

New faces

IT IS A FINE excitement, election time.

Because of the exigencies of a tough trial I missed most of it, but was found crouching in front of the telly at 5am demanding of it "But who are our masters now?" The suspense was killing me – but eventually fevered impatience was rewarded, and the quintennial rush to the Ministry of Justice website could begin. I'm surprised it didn't crash, with the sheer weight of lawyers anxious to know who their new line managers were and what life under them would be like.

Anxious emails then shot around chambers – would Clarke the new and unexpected lord chancellor be any good for legal aid? At least he was a barrister, and had some grasp of the reality of our lives, surely? Minister of state and Lib Dem Tony McNally has a decent voting record on civil liberty issues, very strongly anti identity cards and stricter asylum laws, and strongly for gay rights.

The parliamentary under secretaries of state, Tories Crispin Blunt and Jonathan Djanogly, are much what one might expect. Djanogly has a legal background as former corporate finance partner for SJ Berwin which should give him a head start on the PPE costs litigation and litigators' payments of one minute to read a page. Blunt was a professional soldier who has held shadow jobs in defence, counter terrorism and the Home Office; whether he will be the heavy government gun is another excitement to discover.

Nick Herbert, the former shadow secretary of state for justice, is minister of state, jointly with the Home Office. It was he who in opposition devised the 'earned release' scheme as an alternative to automatic release half way through a prison sentence. This idea has judges setting minimum and maximum sentences, and release at some point between would be at the discretion of prison governors, depending on how well the prisoner had responded to prison and its many rehabilitative benefits and how much of a danger to the public he is thought to represent. The potential for unfairness and uncertainty in that scheme looks tailor made for litigation by prison lawyers, which may not be the desired consequence of it.

On the other hand, Clarke has hinted that replacing the Human Rights Act is not a 'priority', which can only be good. If financial constraint is the excuse for leaving the HRA well alone, then being broke has some advantages after all.



Out with the old

It was thought too optimistic to expect a week or two of peace and quiet, without the perpetual motion of restructuring/revamping /reforming of the CJS which has been the fashion for the last 13 years. But justice and kitchens have something in common – the first thing a new homeowner does is rip it out and bring in shiny new units and a waste disposal system.

Herbert announced on 19 May that responsibility for charging in all but indictable only cases is to be removed from the CPS and given back to the police. It was switched from the police to the CPS in 2003 because of concerns about excessive expenditure of time, money and vital bodily fluids caused by the police getting charges wrong. And they did get them wrong in every conceivable way – over charging, undercharging, double-counting charging, charging offences not known to law, charging the wrong offence entirely.

CPS charging was reviewed by both the CPS and the police inspectorates recently, who basically approved the scheme and said it was working OK. But the police hate it, and always have. They complain about two perceived disadvantages: delay and the dreaded form filling. There is an element of delay built into the scheme, where cases are not immediately processed from police station, to court, to remand in custody. Where a charging decision has to be made by the CPS, which can take some weeks, a suspect is released and bailed. This delay does not, in reality, affect serious cases at all because a CPS lawyer is actually available, in person or by phone, to advise on urgent charging where suspects should be remanded in custody. It can be a somewhat laborious scheme, but is not unsafe for the public.

As for form filling, apparently it takes a million hours a year to prepare the case files for the CPS decision – and the police resent this, as they do all forms of record keeping,

How accurate is that statistic in any event, and who, precisely, is counting those hours? Does the time spent counting the hours spent count as time spent counting? I do not expect that anyone will consider, far less count, the hours spent by defence solicitors – not paid by the hour at all, on diminutive standard fees, in disentangling any confusion or unfairness caused by unqualified charging processes.

Paperwork protection

The police always complain about the amount of paperwork they have to do, as if keeping records at all is a bureaucratic inconvenience and beneath them. They are given extraordinary powers. They can stop, question, search, issue penalty notices for an increasing range of offences, arrest, intrusively investigate, retain and distribute personal data and information, impound property, break down doors, take children off the streets, disperse demonstrations, detain suspects in custody, oppose bail – all of which are central to the liberty of the subject.

Complaints about 'form filling' and 'bureaucracy' disguise the dangerous suggestion that the use of those powers should have no audit trail. For example, if they stop and search a young person in the street, of course they must record this and keep copies.

Of course they have to monitor race and ethnic origin, to assess disproportionality. Without that, we are back to the old days of indiscriminate searching of young black men under the 'sus' law. If they are detaining a suspect in the police station, there has to be a form, even if it is long and cumbersome, recording how he was treated. Without that, and without sanction for failures to fill it in, there is less protection against the abuse of power. The burden of bureaucracy is a small price to pay for that protection.

Jeannie Mackie is a barrister practising from Doughty Street Chambers