The Adversarial Lawyer and the Client's Best Interest: Failures with Pre-Charge Engagement

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When thinking about the classic role of the defence lawyer, one would imagine a lawyer zealously defending their client from prosecution in the courtroom. However, a strong body of evidence[1] suggests that defence lawyers are not zealous advocates but cogs a machine that simply processes defendants' guilt. As such, the idea of a zealous advocate, which is centered in adversarialism, does not exist. Over the last 30 years, the adversarial process in England and Wales has suffered 'death by a thousand cuts' via piecemeal changes to the criminal justice process; these include changes to the right to silence, disclosure, and the creation of the Criminal Procedure Rules (CrimPR). The latter created a 'sea change'[2] in how criminal cases were dealt with and inflicted a culture of cooperation, where both prosecution and defence are working toward the common goal of satisfying the Overriding Objective of the CrimPR – namely to 'deal with cases justly'.[3] This means that the criminal justice process has become less adversarial and more managerial or process-driven in nature. The focus of this approach is to process the guilt of the defendant in the most efficient and expeditious manner,[4] thus negating the combative culture of traditional adversarialism. A further extension of this managerialist culture was the advent of Pre-Charge Engagement (PCE). Introduced in 2021, this process was designed to divert some cases from trial by opening a dialogue between the defence lawyer (or the suspect himself, if unrepresented) and the police and prosecution. If used successfully, the scheme could greatly benefit the criminal justice system by helping reduce the backlog of cases currently outstanding in the criminal courts and a swifter resolution for complainants, suspects, and witnesses. However, the scheme is hardly being used and this article will contend that defence lawyers are not acting in their client's best interests by failing to use PCE and certainly do not conform to the classic conception of the defence lawyer's role.

Traditional Conception of the Adversarial Defence Lawyer of the Lawyer

When considering the role of the defence lawyer, there is a danger of oversimplifying it as one that merely advances the interests of the client. This simplified view does not allow room for other values that, at times, the defence lawyer may have to promote ahead of his client's interests. The defence lawyer's role can be seen to operate with three interwoven duties: firstly, he is the mouthpiece of his client; secondly, he is an officer of the court; and finally, he has a duty to the public.[5] Despite being charged with advancing his client's case, the defence lawyer's obligation to his client is, obviously at times, tempered by obligations owed to other parties in the criminal justice process; this notion was expressed by Lord Reid in the case of *Rondel v Worsley*:[6]

> '…Counsel has a duty to fearlessly raise every issue, advance every argument and ask

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[1] See generally, M. McConville, J. Hodgson, L. Bridges and A. Pavolvic, *Standing Accused* (1994), Oxford University Press, Oxford; D. Newman, *Legal Aid Lawyers and the Quest for Justice* (2013), Hart: Oxford and E. Johnston, *The Role of the Defence Lawyer: Conceptions and Perceptions within a Changing System*, (2021), Lexington: Washington DC

[2] *R v Jisl* [2004] EWCA Crim 696.

[3] Criminal Procedure Rules 2020, Rule 1.1.

[4] Criminal Procedure Rules 2020, Rule 1.1(e).

[5] M. Blake and A. Ashworth, 'Ethics and the Criminal Defence Lawyer' [2004] *Legal* Ethics vol 7 167-190 at 167

[6] [1969] 1A.C. 191.

> every question, however distasteful, which he thinks will help his client's case. But as an officer of the court concerned with the administration of justice, he has an overriding duty to the court, to the standards of his profession and to the public, which may and often lead to a conflict with his client's wishes…'.[7]

According to Lord Reid, to fulfil their role, the defence lawyer must explore every possible avenue to provide their client with a defence. It has been claimed that the defence lawyer operates on the horns of a trilemma: he needs to accumulate as much knowledge about the case as possible; hold it in confidence; and never mislead the courts.[8] The adversarial criminal process in England and Wales is rooted in the image of the defence lawyer acting as the accused's shield from the powerful state; this notion has in turn cultivated the ideal of neutral partisanship becoming a central tenet of the defence lawyer's role.[9] This duty of neutral partisanship reflects a dual part of the adversarial ethos; the accused is to be adequately protected from the 'oppressive' state, and arguments on both sides of the question best discover the truth.[10] A further image of the defence lawyer is that they are viewed as the 'gladiator of the accused,'[11] a 'fearless knight,'[12] and the 'hired gun'.[13] These epithets express the notion that the defence lawyer acts as the accused's fearless protector, unafraid to protect the accused from the 'over-zealous' state and ready at will to advance his client's case. In theory, the defence lawyer becomes an 'extension of the client's will'.[14] In essence, the lawyer says, 'all that the client would say for himself (were he able or willing to do so)'.[15] However, questions remain as to whether or not defence lawyers portray this image in practice or does the 'new regime'[16] and changing landscape of criminal justice make this almost impossible.

A further core duty of the defence lawyer is their duty to the administration of justice. The defence lawyer is not interested in the moral truth of a matter, he is said to owe 'an allegiance to the higher cause of truth, justice and the public interest.'[17] The term 'higher cause' gives the impression that the allegiance owed to truth, justice and the public interest should override other duties the defence lawyer has. Truth and justice are interwoven elements of the adversarial process but are not the same. 'Truth' may represent what 'actually' happened in relation to a criminal offence. The Oxford English Dictionary defines truth as 'that which is true or in accordance with fact or reality.'[18] The adversary system is based on the notion that the 'truth is best discovered by powerful statements on both sides of the question.'[19] This definition accepts that while powerful statements aid in answering the question, it accepts that both the defence and prosecution's version of events may not be entirely truthful. The Oxford English Dictionary defines 'justice' as 'the quality of being

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[7] *ibid* at 227-28.
[8] M. Blake and A. Ashworth, 'Ethics and the Criminal Defence Lawyer' [2004] *Legal* Ethics vol 7 167-at 173.
[9] *ibid* 169.
[10] *Ex parte Lloyd* (1822) Montagu's Reports 70n, 72 per Lord Eldon.
[11] R. Du Cann, *The Art of the Advocate* (Penguin Publishing, 1964) at p.46.
[12] M. Cain and C. Harrington, *Lawyers in the Post-Modern World* (Oxford University Press, 1994) at p.55.
[13] F. Zacahrias and B. Green , Reconceptualizing Advocacy Ethics, (2005) 74 Geo.Wash.L.Rev. 27. at p. 182.
[14] W. Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978), Wis.L.Rev. 42.
[15] D. Pannick , *Advocates* (Oxford University Press, 1992) at p.92.
[16] E. Johnston, ' The adversarial defence lawyer: Myths, disclosure and efficiency—A contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020), *The International Journal of Evidence & Proof*, 24(1), 35-58. https://doi.org/10.1177/1365712719867972
[17] D. Nicholson and J. Webb, *Professional Legal Ethics – Critical Interrogations*, (Oxford University Press: Oxford), 1999, at p.64.
[18] http://oxforddictionaries.com/view/entry/m_en_gb0886190#m_en_gb0886190 [Last Accessed October 2023.
[19] *Ex parte Lloyd* (1822) Montagu's Reports 70n, 72 per Lord Eldon.

fair and reasonable.'[20] Therefore the term justice is more concerned with the fairness of the procedural process rather than ascertaining the truth of any accusation.

Securing both truth and justice is at the forefront of the defence lawyer's responsibilities. The defence lawyer may 'not do everything legally permissible to promote his client's cause.'[21] As such, it appears that the duty to the court is paramount and the lawyer's duty to the client is secondary to fulfilling the obligation to the court. If the duty to the client should be the primary duty the defence lawyer owes, he would be permitted to do anything, so long as it was legal, to advance the case of the client. However, this is not the case and the duty owed to the court appears to take precedence over the other duties. Therefore, the lawyer cannot look to delay proceedings by manufacturing a situation that would lead to a delay; therefore, he must ensure that the procedural justice system runs efficiently. However, there is a clear conflict between the duty to the client and the duty to the administration. For example, an ambush defence – where the defence surprises the prosecution at trial with the appearance of an unknown witness or piece of evidence - is an acceptable tactic to employ when furthering a client's case as part of being a partisan advocate; however, when furthering the duty to the court, an ambush defence is strongly discouraged. It is thought that an ambush approach allows the defence a strategic advantage but it 'denies the fundamental principles of fairness'.[22] As an officer of the court, the defence lawyer must take steps to ensure that he is not blinded by partisanship.[23] Despite the duty the defence lawyer owes to the client, the duty to the court should be the primary duty owed by the lawyer: '… the criminal trial is not a sporting contest and the fair determination of an individual's guilt and the protection of society are both important objectives of criminal law.'[24] This statement further emphasises that despite owing a duty to his client, the defence lawyer's primary concern should be achieving a fair and just verdict, which is not necessarily a verdict favouring the client.

The final duty from Lord Reid's statement in *Rondel v Worsley* is the duty to the public. This duty obliges the defence lawyer to consider the implications of his actions upon the public; he must have regard to the requirements of the society for which the system serves. The criminal defence lawyer is a public servant, and as such there is a requirement for him to protect the integrity of the legal system; in protecting the values and integrity of the legal system, the defence lawyer fulfils his duty to the public. He satisfies this aim by not 'degrading' himself to achieve the client's desired result.[25]

The duty to the public may be seen as restricting the defence lawyer's duty to his client. A partisan approach to defending a client is tempered by the principle that the lawyer should act, throughout his dealings with the client, as 'a good person should act'.[26] The lawyer should remember that a partisan duty to his client does not replace his ideas of right and wrong behaviour. Should a client propose a course of action that is unjust, the lawyer should advise the client to take the action that is morally correct; it is important to remember that the action and direction of the defence lawyer will have ramifications for society and the general public. The duty to the client renders

[20] http://oxforddictionaries.com/view/entry/m_en_gb0435410#m_en_gb0435410 [Last accessed October 2023].
[21] F. Zacahrias and B. Green, *Reconceptualizing Advocacy Ethics* (2005) 74. Geo. Was. L.R. at 67.
[22] G. Tomlijanovic , 'Defence Disclosure: Is the Right to Full Answer the Right to Ambush?', (2002-2003) 40 Alta. LR., 689.
[23] F. Zacahrias and B. Green, 'Reconceptualizing Advocacy Ethics' (2005) 74. Geo. Was. L.R.at 28.
[24] D. Bress, 'Professional 'Ethics in Criminal Trials: A View of Defense Counsel's Responsibility', 64 Mich. L. R., 1498.
[25] R. Lawry, 'The Central Moral Tradition of Lawyer', (1990-91)19 Hofstra L.Rev., 337.
[26] *Ibid* at 337.

the defence lawyer as an '… instrument of justice and not a worker of injustice'.[27] This means the lawyer, whilst acting as a partisan representative of the accused, has other obligations that he has to acknowledge. Without this duty to the public, the client would have an unrestricted and unchecked defence; this may encourage dishonest, deceitful and distracting practices that will allow the defence lawyer to keep his opponent from presenting their case effectively.[28] The duty to the public acts as a check to ensure the lawyer acts ethically and in a way that would not cause the public to lose confidence or faith in the criminal justice process. Furthermore, ensuring that the process is conducted ethically ensures that both sides play fair and ultimately, the criminal justice process is fair.

Death of Adversarialism and the Rise of the New Regime

At the dawn of the 21st Century, there was a seismic shift in how criminal procedure is 'done' in England and Wales. In 2001, Lord Justice Auld undertook a *Review of the Criminal Courts of England and Wales* (the Auld Review) and made it clear that 'fairness, efficiency, and effectiveness' ought to be at the heart of the criminal justice system. He also recommended that a 'single and simply expressed instrument'[29] should be created to codify criminal procedure in England and Wales and in 2003, the Criminal Procedure Rules were created. The Rules would govern the practice and procedure to be followed in the Criminal Division of the Court of Appeal, the Crown Court and for criminal proceedings in magistrates' courts. Furthermore, the Committee is responsible for the development of the necessary procedures to bring about the closer alignment of the criminal courts (Department for Constitutional Affairs, 2010). The Rules were created under the authority of s. 69 of the Courts Act 2003 and the Act explicitly states that they should secure that the criminal justice system is accessible, fair and efficient and the rules are simple and simply expressed[30] Rule 1.1 explicitly states that the overriding objective of the new code is that criminal cases should be dealt with justly. Rule 1.1(2) provides a non-exhaustive list of what 'justly' means and it includes:

(a) acquitting the innocent and convicting the guilty;
(b) dealing with the prosecution and defence fairly;
(c) recognizing the rights of the defendant, particularly those under Article 6 of the European Convention on Human Rights;
(d) respecting the interests of witnesses, victims, jurors and keeping them informed of the progress of the case;
(e) dealing with the case efficiently and expeditiously;
(f) ensuring that the appropriate information is available to the court when bail and sentencing are considered; and
(g) dealing with the case in ways that take into account –
    i. the gravity of the offence alleged,
    ii. the complexity of what is in issue,
    iii. the severity of the consequences for the defendant and others affected and,
    iv. the needs of other cases.

To achieve the overriding objective, and ultimately preserve resources and create a more efficient justice system, a transformation in culture throughout the criminal justice process became

[27] G. Archer, 'Ethical Obligations of the Lawyer' in F. Zacahrias and B. Green , *Reconceptualizing Advocacy Ethics* (2005) 74. Geo. Was. L.R. 28.
[28] A. Alschuler, 'How to Win the Trial of the Century: The Ethics of Lord Broughman and the OJ Simpson Defense Team', (1997-1998) 29 McGeorge L.Review., 299.
[29] R. Auld, *Review of the Criminal Courts* (2001) at 472, para. 184) available here: https://www.criminal-courts-review.org.uk/auldconts.htm [Last accessed October 2023].
[30] See Chapter 2, *Ibid.*

necessary. This shift entails fostering cooperation between the prosecution and defence. This transformation has primarily materialized through the mandatory adoption of a Case Management Form, particularly in magistrates' courts, which closely aligns with the requirements set forth in the CPIA defence case statement.[31] While the defence statement aimed to narrow down the issues to be addressed during trial, Case Management Forms were devised to pinpoint the core issues and streamline the trial process for greater efficiency and expediency. Furthermore, another initiative was introduced in 2005, *Criminal Justice: Simple, Speedy Summary* (CJ:SSS)[32] which was designed to reduce the workload of the magistrates court and make more use of out-of-court disposals.[33] Welsh argues that CJ:SSS ought to ensure all necessary documents are with the court and the defence lawyer prior to the first hearing, thereby allowing appropriate advice to be offered to the client.[34] Effectively, both the CrimPR and CJ:SSS attempted to front load the pre-trial preparation elements, ensuring both sides are ready to go. Arguably, the 'tentacles'[35] of the efficiency drivers that have driven criminal justice policy in the courts for the last 20 years are now seeping into the police station and the pre-charge investigation and we are witnessing a transformation in police interrogations, rooted in increasing the efficiency of the process. Jackson states that police interrogation of suspects had changed from 'a process of preparing cases for trial to becoming a real substitute for trials themselves.'[36]

Pre-Charge Engagement and the desire for a more efficient process affirm Jackson's claim that the police interview is effectively a substitute for the criminal trial, as PCE has the potential dispose of the case, and avoid trial, at an early stage. However, this is not the only efficiency driver to make occur in the police station in the last few years. A contentious one emerged during the Covid-19 pandemic. As social distancing would be near impossible during a police interview, it was agreed that defence lawyers could remotely 'dial-in' to the interview and represent their client via telephone or video link. A Custody Protocol was published in April 2020 which set out the procedure where physical attendance at the police station would not be possible. While many lawyers stated they were happy to provide telephone legal advice, there is little evidence to ascertain if the suspect is happy with remote advice.[37] Little is known if the suspect understands the allegation(s) put to them or if they trust or understand their lawyer. There is a clear incentive to offer remote legal advice, as the rate of remuneration from the Legal Aid Agency remains the same for a remote interview as it would for an interview where they physically attend. This provides a 'powerful incentive'[38] as not only will efficiency increase, as lawyers can attend several different cases, taking place at different police stations without the need to travel, but it each case will attract the standard fee that they can claim from the LAA. Questions remain about the quality of advice offered to suspects in the police station – can the suspect understand the nature of the advice offered, are they adequately confident enough to interrupt questioning to have a private consultation with their lawyer, can the lawyer pick up on the non-verbal cues from their client and subsequently interject?[39] If a suspect has their lawyer attend the interview remotely, this does not preclude them from engaging with PCE. The *Guidelines* on disclosure suggest that PCE can be

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[31] Criminal Procedure and Investigations Act 1996, s.6.
[32] L. Welsh, *Access to Justice in Magistrates' Court: A Study of Defendant Marginalisation*, (2022) Hart Oxford at p.64
[33] *ibid* at p. 65
[34] *ibid*
[35] E. Johnston, The Tentacles of State Case Management: 'Co-operative' lawyering and 'efficient' disclosure in the context of plea determination, in M. McConville, L. Marsh and M. Lager, Research Handbook on Plea Bargaining and Criminal Justice (2024) Hart: Oxford forthcoming.
[36] J. Jackson, 'Police and Prosecutors after PACE: The road from case construction to case disposal' in E. Cape and R. Young (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Hart 2008) p.276.
[37] E. Johnston and E. Cape, Legal Assistance at the Police Station: Shifts and Contradictions in the Context of Covid-19 at p16 in E. Johnston, *Challenges in Criminal Justice*, (2022), Routledge: Abingdon.
[38] *Ibid* at p.17.
[39] *Ibid* at p.18.

undertaken in person or via correspondence. Although arguably, it would be far more efficient to engage with PCE at the moment the interview is completed, rather than at a later juncture.

What is Pre-Charge Engagement?

In December 2020, the revised *Attorney General's Guidelines on Disclosure* (*the Guidelines*) introduced PCE in an Appendix to *the Guidelines*.[40] Prior to its inception, the scheme was not piloted and there is a dearth of research on its operation. *The Guidelines* suggest that the disclosure obligations must be completed in a 'thinking manner'[41] which was taken from *R v Olu, Wilson and Brooks*[42] where the court clarified that disclosure should not be undertaken 'in a mechanical manner … keeping in mind [and] being alive to the countervailing points of view … considering the impact of disclosure decisions … keeping disclosure under review.'[43] Whilst this 'thinking manner' was applied to disclosure, it is clear that both disclosure and PCE are inextricably linked. PCE should not be undertaken in a mechanical manner an outcome consistent with the government suggestion that only 1-3% of cases will involve PCE.[44] The scheme provides the suspect with a pre-charge opportunity to provide countervailing points of view, the suspect can comment on further lines of enquiry or other exculpatory evidence. However, it might be argued that PCE is a mechanism for persuading suspects to reveal further information rather than the police providing information to the suspect. In essence, the way *the guidelines* are written suggest that PCE has a one-way flow of information: to the police, from the suspect.

It is important to note that the process is voluntary. There is currently no obligation to engage with the process and should either side reject the offer of engagement, no inferences at trial can be drawn. The *Guidelines* explicitly state this as PCE is described as a 'voluntary engagement between the parties to an investigation after the first PACE interview, and before any suspect has been formally charged'.[45] Both the police and the defence lawyer (or an unrepresented suspect) need to agree that it is in the interests of progressing the case to engage with. At face value, this is a risk-free situation for the suspect.[46] The *Guidelines* provide a non-exhaustive list of what PCE might involve, including:

a. Giving the suspect the opportunity to comment on any proposed further lines of enquiry
b. Ascertaining whether the suspect can identify any other lines of enquiry
c. Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation
d. Discussing ways to overcome evidential barriers to obtaining potential evidence such as revealing encryption keys.
e. Agreeing any keyword searches of digital material that the suspect would like carried out.
f. Obtaining a suspect's consent to access medical records.
g. The suspect identifying and providing contact details of any potential witnesses
h. 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.[47]

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[40] *The Guidelines*, Appendix B.
[41] *The Guidelines* p.3 para 4.
[42] [2010] EWCA 2975, [2011] 1 Cr. App. R. 33.
[43] *Ibid* at 42-44.
[44] Ministry of Justice, *Government Response: Criminal Legal Aid Review – Remuneration for Pre-Charge Engagement* (2021) at p.14 available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976301/pre-charge-engagement-consultation-response.pdf [Last Accessed October 2023].
[45] *The Guidelines* 34.
[46] *Ibid* 35.
[47] *Ibid.*

By looking at what PCE might involve, it is debatable whether the scheme offers anything new to the pre-charge process. At first glance, PCE appears similar to what Reasonable Lines of Enquiry (RLE) can involve. The Code of Practice that accompanies the Criminal Procedure and Investigations Act 1996 (CPIA 1996), suggests that an investigator 'should pursue all reasonable lines of enquiry, whether these point towards or away from the suspect … it is a matter for the investigator to decide which material … is reasonable to inquire into.'[48] This notion of RLE is replicated in the above list in section (a) – (c) and (e). However, just because the suspect suggests an RLE, the police are not obligated to follow the line, if they do not believe it is reasonable in the circumstances of the case. In *R v E*[49] the Court of Appeal emphasised that the seizing a mobile device of the complainant, is not automatically a reasonable line of enquiry in every case. The Court of Appeal reversed the decision of the original trial judge to stay the proceedings on the basis that the RLE should have been followed. This approach was reiterated in *CB*[50] where the defendant was convicted of sexually assaulting his partner. At trial, he attempted to adduce evidence of previous false complainants made by the complainant. Whilst the police downloaded the contents of her mobile phone, the appellant complained that the approach to disclosure was inadequate. The appeal was dismissed with the Court reiterating that per the Attorney General's Guidelines on Disclosure, RLE should not be granted for a 'fishing expedition'. *The Guidelines* state that 'it is not the duty of the prosecution to comb through all the material in its possession … on the lookout for anything which might conceivably or speculatively undermine the case or assist the defence.'[51] Clearly, PCE allows for RLE to be offered but as per the common law approach, the police or prosecution are under no obligation to follow any particular line of enquiry, it will all depend on the circumstances of the case.

In terms of sub-section (d), again it is questionable if the potential to discuss ways to overcome evidential barriers, such as the suspect revealing encryption keys. This does not offer anything new to the pre-trial investigation. Section 49 of the Regulation of Investigatory Powers Act 2000 (RIPA 2000) provides powers to compel a suspect to disclose passwords or encryption keys to devices or files. Those who are charged with failure to comply with the notice cannot rely on the privilege against self-incrimination as the data contained on the file 'existed independently of the will of the appellant'.[52] The privilege cannot be afforded to material that had an existence independent of the will of the individual[53] and therefore the power to compel suspect to reveal encryption keys is already in existence.

Sub-section (f) highlights the potential one-way nature of PCE, by allowing a suspect to give consent to obtain their medical records. There is no statutory duty to compel medical professionals to disclose confidential patient information to the police. However, disclosures can be made if it is supported by 'either the explicit consent of the individual concerned or be sufficiently in the public interest to warrant the disclosure'.[54] The decision whether the disclosure is in the public interest rests with the medical professional and often, this decision will be complex. The General

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[48] Criminal Procedure and Investigations Act 1996, Code of Practice, para 3.5 (available here: Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice (publishing.service.gov.uk) [Last accessed December 2022.

[49] [2018] EWCA Crim 2426.

[50] [2020] EWCA Crim 790.

[51] *The Guidelines* p.31 para 39

[52] *R v S* [2008] EWCA Crim 2177.

[53] *R (On the Application of River East Supplies Ltd) v Nottingham Crown Court* [2017] EWHC 1942 (Admin).

[54] NHS England, Sharing Information with the Police, 4th May 2022, available here: https://www.nhsx.nhs.uk/information-governance/guidance/sharing-information-with-the-police/ [Last accessed October 2023].

Medical Council suggests that when deciding if a disclosure is in the public interest, the medical professional needs to consider if the potential harm or distress the patient will suffer will impact future engagement with treatment. Secondly, the medical professional must consider if there is any potential harm impacting the levels of trust the suspect has with medical professionals. Thirdly, the potential harm caused to others should the information not be disclosed. Fourthly, the benefits to an individual or society arising from the release of the information and the nature of the information, and any views expressed by the patient. The final issue is whether the harms can be avoided, or benefits gained without the breaching the patient's privacy or, if not, what is the minimum intrusion.[55] Therefore, by engaging PCE to obtain the suspects' medical records removes a great deal of complexity and bureaucracy from the investigation. Thus, rendering it far more efficient in nature.

Sub-sections (g) and (h) are effectively provisions already exist elsewhere, albeit it by using PCE for the purpose of obtaining details of witnesses and expert evidence, will bring this notification forward to an earlier juncture in the criminal justice process. In advance of trial, the defendant must provide these details in the Case Management Forms (for cases heard in the magistrates' court)[56] or in a defence case statement (for cases heard in the Crown Court).[57] So again, PCE is offering nothing new to the process but is effectively bringing forward the time in which the police or prosecution are made aware of the existence of these witnesses. Arguably, it is questionable about how realistic this opportunity to engage is. This engagement takes place pre-charge, very little is known about the case and certainly there will have been little disclosure to the suspect regarding evidence. As such, it might be unrealistic to expect suspects to provide information regarding any potential witnesses when they are receiving very little in return.

At face-value, the wording of the guidance is problematic. The procedure is termed 'engagement', which paints a picture of two parties working together towards a common goal. However, the aforementioned, non-exhaustive, list of what PCE might involve suggests a one-way flow of information – from the suspect to the police and very little information flowing in the opposite direction. Furthermore, since PCE takes place before the commencement of any formal proceedings, the statutory disclosure rules do not apply. Disclosure must not be undertaken in a 'mechanical manner'[58] and the disclosure of unused material must be considered part of the PCE process. Thus, ensuring that the engagement is fair, and the suspect is not misled as to the strength of the prosecution's case.[59] The investigator/prosecutor also should be 'continually alive to the potential need to make further disclosure'[60] as the suspect continues to provide more information throughout PCE.

The Existing Findings on Pre-Charge Engagement

Thus far, very little has been written on the use of PCE in England and Wales. In 2021, Johnston conducted a study examining defence lawyers' perceptions of the scheme.[61] The study consisted

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[55] Para 68 https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/confidentiality/disclosures-for-the-protection-of-patients-and-others [Last Accessed December 2022].

[56] Part 4 of the Preparation for Effective Trial Form contains a section concerning 'Expected Defence Witnesses.' Furthermore, Rules 19.3 and 19.4 outline the prescribed time periods of when an expert witness report should be served to the other side.

[57] S.5 Criminal Procedure and Investigations Act 1996 compels the defendant to provide a Defence Case Statement. S.6 outlines that defence case statements can be given in the magistrates' court but this is voluntary. S.6A outlines the contents of the statement. S.6D outlines the provisions regarding the disclosure of experts instructed by the defendant.

[58] *R v Olu, Wilson and Brooks* [2010] EWCA 2975.

[59] *The Guidelines* at p.38 para 22.

[60] *ibid.*

[61] E. Johnston, 'Pre-Charge (Lack of) Engagement: An Empty Gesture?, (2022), Crim.L.R. 9 737-754.

of a 10-question online survey that ran between August and December 2021. At the time of the study, PCE had been in existence for 8 months. In total, 40 participants completed the online survey. The survey consisted of a mixed-methods approach, which combined both qualitative and quantitative elements. Of the 40 participants, 33 (83%) were criminal defence solicitors and seven (17%) were Accredited Representatives. There was a mix of geographical regions where the lawyers practised: four lawyers were from the South West of England (10%); three from the South of England (8%); seven from the South East of England (18%); 15 from London (38%); three from the Midlands (8%); two from the North West of England (5%); three from the North East of England (8%); and three from Wales (8%).

Thirty-six respondents answered the question of whether PCE was working as intended. 100% of these answered 'no' it was not. When asked for an expansion on that answer, the majority of the responses fit within three categories. Firstly, that PCE is not being used. Secondly, that there are issues around the understanding of PCE and who can suggest that both sides engage, and finally, there are practical issues in the day-to-day workings of a criminal defence lawyer, e.g., concerning the remuneration of PCE and time pressures of other cases. In the first category, 13 respondents (32.5%) stated that PCE is not being used. The majority answered 'it is not being used' while others were more vociferous in their response; they expanded their answers with terms such as '[it is] utterly pointless,' and a 'complete waste of time.' Nine respondents (22.5%) suggested there are issues with police understanding of PCE. The respondents in this category suggested a number of issues. Some claimed that the 'police do not engage with PCE in any meaningful way' and that the scheme 'does not seem to be followed by the police.' Some thought there were wider concerns with the adversarial nature of police investigations and said, 'it appears to only assist the police and places the client in jeopardy' and that 'police officers believe they are there to secure convictions and not investigate [the allegation].' This points to an issue with culture in contemporary criminal justice. The 'sea change'[62] established in the wake of the *Auld Review*[63] and creation of the CrimPR has helped cultivate a culture of co-operation. As discussed above, the defence lawyer and their client are active participants in the criminal justice process and both have to work to achieve the overriding objective of dealing with cases justly.[64] It appears that the notion of co-operation does not trickle down to the police, and they remain adversarial in nature. One respondent claimed that PCE 'is used entirely defensively by the police' and this points to a further misunderstanding as to the purpose of the scheme. The *Guidelines* state that there is little tactical advantage for the police engaging in PCE. Both investigators and prosecutors should not seek to initiate (or agree to) PCE where they are likely to rely on the suspect's answers at trial.[65] As such, PCE should not be a mechanism to strengthen a weak case. The *Guidelines* go on to state that there are a number of benefits to engaging with PCE, but it is notable that no respondents mentioned them. These benefits include:[66]

- 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

[62] R *(On the Application of the DPP) v Chorley Justices* [2006] EWHC 1795 Admin per Thomas LJ at para 24.
[63] Auld, R, *A Review of the Criminal Courts of England and Wales*, (2001) available here: http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/ccr-00.htm [Last Accessed December 2022].
[64] Rule 1.1(1) CrimPR 2015.
[65] *The Guidelines* p.36, para 8.
[66] *The Guidelines* p.37, para 10.

- There will be economic cost savings throughout the process.

Despite these benefits, it is clear the system is not working as intended or indeed being offered very often.

Why is PCE not working

Writing in the early 1990s, McConville et al believed that the culture of criminal defence work was rooted in adversarialism. From there observations, they found that in many defence firms, there was a 'production line quality' which was geared toward guilty pleas and they found that some firms were 'orientated toward a stereotype of the criminal client as dishonest and untrustworthy, and *less* predisposed toward conducting cases through guilty pleas.[67] Research conducted in the 1970s suggested a similar issue when examining the adversarial nature of defence lawyers. Bottoms and McClean found that access to a defence lawyer was a 'sacred tenet of the Due Process model'[68] but simply by having access to a lawyer offers no guarantee that due process values are adhered to where the leading protector of due process values is a 'Liberal Bureaucrat.' According to Bottoms and McClean, the Liberal Bureaucrat is a 'practical man; he realises that things have to get done, systems have to run … the defendant will have substantial protections … but these protections must have a limit … [as if there were no limits] … the whole system of criminal justice will collapse'.[69] McConville et al found that defence firms with adversarial justice. Simply put, they were concerned with 'the efficient management and processing its clients through the machinery of justice, than with justice itself.'[70] They found that 'poor quality defence firms do little to uphold the values or principles' of criminal justice in England and Wales.'[71] Johnston's examination into the defence lawyer's working practices mirrored these studies' findings. Johnston found that defence lawyers were not adversarial in nature and 'cogs in a machine' geared toward the drive for a more efficient process.[72] Newman suggested that defence firms mimicked the form of a 'sausage factory' where they prioritised profit-making in the quickest manner possible.[73] He stated that lawyers often viewed their clients in an unfavourable light and held a presumption of guilt against their clients. They assumed their client would enter a guilty plea and it would be their job to help facilitate such a plea.[74] None of the empirical evidence offered here paints the picture of the defence lawyer as an adversarial warrior who prioritises their client's best interests above all other interests. With a distinct lack of engagement with PCE, it appears that some 40 years after Bottoms and McClean's leading work, defence lawyers are largely non-adversarial in their approach to their clients and in the modern era they focus on efficient management and processing their client to achieve a 'just' outcome.

There is a distinct level of disdain for the funding model attached to PCE. Evidence from both the response to the government consultation and Johnston's study point to the fact that the funding model is insufficient. Fifty per cent of respondents to the government's *consultation*

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[67] M. McConville, J. Hodgson, L. Bridges and A. Pavolvic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (1994), Oxford University Press, Oxford at 271.

[68] A. Bottoms and J. McClean, *Defendants in the Criminal Process*, (1973) Routledge, Abingdon, at p.229.

[69] *Ibid*

[70] M. McConville, J. Hodgson, L. Bridges and A. Pavolvic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (1994), Oxford University Press, Oxford at 295.

[71] *ibid* at p.298.

[72] See E. Johnston, *The Role of the Defence Lawyer: Conceptions and Perceptions within a Changing System*, (2021), Lexington: Washington D.C. – in particular see Chapter 6.

[73] D. Newman, *Legal Aid Lawyers and the Quest for Justice* (2013), Hart: Oxford at p.30.

[74] *ibid* at p.112

suggested the remuneration amount was insufficient.[75] This was also apparent in Johnston's study, as five respondents (12.5%) explicitly mentioned the rates of pay; one suggested that the 'payment is low and the risk of a mistake [providing the police with additional evidence] is too high,' while another commented that 'it takes a great deal of time and it's likely not worth engaging with'[76]Another respondent suggested that 'unless the police agree to PCE in writing, you will not get paid for it … we have enough pressure without trying to get paid on an over-complicated scheme.' In their *consultation* submission, The Law Society suggested that this requirement for a written agreement to engage in PCE created a layer of 'unpaid and superfluous bureaucracy'.[77] They suggested that a detailed note on the file should act as 'clear evidence that there was an agreement between the parties to engage'.[78] In response, it was agreed that any agreement to engage with PCE can be informal and that 'to ensure payment for PCE work can be made, the Legal Aid Agency will require a file note detailing an oral or written agreement on which a PCE fee is to be claimed'.[79] So the government are listening to the lawyers' concerns regarding certain aspects of PCE and mitigating their concerns.

The notion of diverting cases from potentially unnecessary trials has never been more important. The backlog of cases in the criminal court is staggering. As of September 2023, there are almost 65,000 cases outstanding in the Crown Court – which represents an increase of 4% on the previous quarter.[80] The President of the Law Society, Lubna Shuja, suggested that the delays faced by defendants, witnesses and complainants are unacceptable. Shuja went on to say that the 'entire criminal justice system is fracturing … people seeking justice … are left in limbo waiting longer and longer to see it happen'.[81] The backlog in the magistrates' court is equally as bleak. As of April 2023, the backlog stood at 347,000 cases, an increase of some 10,000 cases on the previous year.[82] There were attempts to reduce the backlog in the magistrates' court by extending magistrates' sentencing powers. In 2022, the government extended the powers so magistrates could pass a sentence of 12 months for a single offence, replacing the maximum sentence of six months. This extension was thought to free up an extra 1,700 days of Crown Court time each year.[83] However, this was reversed after 10 months as the magistrates' court works faster than the Crown Court and the increase in sentencing powers 'had led to an increase in the prison population that needed to be addressed, going back to the previous sentencing powers would slow down the increase in the prison population'.[84] It is clear that the government have attempted to reduce the backlog through extended powers of the magistrates, but this proved futile. The criminal justice system is 'fracturing' and needs an injection of proper funding. In the meantime, PCE could offer a viable

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[75] *Government Response*, para 23.
[76] E. Johnston, 'Pre-Chrage (Lack of) Engagement: An Empty Gesture? (2022), Crim. L.R. (9), 737-754 at 751.
[77] *Government Response*, para 27.
[78] *Ibid.*
[79] *Ibid* para 33.
[80] M. Fouzder, 'Criminal Court backlog hits record high of almost 65,000 cases', 29th September 2023, Law Society Gazette, available here: https://www.lawgazette.co.uk/news/criminal-court-backlog-hits-record-high-of-almost-65000-cases/5117383.article [Last accessed October 2023].
[81] *Ibid.*
[82] New Law Journal, Backlog Crisis Deepens in Criminal Courts, 14th June 2023, issue 8029, available here: https://www.newlawjournal.co.uk/content/backlog-crisis-deepens-in-the-criminal-courts#:~:text=The%20magistrates%27%20court%20backlog%20was,for%20trials%20to%20take%20place [Last accessed October 2023].
[83] Ministry of Justice, Magistrates to help tackle backlog as sentencing powers doubled, 2nd May 2022, available here: https://www.gov.uk/government/news/magistrates-to-help-tackle-backlog-as-sentencing-powers-doubled [Last accessed October 2023].
[84] HL deb, 16 May 2023, vol 830, col 211 available here: https://hansard.parliament.uk/lords/2023-05-16/debates/A7694043-1B1D-47A6-BC15-9BD92B07174F/SentencingAct2020(Magistrates'CourtSentencingPowers)(Amendment)Regulations2023#:~:text=The%20instrument%20that%20is%20the,in%20place%20in%20May%202022. [Last accessed October 2023].

alternative of disposing of a case in advance of trial, yet the initial take-up has been low. Lawyers, and the police, are simply not engaging with the scheme, and it is going pretty much unused. However, by not using the scheme purely because the rates are perceived to be insufficient places their client at a clear disadvantage their client. As discussed, traditional adversarialism and acting as a 'zealous advocate' is centred on advancing your client's best interest. However, lawyers are not acting in the client's best interest and potentially miss an opportunity to divert a case from prosecution purely because the lawyer does not think engagement is worthwhile from a financial standpoint. As evidenced below, the scheme could have positive benefits for all involved by actively engaging with the process.

Can PCE Work?

In short, the answer appears to yes. A follow-up survey was undertaken with a firm of solicitors who offer a version of PCE for private paying clients. This version of PCE effectively mirrors the Legal Aid version but yields very different results. When dealing with private paying clients, it appears that PCE, is beneficial to both the client and the criminal justice system as a whole. One lawyer commented that with 'private paying clients, where we can spend an adequate amount of time on engagement, we can either compile a better case for mitigation (should the case go to trial) or divert the case from prosecution and receive an out-of-court disposal.' Of the sample of six lawyers, 40% claim that early engagement has led to 'No Further Action' being taken by police, therefore the investigation ceases immediately and no sanction is placed upon the suspect. One lawyer claimed, ' where I argue the case should not proceed, I estimate that 75% of [my] representations are successful'. This remarkable figure suggests that early engagement between the defence lawyer and the police can result in a diversion from prosecution. However, the lawyers surveyed suggest that they spend at least 14 hours on engagement (40%) and 60% claim to this engagement takes over 20 hours. Which of course highlights the problem with the scheme – there simply is not adequate funding for the Legal Aid client.

The rates of remuneration could be a further explanation for the low usage of Legal Aid PCE. The hourly rate for PCE work is £51.28 in London and £47.45 elsewhere and is subjected to an extendable upper limit of £273.75[85] This equates to a little over five hours work in London and just under six hours elsewhere. However, using the private paying client as an example to successfully engage and use PCE would take a minimum of 14 hours, which would cost £717.92 in London and £664.30 elsewhere, which means the finances set aside for PCE would have to increase greatly. One lawyer supported this increase when they said, 'it's not economically viable to undertake PCE on a Legal Aid basis.' Arguably, this places the Legal Aid client at a double disadvantage; firstly, their lawyer does not engage with PCE as it is not in their economic interests to do so. Perhaps this is because the rate of remuneration is too low, the volume of work involved will not be completed before the upper limit is reached or a combination of both factors. The second tier of justice is reserved for those without means. They are provided with an overworked and underfunded Legal Aid lawyer, who does not have either the time or the inclination to engage with the police as it is not economically viable. Instead, their case progresses through the system and will be heard in court.

Although greater awareness and use of PCE is needed, greater engagement is also required. The Impact Assessment of PCE estimated the cost of the regime will be between £300,000 and £1.8million per annum. However, in 2021-22, only £9,000 was spent on PCE.[86] Using the higher London weighting as an example, this would account for 175 hours for PCE work. Again, using

[85] £51.28 per hour in London, £47.45 per hour outside London. See Criminal Legal Aid (Remuneration)(Amendment)(No 2) Regulations 2020 SI No 497.

[86] Per Mike Freer, Assistant Whip, The Parliamentary Under-Secretary of State for Justice. See here: https://www.theyworkforyou.com/wrans/?id=2022-11-14.86596.h&s=afzal+khan#g86596.q0

the, the upper limit will only allow for 5.3 hours per case. Using these estimates, this means there were approximately 33 claims for defence work under the PCE scheme. Clearly, the scheme is not being used. Using the upper limit of £1.8million of the Impact Assessment, the government could cover (using the London weighing) 6,575 cases per year yet approximately only 33 claims were made. This is a remarkable disparity, which indicates the scheme is not working as intended. If the scheme was working as intended, the evidence suggests that a number of cases could be diverted from trial, thus helping to clear the backlog of cases that has been building over the last ten years. In 2022/23 there were around 67,000 cases outstanding in the Crown Court and 367,000 in the magistrates' court.[87] Pre-Charge Engagement could help clear this backlog from cases that do not warrant prosecution and can be diverted by other means.

Conclusion

The numbers of defence lawyers in England and Wales are dwindling. The financial incentives to carry out defence work are minimal. They are overworked and the system is under-funded. However, the lawyers who have taken part in this study thought that PCE was a 'waste of time' are wrong. Arguing that the rates of renumeration and time allowed to conduct PCE are insufficient is a fine point to make. However, PCE can work – as shown with the non-Legal Aid client – and the success rates in terms of diversion from prosecution are high. However, having a reluctance to engage with a scheme that can advance the best interest of your client because you are not being paid enough is wholly wrong. This is not what the adversarial defence lawyer is supposed to do. They are supposed to be zealous advocate of the accused, their shield from the oppressive state and if a scheme exists that can divert your client's case from prosecution, the lawyer ought to be engaging with it. Although, this lack of engagement is indicative of a process where zealous advocacy does not exist. It begs the question if it ever truly existed? Since the 1970s academics have found that lawyers acting in an adversarial manner exists in theory rather than in reality. Lawyers have been described as 'profit-driven' and operating in a 'sausage factory' where they view their clients with disdain and process guilty pleas. Perhaps the lack of engagement with PCE falls in line with these findings, defence lawyers in England and Wales are not adversarial in nature and by failing to engage with PCE, are not acting in the client's best interest.

It could be argued that engagement would be more attractive to the 'profit driven' lawyer if the rate of renumeration was more attractive.. This article has offered evidence from a non-Legal Aid version of PCE and here the lawyers claimed that whilst they have a success rate of circa 75% in terms of diverting cases from prosecution, all six of the lawyers interviewed suggested that each case took in excess of 14 hours, with some cases taking over 20 hours. This places the Legal Aid client at a disadvantage; using the upper London limit for claims, the Legal Aid Lawyer can only claim for five hours work on PCE. The private client version takes almost 4 times longer than this limit, as such PCE seems like 'a waste of time'.[88] The five hours of Legal Aid PCE would not allow enough time to adequately engage with the process; especially if the suspect requires intervention from other services such as interpreters, mental health practitioners or an appropriate adult. As one lawyer stated in the government's consultation on PCE, the rates of pay 'does not reflect the level of work that will be required in terms of taking instructions from the client and considering the reasonable lines of enquiry'.[89] Lord Reid suggested the defence lawyer has three core duties,

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[87] See Institute for Government, Performance Tracker 2022/23: Spring Update, 23rd February 2023, available here: https://www.instituteforgovernment.org.uk/performance-tracker-2022-23/criminal-courts [Last accessed October 2023].

[88] E. Johnston, 'Pre-Chrage (Lack of) Engagement: An Empty Gesture? (2022), Crim. L.R. (9), 737-754 at 750.

[89] Ministry of Justice, *Government Response: Criminal Legal Aid Review – Remuneration for Pre-Charge Engagement* (2021) at para 35 available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976301/pre-charge-engagement-consultation-response.pdf [Last Accessed October 2023]..

advancing the client's best interest, a duty to the administration of justice and a duty to the public. Arguably, PCE represents an opportunity to fulfil all three duties that Lord Reid[90] suggests that the defence lawyer is obligated to follow, but a lack of engagement with the scheme has led to a missed opportunity. This missed opportunity ultimately means the defence lawyer satisfies none of the three duties that Lord Reid described.

[90] *Rondel v Worsley* [1969] 1A.C. 191.