

CRIMINAL LAW NEWSLETTER

LEGAL UPDATES & INSIGHTS

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FOREWORD

Welcome to the first edition of St Ives Chambers' Criminal Law Newsletter. Our aim is to provide a bi-annual update on developments in criminal law and practice, offering practical insight and guidance to those working throughout the Criminal Justice System. In this edition:

Sophie Murray considers the admissibility of previous allegedly false complaints in RASSO cases in light of the Court of Appeal's decision in Hurley [2025] EWCA Crim 642, providing a practical framework for practitioners dealing with this issue.

Imaan Blackaby provides guidance on successfully advancing an insanity defence, and highlights the importance of ensuring that psychiatric evidence satisfies the relevant legal criteria.

Holly Sims examines intimate image abuse and the impact of sections 66A–66H of the Sexual Offences Act 2003.

Emily Waggott explores Sexual Harm Prevention Orders and sets out a useful series of practical tips for those responding to applications during the sentencing process.

Pierre de Garis provides a detailed guide to RIPA notices and includes a helpful checklist for future reference.

The Criminal Team at St Ives Chambers prides itself on providing fearless, determined, and effective advocacy. The quality of our work is recognised by both Chambers & Partners and The Legal 500. Whether advising pre-charge, appearing at trial, or conducting appellate work, our members are committed to delivering expert representation at every stage of proceedings.

We are delighted to launch this first edition and look forward to sharing future developments and practical insights with our solicitors.

Finally, I would like to express my sincere thanks to Queenie Djan for her invaluable assistance in bringing this Newsletter together.

We very much hope that you find it informative and useful.



Thomas Duggan
Call 2019



New pupils & Tenants

Having successfully completed their First Six, our four pupils have now commenced their Second Six. To instruct Charlie Denney, Millie Jeavons, Thomas Hodgkiss and Andrew Eve, please contact the Clerks.



Recent Notable Cases

Holly Sims was successful in the Court of Appeal.

[R v Paul Harris & Ors \[2025\] EWCA Crim 1442](#)

Milo MacBeth successfully defended the safety of a conviction in the Court of Appeal.

[R v Junaid Ali \[2026\] EWCA Crim 559](#)



Announcements

David Outterside has been appointed as Recorder and will sit in the Crown Court on the Midland Circuit.

Sophie Murray appears on BBC West Midlands to discuss the high-profile acquittal of a woman charged with perverting the course of justice following her making an allegation of rape. [Click here for media coverage](#)

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For further information about our services, please do not hesitate to contact our clerks, Daniel Giles and James Harte, on

 0121 236 0863

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A Practical Approach to the Evidence and Admissibility of a Previous “False” Complaint in Sex Cases

INTRODUCTION

In cases involving allegations of a sexual nature, disclosure must be sought in relation to any previous false allegations made by a complainant if an application to cross-examine the complainant about them is to be successful.

Applications to cross-examine the complainant as to her credibility in relation to previous allegations are subject to judicial approval and can be made under s41 YJCEA 1999 or s100 CJA 2003, depending on the material.

The evidence can either fall foul of s41 as being about the complainant’s previous sexual behaviour or is non-defendant bad character and subject to an application under s100. It is often not clear which it is until the material is assessed and the application is made, and therefore both arguments will have to be set out for the judge.

Therefore, when a previously “false” allegation is flagged in the disclosure, the role of the defence solicitor in tracking down all available evidence in relation to that previous allegation is essential to ensure your client has a fair trial.

Any application to cross examine the complainant will not be successful without all the evidence in relation to that allegation being placed before the court.

This requires a **pro-active response** from the solicitors in obtaining disclosure regarding that complaint in order that a judge can properly assess what material if any can go before the jury.



WRITTEN BY

SOPHIE MURRAY
Head of Crime Group

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Sophie’s practice here

THE LAW

The Court of Appeal considered the proper approach to evidence of allegedly false complaints of sexual and other offences made by a complainant in **Hurley [2025] EWCA Crim 642**.

The court summarised the current position in law in seven propositions:

- 1 Evidence that a complainant has made false complaints of rape on occasions other than those on the indictment is always non-defendant bad character evidence for the purposes of section 100 because it is evidence of misconduct as defined in section 112(1) of the 2003 Act as "the commission of an offence or other reprehensible behaviour".
- 2 Therefore, its admissibility requires meeting the enhanced relevance test under section 100(1)(b) of the Criminal Justice Act 2003, which mandates that (1) the evidence must have substantial (but not necessarily conclusive) probative value in relation to Y's credibility; and (2) such credibility must be a matter in issue of substantial importance in the proceedings as a whole.
- 3 False complaints where the complainant claims to be the victim of other sexual offending will engage section 41 of the Youth Justice and Criminal Evidence Act 1999 if the evidence is "about" the complainant's "sexual behaviour" for section 41 purposes. Where the questioning is not about any sexual activity of the complainant, but about what the complainant said, then section 41 will not be engaged and the admissibility issue will be resolved applying section 100.
- 4 Before section 41 can be avoided, there must be "a proper evidential basis" for concluding that the complaint was false (**R v RD [2009] EWCA Crim 2137**; **R v AM [2009] EWCA Crim 618**).
- 5 The "proper evidential basis" can be less than a strong factual foundation indicative of falsity. It must, however, have substantial probative value in relation to a matter in issue and be of substantial importance in the context of the case as a whole, otherwise it will be inadmissible because of section 100 CJA 2003.
- 6 Whether applying section 41 or section 100, the admissibility decision will be highly fact-specific, and it is neither possible nor desirable to delimit or prescribe the circumstances in which the test will be met in any individual case.
- 7 When determining whether the admissibility test is satisfied, the court is not exercising a discretion but making an evaluation about the quality of the evidence.

ARTICLES & CASE LAW UPDATES

THE PROPER EVIDENTIAL BASIS

To arrive at propositions (v) and (vii), the Court of Appeal considered applicable authorities on the meaning of a “proper evidential basis”. These authorities included Gabbai [2019] EWCA Crim 2287 in which it was said at [46]:

“The Court of Appeal has articulated the threshold as requiring “some material from which it could properly concluded that the complaint was false” (R v AM [2009] EWCA Crim 618 at [22]), or “whether there was a proper basis to allege the complaints were false” (R v Knight [2013] EWCA Crim 2486 at [36]), or “some material from which it could properly be concluded that [a previous complaint] was false”, see R v Conn [2018] EWCA Crim 1751

As this Court observed in Al- Hilly (2014) 2 Cr.App.R. 33 :

‘Each case is fact sensitive and the ultimate question is whether the material is capable of leading to a conclusion that the previous complaint was false’.” In Bovell [2005] EWCA Crim 1091, in a judgment delivered by the Vice President (Rose LJ) set out guidance relating to bad character applications, stating at [2]: “...it is necessary for all parties to have the appropriate information in relation to convictions and other evidence of bad character, whether in relation to the defendant or to some other person, in good time.”

In that case there were multiple reports by the complainant of her making false allegations in relation to violence and sexual abuse.

The definition of “substantial” in relation to the evidence relied upon means “that the evidence concerned has something more than trivial probative value, but it is not necessarily conclusive of probative value” for the purposes of s100. (R v S [2009] EWCA Crim 2457.)

In R v Al Hilly [2014] 2 Cr.App.R. 33 (“Al Hilly”) at para 19:

“The mere fact that a complaint is raised and is not pursued does not necessarily mean that a complaint is false. Courts should be ready to deploy a degree of understanding of the position of those who have made sexual allegations. Failure to pursue the complaint does not of necessity show that it is untrue. A rather closer examination of the circumstances is required ”

In terms, the court in Hurley confirmed that pejorative judgements made by the police in relation to investigations were not to be laid at the door of the complainant and therefore failure to investigate could not amount to a proper evidential basis for an application under s41.

ARTICLES & CASE LAW UPDATES

PRACTICAL STEPS

✓ The result of this re-statement of the law is that it provides a framework from which to start the process. Often the first indication that a previous false allegation was made will be in a police log. A police log is not evidence, it is hearsay and it is from here that further specific disclosure applications must be made.

✓ This involves a proactive approach to obtaining such material, which may be statements, ABEs, phone evidence or CCTV. However, WhatsApp or Facebook messages should be treated with caution and the court's attitude to what this type of evidence shows is mixed.

✓ In a recent case, a police log referenced various ways in which a previous allegation had been investigated, but no efforts were made by the police to assist the defence in providing the source material to the police log. At trial the defence were prevented from asking the complainant questions about that allegation. The Judge ruled that the material was hearsay and was unclear as to what it showed. It did not form a proper evidential basis on which to conclude there had been a false allegation. This is now the subject of an appeal.

✓ The approach must be that a complete picture of the supporting evidence for the contention that a previous allegation was false must be before the court. Careful review of the MG6C and any police logs disclosed at Stage 1 and after Stage 3 is essential, as are comprehensive disclosure requests within defence statements and throughout the trial process as further material is disclosed by the Crown.

By Sophie Murray

Raising a defence based on insanity

INTRODUCTION

A defence of insanity is available as a defence founded upon a mental condition. However, raising the defence and proving it requires following a strict test (**M’Naghten**)[1] and the expert evidence of two registered medical practitioners, at least one of which should have approval under **section 12 of the Mental Health Act 1983**. Before raising a defence of insanity, it is important to understand the difference between insanity and non-insane automatism (which is also a defence available upon a mental condition). Insanity is a defence which applies when the defendant is suffering from a physical or mental malfunction with an internal cause. Non-insane automatism is a defence which involves external factors which caused the defendant to act involuntarily.[2] The “disease of the mind” is the phrase regularly used when considering a defence of insanity and such a defence invites the jury to return special verdict of not guilty by reason of insanity.

The onus is on the defence to establish insanity on the balance of probability before the jury. However, that does not mean the prosecution’s role is only to rebut the defence. If the prosecution has evidence of insanity, they are obliged to make the evidence available to the defence.[3]



WRITTEN BY

IMAAN BLACKABY

Call: 2019



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Imaan’s practice [here](#)

They must also prove the defendant did the act as to the criminal standard – ‘**did the act or omission charged**’. The standard required by the prosecution simply does not change because a defence of insanity is raised. Their duty remains the same.

In order for the defence to rely on insanity they must follow the M’Naghten test. It is a strict test and meeting all the requirements is necessary. There is no scope to prove some principles and not others. All the principles must be established. Whilst some may consider M’Naghten to be ‘old law’, it is still good law as confirmed by the case of **Usman in 2023**. It sets out the foundations in English law of laying down a defence of insanity.

[1] M.Naghten’s Case (1843) 10 Cl. & F. 200

[2] Archbold 2026, Chapter 17B-74 page 2021

[3] Dickie (1984) 79 Cr, App, R, 213 CA.

THE PRINCIPLES

The principles are as follows:

(a) Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved.

(b) In order to establish the defence of insanity it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of

(a) reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong.

(c) Every man must be taken to conclusively know the law of the land without any need for proof that he in fact does so.

(d) A suitably qualified medical expert is entitled to give his opinion as to the defendant's state of mind at the time of the commission of the offence.

Principle (b) clearly is the most challenging principle of the test. It falls on establishing whether a defendant can understand that their actions were wrong. Even if a defendant did know the nature and quality of their act then they must still show they did not know it was wrong in order to satisfy the test. There is a distinction between having knowledge that the act was wrong but doing it anyway because of an illness, or simply having no capacity at all to understand that it is wrong due to an illness (disease of the mind). Under the current law, to say 'I know it is wrong, but I did it because the devil told me to' would not be sufficient, and the defence would fail.

Keal [2022][4] made it clear in law that the defence of insanity is not available to a defendant who knew what he was doing was wrong but believed he had no choice but to do the act in question. When understanding what amounts to wrong, it was ruled in Keal that a defendant must

(a) not know his act was unlawful (legally wrong) and

(b) he did not know the act was morally wrong by the standard of ordinary people.

Only if both limbs are satisfied can a defendant have a defence of insanity within the M'Naghten test.

[4] Keal [2022] EWCA Crim 341

COMMENTARY

Of course, it is for the defence to prove on the defendant's behalf that the test is satisfied, and part of that exercise requires written or oral evidence of at least two registered practitioners. Without such evidence, a jury cannot return a verdict of not guilty by reason of insanity.[5] The evidence of two registered medical practitioners follows the general rule set out in **Rule 3.10 of the Criminal Procedure Rules 2025**. However, whilst the requirements and procedure may be the same to that as a fitness to plead reports etc., an insanity report differs. Not only should the reports establish to a Judge's satisfaction there is a defect of reason from a disease of the mind, but also address the other elements of the defence being met. The reports must address whether the defendant either knew the act was legally wrong, morally wrong or both.

It is important to remember that experts are allowed to give their opinion on the ultimate issue, and it can be said that they are encouraged to do so based on the ruling in *Usman*. [6] If the medical expert report lacks such information, then it is likely the defence of insanity will fail. Litigators should feel free to obtain counsel's advice on the scope and terms of letters of instruction in order to ensure reports are admissible and cover the necessary topics.

Whilst the law is clear and remains firm on the defence of insanity, there could be scope for change. In more recent years as our understanding of mental health and science develops, the Law Commission has proposed reform. The current rules have been criticised as 'lagging' behind psychiatric understanding and the label of 'insane' is outdated because it is simply wrong to those who have learning disabilities or difficulties according to the research conducted by the Law Commission. They have also observed that the case law on insanity is incoherent and produces results that run counter to common sense. The Law Commission has set out a proposal for reform for a lack of capacity defence with an underlying approach like that of civil cases. In addition, they also propose new special verdicts.

[5] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s.1(1).

[6] *Usman* [2023] EWCA Crim 313

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Until 2018, the presumption was that insanity at the time of the commission of the offence meant a lack of mens rea. This was altered in **Loake [2017]** but only to the extent of clarifying that this was an over simplification and that it is possible for someone to have full mens rea, whilst at the same time not knowing what he was doing was wrong due to a defect of the mind.[7] Nevertheless, the courts have been clear that any reform on such longstanding and established principles is a matter for Parliament.

Clearly it is a matter for Parliament as to the extent that those with mental health conditions are held criminally responsible for the crimes they are alleged to have committed. What is clear from the report is that fitness proceedings require more urgency and attention and so any change is likely to be in that area of the law first before the defence of insanity is revisited.

As the law currently stands, providing that the test under M’Naghten is met, the defence of insanity is available to any defendant for strict liability offences or offences with an objective mens rea requirement.

By Imaan Blackaby

[7] **Loake vs CPS [2017] EWHC 2855 (ADAM); [2018] 1 Cr. App. R. 2016, DC.**

Online intimate image abuse: ‘Cyberflashing’, ‘Deepfakes’, and Incest themed pornography

INTRODUCTION

With the evolution of technology and Artificial Intelligence (AI), the law is progressing to keep up with these advances and the abuse by some of the same. Over the last few years, there has been the introduction of new offences concerning intimate image abuse. This has been done by the insertion of **Sections 66 A-H of the Sexual Offences Act 2003**, some of which replaced existing law and some of which are newer additions.

In Sections 66A-D, there are offences in relation to intimate image abuse, ‘Cyberflashing’ and ‘Revenge porn’ offences in relation to real persons. Sections 66E-H more recently extends offending to encompass digitally created and altered images with the resemblance of a real person.

Further developments are also expected in this area, including proposals in relation to incest themed pornography.



WRITTEN BY

HOLLY SIMS

Call: 2021



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Holly's practice here

SO, WHAT DOES THE CURRENT LAW PROHIBIT?



Section 66A

Sending etc
photographs or
film of genitals.



Section 66B

sharing or
threatening to share
intimate
photograph or film.



Section 66C

Exemptions



Section 66D

Definition of
‘intimate state’.

SECTION 66A – SENDING ETC PHOTOGRAPHS OR FILM OF GENITALS.

It is commonly colloquially referred to as ‘Cyberflashing’.

It is an offence for a person to intentionally either send or give a photograph/ film of someone’s genitals to another with intent to cause them alarm, distress, humiliation, or for obtaining sexual gratification and being reckless as to whether the receiver will be caused alarm, distress or humiliation.

As well as applying to real genitals, this section also applies to computer generated photographs.

This section came into force on 31 January 2024 (as inserted by Section 187 of the Online Safety Act 2023). It is an either way offence and carries a maximum sentence of 2 years’ imprisonment.

Further, if convicted, a Defendant is subject to the Notification Requirements under Section 82 of the Sexual Offences Act 2003

SECTION 66B – SHARING OR THREATENING TO SHARE INTIMATE PHOTOGRAPH OR FILM.

The difference between this Section and Section 66A is that this addresses the sharing of photographs as others, commonly colloquially known as ‘revenge porn’ or ‘image-based abuse’.

Further, unlike Section 66A, for Section 66B(1) this offence does not require proof of any intention to cause alarm or distress or obtain sexual gratification.

A Section 66B(2) offence is committed if there is no consent, and the sender intends to cause alarm, distress or humiliation.

A Section 66B(3) offence is committed if there is no consent, and the purpose is for obtaining sexual gratification.

An offence under Section 66B(4) relates to the threat to share intimate images with the intention of causing someone to fear they will be shared, or being reckless as to the same. For this threat, the Prosecution do not have to prove that an image actually exists, but simply that there was a threat to share an intimate image.

This section came into force on 31 January 2024 (as inserted by Section 188 of the Online Safety Act 2023). Section 66B(1) is a summary only offence, whereas Sections 66B(2)-(4) are either way offences and carry a maximum sentence of 2 years’ imprisonment.

Further, if convicted, a Defendant is subject to the Notification Requirements under Section 82 of the Sexual Offences Act 2003.

SECTION 66C – EXEMPTIONS:

Section 66C provides defences to the above.

If the image was taken in a place to which the public, or a section of the public had / were permitted to have access, there was no reasonable expectation of the Complainant of privacy of the image or film being taken and the Complainant was, or the Defendant reasonably believed that they were in the intimate state voluntarily.

If the photograph or film had or the Defendant reasonably believed it had been previously publicly shared and the Complainant had, or the Defendant reasonably believed that they had consented to the previous sharing.

For Section 66B(1) only, there is a defence of reasonable excuse (Section 66B(8)).

For offences under Section 66B(1), it is a defence if the Complainant is under 16, they lack capacity to consent to the sharing or are reasonably believed to be consenting by the Defendant, and it is shared with a healthcare professional or in connection with that treatment.

Section 66B(1) is also a lesser alternative offence to Sections 66B(2) or (3).

SECTION 66D – DEFINITION OF ‘INTIMATE STATE’.

This section provides a definition of intimate state.

The definition is wide and states as follows:

‘(5) Except where a photograph or film falls within subsection (8), a photograph or film shows, or appears to show, another person in an intimate state if it shows or appears to show

- (a) the person participating or engaging in an act which a reasonable person would consider to be a sexual act,
- (b) the person doing a thing which a reasonable person would consider to be sexual,
- (c) all or part of the person’s exposed genitals, buttocks or breasts,
- (d) the person in an act of urination or defecation, or
- (e) the person carrying out an act of personal care associated with the person’s urination, defecation or genital or anal discharge.

(6) For the purposes of subsection (5)(c) the reference to all or part of a person’s “exposed” genitals, buttocks or breasts includes—

- (a) a reference to all or part of the person’s genitals, buttocks or breasts visible through wet or otherwise transparent clothing,
- (b) the case where all or part of the person’s genitals, buttocks or breasts would be exposed but for the fact that they are covered only with underwear, and
- (c) the case where all or part of the person’s genitals, buttocks or breasts would be exposed but for the fact that they are obscured, provided that the area obscured is similar to or smaller than an area that would typically be covered by underwear worn to cover a person’s genitals, buttocks or breasts (as the case may be).’

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SECTION 66E – CREATING PURPORTED INTIMATE IMAGES OF AN ADULT.

This is commonly colloquially referred to as 'deepfake images' and is the more recent insertion into the legislation.

Deepfake images are digitally created and altered content often in the form of fake images, videos and audio recordings.

This section came into force on 06 February 2026 (as inserted by Section 138 of the Online Safety Act 2023).

It was added to combat the emergence online of deepfake technology and deepfake generated intimate imagery. This is often done by manipulating and sexualising images of real persons.

It is an offence under this section for a Defendant to intentionally create a purported image of another person, if that person does not consent and the Defendant does not reasonably believe that they consent.

What is a purported intimate image? – Section 66E(2) provides a definition. It is an image which appears to be of another adult but in reality is not, it having been altered and showing them in an intimate state.

The definition of intimate state remains the same as for Section 66D above.

The defence of reasonable excuse applies under Section 66E(5).

SECTION 66F – REQUESTING THE CREATION OF PURPORTED INTIMATE IMAGES OF AN ADULT.

Section 66F is also a summary only offence.

This is the same as Section 66E above but makes it an offence to request the creation of the image.

SECTION 66H – EXTENSION OF TIME LIMITS FOR PROSECUTION.

This section extends the time limit that applies to these offences, so that prosecutions can be brought at any time that is both within six months from when sufficient evidence comes to the prosecutor's knowledge, and within three years from when the offence was committed.

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FUTURE PROPOSALS

As of April 2026, the Government added amendments to the Crime and Policing Bill, which has received Royal Assent as the Crime and Policing Act 2026 and is expected to come into force in late June 2026, with the aim of tightening regulations on pornography that sexualises family relationships.

As a further measure to tackle violence against women and girls, the ban is intended to cover pornography depicting sexual acts between close family members, as well as the proposed inclusion in certain circumstances of step-relatives. There are further proposals to ban pornography that uses adult actors to role play as children (often colloquially referred to as 'barely legal' or 'teen' content).

The proposals include penalties of up to 2 years' imprisonment for possession of incest pornography, up to 3 years' imprisonment for possession of 'barely legal' content, and up to 5 years' imprisonment for publishing and distributing the same.

By Holly Sims

A Practical Guide to Sexual Harm Prevention Orders

INTRODUCTION

Sexual harm prevention orders ('SHPO's) are a routine feature of sentencing for sexual offences. In theory, they are meant to be preventative, not punitive. In practice, however, draft orders are too often an afterthought at the end of the sentencing exercise, and commonly include lengthy, unclear and sweeping prohibitions bearing little correlation to the actual offending.

This matters to defendants, as a breach of a SHPO is itself punishable by up to 5 years' imprisonment (**section 354 of the Sentencing Act 2020 ('SA 2020')**). A poorly drafted SHPO can make criminals out of defendants going about their ordinary lives. Defence practitioners should therefore treat these orders with the same seriousness as the sentence itself.

This article is intended as a practical shortcut. It discusses the core principles relating to SHPOs, the important authorities, and the arguments that should routinely be advanced when faced with oppressive draft orders.

THE STATUTE

The power to impose a SHPO is governed by **sections 343 to 359 SA 2020**. The key provision is section 343, which sets out that the court may only impose prohibitions that are "necessary for the purpose of protecting the public or any particular members of the public from sexual harm from the offender". This is the foundation for every lawful SHPO. It ensures that the court is not entitled to impose conditions merely because the offence is sexual, the restrictions "might help", or a broad order might be "safer". There must be a clear connection between the offending, the identifiable future risk and the specific prohibition proposed.



WRITTEN BY

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Call: 2023



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Emily's practice here

Necessity Also Means Proportionality

The leading authority for SHPOs is **R v Smith [2011] EWCA Crim 1772**; this case was in relation to the predecessor, Sexual Offences Prevention Orders ('SOPO's), but is repeatedly confirmed as applying equally to SHPOs. In Smith, the Court of Appeal made clear that the test of necessity also requires a test of proportionality.

Repeating the questions laid out in **R v Mortimer [2010] EWCA Crim 1303** and **R v Collard [2004] EWCA Crim 1664, [2005] 1 Cr App R (S) 34**, when imposing a SHPO the court must ask:

1. IS THE MAKING OF AN ORDER NECESSARY TO PROTECT FROM SERIOUS SEXUAL HARM THROUGH THE COMMISSION OF SCHEDULED OFFENCES?
2. IF SOME ORDER IS NECESSARY, ARE THE TERMS PROPOSED NEVERTHELESS OPPRESSIVE?
3. OVERALL ARE THE TERMS PROPORTIONATE?

Importantly, the Court in **Smith at [22]** warned against speculative drafting, stating "it is not legitimate to impose multiple prohibitions on a defendant just in case he commits a different kind of offence". That principle is routinely overlooked in practice.

TAILORING THE SHPO TO THE ACTUAL RISK

One of the most important practical principles is that there is no universal SHPO. The Court of Appeal emphasised this in **R v Parsons and Morgan [2017] EWCA Crim 2163 at [5]**: "any SHPO must be tailored to the facts. There is no one size that fits all factual circumstances". Yet many draft orders appear to be copied and pasted from unrelated cases.

A defendant convicted of making indecent images of children is frequently presented with blanket child-contact prohibitions, restrictions on where they can stay and a prohibition on leaving the UK, despite contact and travel playing no part in the offending whatsoever. This approach is unlawful, unless the Prosecution can identify a real and evidenced risk justifying those terms. This was emphasised in **Parsons and Morgan at [71]**: "there must be an identifiable risk of contact offences before prohibitions on contact can be justified". Accessing indecent images does not automatically justify prohibitions on contact with children; without the connection showing contact offending, the restriction should not be imposed.

ARTICLES & CASE LAW UPDATES

COMMON PROHIBITIONS

Child-contact prohibitions engage Article 8 ECHR rights to a family and private life. Too often SHPOs prohibit “unsupervised contact with children”, “contact with any child under 18” or prohibit residence where children may be present, without defining supervision, incidental contact, family exceptions or ordinary social interaction. Smith expressly warned at [22] that “care must be taken in considering whether prohibitions on contact with children are really necessary”. Where such restrictions are justified, they should contain sensible exclusions, such as incidental contact, approved family members, employment realities and clear definitions. The recent decision in **R v Pearl [2025] EWCA Crim 994** reinforces this notion, crystallising that sweeping child-contact bans cannot stand absent to an identifiable risk to children generally. It is not enough for the Crown to assert that a prohibition is necessary on the safety-first principle in case the defendant might graduate to offences of that nature in the future (**R v Lewis [2016] EWCA Crim 1020 at [10]**).

Some draft SHPOs request that the Defendant must let the police into their home. But this has been disapproved of in Smith: “**There is no need for the SOPO to invest the police with powers of forcible entry into private premises beyond the statutory ones which they already have.**” [20]. It is enough that the defendant must submit his devices for inspection upon request.

Some draft SHPOs restrict where defendants can stay and their travel abroad. Nevertheless, **Smith at [9]** emphasised that Courts must remember that a Defendant convicted of sexual offences is likely to be subject to multiple other relevant regimes. A SHPO is not necessary where it merely duplicates existing obligations. The notification requirements now contained in **sections 80-102 Sexual Offences Act 2003** (‘SOA 2003’) require a defendant to notify where he lives and if he travels abroad. Accordingly, provisions within a SHPO requiring notification of residence or overseas travel will frequently be unnecessary and duplicative unless the prosecution can identify some additional specific risk justifying them.

LENGTH

A SHPO must be for at least 5 years, and it can specify different lengths of time for different prohibitions (**section 347 SA 2020**). Almost always, draft SHPOs request the order last “until further order”. Indefinite orders should not become the default position. Often for sentences under 30 months, SHPOs reflect the length of the notification requirements set out in **section 82 SOA 2003**. This is often sensible, proportionate and easy for defendants to remember. Nevertheless, for sentences 30 months or over, therefore meaning notification requirements are indefinite, it does not follow that a SHPO must be for the same length of time. In **Lewis at [19]**, reiterating Smith, the Court determined there is no reason why the duration of a SHPO must mirror notification requirements. The Prosecution should therefore be asked to explain why the proposed duration is necessary, what evidence supports a life-long risk and why a shorter period would not suffice.

PRACTICAL DEFENCE TIPS



Ask for clarity

Every term must be clear, realistic, enforceable and readily understandable. Vague drafting should be challenged.



Insist on evidence-led drafting

For every proposed term ask:

- What specific risk is being addressed?
- What evidence supports that risk?
- How does this prohibition mitigate it?
- Why is a narrower term insufficient?

If the Crown cannot answer those questions, the provision should not be included in the SHPO.



Draft your own alternative

Judges are far more receptive when presented with a shorter, clearer and workable alternative to the proposed SHPO, rather than having to re-draft via oral objections.

NOTE FOR PROSECUTORS

R v Jackson [2012] EWCA Crim 2602 contains a passage directed at prosecuting advocates, stating that it is the responsibility of the Prosecution to place before the Court an order which is necessary, proportionate, and tailored to the individual case. Prosecuting advocates should refrain from requesting that an expansive police-drafted template is made as the final order, without proper analysis. A “safety-first” approach is not lawful if the terms go beyond the evidenced risk.

CONCLUSION

SHPOs are too often treated as administrative appendices to sentence, but they can govern a defendant’s internet access, family life, employment, relationships and daily living for years – sometimes indefinitely. A properly argued challenge can significantly reduce these long-term restrictions, prevent inadvertent criminalisation and can ensure that the order is lawful, proportionate and workable. The authorities are clear; necessity must be evidenced, proportionality is important, and blanket restrictions are not justified just because it is convenient wording. Defence practitioners should approach SHPOs with the same rigour as any other part of sentencing exercise.

By Emily Waggott

RIPA Notices (s. 49)

Regulation of Investigatory Powers Act, 2000

INTRODUCTION

Electronic data in its myriad of forms is an almost ever-present feature in most criminal investigations, and any ultimate prosecution, whether that be offences involving drugs, violence, fraud, firearms or sexual offences.



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Section 49 of the Regulation of Investigatory Powers Act, 2000 ("the Act") contains a persuasive and powerful tool within law enforcement's ever growing investigatory toolkit to assist in the investigation, and ultimate prosecution, of those offences and any others.

The purpose of section 49 is to mitigate the investigatory hurdles posed by electronic data that cannot, or cannot be readily, accessed or put into an intelligible form without a key, otherwise referred to as 'protected information' within the Act. [2]

Section 49 underpins what is more commonly referred to as a 'RIPA Notice'. Knowingly failing to comply (save in some limited circumstances), with the same by any person upon whom a valid notice has been served, constitutes a standalone criminal offence[2] punishable on indictment by up to two, or five in national security or child indecency cases, years' imprisonment.[3]

The purpose of this article is to examine the central statutory requirements that must be satisfied for a RIPA Notice to be validly issued, and upon which the validity of the same can be challenged.

[1] Section 56, Regulation of Investigatory Powers Act, 2000 – contains the statutory interpretation of 'protected information'.

[2] Section 53(1), Regulation of Investigatory Powers Act, 2000

[3] Section 53(5A), Regulation of Investigatory Powers Act, 2000 – see section 53(6) et seq for further definition of child indecency cases.

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THE LAW

GATEWAY

Section 49(1) provides that section 49 of the Act is engaged where protected information comes into the possession of any person through five permissible gateways, each of which covers, broadly speaking, the most common ways law enforcement come into lawful possession of protected information.

They include a person coming to, or being likely to, possess said information:

- (a) Through a statutory power to seize, detain, inspect, search or otherwise interfere with documents or other property;
- (b) Through a statutory power to intercept communications, or obtain secondary data from communications;
- (c) Through certain powers conferred by the Investigatory Powers Act, 2016 (“IPA”), or other notices under the Act or the IPA;
- (d) From its disclosure or provision in pursuance to any other statutory duty (irrespective of whether this is from any request for information);
- (e) By any other lawful means not involving the exercise of statutory powers it has come to be possessed by the intelligence services, police, National Crime Agency, or Revenue and Customs.

THE REASONABLE GROUNDS TEST

Section 49(2) provides the test that must be undertaken by the appropriate person determining whether to grant a RIPA Notice.^[4]

It goes without saying that the burden on meeting this test falls on the party seeking the notice. The standard to which the appropriate person must be satisfied is one of having ‘reasonable grounds to believe’. It does not require this person to be satisfied to the normal criminal standard.

^[4] Please see Schedule 2 of the Act to identify appropriate persons

There are four limbs to the test:

- (a) That a key to the protected information is in the possession of any person,
- (b) That the imposition of a disclosure requirement in respect of the protected information is
 - (i) Necessary on grounds falling within subsection (3) [in the interests of national security, for the purpose of preventing or detecting crime, or in the interests of the economic well-being of the UK], or
 - (ii) Necessary for the purpose of securing the effective exercise or proper performance by any public authority of any statutory power or statutory duty,
- (c) That the imposition of such a requirement is proportionate to what is sought to be achieved by its imposition, and
- (d) That it is not reasonably practicable for the person with the appropriate permission to obtain possession of the protected information in an intelligible form without the giving of a notice under this section^[5]

A key, in relation to any electronic data, means any key, code, password, algorithm or other data the use of which (with or without other keys) allows access to the electronic data, or facilitates the putting of the data into an intelligible form.^[6]

It is important to recognise the difference between an advisory notice, commonly given during the course of a police interview, and a formal RIPA Notice. The former does not incur any criminal liability for failing to comply, such a liability only arises upon receipt of the formal RIPA Notice.

It is also important that clients are advised that RIPA Notices do not only extend to keys to access devices. RIPA Notices can be drafted to compel the disclosure of any key to access any protected information. I do not see any reason that this could not include social media accounts, communications applications nor indeed cryptocurrency wallets.

^[5] Section 49(2), Regulation of Investigatory Powers Act, 2000

^[6] Section 56, Regulation of Investigatory Powers Act, 2000

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The application of the ‘necessity’ aspect of a RIPA Notice was recently challenged in the case of **KNZ v Commissioner of Police of the Metropolis [2025] UKIPTrib 4**.

This was a case brought by KNZ before the Investigatory Powers Tribunal in which KNZ challenged the issuance of a RIPA Notice under section 7 of the Human Rights Act, 1998 and a complaint under **section 65(2)(B) of the Act**. In this matter, KNZ asserted it was neither necessary nor proportionate to have been given a RIPA Notice requiring him to disclose the pin code to his iPhone.

The notice had been given as part of an investigation into KNZ having allegedly intentionally caused another male to engage in sexual activity without his consent, contrary to **section 4 of the Sexual Offences Act 2003 (‘SOA’) [6-8]**.

While ultimately unsuccessful, the case provides a good case study as to the principles adopted by the Tribunal in determining such applications, namely those of judicial review [30]. As well as the use by the Tribunal, by way of analogy in the absence of detailed authority, of the approach to other statutory police powers such as arrest without warrant under s. 24 of PACE (when determining what is reasonable grounds for belief under section 49(2) of the Act) [36-37].

CONTENT OF NOTICE

A RIPA Notice must be in the correct statutory form, namely:

- a. MUST be given in writing or, if not in writing, must be given in a manner that produces a record of its having been given;
 - b. MUST describe the protected information to which the notice relates;
 - c. MUST specify the matters falling within subsection (2)(b)(i) or (ii) by reference to which the notice is given;
 - d. MUST specify the office, rank or position held by the person giving it;
 - e. MUST specify the office, rank or position of the person who for the purposes of Schedule 2 granted permission for the giving of the notice or (if the person giving the notice was entitled to give it without another person’s permission) Must set out the circumstances in which that entitlement arose;
 - f. MUST specify the time by which the notice is to be complied with; and
 - g. MUST set out the disclosure that is required by the notice and the form and manner in which it is to be made;
- and the time specified for the purposes of paragraph (f) must allow a period for compliance which is reasonable in all the circumstances.[7]

[7] Section 49(4), Regulation of Investigatory Powers Act, 2000

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It is critical that notices comply with each of the aforementioned criteria.

It is also worth noting the additional caveat to paragraph (f) that requires the time to comply with any notice must be reasonable in all the circumstances. While most requests are likely to relate to pin codes for mobile phones which are easily provided, timelines should be robustly challenged where legitimate grounds to do so arise. I am particularly conscious that it is proving challenging to arrange timely visits with individuals who are remanded in custody awaiting trial. In such circumstances, the normal 7 to 14 day period may, quite properly, be unreasonable in cases where it is taking 14+ days to facilitate a conference.

Such an assertion may be met with a challenge that a key may be provided quickly, via a prison telephone call for example. However, it is my view that in some cases a conference, not simply a short telephone call, is necessary following the receipt of a RIPA Notice. A person will need to receive legal advice not only on the scope of the notice and the protected information sought, but also on the effects of failing to comply, whether any applicable defences arise, and other critical strategic decisions that may have considerably broader implications.

POSSESSION OF KEY BY MORE THAN ONE PERSON (OFFICERS, EMPLOYEES AND PARTNERS)

Section 49(5) of the Act addresses the situation where it appears to the person with appropriate permission that more than one person is in possession of the key to any protected information and they are in possession of that key in their capacity as an officer or employee of a body corporate and that another of those persons in possession is the body corporate itself or another officer or employee.

In short, where this situation arises, notice should only be given to a senior officer or employee of the body corporate. Notice should only be given on this original officer or employee where it appears to the notice giver that no such senior officer or employee of the body corporate to whom it is more reasonably practicable to give the notice.

‘Senior officer’ is defined in section 49(10) of the Act:

“In this section “senior officer”, in relation to a body corporate, means a director, manager, secretary or other similar officer of the body corporate; and for this purpose “director”, in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate.”

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The relevance of this provision is likely most readily applicable in the context of 'white collar crime', though it is not restricted to such circumstances. It provides an additional consideration when advising a person who has received such a notice as an employee or officer. If there a senior officer or employee, it may be more appropriate that the notice is made on them, in turn shielding such an employee from potential prosecution should they fail to comply.

Section 49(6) of the Act extends similar provisions to partnerships.

Notwithstanding the above, it is important to note that where special circumstances arise which would have the effect of defeating the purpose of the notice, in whole or in part, those provisions within subsection (5) and (6) do not apply. [8]

THE OFFENCE & DEFENCES

As outlined above, the offence of knowingly failing to make the disclosure required by a **RIPA Notice can be found within section 53(1) of the Act.**

It is important to note that if it is shown that a person was in possession of a key to any protected information at any time before the giving of the RIPA Notice, that person will be taken to be have continued to be in possession of the same at all subsequent times unless it is shown that the key was not in his possession after the giving of the notice and before the time by which that person was required to disclose it.[9]

It is a defence for a person who has received a RIPA Notice and failed to make the required disclosure to show they were not in possession at a particular time if sufficient evidence of that fact is adduced to raise an issue with respect to it. Upon satisfying that burden, it then falls to the prosecution to prove the matter to the contrary to the criminal standard.[10]

[8] Section 49(7), Regulation of Investigatory Powers Act, 2000

[9] Section 53(2), Regulation of Investigatory Powers Act, 2000

[10] Section 53(3), Regulation of Investigatory Powers Act, 2000

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TIPPING OFF

There is an additional offence under **section 54(4) of the Act** that is committed in situations where a RIPA Notice that includes a prohibition on either a person who receives the notice and every other person who becomes aware of it, or its contents, to keep secret the giving of the notice, its contents and the things done in pursuance of it, then proceeds to fail to comply with such a requirement.

Such a provision may raise questions as to how then anyone could receive legal advice on such a RIPA Notice containing said requirement without committing an offence. However, **section 54(6) and (7) of the Act** goes on to provide the following defences that apply both to the recipient of a notice and their legal advisor:

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In proceedings against any person for an offence under this section in respect of any disclosure, it shall be a defence for that person to show that—

- (a) the disclosure was made by or to a professional legal adviser in connection with the giving, by the adviser to any client of his, of advice about the effect of provisions of this Part; and
- (b) the person to whom or, as the case may be, by whom it was made was the client or a representative of the client.

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In proceedings against any person for an offence under this section in respect of any disclosure, it shall be a defence for that person to show that the disclosure was made by a legal adviser—

- (a) in contemplation of, or in connection with, any legal proceedings; and
- (b) for the purposes of those proceedings.”^[11]

Though of course, by way of **section 54(8)**, neither defence applies where such an act is made with a view to furthering any criminal purpose.

^[11] There are additional defences available in alternative situations under section 54(9) and (10), however they have not been included due to the scope of the article. In short however, (9) provides a defence where the disclosure is either to, or authorised by, a judicial commissioner. (10) provides a defence in proceedings for an offence under this section against a person other than the person to whom the notice was given, if that person neither knew nor had reasonable grounds for suspecting that the notice contained a requirement to keep secret what was disclosed.

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THOUGHTS

How best to respond to a RIPA Notice remains a decision that may very well have substantial impacts on any case. Needlessly refusing to comply and ultimately being acquitted of the substantive offence can leave someone still facing the spectre of a custodial sentence where they are convicted of a section 53 offence.

However, that does not mean that every recipient should rush to comply without first taking stock. There remain a number of stages at which timely and accurate representations and challenge can produce a positive outcome. RIPA Notices are not something that should necessarily be taken laying down, and where appropriate, robust challenge is the correct course of action to take.

To assist in doing so, I have prepared a concise checklist which is annexed to this article that highlights what I think are the key stages in respect of the issuing of, and responding to, a RIPA Notice.

By Pierre de Garis

ANNEX A

RIPA NOTICE CHECKLIST

Step	Substance	Y/N
Step 1 – Gateway to possession	Has the protected information come to be possessed, or is likely to be possessed, through any of the five gateways	
Step 2 – Appropriate permission	Has it been made by a person with appropriate permission within sch. 2 of the Act?	
Step 3 – If it has been made by a person with appropriate permission under Sch. 2 of the Act, why/how do they believe the following:	(1) that a key to the protected information is in the possession of any person,	
	(2a) that the imposition of a disclosure requirement in respect of the protected information is necessary: - in the interests of national security; - for the purposes of preventing or detecting crime; or - in the interests of the economic well-being of the UK <u>OR</u> (2b) necessary for the purpose of securing the effective exercise or proper performance by any public authority of any statutory power or statutory duty	
	(3) the imposition of such a requirement is proportionate to what is sought to be achieved by its imposition	
	(4) it is not reasonably practicable for the person with the appropriate permission to obtain possession of the protected information in an intelligible form without the giving of notice	

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Step 4 – Is the notice in the correct form and contain the necessary information	In writing or (if not in writing), given in a manner that produces a record of its having been given?	
	Describe the protected information to which it relates?	
	Specify the matters falling within section 49(2) (b)(i) or (ii) by reference to which the notice is given?	
	Is the office, rank or position held by the notice giver specified?	
	Is the office, rank or position of the person who granted permission under sch. 2 for the giving of the notice stated? Or if notice giver was entitled to give it without another's permission, are the circumstances in which that entitlement arose set out?	
	Is the time in which to comply with the notice stated (this must be reasonable)?	
	Is the disclosure that is required by the notice AND the form and manner in which it is to be made set out?	

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Step 5 – employee, officer or partner	Is the correct individual receiving the notice where more than one person appears to possess the key (section 49(5) and (6)).	
Step 6 – do circumstances arise that constitute a defence should the notice not be complied with?	See section 53 of the Act.	

CONTACT US

For further information about our services, please do not hesitate to contact our clerks, Daniel Giles and James Harte, on

 0121 236 0863

Further details can also be found on our [website](#).



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