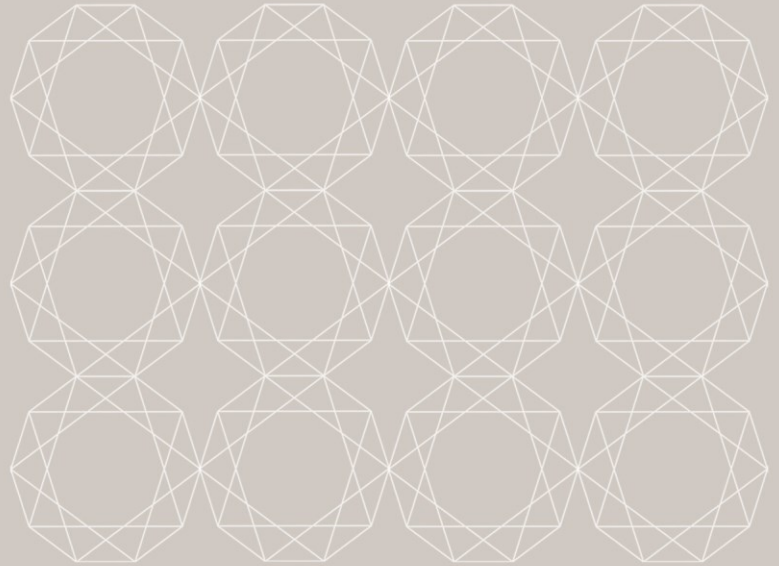




DEKA
CHAMBERS

BRIEFING
July 2023

CRIME & FRAUD



Welcome to the latest edition of the Crime Briefing which focuses on the topical areas of anonymity in criminal proceedings and the new fraud strategy ‘Stopping Scams and Protecting the Public’ published by HM Government in May 2023 with articles written by Eleanor Mawrey and Thom Dyke. We hope that you find these articles informative and interesting.

There was considerable interest over the identity of the BBC presenter at the centre of allegations circulating in the media with many on social media platforms speculating who that could be which caused some presenters to publicly deny involvement. Thom’s article focuses on the debate of anonymity versus open justice.

Fraud has increased and is the most reported crime. Fraudsters have adapted and continue to do so especially in the current climate. Eleanor’s article considers the new fraud strategy and whether the investment will tackle the problem.

We are one of the largest common law sets in the country. We have a strong and experienced team of barristers practising criminal law and fraud who prosecute and defend in some of today’s most high profile and leading cases.

We are incredibly proud to announce that Tom Little KC has been shortlisted as Silk of the Year and Claire Harden-Frost as Criminal Junior of the Year in the Legal 500 Bar Awards 2023.

James Thacker

Head of the Crime & Fraud Team

For further information about Deka Chambers contact us via email on clerks@dekachambers.com or call us on **020 7832 0500**.



THE GOVERNMENT'S NEW FRAUD STRATEGY: A WASTED OPPORTUNITY?

By Eleanor Mawrey



Despite fraud accounting for 40% of all crime and costing victims an eye-watering £2.35 billion¹ in 2021 it has received little of the attention it deserves from government, with no new real investment since 2008. Since that time, the world has very much moved on, with the explosion of data and new technology; social media, that was then still in its infancy, has altered the way everyone, including fraudsters, interact. It was therefore high time for a re-evaluation of the way such crime is tackled but one has to wonder whether the new government "Fraud Strategy: Stopping Scams and Protecting the Public", published in May really goes far enough.

The new strategy has three prongs which I shall consider in turn, focusing on some of the proposals under each:

- Pursuing Fraudsters
- Blocking Fraudsters
- Empowering the Public

Pursuing Fraudsters

The government proposes to invest £100 million during the course of 2024/25, which given the scale of the problem and more importantly the cost to UK as whole, seems woefully inadequate, especially when properly targeted investment could more than pay for itself. If one considers the Serious Fraud Office [SFO], their entire budget currently sits at only £60m², which given the task they undertake and the wealth of the corporates and individuals they pursue is absolute peanuts, with such chronic underfunding undoubtedly contributing to their well-published difficulties. But, it is also a false economy; the SFO more than pays for itself, with £710m³ being received into the Treasury from the SFO since 2014 as a result of Deferred Prosecution Agreements, making it a net direct contributor to gov of £461m⁴. That is even before one takes into account the potential but real financial benefit of a deterrent force with true reach and bite.

Where is this new government investment going to be spent? Not, seemingly, on the SFO. Part of it is going towards funding a new "National Fraud

Squad", with 400 new specialist investigators which will be spread across the National Crime Agency [NCA], City of London Police [CoLP] and Regional Organised Crime Units [ROCU]. This sounds great in theory, but one does not need to be fraud specialist to see that the numbers in the Strategy don't quite tally, with some double accounting seemingly taking place; it speaks of 300 already in post, with an extra 100 by Jan 24 and another 100 by 2025. In any event, whilst new resources are very welcome, they are no substitute for keeping the resources and experience that you already have. The 20,000 new police officers have not made up for the wealth of talent and knowledge that has haemorrhaged from the force during that same period⁵, a rookie is no substitute for a DS.

One very welcome proposal is the death of "Action Fraud", whose short-comings have been well-known to all. It had a very difficult task but again like the SFO, was critically underfunded. The government intends to put £30m, across three years, to replace and improve the service. At only £10m a year, this again seems like a drop in the ocean and likely therefore to fall foul of the problems faced by Action Fraud given the size of the responsibility placed on it.

Next up in the proposals is a new "multi-agency fraud targeting cell" within the NCA which "will draw on all source data to improve system-wide understanding of the threat and produce high quality intelligence packages". This is undoubtedly a very good idea. Tackling fraud can only be done with proper investment in tech and tech specialists but this is where the proposals seem to fall far short of what is needed. Artificial Intelligence [AI] for example, only has two passing references within the Strategy, both in the context of the threat it poses when used by fraudsters. Given the rapid increase in its capabilities, it should not only be at the top end of the list of threats but perhaps more importantly it should be at the forefront of the government's strategy in combating fraud. Fraudsters, whether on a small or State scale are using new tech to facilitate their crimes and if we are to have any hopes of keeping up with them, we

need to be investing very significant sums in this area; both in the acquisition/development of software but also in recruiting specialists to be trained, and train others, in its use.

Finally, under this heading it “hopes to improve the criminal justice response and put more fraudsters behind bars”; a laudable aim. It proposes a new independent review into the challenges of investigating and prosecuting fraud, including a look at “modernising the disclosure regime for cases with large volumes of digital evidence”. This latter part is very welcome, and long overdue and may make up for the lost opportunity to grasp this particular nettle as part of the revamp of the Attorney General’s Guidelines both in 2020 and again in 2022. It is not a problem easily solved; the 1996 legislation, the Criminal Procedure and Investigation Act or perhaps more critically the Code that helps implement it, have not caught up with the issues caused by the explosion of data. However, it will be interesting to see what the review comes up with. Does the solution lie in a re-wording of those critical sections, designed to ensure a fair trial, or does it lie in better resourcing and technology to cut through the review process in an efficient manner both in terms of time and money spent?

Blocking Fraudsters

A new Anti-Fraud Champion has been appointed in the shape Anthony Browne MP whose experience leading the implementation of LIBOR reforms will prove very useful. The hope is that, in part through better co-ordination with industry, more can be done to co-ordinate counter-fraud efforts. This seems a very sensible initiative, with the rolling out of further Fraud Sector Charters, including one specifically focused on “Online Fraud”. Such incentives already seem to be having a positive effect and it will be interesting to analyse their true impact over time. To these, they plan to add teeth, in the form of the Online Safety Bill, the Economic Crime and Corporate Transparency Bill and new Failure to Prevent Fraud Bill, all currently making their way through parliament. We will have to wait and see what final form these take and whether they go far enough or, as some argue, go too far such as to become intrusive or simply unworkable.

Empowering People

Just as the public gets more savvy and has learnt to send the emails purporting to be from a Prince asking for help transferring his money straight to the

deleted folder, so too are the fraudsters becoming increasingly sophisticated in their approach. Since 2020, authorised Fraud, (where victims are tricked into making payments), has overtaken unauthorised fraud, and that trend (especially with the powers of AI to mimic genuine services and indeed individuals) looks set to continue. Interestingly, those in the higher income brackets, such as professionals and managers, are most likely to be targeted as they are the ones with the surplus income to “invest”. Better education is certainly needed. The more therefore that can be done to spread awareness to stop the frauds occurring in the first place, and improving the access for reporting it when it does, the better for all. Getting rid of Action Fraud, as mentioned above, will go some considerable way towards that, providing of course its replacement is fit for purpose and properly resourced.

It is good to see the paper acknowledge the emotional cost of financial crime, which in my view is often overlooked. We all know the scourge that drugs play on society and the sentences handed down by the courts reflect this, but members of the public are actually far more likely to be the victim of fraud, and the impact of that can be just as devastating to those involved. It is heartbreaking to see an elderly victim lose all their hard-earned savings in an investment scam, such that their retirement is severely compromised, not to mention the dent that it does to their confidence. Proposals to help victims recover their money, and more quickly, for example by making repayment by companies mandatory where customers have been tricked into handing over their money as part of the new Financial Services and Markets Bill, are welcome.

Conclusion

The new Fraud Strategy is undoubtedly a step in the right direction; it has acknowledged the scale of the problem and started the conversation. As ever, much of it boils down to money and one can’t help feeling that the investment secured is not nearly enough. This therefore seems somewhat of a wasted opportunity, as properly targeted monies spent on tackling fraud would not only pay for themselves but reap untold dividends both reducing crime figures but also for the Treasury.

1. <https://www.gov.uk/government/publications/fraud-strategy>

2. <https://www.sfo.gov.uk/about-us/>

3. ditto

4. ditto

5. <https://fullfact.org/crime/police-officer-uplift-numbers/>



ANONYMITY IN CRIMINAL PROCEEDINGS: RIGHT TO KNOW?

By Thom Dyke



1. The law concerning the anonymity of those involved in the criminal justice system has evolved in piecemeal fashion over recent decades. Some areas have been helpfully codified in statute, whereas others have been left to languish at the mercy of the common law. As the latest high-profile BBC sex scandal dominates the headlines, accompanied by the usual frenzied online speculation as to the identity of the individual behind the allegations, now is a timely moment to reflect upon the current state of the law and whether there is any prospect of reform on the horizon.
2. The starting point for any discussion of the law of anonymity in the criminal courts is the principle that justice must not only be done, but must also be seen to be done. Far from a mere platitude, this principle is enshrined in the common law. The rationale underpinning open justice was explained by the House of Lords in *Scott v Scott* [1913] AC 417. This case arose from family law proceedings in which a divorce petition had been heard in private by the consent of both parties. Copies of the transcript of the hearing were subsequently circulated by the wife to a third party, which led to the husband bringing contempt proceedings. The Court of Appeal determined it had no jurisdiction to hear an appeal from the High Court's finding of contempt, on the basis that it constituted a criminal matter. The House of Lords held in strident terms that open justice was a fundamental principle, which should only be departed from where it was strictly necessary. To underscore this principle, the court cited nineteenth century philosopher Jeremy Bentham to the effect that "*where there is no publicity there is no justice..it is the keenest spur to exertion and the surest of all guards against improbity*".
3. As time went on, further exceptions were carved out from the general rule of open justice. In 1975, the Heilbron Committee published recommendations for reforming the law concerning sexual offences. It proposed that complainants in allegations of rape should be entitled to automatic anonymity, on the grounds that it would prevent potential complainants being deterred from coming forward. Noting that "*the risk of such public knowledge can operate as a severe deterrent to bringing proceedings*", particular reliance was placed upon the potential severity of the humiliation for complainants in trials where their prior sexual history might be brought out at trial. This remained an ongoing issue until the practice was significantly curtailed by the introduction of section 41 of the Youth Justice and Criminal Evidence Act 1999.
4. The report published by the Heilbron Committee led to the passing of the Sexual Offences (Amendment) Act 1976. Section 4 (1)(a) introduced automatic lifetime anonymity for women who made an allegation of rape. This protection applied from the moment the allegation was made but could be removed by a trial judge where they were satisfied that anonymity imposed a substantial and unreasonable restriction and removal was in the public interest, or by a convicted defendant on application to the Court of Appeal. However, Parliament went beyond the recommendations of the Heilbron Committee and included section 6, which gave a corresponding right to anonymity to a defendant accused of rape, up to the point of conviction.
5. Section 6 was repealed by the Criminal Justice Act 1988. Since then, there have been various calls for its reintroduction. In 2003, the Home Affairs Select Committee published a report proposing that it should be brought back on the grounds that sexual offences should be treated as a distinct category, given the social stigma which

- applies to those accused. The arguments in favour can be summarised under four main heads: (i) equality between complainants and defendants; (ii) the devastating effect of accusations upon suspects and the increased risk of suicide in such cases; (iii) the risk of public disorder in circumstances where suspects are threatened or attacked; and (iv) the perceived risk of one-way anonymity giving rise to false allegations. In recommending the reintroduction of anonymity for defendants, the Committee suggested restricting the scope of the protection, so that it would only apply from the point the allegation was made up until the point of charge. Despite these recommendations the proposals were not taken forward.
6. Subsequently, private members bills were introduced in Parliament in 2010 and 2019 in an attempt to bring about reform. In March 2019 the Anonymity (Arrested Persons) Bill had its second reading. Lord Paddick, the Bill's sponsor, noted that although there was guidance from the College of Policing stating that "*police will not name those arrested, or suspected of a crime, save in exceptional circumstances where there is a legitimate...purpose to do so*", this did not apply to the traditional media, and far less to social media. Despite the title of the draft Bill suggesting a general right to anonymity, its provisions were described in terms of 'reporting restrictions', and were specifically aimed at preventing publication, as opposed to dissemination. It was proposed that such restrictions could be removed on application by the suspect, the police, any person considered by the court to have a sufficient interest, or by the court of its own motion. Curiously, although much of the Parliamentary debate concerned accusations of sexual offences, the draft Bill applied to all criminal offences, regardless of their nature. In doing so, supporters of the Bill were unable to deploy the arguments as to the uniquely devastating nature of sexual allegations, which had been relied upon in 2003 by the Home Affairs Select Committee report.
 7. With no statutory protection, suspects and defendants must rely on the protection of the common law insofar as it grants a right to privacy. It has long been accepted by the courts that the police will owe a private law duty of confidentiality to those who are the subject of an investigation. In *Marcel v Commissioner of Police for the Metropolis* [1992] Ch 225, the Court of Appeal made clear that police powers to seize documents under the Police and Criminal Evidence Act 1984 were subject to a corresponding obligation to the owner of the documents to keep them confidential. More recently, in *ERY v Associated Newspapers Ltd* [2016] EWHC 2760, the High Court confirmed that a suspect who had been interviewed by police in connection with an allegation, had a reasonable expectation of that fact being kept private, together with the contents of his police interview.
 8. It is important to recognise that the common law does not extend a right to privacy to those who engage in potentially criminal activity in a public place. In the case of an individual who was alleged to have taken part in a public riot, the Supreme Court held in *Re JR38* [2013] 2 AC 93 that a suspect's Article 8 right to privacy did not extend so far as to encompass acts undertaken in full view of members of the public.
 9. In 2022, the issue of a right to privacy for those suspected of criminal offences came before the Supreme Court once again, in the case of *Bloomberg v ZXC* [2022] AC 1158. The court was tasked with answering whether and to what extent, a person who has not been charged with an offence can have a reasonable expectation of privacy in relation to information that relates to a criminal investigation into his activities. The case involved the publication by Bloomberg of information relating to the alleged criminality of ZXC, which had been detailed in a Letter of Request sent by the UK to a foreign state. This document stated openly that it was confidential, due to the need to prevent any party from acting to frustrate the criminal investigation. In dismissing



Bloomberg’s appeal, the Supreme Court confirmed that in general, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation. However, whilst a reasonable expectation does exist, the Supreme Court endorsed the views of the Court of Appeal that such an expectation was not invariable, and was to be treated as a starting point, subject to other considerations. The decision emphasises that any such determination will necessarily be a fact-specific enquiry which will need to be tailored to the individual case. Suspects should not, therefore, place unguarded reliance that *Bloomberg v ZXC* will act to guarantee their privacy.

whose circulation would suffer’. Despite the lack of appetite for reform, the unflagging omnipresence – although not omniscience – of social media suggests that questions of anonymity are likely to be of increasing importance to criminal and police law practitioners for the foreseeable future.

10. Is there any realistic prospect for reform? In May 2023, the Ministry of Justice launched a consultation into the principle of open justice. The consultation, entitled ‘Open Justice – The Way Forward’, which will remain open until September 2023, is said to reflect the government’s commitment to uphold open justice, so as to “*strengthen the scrutiny and transparency of the justice system*”. Unfortunately, the consultation fails to address any of the substantive issues around anonymity. Instead, it concentrates on issues such as remote observation for journalists wishing to observe proceedings, and proposals aimed at bringing transparency to the Single Justice Procedure (“SJP”).
11. For all its talk of “*a great opportunity to reassess and modernise how we can deliver open justice by harnessing new technologies available in the modern age*”, the failure of the consultation to address anonymity looks like it will be a missed opportunity. It is easy to be reminded of the conclusions of Sir Richard Henriques in his review of the Metropolitan Police investigations into historic sexual offences, that the introduction of pre-charge anonymity “*...would enrage the popular press*



Crime & Fraud Team



Tom Little KC

Call: 1997 Silk: 2018
Senior Treasury Counsel



Jonathan Loades

Call: 1986
Level 4, RASSO List



Louise McCullough

Call: 1991
Level 4, RASSO List
Fraud Panel Level 3
Serious Crime Panel Level 3



Claire Harden-Frost

Call: 2000
Level 4, RASSO List,
Fraud Panel Level 4



Gareth Munday

Call: 2000
Level 4, RASSO List,
Fraud Panel Level 4



Eleanor Mawrey

Call: 2001
Level 4,
Fraud Panel Level 4



James Thacker

Call: 2001
Level 4, RASSO List
Fraud Panel Level 4
Serious Crime Panel Level 4



Giles Bedloe

Call: 2001
Level 4,
Fraud Panel Level 4



Jennifer Osborne

Call: 2007
Level 4, RASSO List,
Fraud Panel Level 3
Serious Crime Panel Level 3



Thom Dyke

Call: 2007
Level 4, RASSO List
Serious Crime Panel Level 3



Patricia Londono

Call: 2008
Fraud Panel Level 2
Serious Crime Panel Level 2



Stephanie Hayward

Call: 2011
Level 3, RASSO List
Fraud Panel Level 2



William Dean

Call: 2011
Level 2



Helen Pooley

Call: 2012



Laura Hibberd

Call: 2013
Level 3



Thomas Jones

Call: 2015
Level 2



Kyah Mufti

Call: 2016
Level 2



Theodore Bunce

Call: 2017
Level 2



Francesca Kolar

Call: 2018
Level 3



Lucy Lodewyke

Call: 2018
Level 2



Amelia Katz

Call: 2018
Level 2



Madeleine Miller

Call: 2019
Level 2



Louise Thomson

Call: 2019
Level 2



Bilawal Khan

Call: 2017
Level 1

DEKA CHAMBERS

5 Norwich Street, London, EC4A 1DR

T: 020 7832 0500

E: clerks@dekachambers.com W: www.dekachambers.com

