

# Clearing the Backlog: Effective Use of Pre-Charge Engagement

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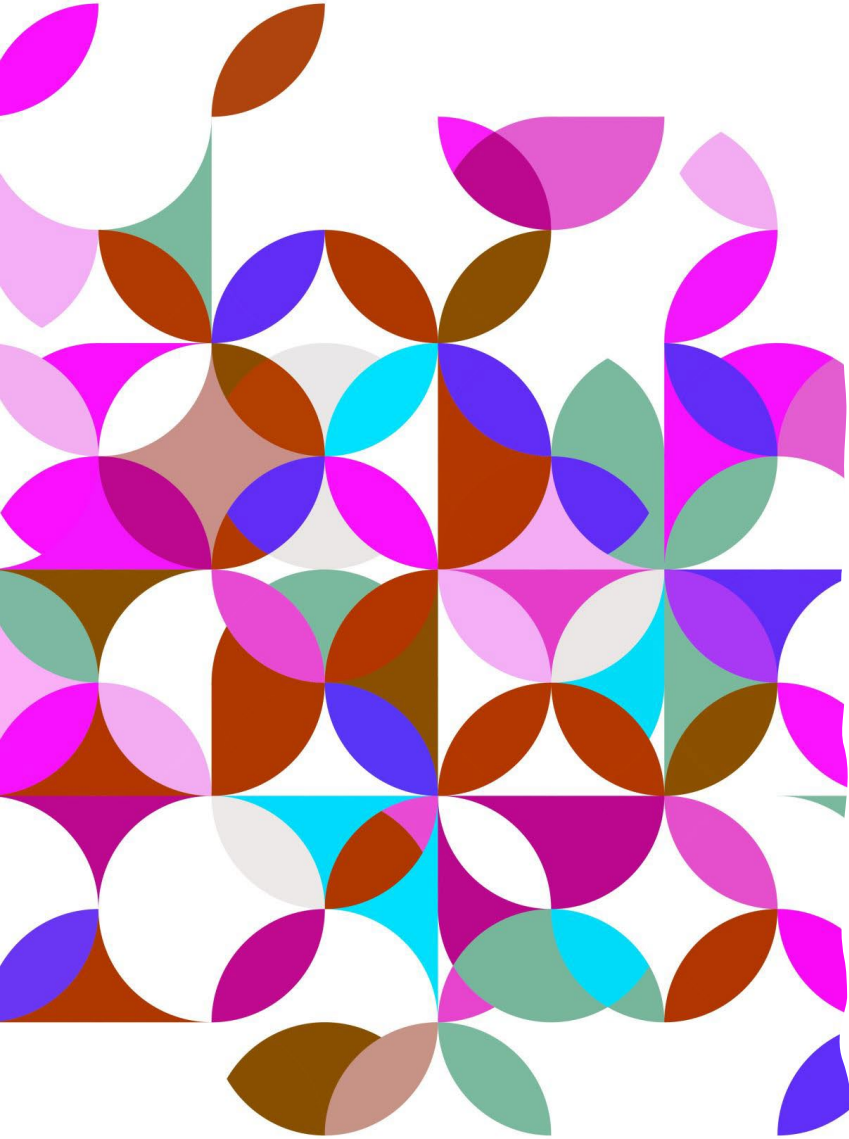
# Pure adversarialism no longer exists

The CJS is now designed to be economic, efficient, as swift as possible

This has been a slow and deliberate attempt to marginalise the role of the defence lawyer and 'provide' justice on the cheap

PCE is another part of this idea and attempts to frontload the collection of evidence to *potentially* divert the case from trial

# What can PCE entail?



- Voluntary engagement between defence lawyer and the police at the pre-charge stage
- The *Guidelines* provide a non-exhaustive list of the potential benefits of engaging with PCE (subsections a-h of the Guidelines)
- Giving the suspect the opportunity to comment on any proposed further lines of enquiry.
- Ascertaining whether the suspect can **identify any other lines of enquiry.**
- Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.
- Discuss ways to overcome evidential barriers to obtaining potential evidence such as revealing encryption keys.
- Agreeing on any keyword searches of digital material that the suspect would like carried out.
- Obtaining a suspect's consent to access medical records.
- The suspect can identify and provide contact details of any potential witnesses.
- Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect's representative intends to instruct their own timescales for this.
- All of this already happens but it is about frontloading the process to achieve an earlier result.

An abstract graphic on the left side of the slide. It features a black silhouette of a person's profile, facing right. The silhouette is overlaid with numerous thin, curved lines in various colors including blue, green, yellow, and red. These lines create a sense of motion or a complex, layered structure. The background of the graphic is black.

# Where can PCE be used?

- The December 2020 *AG Guidelines on Disclosure* said this could be used in cases involving Sexual Offences and Fraud
- The most recent version changes this to only Fraud offences
- A 'no comment' interview does not stop PCE from being offered
- PCE can be face-to-face or via correspondence
- Since pre-charge engagement takes place prior to the institution of any proceedings, the statutory disclosure rules will not be engaged

# Is PCE advantageous to the suspect or the police?

- Engagement from the suspect *might* lead to the case being diverted from trial
- But it all depends on how its used – The Defence are fearful of its use
- This is reminiscent of the original arguments for the regime of defence disclosure under the CPIA 1996 where it was argued that by requiring an accused to disclose a defence case statement, the prosecution will weed out inherently weak cases but rather the drop-weak cases they were tightened after service of defence disclosure
- But there is a safety net for suspects: the *Guidelines* go some way to mitigating this concern. They state that investigators and prosecutors should not seek to initiate, or agree to, pre-charge engagement in respect of matters where they are likely to seek to rely on the contents of the suspect's answers as evidence at trial
- It would not be the first time that efficiency mechanisms have been used as incriminating evidence against a defendant. The case management forms of the CrimPR have been used as a tool by the prosecution to assist in their pursuit of a conviction – *Epping Magistrates' case*
- So careful consideration of its use needs to be used but if we could use the scheme and divert cases some cases from prosecution this could help everyone in the CJS.

# The Court Backlog

June 2022  
Crown Court:  
58,271

June 2022  
Magistrates Court:  
358,076

Issues with the backlog:

**Victims, witnesses and defendants continue to face unacceptable delays and the wider public's faith in the justice system is under threat**

**Despite the courts of England and Wales now operating at full capacity, the backlog will not go away anytime soon without urgent action to ensure there are enough judges, prosecutors and defence lawyers to cover the huge number of cases**

**Looking at the longer view, the backlog is decreasing at a snail's pace – by just 286 cases in six months from November 2021 and April 2022**

**If PCE is actively engaged with, there can be a chunk taken out of the magistrates' backlog – which frees up everyone's time. But as we will see later – Nobody is using it.**

# Study 1: The Legal Aid Lawyer

The most worrying revelation was made by one lawyer who believed the 'purpose' of the scheme was to 'assist the police to better understand the defence of the suspect.'

The understanding of PCE among respondents appears to be very mixed

Whilst three (7.5%) respondents had no understanding of what PCE, there were 11 respondents (27.5%) who thought PCE exists to assist the police with their investigation. Two respondents (5%) stated that to their understanding, PCE is effectively what they already do in the police station.



# Study 1: The Legal Aid Lawyer

- At the time of the survey the scheme had been in existence for under a year. As such, it might be understandable if lawyers had a minimal or a lack of understanding of what PCE consists of and how it ought work
- However, the survey found that three respondents (7.5%) had no understanding of what PCE is
- Twenty-one respondents (52.5%) highlighted the importance of communication between the defence and the police.
- One respondent suggested that there ‘should be effective communication between the suspect [or their lawyer] and the police.’
- **But**
- One respondent (2.5%) suggested that the purpose of PCE was to ‘provide police with lines of enquiry that would assist [my] client in confirming that they may not be guilty of the offence(s).’
- six respondents (15%) suggested that the scheme could have benefits for their client in terms of avoiding prosecution. It was suggested that PCE presents an opportunity to ‘negotiate’ with the police for a lesser charge or, in some cases, no charge at all. One respondent claimed that the scheme allows ‘us [defence lawyers] to engage with the police to try to resolve matters and divert a case going to court.’





# Benefits of PCE

- The Guidelines state several benefits for engaging with PCE:
- Suspects who maintain their innocence will be aided by early identification of lines of enquiry that points away from them
- PCE can help form the prosecutor's charging decision, this could lead to the earlier dropping of proceedings
- Issues in dispute will be narrowed, so unnecessary inquiries are not pursued
- An early resolution may reduce anxiety and uncertainty for both suspects and complainants
- There will be economic cost savings throughout the process.

# The privately funded PCE

- This study is from a firm in the northwest of England
- Their engagement is largely based on PCE but is not hindered by the Legal Aid Rates – it is very expensive
- The vast majority of their early engagement cases involve privately paying clients
- 100% of the respondents said this engagement took more than **14 hours**
- This is interesting as the government suggest it ought to be done in **4 hours**.
- **Spending more time = better decisions**

# The benefits

- Reassured clients, made the process clearer to them, affected charging decisions, made investigations more thorough
- can help collate mitigation to enable a better result when guilty
- Provided reassurance and guidance to clients in time of high anxiety and stress
- Some success in achieving out of court disposals where dealing with more low level offences.
- Build good relationship with investigator - effective communication means keeping up to date with the case

# Results of Engagement

It depends on the case. Where I argue that the case should not proceed, I estimate that around 75% of representations are successful in diversion.

- If the 75% is a true figure, this could have a large impact on relieving pressures on both the police workload and cases being sent to trial.
- They *can* be disposed of cleared-up in another way other than trial
- But it needs engagement from both sides to greatly reach the point where this decision to dispose can be made.

# Concluding thoughts

- More understanding on both sides is needed to understand the value of PCE.
- Greater levels of funding is needed to entice the legal aid lawyer to engage
- The scope of where it can be used ought to be widened
- With the benefits of diverting suspects from prosecution, PCE represents a tangible opportunity to reduce the backlog in the criminal courts
- However, the lack of use of the scheme will do nothing to assist in reducing the number of outstanding cases.
- The early findings are not encouraging, what remains is the creation of a two-tier system of justice, that allows those with means to reap the benefit, whereas the LA client is disadvantaged
- It represents an opportunity to create a shift in culture – adversarialism has been replaced by an efficient cost-effective system of ‘justice on the cheap’
- The estimation that PCE can be carried out in 4 hours is inherently wrong.