

THE KNOWLEDGE

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SPRING EDITION

Reining in the Long-arm Jurisdiction of the United States Department of Justice

Edward Grange

“Deepfakes” and the Criminal Law: Addressing the Rise of AI-Generated Sexual Material

Danielle Reece-Greenhalgh

R v Skeene and Conspiracy to Defraud – Clarity on “What”, but not “Why”

Nick Barnard

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CONTENTS

4	Profile: Henrietta Ronson
5	Reining in the Long-arm Jurisdiction of the United States Department of Justice Edward Grange
14	“Deepfakes” and the Criminal Law: Addressing the Rise of AI-Generated Sexual Material Danielle Reece-Greenhalgh
22	R v Skeene and Conspiracy to Defraud – Clarity on “What”, but not “Why” Nick Barnard
30	Unintended Consequences of the Expanded Use of Section 28 Pre-Recorded Cross-Examinations Vanessa Reid
40	Sexual Misconduct in the Workplace – The Criminal law Dimension Andrew Smith

WELCOME



Andrew Smith

Managing Partner
and Editor

Welcome to this Spring 2025 edition of The Knowledge

In this edition, we begin by welcoming our new partner, Henrietta Ronson, who joined us on the 1st of April. You can learn more about her practice on the next page.

Edward Grange kicks off our articles by examining *El Khouri v United States of America*, a recent Supreme Court decision with broad implications for extradition, UK/US criminal law enforcement, and the extraterritorial reach of UK money laundering offences.

Danielle Reece-Greenhalgh considers the evolution of offences addressing sexualized “deepfake” images, including the Government’s proposed new offence of creating or requesting such images.

Nick Barnard analyses the Court of Appeal’s decision in *R v Skeene and Bowers*, where two defendants’ convictions were upheld in an SFO case. He suggests what this tells us about the contentious relationship between conspiracy to defraud and statutory fraud offences

Vanessa Reid traces the history of section 28 special measures for vulnerable victims and witnesses in the Crown Court, questioning whether they are improving conviction rates or creating new challenges.

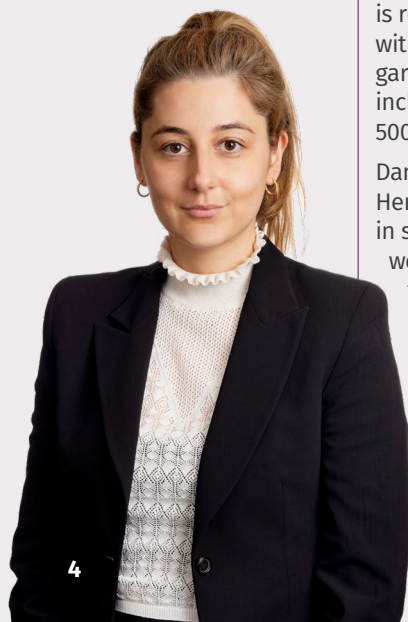
Finally, I explore the criminal law aspects of workplace sexual misconduct investigations, particularly when professional advisors are accused of enabling misconduct or suppressing reports to law enforcement.

Happy reading!

Partner Henrietta Ronson

"Joining Corker Binning is an incredible opportunity to work alongside some of the best minds in criminal defence. The firm has a stellar reputation for fighting smart and achieving results. I can't wait to get started and contribute to its continued success."

Henrietta Ronson



We are delighted to announce that Henrietta Ronson joined Corker Binning on the 1st of April. She will specialise in serious and general crime, alongside Danielle Reece-Greenhalgh and Edward Grange.

Henrietta has extensive experience across a varied portfolio of high-profile, high net-worth and private client cases, including proceedings relating to sexual offences, violence, domestic abuse and drugs, as well as white-collar investigations and prosecutions brought by the NCA, SFO and FCA. She has particular expertise in handling individuals in the spotlight, having dealt with numerous media personalities in the music industry, journalism and politics.

Henrietta was previously a Partner in the Crime and Regulatory Department at Simons Muirhead Burton, where she joined the firm as an Associate in 2018. She is respected for her confident and assured manner with clients and incisive analysis of evidence. She has garnered many accolades and acknowledgements, including rankings in Chambers & Partners, the Legal 500 and Spears.

Danielle Reece-Greenhalgh said, "I am delighted that Henrietta is joining us to further bolster our offering in serious and general crime. She brings with her a wealth of experience combined with formidable talent and well-earned respect in the market, and we are looking forward to welcoming her to the team."

Chambers & Partners 2025: "Henrietta Ronson is super-bright, yet approachable. The combination of her legal brain and an ability to see the human aspect in a case inspires a lot of confidence."

Reining in the Long-Arm Jurisdiction of the United States Department of Justice

In December 2019, a jury in Brooklyn, New York, acquitted Jean Boustani, a lead salesman for a Lebanese shipbuilding company, on allegations that he helped to defraud US investors in bonds backed by the Mozambican government. The verdict was to be the first trial defeat suffered by the DOJ's FCPA Unit in many years, and it appeared to represent a reproach of the DOJ's long held position that it may prosecute foreign individuals for overseas corruption - its so-called "long-arm jurisdiction." Unlike in the UK, the jury spoke after the verdict, revealing the reasons why they acquitted, with one juror saying, "We couldn't find any evidence of a tie to the Eastern District of New York."

Commentators at the time warned against an elevated feeling of optimism, stating:

"We caution against reading too much into any particular jury verdict. Prosecution risks to foreign nationals allegedly involved in such schemes remain acute. It is easy to see a jury considering similar facts in another case reaching a different result."

They were not wrong. In August 2024, one of Boustani's co-conspirators, Mozambique's former finance minister Manuel Chang, who had been extradited from South Africa, was convicted of conspiracy to commit wire fraud and conspiracy to commit money laundering for his role in the "tuna bonds" scandal. The DOJ had clearly listened to

Edward Grange

Partner

¹ <https://www.dlapiper.com/en-gb/insights/publications/2019/12/jury-acquits-jean-boustani-in-apparent-rebuke-of-doj-attempt-to-police-overseas-corruption>



"The DOJ had clearly listened to the juror who had explained why they acquitted Mr Boustani five years earlier, and successfully adjusted their jurisdictional arguments to ensure the trial would not suffer the same fate."

the juror, who had explained why they acquitted Mr Boustani five years earlier and successfully adjusted their jurisdictional arguments to ensure the trial would not suffer the same fate.

However, that victory for the DOJ, in its ability to prosecute overseas corruption by foreign nationals, was dealt a blow on the 10th of February 2025, when President Trump signed an Executive Order² that, for a period of 180 days, amongst other directions, put a pause on new enforcement actions being taken under the FCPA. Whilst some judges³ are set to incur the wrath of the Administration by ignoring the Executive Order, the likely impact will be that prosecutions are indeed delayed whilst a review takes place and/or they are discontinued entirely.

To add further misery to an already deflated DOJ, having suffered several high-profile resignations of its attorneys who refused to bow to demands to discontinue cases, on the 12th February 2025, the UK Supreme Court delivered a judgment that dispatches a sucker punch to the ability of US prosecutors to seek the extradition of those in the UK who are indicted for conduct that took place outside the US. Whilst not being a knockout blow, it certainly put the DOJ on the ropes.

The Supreme Court's decision in *El-Khouri v The Government of the United States*⁴ is likely to have sent seismic shockwaves through the DOJ - Particularly in the Southern District of New York (often referred to as the "Sovereign District"). Prosecutors there have consistently sought to extend their jurisdictional reach further and further abroad, leading some to claim that their long arm keeps getting longer.

Over a split hearing, The Supreme Court had to grapple with the definition of an "extradition offence" and the operation of the dual criminality requirement in section 137 of the Extradition Act 2003. And it was not the first time such a question had been considered by the UK's top court.

For 20 years, since the decision of the House of Lords in *Office of the King's Prosecutor, Brussels v Cando Armas and another*⁵, conduct occurring "in" a Category 2 territory (i.e., a country outside the EU seeking a person's extradition from the UK) could be held to include conduct that occurred outside that territory, depending on where the consequences of that conduct were intended to occur:

*"Actings elsewhere will be sufficient to constitute conduct in that territory so long as their intended effect was to bring about harm within that territory"*⁶.

Judgments since then have been littered with findings of 'intended effects bringing about harm' in the requesting state. These judgments proceeded on the basis that, even if all acts comprising the offence occurred entirely outside the country seeking extradition, they could be deemed to have occurred "in" that country - provided that is where the effects were intended to be felt.

This was not the ratio decidendi of the decision in *Cando Armas* but rather the obiter dicta remarks of Lord Hope, with which all the other Lords agreed. Some erroneously declared after the decision in *El-Khouri* that *Cando Armas* had been overturned. That was to misunderstand the principle of stare decisis and the difference between a judgment's ratio decidendi and its obiter dictum. The obiter remarks - which the Justices in *El-Khouri* described as "mistaken", "flawed", a "muddle", "notwithstanding scrutiny", "illogical", "an error", and "defective" - do not survive post *El-Khouri*, but the ratio remains intact, having not been questioned.

In order to be an extradition offence, the conduct alleged has to satisfy the conditions in one of s137(3)-(5). Putting aside s137(5) (which deals with offences attracting universal jurisdiction), the conditions to be met in order for conduct to be considered an extradition offence are:

(3) (a) the conduct occurs in the category 2 territory;

² <https://www.whitehouse.gov/presidential-actions/2025/02/pausing-foreign-corrupt-practices-act-enforcement-to-further-american-economic-and-national-security/>

³ It was reported by Bloomberg that Judge Michael Farbiarz in New Jersey on 11 March 2025 denied a request for a 180-day delay to a case against former Cognizant Technology Solutions Corp. executives ruling that trial must commence by 7 April 2025 - <https://www.bloomberg.com/news/articles/2025-03-11/judge-denies-long-delay-of-bribery-case-in-test-of-trump-order>

⁴ [2025] UKSC 3

⁵ [2005] UKHL 67, [2006] 2 A.C. 1, HL

⁶ At paragraph 40

"The Supreme Court's decision in El-Khoury v The Government of the United States is likely to have sent seismic shockwaves through the DOJ - particularly in the Southern District of New York (often referred to as the Sovereign District)."

- (ii) the conduct would constitute an offence under the law of the relevant part of the United Kingdom, punishable with imprisonment or another form of detention for a term of 12 months, or a greater punishment if it occurred in that part of the United Kingdom;
- (c) the conduct is so punishable under the law of the category 2 territory;
- (4) The conditions in this subsection are that -
 - (a) the conduct occurs outside the category 2 territory;
 - (b) in corresponding circumstances, equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom, punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment;
 - (c) the conduct is so punishable under the law of the category 2 territory.

The Supreme Court in El-Khoury held that sections 137(3) and 137(4) are mutually exclusive. Section 137(3) applies if some or all of the conduct occurs in the country seeking extradition. Section 137(4) applies if all of the conduct occurs outside the country seeking extradition. And for both section 137(3) and 137(4), and in distinction to Lord Hope's observations in Cando Armas, conduct occurring "in" the country seeking extradition means where the person's acts specified in the extradition request were physically carried out, rather than the location of their intended effect.

Plainly, this interpretation may hamper the US's ability to seek the extradition of those accused of cross-border criminality, who did not carry out any of the physical acts of their alleged offending in the US. For this purpose, the court is only concerned with where the person's acts specified in the extradition request were physically carried out - ignoring "mere narrative

"The court must no longer consider where any consequences of those acts were intended to be felt, (or indeed, where they were in fact felt)."

background and focusing on the substance of the alleged criminality." The court must no longer consider where any consequences of those acts were intended to be felt, (or indeed, where they were in fact felt).

In Mr El-Khouri's case, the Supreme Court was in no doubt that none of the conduct comprising the alleged offending brought the case within section 137(3): "Mr El-Khouri was not within the United States at the time when he is alleged to have done any act constituting or forming part of the alleged dealing; the dealing is not alleged to have occurred on a market regulated in the United States, and the professional intermediary allegedly relied on by Mr El-Khouri was not within the United States when the alleged dealing occurred".

As such, the dual criminality analysis had to proceed under section 137(4). This required the court to consider whether an analogue offence would be committed under UK law if the "alleged conduct of the requested person (and any other relevant event) occurring outside the territory of the requesting state had occurred outside (the relevant part of) the UK (and vice-versa)." In other words, would the alleged conduct amount to an extra-territorial offence under UK law? In Mr El-Khouri's case, the court was satisfied that it did not, since the analogue offence of insider dealing is strictly territorial in scope.

Not deterred, the US then sought to equate the alleged conduct to an offence of money laundering under section 329 of the Proceeds of Crime Act 2002. In support of their argument as to the extraterritorial application of the Proceeds of Crime Act 2002, *R v Rogers and others*⁸ was cited and relied upon. In that case, a UK citizen who lived in Spain, permitted money constituting criminal property obtained by defrauding persons in the UK, to be paid into and withdrawn from his Spanish bank account. He was convicted under Section 327(1)(c) of the Proceeds of Crime Act 2002. The Court of Appeal rejected his argument on appeal that the UK did not have jurisdiction, declaring the

"provision at section 340(11)(d) that money laundering is an act which would constitute an offence (including one under section 327) if done in the United Kingdom, appears to admit of no other construction than that Parliament intended, extraterritorial effect to this legislation."

Lord Hope was not the only one to come under attack. The Supreme Court in *El-Khouri* concluded that the case of *Rogers* was wrongly decided (which many commentators stated at the time it was decided)⁹. They suggested that

"It is unfortunate that counsel for the defendant and the court in Rogers failed to recognise that section 340(11)(d) merely defines "money laundering" and does not either create an offence itself or extend the territorial scope of the offences created by sections 327, 328 and 329 to acts done abroad".

The Proceeds of Crime Act 2002, according to the Justices in *El-Khouri*, "does not provide that to acquire, use or possess abroad property derived from criminal conduct committed abroad, constitutes a criminal offence in the United Kingdom." Thus, the US is not the only jurisdiction to be reined in by the Supreme Court's decision - the UK's exorbitant money laundering jurisdiction has also been cut back to its territorial size. This will come as welcome relief to many MLROs and lawyers who had previously been forced to prepare SARs on the assumption that entirely extraterritorial conduct gave rise to "criminal property".

Whether US prosecutors will now seek to reframe (or refrain from initiating) their extradition requests to the UK remains to be seen. Clarifying the law is one thing, but changing a prosecutorial culture as entrenched as the DOJ's is quite another.

It also remains to be seen whether UK enforcement agencies will now feel more emboldened to commence their own investigations into conduct occurring in the UK. The FCA did not seek to prosecute the alleged

⁹ CLW/14/31/7

⁷ At paragraph 71

⁸ [2014] EWCA Crim 1680, [2015] 1 W.L.R. 1017, CA

"President Trump's dramatic actions have cast doubt on whether the DOJ will remain as the world's policing entity for financial crime – and The UK Supreme Court has now played its part in reining in the DOJ's famous long arm jurisdiction."

conduct that Mr El-Khouri was accused of, concluding that there was insufficient evidence to provide for a realistic prospect of conviction. Similarly, the SFO refused to prosecute the late Mike Lynch for conduct that mainly occurred in the UK. Perhaps they will now be more eager to take the lead on prosecuting conduct that occurred in the UK, rather than ceding jurisdiction to their US counterparts. But again, that requires a change in prosecutorial culture alongside the correct understanding of criminal jurisdiction.

In ongoing extradition proceedings before Westminster Magistrates Court, pending judgments¹⁰ have been adjourned to allow the parties to consider the impact of the decision in El-Khouri on the dual criminality exercise, to be conducted by the court of first instance.

This has resulted in further information being served by the requesting state, not originally contained within the extradition request, which seeks to provide further detail on the US nexus, in order to strengthen its jurisdictional claim that conduct occurred "in" its territory.

Jurisdictional arguments are rarely as clear-cut as they were in El Khouri; where a requested person is part of an alleged conspiracy or joint enterprise, the UK's complex rules on the extraterritorial application of inchoate liability may provide a hook with which to argue that some conduct occurred in the US.

But one thing is clear: the case of El-Khouri will inevitably lead to current cases before the UK courts (as well as future cases in the pipeline) being reconsidered on both sides of the Atlantic, where the extradition request frames the conduct as physically occurring outside the US.

President Trump's dramatic actions have cast doubt on whether the DOJ will remain as the world's policing entity for financial crime – and The UK Supreme Court has now played its part in reining in the DOJ's famous long arm jurisdiction.

¹⁰ <https://www.law360.com/corporate-crime-uk/articles/2306240>

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“Deepfakes” and the Criminal Law: Addressing the Rise of AI-Generated Sexual Material

Danielle Reece-Greenhalgh

Partner

In recent years, the use of AI and deep learning to create hyper-realistic images, videos and audio - commonly known as “deepfakes” - has surged exponentially. AI technology is able to take existing (i.e. “real”) image and audio data and replace or alter key details. Facial features, speech and movement can all be modified in a manner so seamless that it is often impossible to distinguish between the real and computer-generated content.

Deepfakes are often discussed in criminal law in the context of harmful sexualised content, particularly pornography featuring depictions of individuals without their consent. AI models that enable the production of pornography from (a) text prompts or (b) existing (non-pornographic) images have caused a proliferation of both child sexual abuse material and deepfake pornography depicting real adult individuals. This, in turn, has exposed lacunae in the criminal law which the government has vowed to address.

In January 2025, the Ministry of Justice announced a “crackdown” on sexually explicit deepfakes.¹ Along with an overhaul of existing voyeurism laws (to widen the taking of an intimate image without consent beyond “upskirting” and to criminalise the installation of equipment with intent to take

such images), this crackdown includes proposed new offences of “creating or requesting the creation of a purported intimate image of an adult.” The specific acts to be criminalised are therefore, (a) the creation of the purported (i.e. deepfake) intimate image, or (b) requesting its creation.

Whilst the government had initially announced that these proposed “creating” and “requesting” offences would be incorporated into the Crime and Policing Bill, they were subsequently expedited into legislation already tabled before the House of Lords. They now appear at section 135 of the Data (Use and Access) Bill.² Given the renewed focus on the creation of deepfakes and the legislative priority it has been afforded, it is likely that they will now pass into law under the current government.

The legislative debate

To understand why these “creating” and “requesting” offences are being proposed now, it is necessary to discuss the history of the legislative debate. For many years, the police and CPS investigated and sought to prosecute aspects of the adult “deepfake” trade using non-sexual offences. For example, harassment, stalking and malicious communications laws. These attempts were only intermittently successful, and as a result, many campaigners began to advocate for specific sexual offences targeting both the creation and the distribution of adult deepfake images.

These campaigns pointed to the fact that individuals who discover deepfake sexual images of themselves report a sense of violation of their bodily integrity, often likened to a sexual contact offence.

Two years ago, Parliament finally responded. The Online Safety Act 2023 inserted section 66B into the Sexual Offences Act 2003 (“SOA 2003”), which created a number of offences concerned with sharing real and deepfake images. But the section 66B offence did not impose criminal liability on those who do no more than make

“In recent years, the use of AI and deep learning to create hyper-realistic images, videos and audio - commonly known as ‘deepfakes’ - has surged exponentially.”

¹ <https://www.gov.uk/government/news/government-crackdown-on-explicit-deepfakes>

² <https://www.gov.uk/government/news/better-protection-for-victims-thanks-to-new-law-on-sexually-explicit-deepfakes>

explicit images of individuals without their consent. Criminal liability only arises if those images are sent or a threat to send is made.

The basis for this distinction was that the perceived harm was thought to arise only from the publication of the images (or fear of the same) rather than the existence of the images themselves.

The decision not to criminalise the production of images stemmed directly from the recommendations of the Law Commission³ which stated that:

*"We do not recommend that the act of "making" an intimate image without consent should fall within the scope of the criminal law. Instead, we consider that the act of sharing a "made" intimate image – such as a "nudified" image – should be the focus of the criminal law. We recognise that this may be disappointing to those who have been victims of such behaviour. However, as with a possible "possession" offence, we consider that a "making" offence would be difficult to enforce, and that the most harmful consequences of this behaviour can be captured through a "sharing" offence."*⁴

Thus, the base offence in section 66B(1) is of intentionally sharing photographs or film which show (or appear to show) an individual in an "intimate" (not necessarily sexual) state, without the consent of the individual depicted⁵. Sharing with the intent to cause alarm, distress or humiliation to the individual depicted (under section 66B(2)), or sharing for the purpose of sexual gratification (under section 66B(3)), are aggravated versions of the base offence, with commensurate increases in sentencing. Section 66B(4) criminalises a person who threatens to share real and deepfake images, but this offence can only be committed if the person intends that the victim, or a person that knows him/her, will fear that the threat will be carried out, or is reckless as to that fear arising. Prosecution for this section 66B(4) offence can be

brought regardless of whether the material threatened in fact exists, or indeed whether it, in fact, depicts (or purports to depict) the intended victim in an intimate state.

The 2025 reforms: "Cracking Down on Deepfakes"

Since these changes to the SOA 2003 came into force, calls for the intimate image provisions to be widened further to take into account a broader range of conduct, including the solicitation and creation of images, have not abated. Campaigners have argued that the existence of the images alone is sufficient to invoke feelings of vulnerability and violation.

Section 135 of the Data (Use and Access) Bill is the government's expedited response, and would insert a new section 66E into the SOA 2003. It is currently drafted as follows:

- (1) A person (A) commits an offence if:
 - (a) A intentionally creates a purported intimate image of another person (B),
 - (b) B does not consent to the creation of the purported intimate image, and
 - (c) A does not reasonably believe that B consents.

"Purported intimate image" is a new concept in law, defined as an image which:

- (a) appears to be, or to include, a photograph or film of the person (but is not, or is not only, a photograph or film of the person),
- (b) appears to be of an adult, and
- (c) appears to show the person in an intimate state.

Intentionally requesting another (either in general or specific terms) to create a purported intimate image would also be an offence. There is no requirement for the request to be explicit – it would include "doing an

"Campaigners have argued that the existence of the images alone is sufficient to invoke feelings of vulnerability and violation."

³ Law Commission: Intimate image abuse: a final report. Law Com No 407, 6 July 2022.

⁴ Ibid

⁵ Section 66B

"The proposed offence, as currently drafted, will criminalise those who experiment with the production of deepfake images on their computers, with no intent to cause harm to the individual depicted or to publish that material."

act which could reasonably be taken to be a request (such as, for example, indicating agreement in response to an offer or complying with conditions of an offer)." The "requesting" offence could therefore be committed with no words being exchanged at all.

Both the "creating" and the "requesting" offences would be triable only in the Magistrates' Court, carrying a possible custodial sentence of up to six months (being the current statutory maximum) and/or an unlimited fine.

These new offences, if enacted, would certainly achieve the objectives of those who have campaigned long and hard for the creators of deepfake images to be held to account. "Crackdown" is the right term given that the offence will ensure that all people involved in the deepfake trade – including those who request images, those who create them and those who distribute them – will now face criminal sanction. Attempts to limit the proposed offences and their consequences (for example by way of a "reasonable justification" defence or removing the possibility of a custodial sentence) have been rejected. However, there are three potential problems with the new offences. One legal, one practical and one ethical.

Firstly, the legal issue, which is one of definition. As currently drafted, the new offences do not define "creation." It will therefore be for the courts to determine whether Parliament's choice of the word "creation" implies something different from the most closely related concept in the criminal law – that of "making" indecent images of children contrary to section 1(1)(a) PCA 1978. "To make" has been very widely defined over the years by the courts, and can include almost any action whereby an image is duplicated or stored (including photocopying, downloading and receiving unsolicited images over social media) as well as the physical creation of the root image. It is assumed (although it is not clear) that the "creating" and "requesting" offences will be restricted to the act of

bringing a deepfake image into being, rather than some of the more passive acts that fall within the scope of the “making” offence.

This definitional issue brings the second, practical problem into play, which is one of enforcement of the “creating” offence. The uncertainty as to the scope of “creation” may well pose difficulties for police where a suspect is in possession of deepfake images, but where the police are unable to establish with any certainty, who originally created them. A suspect may well say that the images have been sent to him unsolicited, but that he nevertheless retained possession of them or that he deleted them. Assuming that “creation” is limited to the act of bringing the deepfake image into being (as opposed, for example, to merely saving the image on the computer’s hard drive), the police would need to prove that the suspect had done more than simply possess the image. They would need to undertake forensic analysis of the computer (as well as the suspect’s other electronic devices) in order to attempt to reconstruct the precise history and derivation of the image.

Furthermore, by its very nature, the new “creating” offence requires no-one apart from the creator to see the image. The image may have been created solely for the creator’s own purposes. But even if it was created in anticipation of being distributed in the future, the image never actually has to move from the creator’s device for the creator to be criminally liable. It is therefore likely to be an offence which is prosecuted only (a) where images are located as a result of other (unrelated) investigations requiring a search of a suspect’s devices; or (b) where a third party accidentally or intentionally obtains access to the device of an individual in possession of such material.

These difficulties in detection and enforcement may well result in a lower charge rate for this offence than was hoped for by its advocates both within and outside Parliament. The limitations help to explain why many

campaigners consider that the offence must go hand in hand with more effective regulation of the software publicly available to create deepfake images.

The third problem might be called an ethical one. The proposed offence, as currently drafted, will criminalise those who experiment with the production of deepfake images on their computers, with no intent to cause harm to the individual depicted or to publish that material. Essentially, individuals who create their own adult pornography.

Whilst it may seem like an over-generalisation, that demographic is likely to include a significant proportion of adolescent males with ready access to and knowledge of AI software, combined with developing sexual interests and curiosities. It will be for each local police force and the Crown Prosecution Service to then exercise their discretion over how these individuals should be treated, having to balance the interests of those (typically women) depicted in deepfake imagery against the risk of over-criminalising young men who perhaps need education and rehabilitation, rather than a spell behind bars.

"It will be for each local police force and the Crown Prosecution Service to then exercise their discretion over how these individuals should be treated - having to balance the interests of those (typically women) depicted in deepfake imagery against the risk of over-criminalising young men who perhaps need education and rehabilitation, rather than a spell behind bars."

R v Skeene and Conspiracy to Defraud – Clarity on "What", but not "Why"

Nick Barnard

Partner

"Whilst no one would demur from the proposition that the offence is 'exceptionally broad,' that is not the same thing as an offence without boundaries. It is not literally a catch-all."

So said Hickinbottom J in his judgment in R v Evans (Eric) [2014] 1 W.L.R. 2817, concerning the scope of the common law offence of conspiracy to defraud. However the relevance to this article is not the substance of the learned judge's conclusion, but that he needed to state it at all.

There is no other criminal offence in the law of England and Wales where the balance between the generality of what the prosecution must prove, and the potential consequences on conviction is so disproportionate. Whilst statutory offences such as careless driving or basic public order offences might be drafted to capture an array of different behaviours, and with no need to prove any particular consequence, these are only punishable by fines. By contrast, conspiracy to defraud carries a maximum sentence of 10 years and non-custodial sentences on conviction are the exception rather than the rule.

On a first reading for those unfamiliar with its history, it may seem extraordinary that Hickinbottom J considered it necessary to confirm that conspiracy to defraud is not in fact an 'offence without boundaries.' However, a review of the case law confirms that, in some instances, the offence has been (wrongly) regarded as carte blanche to treat alleged dishonesty as an offence prosecutable in

itself, with no need to address the related conduct - or in other words, whether or how that dishonesty was put into action.

The overreach of this approach became particularly stark following the passing of the Fraud Act 2006. This specifies both a common mens rea (dishonesty, with intent to make a gain for oneself or another, or cause loss to another or expose another to a risk of loss) and the specific actus reus of the three distinct fraud offences set out at sections 2 to 4.

Whilst these offences under the Fraud Act 2006 can be committed in any number of ways, they could not fairly be described as 'without boundaries'. That being the case, why is an adjacent (and indeed often overlapping) common law offence so apparently ill-confined as to require the judicial clarification that it does, in fact, have limitation?

The answer lies in the fact that conspiracy to defraud was expressly preserved by the Fraud Act 2006, despite the preceding Law Commission report recommending its abolition. The explanation at the time - as set out in the corresponding Attorney General's Guidance last revised in 2012 but still applicable today¹ - was that its preservation was considered to be in the 'interests of justice' to facilitate prosecutions where the 'complete picture' of an alleged conspiracy could not be properly presented by a series of substantive charges or statutory conspiracies. Anticipating the risk of its overuse, the Guidance recommended that prosecutors should always consider whether the

"The overreach of this approach became particularly stark following the passing of the Fraud Act 2006."

¹ <https://www.gov.uk/guidance/use-of-the-common-law-offence-of-conspiracy-to-defraud-6>

relevant conduct could properly be addressed on a statutory basis. If not, the rationale for charging the common law offence must be recorded and approved by a supervising fraud specialist.

The Guidance also indicated that a review of such cases would subsequently be undertaken, presumably with a view to considering whether it should be abolished after all. However, in practice, no such review has materialised and there seems to have been little decline in prosecutorial appetite for conspiracy to defraud, particularly in large, complex, multi-jurisdictional or otherwise novel cases.

In that context, it should be no surprise that, almost 20 years after the implementation of legislation intended to supersede it, the proper application of conspiracy to defraud continues to be a source of argument.

One recent example is the Court of Appeal judgment in *R v Skeene & Anor* [2025] EWCA Crim 17, which is worth examining as both a succinct history of conspiracy to defraud in practice, and as confirmation of the matters which must be proved by the prosecution.

The two defendants in *Skeene* were convicted in May 2022 of three counts of conspiracy to defraud and one count of misconduct in the course of winding up. Each was sentenced to a total of 11 years of imprisonment. The three conspiracy counts related to three investment frauds involving Brazilian teak plantations in which £37 million was obtained from approximately 2,000 members of the public.

Having been refused permission to appeal by a single judge, the defendants renewed their applications against conviction on various grounds. The first and most substantive of these grounds was that:

- (i) The indictment was defective with respect to the three fraud counts, on the basis that it failed to adequately define the conspiracy

with which the defendants were charged, and

- (ii) As a result, the judge's summing up and directions had failed to properly set out the necessary elements of the offence.

Regarding issue (i), the relevant indictments all followed the same format:

[The defendants], during [relevant time period], conspired to defraud investors in [relevant investment project] by dishonestly:

1. ...
2.

The indictment then set out a numbered list of acts, ranging from the general '*Devising and carrying on a scheme that would not generate returns for investors*,' to specified misrepresentations and misappropriations. It was implicit in the structure that each of these acts was alleged to have been carried out 'dishonestly' and were put on an 'and/or' basis. In other words, the prosecution did not allege that either or both defendants had carried out or been involved with all of the acts (whether dishonestly or at all). Nor was any particular act averred to have definitely occurred - or if it had occurred, been committed dishonestly.

The defendants submitted that the indictment failed to adequately define the conspiracy with which they were charged. In particular, the list of acts was '*a menu of options laid out in the particulars, some of which might properly have been regarded as the substance of the agreement, most of which appeared to be simply acts done, at some stage and by someone, in pursuance of some agreement which had already been made*'. As such, the defendants submitted that it did not comply with Criminal Procedure Rule 10.2(1), and specifically sub-paragraph (2)(b), which requires an indictment to contain 'such particulars of the conduct constituting the commission of the offence as to make clear what the

prosecutor alleges against the defendant’.

As a result, not only was the indictment itself defective in failing to make clear the case that the defendants were required to meet, but the trial judge’s summing-up and route to verdict were also flawed. The defence asserted that the prosecution’s burden went beyond proving the existence of an agreement between the defendants to defraud (i.e. dishonestly to prejudice another person’s economic interests, as per the judgment of Viscount Dilhorne in *Scott v Metropolitan Police Commissioner* [1975] AC 819). Instead, it was incumbent on the prosecution to prove that one or more of the numbered acts had actually occurred pursuant to the conspiracy. As such, the jury ought to have been directed (akin to a Brown direction²) that they must conclude, not only that there had been an agreement to defraud, but they must agree that one or more of the numbered acts had occurred in pursuit of that agreement – and their agreement must be in respect of the same act(s).

Unfortunately for the defendants, the Court of Appeal gave short shrift to those submissions. In tracing the history of conspiracy to defraud (and in particular, the form of indictments) from *Scott*, via *R v Landy* [1981] 1WLR 355, *R v Hancock* [1996] 2 Cr App R. 554 and *R v K* [2005] 1 Cr App R 25, the court concluded that the essential ingredients of a conspiracy to defraud are those set out in *Scott*. This is an agreement to dishonestly prejudice another’s economic interests. If those elements are made out the offence is complete. In support of their position, the defendants had little law to rely on, beyond some dicta in *R v K* expressing the need for clarity in drafting indictments and the general statement of *Hickinbottom J* in *Evans*, set out earlier.

In exploring this history, the Court of Appeal in *Skeene* distinguished the position in *Brown*, which concerned a statutory offence for which a particular element (the making of a false or misleading

statement) was essential. Consequently, it was necessary for the jury to be unanimous on the conduct forming that element of the offence. By contrast, a conspiracy to defraud does not require the prosecution to prove that any particular acts flowed from the agreement. As succinctly described by Thomas LJ in *R v K*, ‘provided there is that certainty in the agreement, it matters not how the participants individually intended to go about or actually went about defrauding the intended victims of their money.’

In the case of *Skeene*, the numbered acts were included on the indictment, not because they were an essential element of the offence, but because they were provided as an indication of the matters on which the prosecution intended to rely in seeking to prove the existence of a dishonest agreement between the defendants.

As well as informing the defendants of the case they had to meet, they acted as a safeguard to prevent the prosecution shifting its position without leave of the court. Therefore, the indictment as it was drafted did comply with CrimPR 10.2(1), in that it made clear to the defendants how the prosecution intended to prove the necessary elements of the offence. Similarly, the judge’s summing up and directions properly addressed the issues on which the jury were required to agree.

With reference to the original trial, it was noted that the defendants had opposed the introduction of additional counts of forgery, instead asserting that these could properly be included as one of the numbered counts in support of the substantive conspiracy charges. This indicated that the defendants knew and accepted that none of the numbered particulars were, in themselves, essential elements of the offence that had to be proved by the prosecution and agreed on by the jury.

The judgment in *Skeene* should be praised for

"The judgment in Skeene should be praised for setting out clearly, and without demur, what the law is concerning conspiracy to defraud."

² As per *R v Brown* (Kevin) (1984) 79 Cr App R 115, in which a jury is directed that, where an indictment alleges various matters in respect of an element of the offence – each of which was sufficient in itself to satisfy that element – it is sufficient for the jury to convict on the basis of only one such matter, provided that they are in agreement that the same matter is proven.

"Skeene is no exception to the many concerns raised about the continuing life of conspiracy to defraud."

setting out clearly, and without demur, what the law is concerning conspiracy to defraud. However, this still leaves the debate unresolved as to what the law should be. A lay observer is likely to find it incredible that such a serious offence remains available to prosecutors nearly 20 years after legislation codifying offences intended to supersede it. We can only guess the reaction of juries if they learned that, although the prosecution may have put forward a vast 'menu' of particulars alleged to have been the result or implementation of the conspiracy, they do not need to be convinced of any of them – either individually or as a group.

In direct contrast to a case requiring a Brown direction, it seems very likely, if not inevitable, that each of the 12 jurors would come to a different conclusion on the defendant's conduct, and yet they could properly reach a guilty verdict regardless. It is not so much a case of the prosecution having their cake and eating it, but rather being permitted as many cakes as necessary to suit their case.

Skeene is no exception to the many concerns raised about the continuing life of conspiracy to defraud. The ongoing LIBOR/EURIBOR rigging appeals heard by the Supreme Court last month are a good example. As indicated by the Attorney General's guidance, the retention of the common law offence was intended as a safety net where statutory offences were inadequate. But in practice, it appears to often be treated as a tool to make difficult cases seem straightforward. As also clearly indicated by the guidance, the expectation – in line with the Law Commission's recommendation – was that conspiracy to defraud would be likely to be phased out as the embedded modern statutory regime.

Whilst the issue may have slipped off the political radar in the intervening years, it remains a live issue for criminal courts – and a compelling example of 'better late than never.'

Unintended Consequences of the Expanded Use of Section 28 Pre-Recorded Cross-Examinations

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As discussed in this publication five years ago¹, special measures for witnesses in criminal proceedings have existed in England and Wales in various forms for over a century. The Youth Justice and Criminal Evidence Act 1999 first introduced a range of special measures for eligible categories of adult witnesses, and also consolidated many of the existing protections for child witnesses, ushering in the modern era of special measures.

The most recently introduced special measure is pre-recorded cross-examination and re-examination of eligible witnesses under s.28 of the Act. Taken together with s.27, which allows pre-recorded evidence-in-chief through video-recorded police interviews, s.28 allows a witness to record the entirety of their evidence in advance, without the need to attend trial. Section 28 is intended to improve the witness experience by reducing the stress and anxiety of waiting for an uncertain trial date and enhance evidence quality by allowing witnesses to give evidence closer in time to relevant events. It is also intended to increase participation by witnesses who might

otherwise decline to attend a trial. Witnesses are spared the prospect of giving evidence again in the event of a re-trial, as their pre-recorded evidence can be re-used at any subsequent trial. These goals have become increasingly salient in light of the eye-watering trial delays caused by the current backlog in the criminal courts.

First piloted in 2014 for vulnerable witnesses in a small number of early adopter courts, the use of s.28 has dramatically increased since 2021, when it was made available for vulnerable witnesses in all Crown Courts and rolled out to intimidated witnesses in a larger number of courts. As of September 2022, s.28 has been made available nationwide to both vulnerable and intimidated witnesses, and pre-recorded cross-examinations have now been relied on in thousands of criminal trials.

However, questions remain as to whether s.28 has been rolled out without sufficient consideration of the impact on criminal proceedings overall. Whilst the programme has been praised by many victims' rights advocates, and touted by the Government in response to public outrage over the inadequate handling of rape cases, practitioners who work on s.28 cases have long raised concerns about the impact on listings practices and the court backlog. Concerns have also been raised about under-funding of the necessary staffing and technology and the potential undermining of defendants' rights to a fair trial.

There is now evidence indicating that the use of s.28 special measures may also have a significant negative impact on conviction rates. One recent study found that there were 10 per cent fewer convictions overall in jury trials that used s.28 pre-recorded evidence, and that conviction rates were 20 per cent lower in most types of rape trials.² A recent MoJ impact assessment called that conclusion into question, finding that s.28 had effectively no impact

¹ Pre-recorded cross examination and the expansion of "special measures" | The Knowledge (12 November 2020)

² Written evidence submitted by Professor Cheryl Thomas (PRE0029) to Justice Select Committee (December 2023)

on conviction rates.³ Further data is clearly needed before any definitive conclusions can be drawn, but these preliminary findings raise difficult questions about how to balance the desire to improve the experience of vulnerable and intimidated witnesses against the possibility of distorting the outcomes of criminal trials.

Eligible Witnesses

The Section 28 procedure is now available in all Crown Courts to both vulnerable and intimidated witnesses. A vulnerable witness is defined as any child under 18 and any witness whose quality of evidence is likely to be diminished due to a mental or physical disorder or disability. An intimidated witness is defined as any witness whose quality of evidence is likely to be diminished by reason of fear or distress, as well as any complainant in a sexual offence, domestic abuse allegation, or specified human trafficking offence and any witness in specified categories of serious violent offences.

A court will not automatically grant a s.28 direction to all eligible witnesses. The court must first satisfy itself that the special measure is likely to maximise the quality of the witness's evidence, and then consider any views expressed by the witness. Finally, the court must consider whether the measure might tend to inhibit the evidence from being effectively tested by a party to the proceedings. Certain groups, including the Law Commission⁴ and the Victims Commissioner⁵, have called for all complainants in sexual offences cases to be automatically entitled to pre-record the entirety of their evidence before trial, should they wish to do so. For the time being however, courts must still engage in a balancing exercise which includes consideration of whether a s.28 direction would infringe on a defendant's ability to challenge the evidence against them fairly and effectively.

³ Impact Evaluation of Pre-Recorded Cross Examination for Vulnerable & Intimidated Witnesses | Ministry of Justice (10 March 2025)

⁴ Evidence in Sexual Offences Prosecutions: Consultation Summary | The Law Commission (23 May 2023)

⁵ Next steps for special measures: A review of the provision of special measures to vulnerable and intimidated witnesses | Victims Commissioner (May 2021)

Restrictions on Cross-Examination

Where a s.28 direction is made, a judge has the discretion to order a ground rules hearing (GRH) and make directions, which may include restrictions on the form or content of questions that can be asked of the witness. The use of pre-approved limited cross-examination questions for child witnesses has been approved since the landmark case of *R v Baker* [2010] EWCA Crim 4. Subsequent case law has held that a defendant's right to a fair trial is not compromised by judicial limitations on cross-examination of a child or vulnerable adult witness.⁶ It has also held that any potential unfairness can be dealt with by appropriate directions to the jury, explaining the limitations on cross-examination and the reasons behind them.⁷

Although s.28 is no longer limited to vulnerable witnesses, it has become standard practice in many s.28 cases to require a list of cross-examination questions for pre-approval. This approach was affirmed in *R v Dinc* [2017] EWCA 1206, in which the complainant was an autistic 14-year-old child. The trial judge reviewed and pre-approved questions to be asked in cross-examination, and the complainant was cross-examined using the s.28 procedure. The conviction was appealed partly on the basis that the restriction on cross-examination questions had undermined the fairness of the trial.

The Court of Appeal noted that the appellant had not been able to identify a proper question he had been prevented from asking, or an issue that was not aired, stating that, "There is nothing inherently unfair in restricting the scope, structure and nature of cross-examination or in requiring questions to be submitted in advance, in any case involving a child witness or a witness who suffers from a mental disability or disorder. This applies to all cases, not just those in the section 28 pilot scheme." The Court clarified that previous case law "simply reminded trial judges of the potential for prejudice if a defence

⁶ *R v Edwards* [2011] EWCA Crim 3028 (a defendant's right to a fair trial was not compromised because his advocate could not cross-examine in the "traditional" way).

⁷ *R v Wills* [2011] EWCA Crim 1938 (judges should explain the limitations on cross-examination to a jury and the reasons for them).

"With the extension of the s.28 procedure to intimidated adult witnesses, some judges have, in those cases, adopted the practice of pre-approving a list of topics, rather than specific questions to be asked in cross-examination."

advocate is wrongly prevented from pursuing a legitimate line of questioning."

In *R v A* [2022] EWCA Crim 988, the Court of Appeal considered the restriction of cross-examination questions asked of a complainant who was over 18 at the time of the s.28 hearing and not suffering from a mental disability or disorder. The Court found that the amendments to the questions made by the judge did not undermine the conviction, as they were "unobjectionable and proportionate" and "did not alter the substance or nature of the questions." The Court noted that although the complainant was "no longer a child" this was "a sensitive case in which an allegation of sexual assault was made by one young family member against another – and where the complainant was barely out of her teens."

With the extension of the s.28 procedure to intimidated adult witnesses, some judges have, in those cases, adopted the practice of pre-approving a list of topics, rather than specific questions to be asked in cross-examination. Whilst this is a lighter touch approach than pre-approving every question, it remains entirely a matter of judicial discretion, and the practice has yet to be considered by the Court of Appeal. It is not clear that there is any justification for routinely constraining the form or substance of counsel's questioning of adult witnesses with normal communication capabilities.

Further Questioning of Witnesses

Once a s.28 recording has been made, a witness may only be re-called for further questioning if the party wishing to re-call the witness has become aware, since the time when the original recording was made, of a matter which that party could not, with reasonable diligence, have ascertained by that time, or where it is otherwise in the interests of justice.

The timing of disclosure and formulation of charges therefore becomes particularly important in s.28

cases. The defence is effectively required to act with extra diligence in pursuing disclosure issues, given the high bar for re-calling a witness - even where new information or evidence becomes available after the cross-examination has taken place. As a practical matter, judges are often very reluctant to delay the s.28 timetable once it has been set, even where disclosure issues arise.

This issue was addressed in *R v Benn-Landale* [2017] EWCA Crim 132, a case in which the indictment was amended at trial to add additional charges. The defendant was initially charged with two counts of rape and the defence to the charges was consent. The cross-examination of the complainant was carried out accordingly, using the s.28 procedure. At trial, the Crown made a successful application to add two additional counts of sexual activity with a child under 16. The defence to those charges was a belief in the complainant being at least 16. Consequently, an issue arose which had not been relevant to the original charges, and therefore had not been explored in the cross-examination - namely when and how the complainant had communicated her age to the defendant.

The conviction was appealed on the ground that the judge should not have granted leave to add the alternative counts, because the complainant was not asked during the s.28 cross-examination about when she told the defendant her age. The Court of Appeal dismissed the appeal, finding that the safety of the conviction was not undermined because the complainant's age and communication of her age to the defendant was not suddenly raised mid-trial. It does not appear that any application was made by the defence to re-call the witness at trial. Nonetheless, the Court noted that "s28 aims, among other things, to protect a vulnerable witness from the ordeal of giving evidence during the trial in a Crown Court. Necessarily, the aims include attention to

the undesirability of the process being undermined by subsequent recall of the vulnerable witness for further questions."

This decision suggests that the bar will be very high for re-calling a witness in a s.28 case, even where the fundamental nature of the charges and applicable defences have altered by the time of trial.

Impact on the Trial Process

In April 2023, the Ministry of Justice published a process evaluation⁸ intended to assess whether the expansion of s.28 for intimidated witnesses was working as intended. The research consisted of interviews with 11 intimidated witnesses, 3 trial advocates, and 26 other practitioners including court staff, police officers, Independent Sexual Violence Advisors and CPS reviewing lawyers.

The MoJ process evaluation found that both practitioners and witnesses noted an improved experience for witnesses giving evidence via s.28 as opposed to live cross-examination. Key factors cited were physical separation from the defendant and being able to seek support and therapy at an earlier point in time. Practitioners raised concerns about whether police were unduly influencing witness decisions to seek special measures. Advocates and court staff both believed s.28 to have a negative impact on court listings, due to the additional hearings and the need for the same judge and advocates to be available at all hearings.

On the basis of this somewhat limited data, then-Justice Secretary Dominic Raab announced that "pre-recorded evidence improves rape victims' experience of court".⁹ He asserted that the successful rollout of pre-recorded evidence to intimidated witnesses was a key indication that the Government was close to achieving its targets of driving up prosecutions and convictions for adult rape cases.

"The MoJ process evaluation found that both practitioners and witnesses noted an improved experience for witnesses giving evidence via s.28 as opposed to live cross-examination."

⁸ Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses | Ministry of Justice (3 April 2023)

⁹ Pre-recorded evidence improves rape victims' experience of court: Press release | Ministry of Justice and The Rt Hon Dominic Raab (3 April 2023)

"Professor Thomas cautioned that there was no reliable evidence to indicate which of the possible explanations might account for the stark results of her analysis, and called for further research and improved data collection."

In December 2023, however, Professor Cheryl Thomas of UCL Law submitted written evidence on the use of s.28 to the Parliament Justice Select Committee enquiry on s.28.¹⁰ Professor Thomas provided a detailed analysis of all s.28 cases from June 2016 to June 2023, which included 4,392 cases involving 28,793 charges. Among the most striking findings of this analysis are that there were 10 per cent fewer convictions overall in trials that used s.28 pre-recorded evidence and convictions were 20 per cent lower in rape trials (with the exception of rape of a male under 16 as a historic offence). The difference in conviction rates for s.28 was also greater with adult witnesses than children, and the conviction rate was markedly lower when s.28 was used in cases involving non-sexual offences - ranging from 8 to 23 per cent lower.

Professor Thomas cautioned that there was no reliable evidence to indicate which of the possible explanations might account for the stark results of her analysis, and called for further research and improved data collection. She recommended that witnesses considering special measures be informed of the impact of s.28 on conviction rates, and that the Government pause any further changes to s.28 until the factors leading to lower conviction rates could be identified. Other researchers have raised reservations about the strength of claims that this preliminary data shows a strong correlation between the use of s.28 and lower conviction rates.¹¹ They have noted that the timing of the data collection meant that the national rollout of s.28 to intimidated witness had not been fully taken into account.

On 10 March 2025 the MoJ issued its second impact evaluation of pre-recorded cross examination for vulnerable and intimidated witnesses, which effectively concluded that s.28 has "no impact on conviction rates in either direction."¹² The MoJ evaluation looked at cases between January 2019 and

2022 and found that "s.28 has reduced the length of time to cross-examination with no discernible impacts on case outcomes or court functioning." The report noted that the analysis was constrained by "operational decisions and data collection at the time increased s.28 eligibility was rolled out."

Professor Thomas criticised the report's methodology, stating that, "They have designed a study that excludes more than 80% of verdicts."¹³ She went on to state that the report is "making a pretty big statement in saying that s.28 does not affect a jury's willingness to convict. I don't think their analysis is strong enough to say that." One Crown Court judge interviewed by the Law Society Gazette stated that "Professor Thomas's research accurately reflects the experience of judges up and down the country that "juries just do not view [pre-recorded] evidence in the same way" as live evidence from a witness in court.¹⁴

The desire to relieve vulnerable and intimidated witnesses of the stress and anxiety of criminal proceedings is a worthy goal, and the last 25 years of modern special measures has been a success story in many respects. However, the widespread use of entirely pre-recorded evidence for key witnesses may simply strike too closely at the heart of the adversarial process. As ever, more funding for the criminal justice system, more transparent and reliable data collection and a genuinely evidence-based approach from the Government would be the most effective way to ensure that the s.28 initiative serves its intended purpose, without further unintended consequences for the fairness and integrity of jury trials.

"The widespread use of entirely pre-recorded evidence for key witnesses may simply strike too closely at the heart of the adversarial process."

¹⁰ Written evidence submitted by Professor Cheryl Thomas (PRE0029) to Justice Select Committee (December 2023)

¹¹ Supplementary written evidence submitted by Dr Natalie Kyneswood (PRE0037) to Justice Select Committee: Response to Submission PRE0029: YJCEA 1999 Section 28 and Conviction Rates (February 2024)

¹² Impact Evaluation of Pre-Recorded Cross Examination for Vulnerable & Intimidated Witnesses | Ministry of Justice (10 March 2025)

¹³ Pre-recorded evidence has no impact on rape conviction rates, MoJ claims | Catherine Bakshi, The Law Society Gazette (11 March 2025)

¹⁴ Ibid.

Sexual Misconduct in the Workplace – The Criminal law Dimension

Andrew Smith
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Recent scandals at Harrods and Abercrombie & Fitch have pushed the issue of sexual misconduct in the workplace back into the spotlight. Most reports of these scandals concentrated on the details of the crimes allegedly committed by the powerful individuals who ran these businesses. But some of the reporting has had another focus: the roles played by those who worked closely with, or for, these individuals. Inner circles of colleagues and advisers are accused of enabling the sexual misconduct to occur - whether by turning a blind eye to it, allowing it to continue with impunity or even of covering it up.

So, how does the law typically clamp down on enablers of sexual misconduct? Initially, this may seem to be an inappropriate question. The term “enablers” tends to only be used in the context of economic crime, as in the Law Society’s anti-money laundering guidance,¹ for example. It is rarely used in the context of sexual misconduct. But the concept of enablement is a useful lens through which to explain some of the relevant provisions of employment law, professional regulation and the criminal law.

Starting with employment law, it has long been the case that, where an employee has been sexually harassed at work, they are able to bring certain claims against their employer in the Employment Tribunal. If these claims are successful, and depending on the circumstances, the employer can be liable not

only for their own actions, but also liable vicariously for the actions of their employees and third parties, such as suppliers and customers.

Last October, employment law took a further step, imposing a proactive duty on employers to take reasonable steps to prevent sexual harassment of their employees in the course of their employment.² If this new duty is breached, the Equality and Human Rights Commission (EHRC) can take enforcement action against employers and the Employment Tribunal can order an uplift in the compensation payable by them.³

The accompanying guidance published by the EHRC states that, to discharge this new duty, employers are expected to anticipate scenarios when sexual harassment may take place and take action to prevent it.⁴ Whilst the duty is couched in terms of prevention, the EHRC guidance is clear that the duty can also be breached by an employer’s failure to respond properly after sexual harassment has occurred.

Once a workplace-based incident of sexual misconduct is suspected, one specific group of professionals who may be retained as part of the ‘corporate response’ are external firms of solicitors. Their mandate may encompass an independent ‘fact-finding’ investigation, advice to the employer about their legal options, representation in a claim brought by an employee, or sometimes all of these elements.

In recent years, the SRA has become more vocal about the professional regulatory framework within which solicitors retained on these mandates must operate. First published in March 2018, the SRA’s warning notice on the use of non-disclosure agreements (NDAs) was most recently updated in August last year.⁵ The warning notice applies to all scenarios in which solicitors might negotiate NDAs, but its main focus is the type of NDA through which the solicitor’s client seeks to silence the victims of

"Last October, employment law took a further step, imposing a proactive duty on employers to take reasonable steps to prevent sexual harassment of their employees in the course of their employment."

¹ Professional enablers | The Law Society

² See the Worker Protection (Amendment of Equality Act 2010) Act 2023, which introduced new section 40A Equality Act 2010.

³ Section 40A(3) Equality Act 2010.

⁴ Sexual harassment and harassment at work: technical guidance | EHRC

⁵ SRA | Use of non-disclosure agreements (NDAs) | Solicitors Regulation Authority



"The warning notice states that NDAs will be considered improper if used as a means of preventing or seeking to impede or deter a person from co-operating with a criminal investigation or prosecution, or reporting an offence to a law enforcement agency."

sexual misconduct (or witnesses who might be able to shed light on such misconduct).

The warning notice states that NDAs will be considered improper if used as a means of preventing or seeking to impede or deter a person from co-operating with a criminal investigation or prosecution, or reporting an offence to a law enforcement agency. Where a solicitor negotiates an NDA in these circumstances, the SRA warns that they risk violating several principles in the SRA Code of Conduct. This includes those which prohibit solicitors from taking unfair advantage of third parties and which require solicitors to uphold the rule of law and the proper administration of justice. And by using an NDA to stifle the discovery and reporting of criminal offences, the employer, through the solicitors they instruct, will almost certainly be treated as breaching their freestanding duty to prevent sexual harassment as a matter of employment law.

Whilst the SRA's warning notice is confined to NDAs, it serves the broader purpose of reminding solicitors that their clients' interests cannot be advanced at all costs. It also highlights that they must be especially alert if their retainer becomes coterminous with enabling the evidence of criminal offences to be withheld from the law enforcement.

This, of course, is not to suggest that solicitors are acting unethically if they advise their clients not to report such crimes. There is no positive obligation on employers to report workplace-based sexual offences to the police.⁶ Whilst reporting such offences voluntarily may be perceived by employers as the 'right' thing to do, this is a choice, not a legal obligation (and plainly no choice about what is 'right' can be made unless it has the full and informed support of the victim). It follows that a solicitor is not acting in breach of their professional regulatory obligations if they advise their employer client to follow this legal framework to the letter.

⁶ The only positive obligations of this nature arise in the contexts of terrorism and money laundering. It is acknowledged that certain regulated sectors impose obligations on those they regulate to report workplace-based sexual offences to their regulator, but this is not the same thing as an obligation to report to a criminal law enforcement body.

But for a solicitor to give comprehensive advice to their employer client, in order that informed decisions about whether to report any offences to the police can be taken, knowledge of the criminal law is necessary. The definition of sexual harassment used in employment law is "*unwanted conduct of a sexual nature which has the purpose or effect of violating [the victim's] dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for [the victim].*" This potentially encompasses a multitude of crimes ranging from sexual assault⁷, exposure⁸ and communications offences⁹ to stalking causing serious alarm or distress.¹⁰ And, as the recent scandals demonstrate, when considering these (and other relevant) criminal offences, solicitors must be alert to whether the suspected criminality extends beyond the alleged primary perpetrator.

So how might individuals face criminal liability for having 'enabled' the commission of a suspected sexual offence in the workplace? This could take the form of secondary liability - where a person aids, abets, counsels or procures another to commit an offence¹¹ or inchoate liability (encouraging or assisting another to commit an offence).¹² As an obvious example, suppose A, B and V are work colleagues employed by E: A sexually assaults V at an office party; A is guilty of sexual assault; but where B spiked V's drink at the start of the party, knowing that A intended to sexually assault V later on, B may be guilty of a separate offence of encouraging or assisting A's sexual assault.

Other examples are less obvious. Whilst the criminal law is generally unwilling to impose liability for omissions (i.e. failures to act to prevent a crime being committed), it has long been recognised that, where a person is under a legal duty to act, failure to discharge that duty can constitute encouragement or assistance.¹³ And because employment law now

⁷ Contrary to section 3 Sexual Offences Act 2003.

⁸ Contrary to section 66 Sexual Offences Act 2003.

⁹ For example, the relatively new offences relating to sharing or threatening to share intimate photographs or film contrary to section 66B(1)-(4) Sexual Offences Act 2003.

¹⁰ Contrary to section 4A Prevention of Harassment Act 1997.

¹¹ Contrary to section 8 Accessories and Abettors Act 1861.

¹² Contrary to sections 44-46 Serious Crime Act 2007.

¹³ Coney (1882) 8 QBD 534; Wilcox v Jeffery [1951] 1 All ER 464; Allan [1965] 1 QB 130; Smith v Baker [1971] 1 RTR 350; Clarkson [1971] 1 WLR 1402; Allen v Ireland [1984] 1 WLR 903.

imposes a statutory obligation on employers to take reasonable steps to prevent sexual harassment of their employees, this obligation provides a foundation upon which employers can be criminally liable, if breached. To change the facts in our example: suppose A and V are work colleagues employed by E; they all attend an office party; A tells E that he plans to sexually assault V later that evening; E then leaves the party and A sexually assaults V. A is guilty of sexual assault, but is E, by failing to discharge his legal duty as employer, to take reasonable steps to prevent the sexual harassment of V (as employee), guilty of a criminal offence of encouraging and assisting A's sexual assault of V? The answer is a qualified 'yes', provided E's failure did, in fact, encourage or assist A to commit the sexual assault against V.

This is an example of how an employer might be held criminally liable for having enabled the commission of an offence. But employers can also be held criminally liable for things they do after that offence is committed. For example, if they take steps to suppress the evidence of an offence or prevent the reporting of it to law enforcement. It is widely known that the offence of perverting the course of justice can be committed in relation to active criminal investigations and prosecutions - for example, giving false information to the police to frustrate their enquiries. What is sometimes not recognised is that this offence can also be committed prior to any criminal investigation having started, provided an event has occurred from which it can reasonably be expected that such an investigation will follow. To return to our example: if E learns that A sexually assaulted V at the office party, but E takes steps, either internally or through professional advisors, to discourage V from reporting the assault to the police, E could commit the offence of perverting the course of justice.

In short, it would be a mistake to think that investigations of workplace-based sexual harassment can occur in a vacuum from the criminal law. Many types of sexual harassment (as defined in employment law) will amount to criminal offences. The new statutory duty on employers to prevent sexual harassment widens the scope of inchoate criminal liability. Employers and their advisors may be exposed, not only to breaches of employment law or their professional regulatory obligations, but also to criminal investigation and prosecution, if the evidence suggests they have enabled the commission of offences within the workplace or prevented their discovery by law enforcement.

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