence must be imposed.*

*ii) If the offender is dangerous, consider whether the seriousness of the offence and offences associated with it justify a life sentence. Seriousness is to be considered as we have set out at paragraph 22.*

*iii) If a life sentence is justified then the judge must pass a life sentence in accordance with s.225. If s.224A also applies, the judge should record that fact in open court.*

*iv) If a life sentence is not justified, then the sentencing judge should consider whether s.224A applies. If it does then (subject to the terms of s.224A) a life sentence must be imposed.*

*v) If section 224A does not apply the judge should then consider the provisions of section 226A. Before passing an extended sentence the judge should consider a determinate sentence."*

### Release provisions

The apparent lack of awareness of some practitioners as to the principles governing the imposition of extended sentences extends to the release provisions. Clearly, a failure to fully and accurately advise a client, in a case where the dangerousness provisions are a live issue, could have very serious consequences. In reality, the position is fairly straightforward and contained in section 246A of the CJA 2003 (inserted by section 125 of LASPO).

The section requires that a prisoner serving an extended sentence must be released after serving two-thirds of the custodial term, unless the custodial term is ten years or more, or the sentence was imposed for an offence listed in Parts 1 to 3 of Schedule 15B (such offences include murder, manslaughter, serious violence, sexual offences involving children and certain serious armed forces offences). In those cases, the case must be referred to the Parole Board who will direct his release when satisfied that it has ceased to be necessary for the protection of the public that the defendant should be detained. These release provisions apply whether the offence was committed before or after 3 December 2012.

### Conclusions

The eight separate appeals reported under the name of *Burinskas* are useful examples of how the courts should apply the principles contained in the new sentencing regime. The changes are not superficial and practitioners must be conversant with a new vocabulary when dealing with offences engaging what used to be known as the "dangerousness" provisions but which now go much further in terms of when they will apply to the commission of serious and specified offences by defendants.

**Edward Hetherington**

# A time for change

## A new perspective on dealing with historic sexual offences

In recent months we have witnessed a number of high-profile sex cases, with many more, we are told, yet to come. Some fall under the Operation Yewtree umbrella, some, though not part of that investigation may have their genesis in it while others still are simply coincidental to any overarching operation. A number in recent weeks have resulted in acquittals in respect of all or the majority of charges faced by those accused. Such acquittals, following hard on lurid accounts of the allegations has caused many to question whether the Criminal Justice System is the correct forum for dealing with such complaints.

It is of course part of the power that an abuser exerts over a victim of sexual offences, particularly though not exclusively when that abuser is a family member, that complaints, if made at all, are often not made for many years. A sense of shame and embarrassment, a wish not to upset the dynamics of the family, a fear of being disbelieved and sometimes, a misguided belief that they themselves bear a responsibility for what took place all play a part in non or late disclosure.

In cases of multiple abuse, the publicity surrounding one victim finding the strength to make a complaint can legitimately lead to many more complainants coming forward. But if complaints are not volunteered but arise as a result of the police actively looking for complainants does that make the case less compelling for a jury?

In a case I recently defended, a 17-year old made a fairly contemporaneous complaint of sexual abuse against her stepfather. When the police researched into the background of the defendant, they found that he had been the subject of another allegation, by a different girl in the early 90s. That investigation had concluded when that complainant first of all retracted her statement and then went on to tell social services that she had made up the allegation because she was annoyed at her stepfather and to get him out of the house for a few days. She had not contacted the police again in the intervening years. However, faced with the new allegations the police contacted that original complainant and she too became a witness in the current proceedings. Not content with that, the police contacted another young lady whose details had been provided by the second and she became the third complainant in the trial, her allegations also dating back many years.

Two of the complainants then had never contacted the police (after the first in time had retracted and said she had lied about her initial complaint) and yet they found themselves part of a trial involving contemporary complaints.

In that case it could be argued that the complaints grew organically, one genuinely and (almost) independently leading to

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another until the police found they had three potential complaints (although they were still looking for others). But such progression becomes worrying when, as in this case, information comes to light, usually from within the unused material, which highlights the need for the police to find additional support for the original, single complainant.

Do those worries become more real; when in high-profile cases the police use the press to actively request victims to come forward?

And what of the defendant, arrested many years, and in some cases, many decades after the allegations are said to have taken place? Can he, or she, ever expect to receive a fair trial in those circumstances? Particularly, as in some cases (as in one case I dealt with where some of the allegations against an 87-year old man pre-dated the 1956 Sexual Offences Act) potential witnesses have died or essential evidence has been destroyed in the intervening years.

All of those matters can of course give rise to an application to stay the indictment as an abuse of process. But the reality is that a successful application is rare. The principle being that an abuse of process argument can not succeed unless a fair trial is no longer possible because the delay has caused prejudice to the defendant which could not fairly be addressed in the normal trial process. The fact of even an unjustified delay is not, by itself, a sufficient reason for a stay.

Cases involving sexual allegations, more often than not, very obviously depend upon the word of one person against that of another. And in the case of historic allegations, those allegations are of course, based upon memories. Memories are records of a person's experience of an event. They are not a record of the event themselves. As such, unlike a written record, the memory of an event will contain gaps or forgotten details and may concentrate on a specific detail. That of course would be the subject of the complaint but as it lacks any other verifiable detail it makes it almost impossible to challenge. The context of the memory will also be subject to the complainant's understanding of the event, which may have changed over time. There are also cases where the memory comes not from something the complainants have experienced themselves but from an amalgam of memories and events.

All of these factors make the prosecution and defence of sexual offences, and historic sexual offences in particular, extremely difficult. So much so that some are beginning to question whether our system should continue to allow prosecutions to be brought many years after the allegations are said to have occurred.

With limited exceptions, actions in civil law have to be brought within a particular period of time. The rationale being that someone with a good cause of action should pursue it with reasonable diligence and that a failure to do so potentially deprives a defendant of the evidence with which to disprove the stale claim. Halsbury's Laws of England makes reference to the fact that claims brought many years after the events complained of amount to more "cruelty then justice". In civil law the need for certainty and the avoidance of the possibility of people being perpetually at risk of litigation overrules any right of a claimant to act with anything less than reasonable diligence.

But could the same principle be applied to crime? Surely, where emotions and other factors, many of them outside of the control of the complainant have to be considered, any rule fettering the making of such complaints would simply unbalance the question of unfairness, bringing it full tilt, this time to the door of the complainant?

Well, many other jurisdictions think not. In fact England and Wales are the only countries within Europe that do not have such a limit. The limitation periods set elsewhere have provisions enabling account to be taken of the age of the complainant. The periods range from twelve to 20 years from the date of the offence, the upper range being for complainants who were under the age of consent when the allegations are said to have taken place.

Many will argue that any limitation on such complaints is too blunt an instrument to deal with the many historic allegations the courts have to grapple with, and if that is right, and no Government has considered proposing a statute of limitations for criminal offences, what then is the answer to the burgeoning numbers of historic complaints?

Certainly, the first is that specialist advocates need to be instructed on behalf of both sides. Certainly, a more robust approach has to be taken to making applications to stay the indictment on the grounds of abuse of process on the basis of delay. And certainly, reasoned consideration has to be given to the timing of such an application. For many years after the decision in *Smolenski* it was believed that the court had advocated that such applications should be made at the close of the Crown's case. Superficially, that has the benefit of enabling the effect of the alleged delay to have become crystalised by that stage. But the reality is that an application to stay the indictment is an argument that a trial should not be held at all (because to do so would result in unfairness to the defendant). That means that the application, as confirmed in *CPS v F*, should be a preliminary one, rather than forming part of the trial process. Additionally, if it is made at the close of the prosecution case, the court will have heard the evidence from the complainant and will be reluctant to uphold an application to stay the indictment having put a witness through the trauma of giving evidence. Additionally, if there are issues which affect the credibility of the witness, those can be subject to the more usual half time submission rather than an application to stay. Of course, in some cases there may, exceptionally be compelling reasons why the decision in respect of an application to stay can only be made after the court has had the opportunity of evaluating that evidence and the effect of the alleged prejudice to the defendant. Those are decisions for the advocates who, on both sides, given the complex issues these cases throw up, should do their utmost to ensure that for all parties more justice than cruelty is the order of the day.

**Sarah Regan**

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